Transnational Legal Services in Globalized Economics: American Leadership, Not Mere Compliance with GATS, Through Qualifying LL.M. Degree Programs for Foreign-Educated Lawyers Seeking State Bar Admissions

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TRANSGATIONAL LEGAL SERVICES IN GLOBALIZED ECONOMIES: AMERICAN LEADERSHIP, NOT MERE COMPLIANCE WITH GATS, THROUGH QUALIFYING LL.M. DEGREE PROGRAMS FOR FOREIGN-EDUCATED LAWYERS SEEKING STATE BAR ADMISSIONS

Jeffrey A. Van Delta*

I. INTRODUCTION: THE NATURE OF THE PROBLEM AND AN OPTIMAL SOLUTION

A. Transnational Law Practice and the GATS Treaty

In a 2012 interview, the former Chair of the American Bar Association’s (ABA) House of Delegates, attorney Linda Klein, observed, “U.S. lawyers are going to have to be part of the global economy and international legal industry, or they won’t survive.” In using the term “international legal industry,” Klein aptly described the contemporary emergence of a market for legal services that extends beyond the borders of a traditional, single-jurisdiction legal profession. Now, clients seek multi-jurisdictional legal services. To provide such services and remain competitive, foreign lawyers must obtain admission to practice in the

* For more information on this topic, please look to Professor Van Detta’s sequel A Bridge to the Practicing Bar of Foreign Nations: Online American Legal Studies Programs As Forums For the Rule Of Law And As Pipelines To Bar-Qualifying LL.M. Programs In The U.S., 10 S. C. J. INT’L L. & BUS. 63 (2013).

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jurisdictions in which their clients need services. This has resulted in a considerable advantage to the legal services industries in a number of countries, such as Australia, that have responded to the needs of clients whose businesses and legal issues have morphed with the unfolding of globalization. The international legal industry is defined, in part, by the difficulty of creating truly global law firms through transoceanic mergers. Instead, clients’ lawyers of choice often are tapped to handle their legal affairs in other nations. This has created both opportunity and significant challenges.

As the former Chair of the ABA Task Force on International Trade in Legal Services explained, “The question is, how does the local legal profession respond? . . . Every country is asking the big questions: ‘Is globalization a threat or an opportunity? If we liberalize rules of practice for foreign lawyers, does it help or hurt us?’” These questions are not merely of interest to law firms and lawyers. Nor do they only affect American lawyers seeking to handle client work abroad; foreign lawyers who seek to represent their clients in the United States are affected, too. Additionally, these questions raise issues of whether the United States itself is in compliance with its commitments under international trade law. Concern has been expressed that the way American jurisdictions are handling bar admissions for foreign-educated lawyers may violate treaty obligations under the General Agreement on Trade in Services (GATS). The GATS, which is enforced by the World Trade Organization (WTO) and was ratified by the United States in 1994, has led to nearly twenty years of discussion and negotiation about how its requirements will impact transnational legal

3 See What is the Export Value of the Legal Services Industry, L. COUNCIL AUSTL., http://www.lawcouncil.asn.au/lawcouncil/index.php/12-resources/232-what-is-the-export-value-of-the-legal-services-industry (last visited Jan. 10, 2014) (“Legal services is [sic] a significant component in the export of professional and technical services from Australia and is the second highest export in this category after engineering services”); Peter Rees, Legal Dir., Royal Dutch Shell PLC, Speech at the University Club of Toronto: Global Legal Challenges Facing The Petro-Chemical Industry (May 8, 2010), available at http://www.shell.com/home/content/media/speeches_and_webcasts/2012/recc_toronto_08052012.html (explaining that Shell has over 700 lawyers in forty countries to resolve “a wide range of global legal challenges facing the petro-chemical industry today”).


5 See Susan DeJamatt & Mark Rahdert, Preparing for Globalized Law Practice: The Need to Include International and Comparative Law in the Legal Writing Curriculum, 17 J. LEGAL WRITING INST. 3, 15 (2011) (“As the twenty-first century deepens, legal practice that is confined to issues of domestic law will steadily diminish, to be replaced by practice that involves both domestic and global components, and that requires attorneys who are skilled at moving seamlessly between them.”).


services.\textsuperscript{8} Even if the American approach does not end up producing a technical GATS violation, the nineteenth-century protectionist thinking\textsuperscript{9} behind traditional bar admission policies is inconsistent with the leadership that the United States took in getting a trade-in-services treaty negotiated and ratified in the first place. In doing so, the United States set a high bar for itself, thereby necessitating leadership, not mere compliance with the treaties, to address the globalization of legal services. The international influence that an American legal education and system exert demands that the United States determine how to open its bar admissions to the realities of its position as a global trade law leader, of its role as a standard setter in legal education, and of its context within a globalizing economy.\textsuperscript{10}

\section*{B. The Domestic Response: Stakeholders, Multiple Agendas, and Choosing Among Possible Solutions}

In the face of American commitments to the GATS program, there is no single, centralized program to determine what the United States is prepared to offer in GATS negotiations with respect to opening the American legal services market to foreign-educated lawyers. Of course, it is the Executive Branch Office of the U.S. Trade Representative—a cabinet-level position with the rank of ambassador, which, is currently held by Ambassador Michael Froman\textsuperscript{11}—that is the quarterback for enunciating all of the commitments and


\textsuperscript{9} See, e.g., John D. Killian, \textit{The Old Way, The Hard Way—A Lawyer's Reflections on His Struggle to Gain Admission to a County Bar at a Time When the Rules were Tilted in Favor of the Establishment}, PA. LAW., May/June 2000, at 50; see Adjoa Artis Aiyetoro, \textit{Truth Matters: A Call for the American Bar Association to Acknowledge its Past and Make Reparations to African Descendants}, \textit{GEO. MASON U. C.R. L.J.} 51, 59-65, 82-86 (2007) (discussing a far more shocking and discomforting account about some of the origins of American Bar admission practices); see also John Leubsdorf, \textit{Gandhi's Legal Ethics}, 51 \textit{RUTGERS L. REV.} 923, 927 (1999) ("As his varied tactics suggest, Gandhi was no pushover. Legally, politically, and personally, he was nothing if not assertive. Even to gain admission to the local bar, he had to overcome the Law Society's argument that only whites could be advocates."); Subha Ghosh, \textit{Gandhi and the Life of the Law}, 53 \textit{SYRACUSE L. REV.} 1273, 1274 (2003) ("I was asked to write about media images of Asian and Asian American lawyers and Gandhi was the only serious candidate I could find.").


\textsuperscript{11} \textit{United States Trade Representative Michael Froman, OFF. U. S. TRADE REPRESENTATIVE}, \textit{http://www.ustr.gov/about-us/biographies-key-officials/united-states-trade-representative-michael-froman} (last visited Jan. 3, 2014). It is noteworthy that, in 1995, Congress excluded from eligibility to serve as USTR or Deputy USTR "[a]ny person who has directly represented, aided, or advised a foreign entity (as defined by section 207(f)(3) of Title 18) in any trade negotiation, or trade dispute, with the United States." 19 U.S.C. \textsection 2171(b)(3); see Lucinda Low, \textit{American Bar Association Section of International Law and Practice Report to
making all of the proposals on behalf of the United States in U.S. trade negotiations, such as those dealing with services and the GATS treaty.12 But the U.S. Trade Representative has no direct regulatory authority over the licensing of lawyers in the United States. Even to the extent that licensure for law practice could be claimed as within Congress’s Commerce Clause power, no Congress has yet attempted to do so.13 Rather, that has been a matter within “the traditional authority of state courts to control who may be admitted to practice before them.”14 In addition to state licensing authorities, bar associations and other associations...
composed of lawyers and law firms have a voice—often, a very substantial voice—over bar admissions standards.\(^5\) Thus, it comes as no surprise that leadership in addressing how the American legal profession might respond to GATS obligations has come from: (1) the highest courts of states such as California and New York, from which there is substantial export of legal services and transnational law practices; (2) the American Bar Association; and (3) legal scholars.

New York and California have the led the nation in treating LL.M. degrees as qualifying foreign-educated lawyers to take their state bar examinations, and recently, they have been joined by Georgia.\(^6\) In April 2011, New York issued specific, heightened standards that the program in which a foreign-educated lawyer earns an LL.M. degree must satisfy in order for New York Bar Examiners to consider the LL.M. degree as qualifying.\(^7\) In

and “that in some instances the State may decide that ‘forms of competition usual in the business world may be demoralizing to the ethical standards of a profession.’”).

\(^5\) See, e.g., Michael S. Knowles, Note, Keep Your Friends Close and The Laymen Closer: State Bar Associations Can Combat the Problems Associated with Nonlawyers Engaging in the Unauthorized Practice of Estate Planning Through a Certification System, 43 CREIGHTON L. REV. 855, 858 & n.20 (2010) (quoting CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 849-50 (West 1986)) (noting that “[s]tate bar associations establish licensing requirements to ensure that lawyers practicing within the state’s jurisdiction have the character and ability required for the proficient and effective practice of law,” and that “[a]s part of the licensing system, state bar associations and courts have regulated lawyers through admission requirements and post-admission disciplinary actions”); see Richard A. Epstein, The Role of Accreditation Commissions in Higher Education: The Troublesome Case of Dana College, 79 U. CHI. L. REV. 83, 86-87 (2012) (noting that “[t]he accreditation system of the American Bar Association, which operates through its Council of the Section of Legal Education and Admissions to the Bar, becomes in practice relevant to whether graduates of those law schools may be licensed to practice law,” and that “[n]o credible argument can be advanced that licensed ABA-accredited law school graduates are less qualified than graduates of non-ABA-accredited schools.”).


\(^7\) See New York Changes LL.M. Requirements for Foreign Lawyers to Sit State Bar—New Curriculum Sets New Conditions for LL.M. Programs that Make Lawyers Eligible, LLM GUIDE (May 27, 2011), http://www.llm-guide.com/article/597/new-york-changes-llm-requirements-for-foreign-lawyers-to-sit-state-bar. The New York Board of Bar Examiners treats the attainment of an LL.M. at an ABA-approved law school in the United States as a "cure" for a foreign-educated lawyer whose prior law studies are not found to be qualifying for the New York Bar Examination:

An applicant, whether educated in a Common Law or non-common law country, whose legal education is not of sufficient duration or not substantively equivalent to an ABA-approved law school program, may cure the durational or substantive deficiency (but not both). On April 27, 2011, the New York Court of Appeals amended Rule 520.6 (b). [http://www.nybarexam.org/Docs/Amended_Rule_520.6_April27_2011.pdf] Most provisions of the amended Rule do not apply to programs in effect prior to the 2012-2013 academic year. The following is a synopsis of how the Board of Law Examiners interprets and applies the “cure provision” for (1) programs completed or commenced prior to the 2012-2013 academic year and (2) programs commencing in the 2012-2013 academic year.

**Foreign Legal Education, N. Y. St. Board L. Examiners**, http://www.nybarexam.org/Foreign/ForeignLegalEducation.htm (last visited Apr. 7, 2013). The forward-
March 2011, the ABA Section on Legal Education circulated to bar examiners and legal educators a proposed Model Rule for using LL.M. degrees as a bar examination qualification standard for foreign-educated lawyers, along with a set of proposed Criteria by which American law schools could construct a ground-based LL.M. program in American legal studies.18 In February 2014, Georgia became the first state to adopt a version of the ABA’s Model Rule and Qualifying LL.M. Degree Criteria to permit foreign-educated lawyers to qualify for the Georgia Bar Examination.19 Completing such an LL.M program would qualify foreign-educated lawyers to sit for state bar examinations.20 One of the most attractive features of hosting a qualifying LL.M. program, as set out in the ABA’s proposed Criteria, is that such a program does not require the addition of significant new sections or new faculty. “Qualifying LL.M. programs,” as we shall call them, are founded upon integrating the foreign-educated lawyer into courses that law schools require J.D. students to take.21

Looking amendment to Rule 520.6 is summarized as “Applicants enrolled in a program commencing in the 2012-13 academic may cure the durational or substantive deficiency (but not both) by obtaining an LL.M. degree (Master of Law) at an ABA-approved law school in the United States.” Id. See Proposed Rule on Admission of Foreign Educated Lawyers, 2011 A.B.A. SEC. LEGAL EDUC. & ADMISSION B. REP. 1, 4 [hereinafter A.B.A. SEC. LEGAL EDUC. & ADMISSION B. REP.], available at http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/20110420_model_rule_and_criteria_foreign_lawyers.authcheckdam.pdf (providing background information as well as the exact text of the Proposed Model Rule and Criteria). See Order Amending Rules Governing the Admission to Practice Law; SUPREME COURT OF GA. OFFICE OF BAR ADMISSIONS, supra note 16. For earlier discussions of admission of foreign-educated lawyers to law practice in Georgia, see GA. SUPREME COURT COMM. ON LEGAL EDUC., COMMITTEE REPORT AND RECOMMENDATIONS TO THE BOARD OF BAR EXAMINERS AND THE SUPREME COURT REGARDING ANY POSSIBLE REVISIONS TO THE RULES GOVERNING ADMISSION TO THE PRACTICE OF LAW IN GEORGIA GOVERNING EDUCATIONAL ELIGIBILITY AND ANY OTHER RELEVANT ISSUE (2008), available at https://www.gabaradmissions.org/committee-report. Georgia’s innovation in this area is not surprising, as the Georgia bench and bar are working concertedly to attract more transnational legal business to the state. For example, Georgia recently adopted the Georgia International Arbitration Code, O.C.G.A. §§ 9-9-20 - 9-9-59 (2013), for that very purpose, among others. See, e.g., Stephen L. Wright & Shelby S. Guilbert, Jr., Recent Advances in International Arbitration in Georgia: Winning the Race to the Top, GA. B.J., June 2013, at 18; Stephen L. Wright, Georgia seeks to be arbitration center for international business disputes, SAPORTA REP. (July 7, 2013, 6:38 PM), http://saportareport.com/blog/2013/07/georgia-aiming-to-be-an-arbitration-center-for-international-business-disputes/.

A.B.A. SEC. LEGAL EDUC. & ADMISSION B. REP., supra note 18.

Such American Legal Studies LL.M. programs that state they are designed to assist foreign-educated lawyers to qualify to take one or more states’ bar examinations were consulted in preparing this proposal and report. See, e.g., LL.M. in American Legal Studies, HOFSTRA L., http://law.hofstra.edu/academics/degreeprograms/llmprogram/americantext/index.html (last visited Jan. 3, 2014) (“The program helps to qualify a candidate for eligibility to sit for the New York State Bar Examinations and to be admitted to practice law in New York.”) (LL.M. program consists of twenty-four credit-hours); U.S. Legal Studies, LL.M., ST. JOHN’S U. SCH., L., http://www.stjohns.edu/academics/graduate/law/academics/llm/usls (last visited Jan. 3, 2014) (“The LL.M. in U.S. Legal Studies for Foreign Law School Graduates at St. John’s School of Law is a focused program of study tailored to give you the knowledge and skills you need to pass the New York Bar Exam and succeed in practice in this important jurisdiction.”) (LL.M. program consists of twenty-four credit-hours); Master of Laws (LL.M.) in U.S. Legal Studies, TOURO L., http://www.tourolaw.edu/Academics/?pagecid=371 (last visited Jan. 3, 2014) (LL.M. program consists of twenty-seven credit hours); LL.M In American Legal Studies, VT. L. SCH., http://www.vermontlaw.edu/Academics/Degrees/Master_of_Laws_628LLM%239/LLM_in_American_Legal_Studies.htm (last visited Jan. 3, 2014) [hereinafter VT. L. SCH.] (“Some US states permit foreign lawyers who earn an LL.M in US law to take the bar exam and be admitted to practice in their state, if certain other
C. Leading the Way: A Resident, One-Year LL.M. Program for Foreign-Educated Lawyers Satisfying New York, California, Georgia and Proposed ABA Qualifying Criteria

The opportunity is ripe for American law schools to take the initiative in establishing a LL.M. Program for foreign-educated lawyers that satisfies the criteria of all three major regulators, the New York and California high courts and boards of bar examiners and the ABA, who have chosen the LL.M. as a vehicle for foreign lawyers to become eligible for bar examination and eventual licensure in the United States.22

As a starting point, law schools that offer full-time and part-time J.D. programs and an accelerated J.D. honors program of concentration (such as criminal law or an intellectual property honors program) have up to three basic options for placing foreign lawyers as LL.M. students into its existing programs:23

1. regular full-time (usually, day) division first and second-year required courses;
2. regular part-time (usually, evening) division courses; or

requirements are met. The bar admission requirements for each US jurisdiction are available in the Comprehensive Guide to Bar Admission Requirements, available here. Students in our LLM program have taken either the New York or Washington DC bar exam, and have an excellent pass rate.”).

22 See, e.g., AJMLS Launches Online, Resident LL.M. Programs for Foreign-Educated Attorneys, ATLANTA’S JOHN MARSHALL L. SCH. (July 3, 2012), http://www.johnmarshall.edu/2012/07/atlantas-john-marshall-law-school-launches-online-resident-ll-m-programs-for-foreign-educated-attorneys/; see also Order Amending Rules Governing the Admission to Practice Law; SUPREME COURT OF GA. OFFICE OF BAR ADMISSIONS, supra note 16. The author served as the Reporter to the faculty and administration of Atlanta’s John Marshall Law School charged with researching and assessing the various requirements and standards, trends and developments, and subject-matter content for a qualifying LL.M. program. The faculty adopted the author’s proposal for a qualifying LL.M. program in January 2012, and the institution sought, and received, acquiescence from the ABA Section on Legal Education in July 2012 to offer the qualifying LL.M. program, which is now called the “Resident LL.M. Program in American Legal Studies.”

23 The pedagogy of placing foreign-educated LL.M. program students in classes with J.D. students has been recognized as both sound and desirable:

In law, where relationships are the basis of work, the development of strong ties between international classmates might provide the basis for a future of international lawyering. In terms of business referral, however, LL.M.s do not report substantial activity or even collaboration professionally among classmates, although of course this does occur. This may change as LL.M. graduates age and grow into positions of more influence in their firms and organizations. On the other hand, perhaps LL.M.s respond differently to the notion of working with classmates than do J.D.s. This is one area for future investigation. At the same time, as U.S. law firms have grown into international organizations, they must rely on foreign-educated lawyers working effectively with U.S.-educated lawyers. In this regard, the “mixing” that is characteristic of international students in LL.M. programs might be expanded to include U.S. J.D. students and enhance the comfort of all law graduates for working in an international environment, whether within the firm or across the table.

3. the required courses offered in the consolidated format of an existing J.D. honors program that permits a foreign-educated lawyer to take, within a single academic year, more of the required courses because each subject has been condensed (e.g., from six credit hours to four credit hours). 24

For some schools, the first and second options may be less attractive than the third because the required courses in some first-year regular J.D. program are five or six credit hours.

If a school already has an honors program—in which first-year courses are condensed into four credit hours—or if the school wishes to develop special sections of four-hour first-year courses dedicated to the LL.M. program to permit the LL.M. students to study as many required courses as possible within the time frames for completing an LL.M. degree defined by the residency requirement limitations of the ABA’s proposed Model Rule, such a program might be designed along the lines of the following example 25:

Students begin the Honors Program during their first year of law school. The year-long Legal Research Writing and Analysis course will be coordinated with Criminal Law and Criminal Procedure to help students appreciate the interplay between doctrine and application. This experience will be complemented with Introduction to Criminal Law in which students will engage with a variety of issues relevant to the practice of criminal law, and discuss the role prosecutors and defenders play in addressing these issues. During their second year, students will build on this foundation with courses in advanced criminal procedure, evidence, and advanced evidence. During the spring semester of their second year, students will take Integrated Advocacy, a practical course that uses a simulated problem to tie all of the required courses together in the context of teaching pre-trial litigation and trial advocacy. This will prepare students for an intensive, third-year externship experience through which they will apply these lessons in a criminal law placement. The curriculum teaches skills that help students apply these lessons in the practice of criminal law, as well as strategies to help them address challenges they will confront as practicing attorneys.

The mission of JMLS “is to prepare highly competent and professional lawyers who possess a strong social conscience, continually demonstrate high ethical standards, and are committed to the improvement of the legal system and society.” The Honors Program in Criminal Justice further demonstrates our commitment to this mission.


See, e.g., The J.D. Program Legal Skills and Advocacy Curriculum, ATLANTA’S JOHN MARSHALL L. SCH., http://www.johnmarshall.edu/futurestudent/j-d-program/legal-skills-advocacy/curriculum/ (last visited Jan. 3, 2014); see The J.D. Honors Program in Criminal Justice Curriculum, supra note 24 (descriptions for each course can be found in AJMLS’s online course catalogs for the J.D. program, and the J.D. Honors Program in Criminal Justice, to which the author refers as the “Criminal Justice Honors Program,” or HPCJ).
As explained in Part IV of this article, the Qualifying LL.M. should meet the requirements for bar-exam eligibility in the two most prominent jurisdictions that allow foreign lawyers to sit for their examinations with a qualified LL.M. degree, New York and California. Among California’s requirements is that the LL.M. program include a Professional Responsibility course with California-specific content. Therefore, to ensure that foreign-lawyers who earn an LL.M. in a Qualifying Program are eligible to sit for the California Bar Examination, the LL.M. program students should take Professional Responsibility in a course in which the usual curriculum is enhanced with a California component of California Rules of Professional Responsibility and California’s Business & Professions Code. This might be achieved without inconveniencing the rest of the class by holding a number of additional class meetings, required only for LL.M. students, in which the California topics are addressed.

LL.M. students would be advised that, in choosing among electives, one of the following courses, typical of those offered at American law schools (with typical credit-hour allotments shown in parentheses), may prove the most useful: Legal Writing, Reasoning, & Analysis I (3); Evidence (4); Remedies (3); Criminal Law (3); Criminal Procedure (3); Business Organizations (3); Conflict of Laws (3); Georgia Practice & Procedure (2); Pretrial Practice & Procedure (2); Transactional Drafting (3); Trial Advocacy & Writing (3); Alternative Dispute Resolution & Writing (3); Advanced Appellate Advocacy (2); Advanced Bar Studies (2); Trial Advocacy & Writing (3); Alternative Dispute Resolution & Writing (3); Advanced Appellate Advocacy (2); Advanced Bar Studies (2).

It might well prove to be a school’s experience that a qualifying LL.M. program for foreign-educated lawyers should include a legal writing course in each semester. See Marian Dent, *Designing an LL.M. Curriculum for Non-Western-Trained Lawyers*, 13 PERSP. 87, 88-89 (2005). Dean Dent oversaw the American Business and Legal Education Project in Moscow, in which fifty attorneys at eighteen Western law firms in Moscow, and twelve lawyers working for “international and foreign not-for-profit organizations,” were interviewed about their experiences in American LL.M. programs. *Id.* at 88.

Writing is a skill often ignored in LL.M. programs. The partners and associates I interviewed said that they would structure an LL.M. program with a greater emphasis on analytical writing skills. Those who had taken the trouble to look at applicant transcripts were chagrined that many LL.M. graduates had no writing courses on their transcripts, or had only an “Intro to American Law” course, in which the students had touched on writing and analysis in the context of writing for law school exams, rather than in the context of professional work. The interviewees commented favorable on the few LL.M. programs that contained strong writing components.

*Id.* at 89.
Structured in this way, a Qualifying LL.M. degree program would qualify a foreign-educated lawyer to sit for the bar examination in California, New York, other states that consider the LL.M. degree to be a bar qualification, and any state that adopts the ABA proposed Model Rule.29

D. The Author’s Overture to the Reader: Exploring the Issues, Information, and Thinking Behind a Qualifying LL.M. Program as a Solution to GATS Obligations and the Demand for Foreign-Lawyer Access to American Law Practice

In this article, the author examines the politico-economic forces underlying the ABA’s Proposed Model Rule and Qualifying LL.M. Criteria.

Part II begins with the connection between the GATS treaty and the American legal profession, including a discussion of GATS requirements, the ongoing dialogue within the United States about GATS’s impact on the American legal profession, and the variety of efforts that have been undertaken to open domestic law practice to foreign-educated lawyers.

Part III briefly discusses two efforts to open domestic law practice to foreign-educated lawyers, one of moderate success, the other likely to die on the vine. Specifically, we discuss the twenty-four states that have adopted the special status of the Foreign Legal Consultant (FLC), which is flawed both by the limits of its privilege as well as the hodgepodge of iterations in which states have adopted the status, rather than following consistently the ABA’s Model Rules on FLCs. The other is the notion of recent vintage that the ABA Section on Legal Education consider establishing standards and procedures for accrediting foreign law schools, a proposal originally met with some enthusiasm, as well as two foreign law schools (one in China, the other in India) strongly pushing for its realization.

29 The LL.M programs, at Hofstra, St. John’s, and Vermont provide instructive examples of American Legal Studies Programs. See, e.g., LL.M. in American Legal Studies, supra note 21; U.S. Legal Studies, LL.M., supra note 21; VT. L. SCH., supra note 21. Some schools’ well-established programs are constructed around the N.Y. Court of Appeals Rule 520.6 standards—such as Hofstra’s and St. John’s—and, consonant with Rule 520.6, require twenty-four hours of course work for the degree. See LL.M. in American Legal Studies, supra note 21; U.S. Legal Studies, LL.M., supra, note 21. Other programs, such as Vermont Law School’s U.S. Legal Studies LL.M. program, require a minimum of twenty-nine credits, and permit LL.M candidates to take up to thirty-four credits. VT. L. SCH., supra, note 21. In most respects, the Georgia requirements are taken from the ABA’s 2011 “Proposed Criteria for ABA Certification of an LL.M. Degree for the Practice of Law In The United States.” Georgia adds three additional criteria. See SUPREME COURT OF GA. OFFICE OF BAR ADMISSIONS, supra note 16. A two-credit course, not a mere pre-semester introductory seminar, is now required in “Introduction To United States Law.” Id. It is worthy of note that the Georgia Office of Bar Admissions did not adopt the alternative that New York gives LL.M. programs to substitute for the Introduction course either a course in Constitutional Law or Civil Procedure. Compare id., with N.Y. COMP. CODES R. & REGS. tit. 22, § 520.6(b)(3)(vi)(c) (“two credit hours in American legal studies, the American legal system or a similar course designed to introduce students to distinctive aspects and/or fundamental principles of United States law, which may be satisfied by a course in United States constitutional law or United States or state civil procedure”). Georgia has specified that, among the credit hours, there must be “at least” one course completed from the following list: Administrative Law, Commercial Law (Uniform Commercial Code), Contracts, Corporations, Evidence, Property and Torts. SUPREME COURT OF GA. OFFICE OF BAR ADMISSIONS, supra note 16. Georgia has also added a mandatory skills course component, specifying that among the credit hours, there must be “at least” one skills course completed from the following list: Alternative Dispute Resolution, Appellate Advocacy, Externship Placement, Fundamentals of Law Practice, Legal Clinic, Negotiation, Mediation, Transactional Practice and Trial Advocacy. Id.
However, the proposal has met with great internal skepticism of its feasibility, and appears fated for shunting to the legal equivalent of a rail-yard siding.

In Part IV, we explore the emergence of the LL.M. degree as a bar admission qualification in the United States. We focus on three topics in particular: the emergence of foreign-educated lawyers as consumers of legal education; bar admission hurdles faced by foreign-educated lawyers in the United States; and the New York and California experience in recognizing the LL.M. degree, treated as a legal-education equalizer, as a path for foreign-educated lawyers to qualify for state bar admission.

The ABA Legal Education Section’s Proposed Model Rule and Qualifying LL.M. Program Criteria are the subjects of Part V. In the course of examining both, we discuss the design of qualifying LL.M. programs under the ABA proposed Model Rule and Criteria, including how such a program harmonizes with New York’s and California’s present use of the LL.M. degree as an educational equalizer for foreign-educated lawyers seeking to become qualified to sit for a bar exam, and how Georgia has adopted its own iteration of the ABA proposed Model Rule and Criteria.

That discussion also permits exploration of a series of discrete, but constituent, issues in designing a Qualifying LL.M. program, including factors relevant to assessing a law school’s positioning to offer such a program; the size of cohorts entering the LL.M. program; promoting English-language proficiency to ensure foreign-lawyer functionality in Qualifying LL.M. programs; planning for those immigration matters confronting foreign lawyers who seek to study in the United States; assessing the educational and professional credentials presented by foreign-educated lawyers; ideas about managing the challenges faced by foreign-educated lawyers, particularly those trained in the Civil Law tradition, in the process of transitioning into the study of America’s version of a Common Law legal system; advising prospective and accepted students to review their foreign legal educations with the bar examiners before their matriculation in the LL.M. program; and the role that the ABA Model Rule and Qualifying Standards would expect the LL.M.-offering institution to play in reviewing and assessing the foreign legal educations of LL.M. students admitted to their programs.

In the final sections of Part V, we will review the advantage in offering Qualifying LL.M. programs enjoyed by law schools that have a more bar-and-practice oriented curriculum and explore the opportunities for using synergies with existing J.D. programming to build cultural competency for J.D. students. We also address concerns that foreign lawyers who graduate from Qualifying LL.M. programs will either “compete with” or “take jobs away from” American J.D. holders.

Part VI provides, in a concise conclusion, a holistic assessment of the issues explored in this article.

II. THE GATS TREATY AND THE AMERICAN LEGAL PROFESSION

In this Part, we situate transactional legal services within the regulatory framework established by international trade law. The discussion does not purport to be a disquisition on international trade law; nor does it seek to explore the (sometimes daunting) technical details, opaque diplo-speak, and lengthy history of development that permeate many writings on WTO processes and trade treaties. Our objective is to present the essential background for three purposes relevant to our inquiry:
1. To appreciate that there is an international trade law regulatory dimension to the question of qualifying foreign lawyers for seeking admission to American state bars on an equal footing with Americans who seek bar admission;

2. To appreciate what those regulations require; and

3. To consider possible ways by which American state bars can meet those requirements, focusing on the ABA’s proposed Model Rule and Qualifying LL.M. Program standards.³⁰

Our object is to understand the context that inspired the ABA to research, draft, and publish for commentary a rule that permits foreign lawyers to establish educational equivalency and, on the basis of that equivalency, gain admission by examination to the general practice of law in America.

A. What GATS Requires

I. Rules Against Discrimination in the Trade of Services: How GATS Was Created on the Foundations of GATT

The world of international trade law impresses the Common Law lawyer as far more gauzy and soft than even the grey area of lawmaking through case precedents, analogies, and distinctions. The terminology is largely unfamiliar to most American lawyers. Even those bent towards appreciating international trade treaties and relations affecting the United States may find the vocabulary throws a veil over concepts that would otherwise be familiar.

The late Professor Raymond A. ("Ray") August was an American lawyer and academic who was, in the author’s view, the clearest and most succinct in explaining international trade law in general, and the GATS treaty in particular, to scores of students in both law schools and business schools in his iconic and irreplaceable textbook, *International Business Law: Text, Cases, and Readings.*³¹ Rather than reinvent the wheel, I do homage to


³¹ RAY AUGUST, *INTERNATIONAL BUSINESS LAW: TEXT, CASES, AND READINGS* (Pearson Educ. Inc., 4th ed. 2004) (Professor August was a Professor of Business Law in the College of Business and Economics at Hofstra University.)
Dr. August's highly efficacious discussion of this area by quoting liberally from his explanation of GATS:

The General Agreement on Trade in Services (GATS) came into effect on January 1, 1995, as one of the three main multilateral annexes to the Agreement Establishing The World Trade Organization (the other two being the General Agreement on Tariffs and Trade (GATT) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)). The purpose of GATS is to give to international trade in services a set of rules and principles and a basis for liberalization similar to those that GATT has applied to goods for the last five decades.32

The back-reference here to GATT is of enormous importance; as Dr. August put it, "[t]he most fundamental principle of GATT is that trade should be conducted without discrimination, and that non-discrimination principle is given concrete form in the 'most-favored-nation' (MFN) and 'national treatment' rules" of GATT.33 With respect to the MFN status rule, GATT's Article 1 provides that "each member [nation] [is required] to apply its tariff rules equally to all other members."34 In contrast, "[t]he national treatment rule is the second manifestation of the principle of nondiscrimination that appears in" GATT.35 "In contrast to the MFN rule, which requires nondiscrimination at a country's border, the national treatment rule requires a country to treat products equally with its own domestic products once they are inside its borders," as exemplified in GATT's Section III:4 requirement of equality in treatment "in respect of all laws, regulations, and requirements affecting their international sale, offering for sale, purchase, transportation, distribution, or use," and in GATT's Section III:2, which "sets out the same nondiscriminatory treatment [requirement] with respect to internal taxes."36

In both MFN and National Treatment rule scenarios, the products (Country A import compared to Country B import; or Country A import compared to domestic product) must be "like products," to use the language of GATT, which the WTO Dispute Settlement Body decisions have construed to mean is present even when two products under comparison are not "directly substitutable," by considering a balancing of factors such as the chemical composition of the product; the product's taste (if edible) or other distinctive feature; the production process by which the product is created; the appearance of the product (including even the packaging); the market segment(s) within the importing nation at which the product is targeted; and end-uses to which the product is put by consumers in the importing nation.37

Washington State University; in addition to a Ph.D. in American Legal History from the University of Idaho, he held the J.D. from the University of Texas School of Law and the LL.M. in International Law from the University of Cambridge); Ray August, PRENTICE HALL'S LEARNING ON THE INTERNET PARTNERSHIP, http://mypiphutil.pearsoncmg.com/phlip99/phbios/august.html (last visited Jan. 4, 2014).

32 AUGUST, supra note 31, at 415.
33 Id. at 370.
34 Id.
35 Id. at 371.
36 Id.
Although similar in concept, GATS is organized and operates a bit differently than GATT. As Dr. August explains:

GATS is made up of three interrelated components: (1) the Agreement itself (often called the Framework Agreement), which contains the rules applicable to all member states of the World Trade Organization (who are automatically parties to the GATS); (2) the sectoral annexes that deal with issues unique to particular economic sectors (i.e., the movement of natural persons, air transport services, financial services, maritime transport services, and telecommunications); and (3) the national Schedules of Specific Commitments each member state has agreed to undertake, which were agreed to mainly through negotiations undertaken as part of the Uruguay Round of Multinational Trade Negotiations that produced the WTO Agreement.

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Although much of GATS is based on the provisions in the [GATT] and uses much of the same terminology, the “architecture of GATS is significantly different. Unlike GATT, which provides for a single set of obligations that apply to all measures affecting trade in goods, GATS contains two sets of obligations: (1) a set of general principles and rules that apply to all measures affecting trade in services and (2) a set of principles and rules that apply only to the specific sectors and subsectors that are listed in a member state’s Schedule. 38

Only by designating a particular service sector in its schedule does a WTO member nation take on the obligation to negotiate about opening transnational trade in that particular service sector and to abide by the non-discrimination rules in GATS. 39 While GATS does not define trade in services, it describes “modes of supply” of services, including “services supplied by a service supplier from one member state by means of a commercial presence in another member’s territory (such as banking), and . . . services supplied in the territory of a member state by a service supplier from another member state by means of the temporary presence of the natural persons of another member state (such as . . . consulting work).” 40 Significantly, while the definition of “modes of supply . . . broadly covers all forms of trade in services,” GATS-member nations “are allowed to exclude, as to particular service sectors or subsectors,
one or more of these modes of supply in their Schedules of Specific Commitments.  

Of the Specific Commitments, Dr. August observed:

GATS is designed to open up specific service sectors of the WTO member states' markets to international access on a sector-by-sector and state-by-state basis. Following negotiations, or on its own initiative, a member is to submit a Schedule of Specific Commitments for annexation to GATS that lists the sectors (or subsectors) it is opening to market access. The member [nation] may also list limitations that apply to these sectors and it must do so as to six categories of limitations if it wants those six to apply.

A member nation need only include in its Schedule of Specific Commitments those services sectors "that it has opened up to international market access," for it is only in those areas that it will be able to negotiate market access for its own service exports. GATS does not, however, dictate to a member nation which sectors it may choose to open. Indeed, Dr. August emphasizes that "[o]f course, members are not required to open all of their service sectors" yet points out that GATS, to paraphrase Winston Churchill, is not the end, nor the beginning of the end, nor even the end of the beginning, but rather:

GATS is new and it is but a first step. The Framework Agreement requires, and the member states have agreed, that negotiations continue to liberalize the international trade in services. If GATS is as successful in the future as GATT has been in the past, it seems likely that international trade in services will grow dramatically in decades to come.

The Schedules play the crucial role of defining how the principles of non-discrimination in trade that were developed for goods in GATT have been adapted to the very different context of services trade; as the WTO advises, "It is only by reference to a country’s schedule, and (where relevant) its MFN exemption list, that it can be seen to which services sectors and..."

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41 Id. at 417 (footnotes omitted). Dr. August notes that "[a]lthough the right of member states to make exclusions as to modes of supply is not specifically stated in GATS, this may be inferred from Article XVI, § 1, n.9, and Article XVII, § 1." Id. at 417 & n.9; see GATS supra note 7, Art. XVI-XVII.

42 AUGUST, supra note 31, at 422. These six limitations categories that a nation must list—or forgo their application to the service sectors identified in the nation’s Schedule of Specific Commitments—are "limitations on (1) the number of service suppliers allowed, (2) the total value of transactions or assets, (3) the total quantity of service output or the number of service operations, (4) the number of natural persons that may be employed in a particular service sector, (5) the type of legal entity or joint venture arrangement that a service supplier may use in supplying a service, and (6) the participation of foreign capital in terms of a maximum percentage limit on foreign shareholding or the total value of individual or aggregate foreign investment." Id. (footnotes omitted).

43 Id. at 423. GATS does instruct that, for each sector Schedule, the member nation must specify: "(1) any terms, limitations, and conditions it intends to impose on market access; (2) any conditions and qualifications on national treatment it intends to impose; and (3) the time frame for implementing, along with the data of entry into force of, its commitments. Id. (citing GATS Art. XX).

44 Id.


46 AUGUST, supra note 31, at 424.
under what conditions the basic principles of the GATS-market access, national treatment and MFN treatment... apply within that country's jurisdiction." 47 Thus, while MFN and National Treatment are concepts borrowed from GATT into GATS, and while both rules borrow from the "like products" operative language in GATT in creating the operative language of "like services" in GATS, GATS's actual implementing rules are not only stated differently to take into account the differences between regulating trade in services versus trade in goods, but also differ in important substantive respects from the GATT rules.48

For example, the MFN provision of GATS "provides that 'each member shall accord immediately and unconditionally to services and service suppliers of any other member treatment no less favorable than that it accords to like services and suppliers of any other country,'" which "means that a privilege a state grants to any country (including non-WTO members), such as allowing a foreign bank to operate within its territory, must be granted immediately and unconditionally to other WTO members."49 Yet, there's more to the MFN rule in GATS than meets the eye, for as Dr. August explains,

[the MFN treatment rule in the Framework Agreement (unlike the rule in GATT) is not, it is important to note, a binding requirement that must be uniformly observed. During the Uruguay Round negotiations, the representatives of service industries in a number of industrialized nations opposed binding and unconditional MFN treatment on the round that the level of market openness at that time varied too greatly among countries. They argued that unconditional MFN treatment would allow states with restrictive laws governing services to keep those laws in place, while their own service suppliers would get a 'free ride' into the markets of states with more open laws. To force states with closed markets to open them, the service industry representatives successfully advocated the use of MFN exemptions.50

Although most of these exemptions were effective when GATS became effective and expired by 2004, there are still opportunities to seek new ones "using the ordinary WTO waiver procedures," which, as Dr. August observed, if taken too far, "diminishes the effectiveness of GATS" and threatens to "mak[e] it (like the old GATT 1947) little more than a collection of loopholes held together by waivers."51

Overall, however, Dr. August emphasized the GATS is—and will be for some time—a work in progress by stating, "GATS is new and it is but a first step..."52 The most important steps are those to come in negotiations.53 The GATS "Framework Agreement requires, and the member states have agreed, that negotiations continue to liberalize the international trade in services."54 Dr. August foresaw a "dramati[c] growth" of international

48 AUGUST, supra note 31, at 420-22.
49 Id. at 420 (footnotes omitted).
50 Id. (footnotes omitted).
51 Id.
52 Id. at 424.
53 Id.
54 Id.
TRANSNATIONAL LEGAL SERVICES IN GLOBALIZED ECONOMIES

2. Establishing the Key Comparative Link as the Basis for Trade Anti-Discrimination Enforcement: The Unbearable “Likeness” of Being

The notion of “like services” and “like service providers,” which is at the heart of the GATS anti-trade discrimination provisions, presents conceptual difficulties in translating the comparative element of “likeness” from goods to services, and the concept, originally designed for goods under GATT, makes a much more complex and uncertain fit when services are forced into the “likeness” analysis under GATT. The WTO Dispute Settlement Body has suggested a range of unhelpful interpretations, including an unhelpful metaphor—“the concept of ‘likeness’ is a relative one that evokes the image of an accordion, the breadth of which must be determined by the particular provision in which the term ‘like’ is encountered as by the context and the circumstances that prevail in any given case to which that provision may apply”—as well as the unhelpfully “circumvent[ing]” and “lapidary reasoning” of observing that “‘to the extent that entities provide these like services, they are like service suppliers.”

Within the field of legal services, a recognized GATS sector, there is considerable vagueness as to what constitutes “like” services. For example, do those legal practitioners in

55 Id.

56 The myriad difficulties encountered in the application of “likeness” in GATS negotiations and WTO cases has generated substantial discussion. See, e.g., Miricel Cossy, Determining “Likeness” Under the GATS: Squaring the Circle? 2 (WTO, Working Paper No. ERSD-2006-08, 2006), available at http://www.wto.org/english/res_c/rescr_c/ersd200608_c.pdf (noting that “[i]n the only point on which everybody agrees is that a determination of ‘likeness’ under the GATS gives rise to a wider range of questions – and uncertainties – than under the GATT”); Vu Nhu Thang, Interpreting GATS National Treatment Principle: Possibilities and Problems of Transplant fion GATT, 32 F. INT’L DEVELOPMENTAL STUDIES 173, 177-79, 185-87, 190-91 (2006) (“transplant[ing] [GATT’s conceptualization of] . . . likeness [to GATS] . . . suggests a broad scope of likeness due to the uncertainty in criteria for comparison, and an objective assessment thereof...this uncertainty in determining likeness would constitute a disincentive to WTO Members in undertaking commitments on services liberalization . . . .” Thus advocating for a limitation on the potential broadness of “likeness” by requiring a showing that the “regulatory objectives and purposes” are not legitimate but rather discriminatory because of “protectionist aims.”); Zdouc, supra note 30, at 331-34 (criticizing WTO efforts at defining likeness because they “would mean that it would be irrelevant for the determination of the ‘likeness’ of service suppliers whether the natural or legal persons of foreign and domestic origin to be compared have the ability or capacity to supply the services in question” and observing that “[i]n the longer run ... panels dealing with cases involving trade in services will not be able to avoid developing a conceptual underpinning for the determination of the ‘likeness’... criteria, since that has been a typical feature of past dispute settlement practices under the GATT national and MFN treatment clauses”).


58 Cossy, supra note 56, at 7 (quoting Panel Report, European Communities — Regime for the Importation, Sale and Distribution of Bananas, ¶ 7.332, WT/DS27 (Nov. 8, 2012)).
Civil Law systems\(^9\) who hold roles more limited than the very broad competencies exercised by American and Canadian attorneys, or than even the bifurcated U.K. bar of solicitors and

\(^9\) See, e.g., Pedro A. Malavet, The Foreign Notarial Legal Services Monopoly Why Should We Care?, 31 J. MARSHALL L. REV. 945, 951-52, 960 (1998) [hereinafter The Foreign Notarial Legal Services Monopoly] ("[s]ince the avocat is generally limited to litigation practice, it is the notaire, who fulfills many of the counseling functions of American lawyers relating to property transfers, title, tax decedents' estates and business organizations'...[and]...the Latin Notarist is, by definition, found in non-English-speaking countries" where they function as "a particular specialist, generally located at the top of the legal hierarchy, who is a non-advocate, impartial counsel who advises all parties to a transaction... [and possessos]...the exclusive authority to perform certain forensic functions and to impart the required formality to specified legal transactions"); see also Peter Soskin, Note, Protecting Title in Continental Europe and the United States: Restriction of a Market, 7 HASTINGS BUS. J. 411, 411, 425-24, n.43 (2011) (observing that "[i]n the United States, the title insurance industry provides the process in which homebuyers and lenders protect their rights; however, throughout much of Europe, the Latin notary, an impartial state licensed official, is ordinarily charged with the duty of ensuring that the buyer acquires good title, through registration in the land title registry, providing the buyer with a rebuttable presumption of its validity"); Pedro A. Malavet, The Non-Adversarial, Extra-Judicial Search For Legality and Truth: Foreign Notarial Transactions as an Inexpensive and Reliable Model for a Market Driven System of Informed Contracting and Fact-Determination, 16 WIS. INT'L L.J. 1 (1998) [hereinafter The Non-Adversarial]; Pedro A. Malavet, Counsel for the Situation: The Latin Notary, a Historical and Comparative Model, 19 HASTINGS INT'L & COMP. L. REV. 389, 450-52 [hereinafter Counsel for the Situation] (listing over thirty countries in Latin America, Europe, Asia, and Africa in which the Latin Notary flourishes); Pedro A. Malavet, Puerto Rico: Cultural Nation, American Colony, 6 MICH. J. RACE & L. 1, 105, n.247 (2000) [hereinafter Puerto Rico] (noting that unlike the rest of the United States, the Latin Notary is a regular part of Puerto Rico's mixed Civil Law-Common Law system); infra Part II.A.6 (for discussion of the challenge for determining "like service" and "like service providers" under GATS for the Latin Notary classification). For discussions of how the vast differences between the Latin Notary and the Common-Law notary public have caused serious problems for immigrants in the United States who are misled into believing notary publics in the United States are Latin Notaries, see Mary Dolores Guerra, Lost in Translation: Notario Fraud - Immigration Fraud, 26 J. CIV. RTS. & ECON. DEV. 23, 39 (2011); Milagros Anais Cisneros, Note, H.B. 2659: Notorious Notaries-How Arizona is Curbing Notario Fraud in the Immigrant Community, 32 ARIZ. ST. L.J. 287, 297-307, 322 (2000) (describing in the immigration context a comparative-law and translation problem, "false cognates," arising in clashes of cultures, languages, and legal systems that presents a challenge in the context of GATS legal-services trade liberalization as well).

Notario publico is, of course, not the only false cognate that looks alike in English and in Spanish. Words such as "sentence" (sentencia), "jurisprudence" (jurisprudencia), and "transaction" (transaccion) have different meanings in both languages. The "problem of false cognates is aggravated in the United States" [FN40] because a large percentage of the Spanish-speaking population speaks both English and Spanish. Moreover, because of the constant influx of people from Latin America, use of the term notario, to denote someone who plays the role of a well-trusted attorney, is unlikely to end any time soon.

Id. at 294. Some of the cultural, linguistic, and legal differences between American notaries public and Latin Notaries include:

What little information is available in the United States clearly indicates that the level of complexity of the transactions carried out by Latin notaries, the level of education and training required of them, and the amount of responsibility vested in their office, are nothing like those of their American false cognate "counterparts." Latin notaries, in contrast to American notaries public, are state-appointed, private legal professionals who, whenever asked, are required to: (1) carry out nonadvocacy counseling; (2) give private transactions proper legal form and authenticate such transactions in an enforceable public document; and (3) maintain a permanent record of these transactions, for which they must provide certified copies, if requested. None of these expectations accompany the notarial role in the United States. Moreover, Latin notaries are generally "subject to professional, civil, and criminal liability for miscarriage of their office."
barristers, have a basis for nonetheless contending that they provide “like services” or are “like service providers,” and therefore entitled to challenge U.S. and U.K. restrictions on their ability to qualify to “practice law” as that term is understood in Common Law jurisdictions? As the British medical journal The Lancet expressed about an analogous concern articulated concerning comparability of “healthcare services” and “healthcare service providers” under GATS,

WTO trade courts have power to interpret the national treatment principle and therefore also the power to impose on member states their own version of free trade. Public policies that courts deem discriminatory between foreign and domestic producers are so-called disguised barriers to trade, and can be ruled invalid unless they can be justified within WTO rules by the responsible government. Because of this interpretative power, it is usually not clear in advance what limitations on the non-discrimination rule governments will need to protect their autonomy, and limitations cannot be inserted retrospectively. The problem arises because governments cannot second-guess how WTO disputes panels will define what are like services and like providers.60

The vagueness is compounded by the fact that the concepts of “like services” and “like service providers” is no more clearly elaborated upon in GATS than “like products” were in GATT,61 leaving it again up to the WTO dispute settlement process to come up with another

In the English legal system, the notary never attained the stature of continental European notaries. This diminished role carried over to the United States, where “the notary developed into a purely clerical position.” By contrast, Spain imposed on its Latin American colonies a process of careful screening and testing for competency for appointing notarios publicos, which appointment vested the holders with royal title. Indeed, such officers were considered so important that not even a Viceroy, only the Council of the Indies, was entrusted with their appointment.

In contemporary Latin America, a lawyer fortunate enough to become a notario publico is a private legal professional of immense prestige who holds his or her office for life, as long as he or she remains in good standing. Supervision of the profession is loosely carried out by legislatures or professional groups. Latin notaries, however, are also closely supervised, not by the judiciary, but by the State, which expressly delegates to notarios publicos the sovereign power of publica fides. The publica fides or fe publica (literally, “public trust” or “public faith”) gives the State the power to certify or authenticate.

Id. at 294-96 (footnotes omitted). The differences between American and Latin notaries, and the overlap of powers, duties, and functions between American attorneys and Latin Notaries, will present a very challenging inquiry for determining the extent to which Latin Notaries would be entitled seen by the WTO in a GATS context as providing “like services” under the WTO’s extant “likeness” jurisprudence. See, e.g., Michael L. Closen, The Public Official Role of the Notary, 31 J. MARSHALL L. REV. 651, 662 (1998) (noting that American notaries public, Latin Notaries hold their offices as their principal, and often sole, occupation).


61 See, e.g., Matheny, supra note 37, at 250-51.

Given the weighty consequences of the term “like products,” one might imagine that its inclusion during the original drafting of the GATT would have been informed by a well-articulated agreement as to its meaning. This, however, was not the case. Originally, the
soft, multi-factored balancing test for determining "likeness" of the ilk that the WTO announced in cases such as Japan—Taxes On Alcoholic Beverages. The most substantial power vested in the WTO when it was formed in 1994 was a dispute settlement mechanism, the findings of which are mandatory on member states, and the development of WTO law on "like services" is still very much in its infancy. Yet, there are other potential challenges in implementing the non-discrimination-in-trade principles in GATS beyond the uncertainty as to comparability of services engendered by the open-ended nature of WTO Dispute Settlement Body decisions in cases involving national treatment in service sectors. As The Lancet authors also observed:

The national treatment principle has another potential effect on domestic policy because of its application in cases in which the conditions of competition are affected irrespective of whether treatment is formally identical, that is to say, irrespective of whether like producers and products are treated in the same way. The scope of this provision remains unclear but its effect is potentially far-reaching. For example, a national regulation such as a high-quality standard for medical professionals could be deemed to affect the conditions of competition if domestic suppliers found it easier to comply with than foreign suppliers.

In Subpart 6, we examine how these challenges in determining "like services" and "like service providers" arise in the legal services context under GATS.

3. How The U.S. Put Trade in Legal Services Into Play Under GATS

With all of this in the background, the U.S. Trade Representative put legal services in the United State's first Schedule of Commitments in 1994—indeed, insisted on it—despite opposition expressed by the American Bar Association's representatives (who were

drafters of [GATT] Article III formulated no "precise definition" for the term "like products," deciding instead to leave that task to the proposed International Trade Organization ("ITO"). However, since the ITO never came into existence, the term was never officially invested with meaning. Thus, despite the powerful scope of the term, "the GATT has been functioning without a clear definition of like products since its inception."  

Id. (footnotes omitted).

62 AUGUST, supra note 31, at 371-75.

63 Pollock & Price, supra note 60, at 1074; see Aaditya Mattoo, National Treatment in the GATS: Cornerstone or Pandora's Box? 18-31 (WTO, Working Paper No. TISD-96-002, 1997) (discussing "'[l]ikeness' and the problem of regulatory gerrymandering," pointing out that "the issue of 'likeness'" is "possibly the most difficult problem of interpretation in GATS" and pointing out the limited precedential value that GATT decisions interpreting "like products" offers for GATS "like services" and "like service providers" issues). Ms. Mattoo notes that regulators "will have to make further regulatory distinction," beginning with a focus on "end uses" and a presumption "that suppliers of like services are like suppliers" so that "[a]ny distinction made between suppliers presumed to be like would need to be justified" Id. at 25, 31 (footnotes omitted).

64 Pollock & Price, supra note 60, at 1074.

advising the U.S. Trade Representative negotiating GATS in 1993) and absent clear conditions on other Member nations, particularly Japan, which the ABA urged the U.S. Trade Representative to make a condition precedent to including legal services in the Schedule. In fact, American insistence overcame even French resistance to include legal services in GATS. In total, thirty-six nations, and the European Community nations (later, the European Union), included legal services in their Schedules. The United States, of course, was careful to include in its schedule a listing of pre-GATS lawyer admission and practice laws throughout the United States, which "has the effect of requiring a country's future regulation of legal services to comply with the market access and national treatment provisions in the GATS, but 'grandfathers in' the existing set of regulations." Indeed, "the legal services portion of the U.S. Schedule took twenty pages, most of which was devoted to spelling out state-by-state limitations on market access and national treatment obligations with respect to the rights of foreign lawyers to practice their home country law in the United States." However, unlike a number of other nations, the United States did not invoke in its Schedule the "one-time opportunity at the entry into force of the GATS to unilaterally create MFN exceptions with respect to other members," and thus, vis-a-vis the United States, legal "service providers from all Members must receive MFN treatment." The upshot of this is that: (1) if the U.S. reaches a bilateral trade agreement with any other nation that permits greater access to U.S. bar admission and law practice within the United States, the United States will be obligated to extend that treatment to all other GATS member nations under the MFN rule, and (2) future laws—as well as "current laws not included in the Schedule"—respecting admission and law practice in the United States, at both the federal and state levels, "must comply with additional provisions in GATS, including the "market access," "transparency," and "national treatment" provisions of GATS.

66 GATS' Applicability to Transnational Lawyering, supra note 8, at 1088; see also Karen Dillon, Unfair Trade?, AM. LAW., Apr. 1994, at 54-57. Professor Terry relates that "[t]he ABA delegation and the USTR representative who had been responsible for legal services went to bed thinking that legal services would not be included," but "[d]uring middle of the night negotiations . . . the chief negotiator traded lawyers as part of a larger set of negotiations, thus resulting in legal services being included." GATS' Applicability to Transnational Lawyering, supra note 8, at 1088.


68 See Chapman & Tauber, supra note 65, at 967 & n.164

69 Laurel S. Terry, Corrections to Laurel S. Terry, GATS' Applicability to Transnational Lawyering and its Potential Impact on U.S. State Regulation of Lawyers, 35 VAND. J. TRANSNAT'L L. 1387, 1392 (2002). Most nations, including the European Community (now the European Union) and Japan, listed pre-GATS lawyer admission and practice laws in their schedules. See Chapman & Tauber, supra note 65, at 967 & n. 165.

70 From GATS to APEC, supra note 30, at 912 (citing "General Agreement on Trade in Services, The United States of America Schedule of Specific Commitments, GATS/SC/90 at 15-34 (Apr. 15, 1994), http://www.abanet.org/cpr/gats/legal_services_1994.pdf (showing eighteen pages of the U.S. Schedule were devoted to the “consultancy on law of jurisdiction where service supplier is qualified as a lawyer (subject to certain additional conditions”)). Professor Terry provides guidance as to how the intricate details of such schedules for legal services need to be read using Australia’s legal services schedule as a teachable example. See id. at 909-13.


72 Id. at 965.

73 GATS' Applicability to Transnational Lawyering, supra note 8, at 1004-06.
4. Trade in Legal Services in the Twenty-First Century GATS Negotiations: A Brooding Omnipresence as the Doha Round Sputters Along

During the (still-ongoing and, thus far, not particularly successful) Doha Round of trade negotiations, the U.S. Trade Representative in 2005 made a complex U.S. offer on specific commitments under GATS, asserting the United States’s willingness to engage in negotiations regarding various service sectors—including legal services—with the other participating GATS nations.74 Although the U.S. Trade Representative treats offers as, by and large, confidential and not for public release, it has made the 2005 offer available to the extent of showing that:

[T]he most recent U.S. offer, filed on May 31, 2005, proposed several new commitments affecting legal services, including the elimination of a citizenship requirement for practice before the U.S. Patent and Trademark Office (PTO) (while retaining residence preconditions) and the addition of eight new F[oreign] L[egal] C[onsultant] rules (in Arizona, Indiana, Louisiana, Massachusetts, Missouri, New Mexico, North Carolina, and Utah.75

Commentators have explained that the process leading to this offer and the way in which the offer have gotten swallowed up by other issues relating to different services sectors has resulted in little actual negotiation in the Doha Round over the U.S. offer, or offers to the United States, regarding legal services:

To assist the United States Trade Representative (USTR) in formulating the US offer submitted in 2005, he published a Federal Register Notice in 2004 seeking input on the contents of the U.S. “requests” to other countries. The U.S. legal services offer, submitted on May 31, 2005, does not include any new commitments beyond the contents of the U.S. 1994 Schedule of Specific Commitments and changes since 1994 in eight U.S. states applicable to foreign lawyers seeking to open offices in the U.S.; further additions are possible and likely to reflect adoption of such rules by additional States. At the same time, it seems clear that in few countries other than the United States do services sector desires for market access have a priority in the “Doha Development Agenda” of the current Round. Reform of market access for agricultural products, particularly through the elimination of subsidies for production and export in developed countries, is the principal and most difficult aspect of the Round that could directly and quickly impact the

"development" needs of the many new and less developed countries now in the WTO.  

In a letter to the Wisconsin State Legislature, the Harrison Institute for Public Law at Georgetown Law Center made a number of observations about the dynamic between the states and the USTR in GATS negotiations generally, as well as about that dynamic respecting legal services specifically. First, the Harrison Institute explained the relationship between USTR "offers" and the ultimate commitments the United States undertakes in GATS:

[T]he U.S. "offer" is a stage in the GATS negotiating process. It updates a previous offer that USTR sent to the WTO in March of 2003. What is being offered is a set of draft commitments to follow trade rules under the Market Access and National Treatment provisions of GATS within specific service sectors. According to the WTO, the draft offer is a negotiating document with no legal status and no binding effect on the United States—until, that is, the United States decides to incorporate the offer into the U.S. schedule of specific commitments. This means that USTR remains free to expand, retract, limit or clarify the revised U.S. offer, and comments from your oversight committee are still timely.  

Second, the Harrison Institute noted that communications between the USTR and the states concerning state-regulated services, such as law practice, were not always optimized:

The USTR sought input from state and local officials and national associations in order to increase the accuracy of commitments and limits on commitments that could affect state and local authority. However, 29 attorneys general and three state legislatures (California, Vermont and Maine) criticized the process on various grounds including these:

1. the information sent to state officials was incomplete,
2. the consultation process avoided contact with state legislatures,
3. the time allowed for response was less than two weeks for most of the state officials consulted, and
4. the state officials who had access to full information were not at liberty to share it with other state officials who had the jurisdiction.

Third, the Harrison Institute interpreted the 2005 legal services offer as requiring more of the states than at first, perhaps, meets the eye:

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77 Harrison Institute Memorandum, supra note 74, at 3.  
78 Id. at 2.
The revised offer "binds" 23 states (and DC) at their current stage of "liberalization" of court rules that allow practice by foreign legal consultants. More broadly, the approach that USTR took on legal services could be a new strategy for consulting with states. The advantage is that it takes states where they are, rather than push or preempt them into a federal standard for deregulation. The disadvantage is that it "binds" states nonetheless with a commitment that is designed to constrain future lawmaking authority. 79

The Harrison Institute also reminds the states that the GATS negotiations, at best, are at a via media point:

On May 31st, USTR submitted a revised U.S. offer of specific commitments to the WTO. This is a middle stage in the WTO's process of "request-offer" negotiations to commit all levels of government in the United States to follow trade rules under GATS within specific sectors and subsectors of trade in services. The trade rules that apply to these sectors are National Treatment (no discrimination) and Market Access (no quantitative limits on service suppliers, even in the absence of discrimination. The negotiations on specific commitments are one of four negotiations under GATS. The other three deal with trade rules on Domestic Regulation (the broadest and most significant for state regulation), subsidy rules for services and procurement rules for services. 80

Within the hierarchy of GATS negotiations, too much attention has been paid to the USTR's offers to incorporate legal services into the U.S. Schedule of Commitments, while too little attention has been paid to the separate negotiation of standards on Domestic Regulation (sometimes referred to as "Disciplines" on Domestic Regulation), which may have more far-reaching and less containable effects on state regulators within the United States:

The negotiations on specific commitments become visible in increments. However, the negotiations on "Domestic Regulation" are happening behind the scenes with little public scrutiny. Some WTO members have proposed rules that would require elimination of laws if their objectives can be addressed in a less trade-restrictive manner. The Domestic Regulation rules like the least-burdensome test would apply in addition to the rules under Market Access and National Treatment:

Even if the United States makes no specific commitment on a particular sector, the WTO might implement the trade rules on Domestic Regulation as a general obligation, which could create a conflict with state or local laws that affect that sector.

Water utility example—The largest private water companies are foreign-owned. The United States has to date said "no" to the EU's request for a specific commitment on water services for human use. The Washington Transportation and Utility Commission (WTUC) regulates water rates and

79 Id. at 3.
80 Id. at 2.
acquisitions of private water companies under a "public interest" standard, which is not presently challengeable under GATS. However, if the WTO implements the "least-burdensome" test as a general obligation for all service sectors, then the methodology for setting rates or the conditions required for approving an acquisition could be challenged as more burdensome than necessary. If raised by another country or even by the federal government, this domestic policy argument about the burden of state regulation becomes an international trade obligation under GATS domestic regulation. 8

While the water utility example might, at first blush, seem far removed from the regulation of law practice by state authorities in the United States, the situations are linked by the same potential for much more extensive demands for domestic change should the WTO indeed "implement[] the 'least-burdensome' test as a general obligation for all service sectors." 82 Indeed, there has already been concern expressed that state bar regulators would be in a position of difficulty if the "disciplines" already negotiated for the accountancy sector were to be embraced by the USTR for legal and other professional services. 83 Such are the implications of the inchoate, but inevitable, reconceptualization of law practice as the provision of commoditized legal services.

Looking at legal services and GATS from a holistic perspective, it becomes clear that the major exporters of legal services, such as the United States, have been very cautious to offer "asymmetrical" liberalization, opening its own market without demanding precise concessions in other markets. This well-known phenomenon—alogous to the classic "prisoner's dilemma"—has been a major psychological stumbling block to GATS and why, in so many areas, so little has been accomplished in the eighteen years of various rounds, meetings, and maneuvering around GATS’s obligations. Michael Taylor has captured the essence of the phenomenon in the context of GATS negotiations concerning the maritime service sector:

[B]ecause national treatment obligations follow the positive list model, as opposed to using a negative list, negotiators simply find it easy to leave nationally sensitive maritime services off of their commitment schedules. This is especially so because once a country liberalizes a sector, it faces the real possibility that free-riding service providers will flood its market without reciprocity being provided by the free-riders' home governments. 85

81 ld. at 4
82 ld.
83 See Laurel S. Terry, Lawyers, GATS, and the WTO Accountancy Disciplines: The History of the WTO’s Consultation, The IBA GATS Forum and The September 2003 IBA Resolutions, 22 PENN. ST. INT’L L. REV. 696, 747 (2004) (observing the extensive material discussed in the article and included in appendices that, "[i]n order to fulfill" GATS mandates, "WTO Member States have been considering the issue of whether to extend the provisions of the Accountancy Disciplines to other service sectors, including legal services").
84 Jeffery Simser, supra note 30, at 40 (noting that in the analogy, "comparative advantage dictates that if states can trust each other enough to stay silent, that is not restrict imports, states will have arrived at an optimal choice").
As of this writing, all of this is entirely in flux, and it cannot be predicted where the liberalization of trade in legal services will end up over another decade's worth of negotiation. As far as the primary drivers of the process—trade diplomats, foreign lawyers and lawyer regulators, and foreign businesses and business communities with palpable need for their trusted foreign counsel to practice and advise within the United States—are concerned, all of the signs point to ineluctable, even if incremental, opening of the U.S. legal market to foreign-educated lawyers.\textsuperscript{86}

5. Why the United States Persists in Pursuing Trade in Legal Services Under GATS

The United States has repeatedly put legal services into play for GATS negotiations. Why would the United States do this? It seems that, historically, the trade in legal services strongly favors U.S. exports. It did so at the time that the Schedule was filed in happier economic circumstances, and it continues to do so now,\textsuperscript{87} despite the economic recession and the widespread retrenchment in domestic legal work, particularly for recent law school graduates seeking "big-firm" jobs (as opposed to jobs representing average persons or working in public-oriented law employment for both criminal defense and prosecution and civil needs, including immigration law). Indeed, "in 2007, the U.S. legal services trade surplus was $4.9 billion," and the "U.S. exported $6.4 billion in legal services and imported $1.6 billion in 2007.\textsuperscript{88} By 2010, the United States exported $7.3 billion in legal services and imported $1.5 billion. As a student commentator has aptly observed, "[t]hese trade statistics are impressive not only for their sheer size and the fact that legal services comprise such a large percentage of American imports and exports, but also for the evidence that the growth is occurring so rapidly.\textsuperscript{89}" Thus, "[b]ecause U.S. professional services suppliers are ‘particularly competitive in the world market,’ it should come as no surprise that there is strong interest in promoting their ability to continue to trade at a surplus."\textsuperscript{90} Indeed, the writing has been on the wall since the period when opening legal services markets came under serious discussion in the 1970s and 1980s, leading up to the 1993 inclusion of "legal services" as a sector for trade barrier negotiation in GATS. That watershed event began a two-decade transition to the new Service Provider’s Paradigm, [in which] the legal profession is not viewed as a separate, unique profession entitled to its own individual regulations, but is included in a broader group of ‘service providers’ who are regulated together. The new paradigm has been described as a ‘fundamental,
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seismic shift in the approach towards lawyer regulation' because it has changed who regulates lawyers (with more U.S. federal regulation and international regulation), and it has changed how lawyers are regulated (with the burden placed on the legal profession to justify rules that deviate from the rules used in other cultures or for other professions). U.S. trade negotiators have contributed to this transition.

At the same time, there has been a shift in the way that American bar admission and legal educational standards have been viewed, a shift in which those standards are now often spoken of in the red-flag language of international trade as "trade barriers." In fact, the U.S. Trade Representative has adopted language that, while in a context explicitly discussing barriers faced by American legal service providers in other countries, clearly and inexorably applies to the bar admission and legal education criteria wielded by United States as well.

This might seem to be much ado about nothing. Neither Congress nor the U.S. Trade Representative, nor any other federal body, has purported to direct the U.S. state bar admission authorities to do anything—yet—as a result of GATS. However, the American bar should take no undue comfort in that state of stasis. The entire point of GATS is an (ongoing and endless) cycle of negotiations, and with a vast landscape such as that presented by the services sectors, things do not happen quickly. Indeed, if one wants evidence to support that view, one need only look at the WTO's own published timeline of the fits, stops, and starts that have attended the most recent cycle of negotiations, known as the Doha Round, which were initiated in 2000, and have been stopped and extended in the intervening years over a variety of service sector issues. In July 2012, the U.S. Trade Representative announced that the United States, the European Union, and over a dozen other WTO members had

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91 Id. at 972 (emphasis added).
93 Recent Trends in U.S. Services Trade, 2009 U.S. INT'L TRADE COMMISSION ANN. REP. 1, available at http://www.usitc.gov/publications/332/pub4084.pdf; see From GATS to APEC, supra note 30, at 974-76. As Professor Terry has noted, a U.S. Trade Representative report in 2009 includes a subsection entitled "Regulatory Environments are Restrictive," which . . . [is] noteworthy because of its title, its approach, and its reference to "barriers":

In many countries—especially those with federal systems such as Australia, Canada, and the United States—state-based regulations require formal admittance in the relevant subterritory to be licensed to practice law there. Some U.S. industry representatives believe that divergent state-level regulations impede the delivery of legal services by both domestic suppliers and foreign lawyers. By contrast, an EU directive has reduced certain barriers to entering European legal markets.

94 See, e.g., Hopkins, supra note 13 (noting that "[t]hose who see lawyers as multijurisdictional service providers who represent clients across the country and across the globe are apt to conceive of the practice of law as an integral part of the interstate commercial system"); Eric Williams, A National Bar —Carpe Diem, 5 KAN. J.L. & PUB. POL'Y 201 (1996); Marvin Comisky & Philip C. Paterson, The Case for a Federally Created National Bar by Rule or by Legislation, 55 TEMP. L.Q. 945 (1982). But see Charles W. Wolfram, Sneaking Around in the Legal Profession: Interjurisdictional Unauthorized Practice by Transactional Lawyers, 36 S. TEX. L. REV. 665, 703 & n. 125 (1996).
recommitted themselves to moving the stalled negotiations from the Doha Round forward, in an aggressive set of negotiations. It is no surprise, therefore, that among the handful of commentators who have, like Cassandra, peered into the future through the domain of possibilities in the human imagination, there is concern that, despite a substantial lobby to maintain the traditional state hegemony over bar admissions and legal educational requirements for bar admissions in the United States, "that in the give-and-take of future services negotiations, U.S. trade negotiators may be willing to grant foreign lawyers greater multijurisdictional practice rights than those enjoyed by U.S. lawyers." In the meantime, American lawyers should take no solace that a major push to roll back two centuries of


We have found that the WTO General Agreement on Trade in Services (GATS) provides a strong foundation. At the same time, there have been considerable developments in advancing the liberalization of trade in services in the sixteen years since its conclusion.

A significant number of Members have made great advances in opening up their markets, both autonomously as well as through more than 100 services trade agreements notified to the WTO. Many of these agreements have broken new ground both in terms of market access and in the development of improved services trade rules.

We believe it is time to bring this progress back to Geneva with the ultimate aim of reinforcing and strengthening the rules-based multilateral trading system.

We plan to move our exploratory discussions to a new phase aimed at clearly defining the contours of an ambitious agreement on trade in services to allow us to undertake any necessary consultations or procedures prior to any negotiations. Any such agreement would build upon the achievements of the GATS and the developments mentioned above. Such an agreement would aim to capture a substantial part of the liberalization achieved in other negotiations on trade in services. The outcomes of the agreement could then be brought into the multilateral system.

Any such agreement should:

• Be comprehensive in scope, including substantial sectoral coverage with no a priori exclusion of any sector or mode of supply;

• Through negotiation, include market access commitments that correspond as closely as possible to actual practice and provide opportunities for improved market access; and

• Contain new and enhanced rules developed through negotiations.

We encourage other WTO Members who share a high level of ambition for the liberalization of trade in services, including these objectives, to take part in this effort. We are considering how to further broaden participation of developing countries and how to take into account the interests of least-developed countries.

We plan to intensify our work from September to develop these concepts further and begin working on the mechanics for achieving our shared objectives.

Id. (emphases added).


*98 Hopkins, supra note 13, at 676-77 & nn.135-36 (citing GATS' Applicability to Transnational Lawyering, supra note 8, at 1085-87).
domestic protectionism in American bar admissions has not yet developed, despite the passage of twenty years from the birth of GATS in 1994. The reckoning that awaits the U.S. commitment to negotiate opening legal services markets has merely been delayed. "The failure to date of the Doha Round on GATS has lessened the effect of the clarion call for action to open up state bars to non-United States attorneys." Yet, the lesson of GATS's predecessor, GATT, and, indeed, the lesson that international trade law inculcates is that, as Richard Posner said in a different context, there always must be a "first time" for everything. Even in a tradition-bound service sector such as lawyering, the day is coming.

6. **Challenges in Delineating “Like” Legal Services and Legal Service Providers**

One of issues that will have to be worked out in any GATS negotiations involving the legal service sector is exactly what kinds of legal service providers will be considered "like." The United States is virtually unique in having one primary kind of legal service provider, the attorney, who, once admitted to a state bar, has thereby qualified to play any role in which legal services are provided. Contrasting greatly with the familiar American model are foreign bars, in which it is imprecise to speak of attorneys, since the foreign bars are in which legal services are provided. Contrasting greatly with the familiar American model are foreign bars, in which it is imprecise to speak of attorneys, since the foreign bars are


101 See, e.g., William R. Slomanson, Foreign Legal Consultant: Multistate Model for Business and Bar, 39 ALB. L. REV. 199, 199 & nn.2-5 (1975) [hereinafter Foreign Legal Consultant] (discussing the “unique[ness]” at the time of New York’s foreign legal consultant licensing statute, permitting “[q]ualified lawyers from abroad . . . to advise clients in a manner that was previously within the province of licensed New York practitioners” on “matters such as foreign investment, international joint ventures, and licensing arrangements”); William R. Slomanson, Current Developments: California Becomes Latest State to Consider “Foreign Legal Consultant”, 80 AM. J. INT’L L. 197, 197 n.5 (1986) [hereinafter Current Developments] (“In 1975 New York was the first state to establish a Foreign Legal Consultant license”); Schiller, supra note 89, at 412, 429, 444 (noting that Peking University School of Transnational Law is a foreign law school seeking ABA approval, and arguing that the school “is capable of fulfilling the current Standards and should be accredited”); J. Gordon Hylton, Should the American Bar Association Accredit Foreign Law Schools?, MARQ. UNIV. L. SCH. FACULTY BLOG (Aug. 3, 2012), http://law.marquette.edu/facultyblog/2012/08/03/should-the-american-bar-association-accredit-foreign-law-schools/ (noting that the Peking University law school’s application for ABA accreditation in 2010 “is the first, and so far only, non-U.S. school to make such an application” and observing that “[p]ersistent efforts on the part of the Peking law school have brought the issue back before the ABA for a third time in three years”).

102 See, e.g., Carol A. Needham, Globalization and Eligibility to Deliver Legal Advice: Inbound Legal Services Provided by Corporate Counsel Licensed Only in a Country Outside the United States, 48 SAN DIEGO L. REV. 379, 381 & nn.7-8 (2011) (detailing professor Needham’s observation that “[a]s of early 2011, fourteen states have taken the steps needed to allow lawyers licensed in Australia to take the bar examination and become licensed, even without any additional education at a law school approved by the ABA” which are “Colorado, Florida, Hawaii, Illinois, Kentucky, Louisiana, Maine, Nevada, New Hampshire, New Mexico, Oregon, Vermont, Washington, and Wisconsin”).

roles. For example, traditionally, the German legal profession was divided principally between Rechtsanwälte (an “independent consultant and agent in all legal matters”); the Notar (“who occupies a public office which comprises, essentially, documentary authentication”); and the Juristen, which “can . . . be interpreted to include lawyers who did not take the so-called Zweites Staatsexamen (Second State Examination) and who are working as legal advisers, for instance, as in-house consultants in multinational enterprises (Syndikus) or banking institutions, without admission to practice before the courts.”

Likewise Rechtsbeistände and Prozessagenten, “are not admitted as Rechtsanwälte but . . . may also give legal advice professionally.” Patentanwalte “are exclusively involved in patent litigations and . . . must not only establish their knowledge of the law but . . . must have a degree in the technical sciences as well.” In exploring the difficulty in drawing equivalences between the generalist American attorney and the stratified bars in other countries, Professor Michael Van Alstine cites to another example of a stratified German legal service industry, the Steueberater, in pointing up the difficulty of deciding which legal service providers are “like”:

[What is meant by the word ‘practice’ in the phrase ‘authorized to practice law in a foreign jurisdiction’? That is, whose notion governs the idea of being authorized to ‘practice law’—U.S. notions[,] or what the foreign jurisdiction thinks ‘practicing’ means? In Germany, a ‘tax advisor’ (Steuerberater) is not required to pass the German legal bar exams in order to take on clients and advise them about tax law. Instead, a separate ‘tax advisor exam’ is required. Nonetheless, one way to be able to sit for that exam is to ‘graduate’ from a German university in the field of law. Germany would not, however, consider a ‘tax advisor’ as admitted to practice law in the general U.S. sense. But of course, tax attorneys in the U.S. ‘practice law.’

As Professor Van Alstine concludes, some foreign providers of legal services “may not be able to represent clients on general legal matters, but may represent client interests only on specific issues—for example, tax matters (such as a ‘Steuerberater’ in Germany).” Until a 1971 consolidation the first three classifications into the avocat category, France had a similarly specialized spectrum of legal service providers—notaire, avocat, avoué, agree,
huisssier, and conseil juridique—and a 1990 consolidation further merged conseil juridique into advocate. In Spain, as Gerard Clark described the bar in the late 1980s,

Spanish lawyers are separated into four distinct groups: notarios, procuradores, fiscales, and abogados. The notarios, as draftsmen of, and counselors about, written instruments, are the most prestigious and highly paid. In addition, the notario authenticates documents, making the documents public acts and conclusive evidence of what they contain. The notario also retains records of papers he notarizes and furnishes copies upon request. Notarios are strictly limited in number and are licensed by separate licensing bodies in each district, which administer a highly complex examination for entry.

The procurador or licenciados is the judicial practitioner who is exclusively eligible by statute to sign papers for filing and to make appearances in courts. Their numbers are also limited, though by circumstances rather than law, representing only two percent of the bar. In this capacity, the procurador’s primary responsibility is to assure that court rules are complied with; however, normally he does not engage the court verbally, but hires an advocate for this purpose.

Fiscales are employees of the state whose duties include: prosecution of crimes, disciplinary measures against courts’ personnel, instructions to the policia or police, and representation of the state in judicial proceedings. In addition, fiscales intervene in cases addressing civil status and bankruptcy proceedings, where a party lacks legal capacity, due to age or mental illness, or to protect the public interest.

The Abogado del Estado is primarily an administrative practitioner who represents and advises administrative bodies, enforces tax laws, appears in court to represent the state, and represents civil servants sued for nonfeasance or malfeasance.

The abogado, or advocate, is the practitioner who generally serves non-governmental parties. Most practice as solo practitioners.

France and Germany’s neighbor, Belgium, has a similarly stratified bar, as described by Professor Laurel Terry:

Brussels lawyers who register with the French or Dutch bar associations are called tableau lawyers. Before one can become a tableau lawyer, one must

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serve an apprenticeship, or stage, during which period one is referred to as a stagiaire. The list on which tableau lawyers and stagiaires are recorded is colloquially referred to as the “A List.” . . . [T]hese A List lawyers are also referred to as avocats or advocaten. In addition to the A List, since 1984, the Brussels Bar has maintained a “B List,” on which foreign lawyers could register if they satisfied certain conditions. Because there is no monopoly on giving legal advice [i.e., non-lawyers are allowed to do so under Belgian law], however, historically, many foreign lawyers chose not to register on the B List. The final term which one should know is jurist. A jurist is a Belgian who graduated from a Belgian law school but chose not to serve a stage or register on any bar list.111

The Latin Notary, variously referred to as "the Spanish Notario Público, the French Notaire, the Italian Notaio, the Dutch Notaris and the German Notär,"112 exemplifies the challenges negotiators and regulators will have in reaching agreement upon "like legal service providers" and "like legal services" in the GATS setting. European Notaries have thus far been exempted from internal E.U. services liberalization rules. But with the growing population of Spanish-speaking peoples immigrating to the United States, there is a strong potential market here for the services of Civil Law tradition Latin Notaries.113 Indeed, Latin Notaries would see their office and its functions as the equivalent of many of the privileges, duties, and responsibilities of the American attorney-at-law.114 That the Latin Notary does not perform all of the functions that an American attorney-at-law performs would not much affect the Notarial view of equivalency.115 As Professor Pedro Malavet, who is qualified as a notario público in Puerto Rico, explains, "The Latin Notary is part of an integrated system of legal specialization" in which the participants are accustomed to "[t]he division of the legal profession into separate categories . . . particularly in Western Europe" because ""[t]he Civil

112 The Foreign Notarial Legal Services Monopoly, supra note 59, at 951.
113 Compare Guerra, supra note 59, at 39 (noting that desperate immigrants turn to notorios for help because they speak Spanish, but are often defrauded), with Cisneros, supra note 59, at 297-307, 322 (contending that Congress needs to help "vulnerable immigrants [who] come to believe that the only person who can help them solve their legal problems is a person who calls him or herself a notario and, furthermore, that the notario is entitled to fees far in excess of those charged by American notaries public").
114 Soskin, supra note 59, at 411 & n.5, 415 & n.43, 416-24 (observing that "[i]n the United States, the title insurance industry provides the process in which homebuyers and lenders protect their rights; however, throughout much of Europe, the Latin notary, an impartial state licensed official, is ordinarily charged with the duty of ensuring that the buyer acquires good title, through registration in the land title registry, providing the buyer with a rebuttable presumption of its validity"); The Non-Adversarial, supra note 59; Counsel for the Situation, supra note 59, at 450-52 (listing over thirty countries in Latin America, Europe, Asia, and Africa in which the Latin Notary flourishes); Puerto Rico, supra note 59, at 105 & n.247 (noting that, unlike the rest of the United States, the Latin Notary is a regular part of Puerto Rico's mixed Civil Law-Common Law system and performs attorney-like duties).
115 See, e.g., The Foreign Notarial Legal Services Monopoly, supra note 59, at 951-53, 960 (recognizing that the supervision of Latin notaries and American lawyers are similar, because they are private professions that retain their position in good standing and are both considered officers of the court, and argues, that despite differences with participation in judiciary proceedings, both professions have their admission and practice regulating by the state.).
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Law systems have traditionally differentiated between functions performed by law professionals.\(^{116}\) Precisely because of the "balkanized" nature of the Civil Law legal profession, Professor Malavet sees a strong equivalency between American lawyers and Latin Notaries that would, when viewed in the context of a GATS proceeding before the WTO, provide support for the Latin Notarial contention that it provides services "like" those of American attorneys-at-law:

In the United States, there is one kind of lawyer who is generally expected to be an advocate for his client. Generally speaking, legal specialization here is a matter of custom and practice, there is nothing governmental about it. In most civil law countries, however, governmentally designated legal specialties are the norm. Within this professional balkanization, there is a particular specialist, generally located at the top of the legal hierarchy, who is a non-advocate, impartial counsel who advises all parties to a transaction. The State gives the Latin Notary, i.e., the professional that has found its greatest acceptance in Latin countries, the exclusive authority to perform certain forensic functions and to impart the required formality to specified legal transactions. The practitioner of the Latin Notariat may be identified by the four essential elements of this career as: (1) a private legal professional performing a non-advocacy counseling function; (2) to whom the State entrusts the exclusive power to take a private transaction and give it proper legal form and to authenticate it in a public act, by memorializing it in a public document that is publicly enforceable; (3) who must maintain a permanent record of these transactions and issue certified copies of the public documents he prepares, to interested parties, upon request; (4) who is subject to professional, civil and criminal liability for miscarriage of his office.

The Latin Notary institution must be understood in its proper context, by considering: (1) its nature as a liberal profession performing a public function; (2) its place within established systems of legal specialization; (3) its place within a unified code-based legal system in which notarial law interacts closely with other areas of the law, particularly mortgage and registry law.\(^{117}\)

Nor would Professor Malavet's views permit an easy distinction for trade negotiators based on the United States' decision to treat law as a postgraduate, rather than undergraduate, course of study:

Latin notaries generally require post-secondary legal education, passage of relevant professional examinations and often a period of apprenticeship. Latin Notaries in general are preliminarily required to: . . . have a proper educational degree, usually university or postgraduate. The Spanish Notarial Law of 1862 requires the notary to have a specified post-secondary education or be a lawyer. Today, notarios must have a law degree (licenciados en

\(^{116}\) Id. at 958.

\(^{117}\) Id. at 951-53.
derecho) or be doctors of law. The notario must also pass a notarial examination including written and oral components, one part is drafting a notarial document, another drafting a judicial opinion about Spanish civil law, and the last one answering questions of notarial law or related substantive law subjects. Under the 1913 law, the Italian notary was required to obtain a law degree, practice for at least two years and pass an exam. These requirements have not changed, the notario is still required to have a law degree, to perform an apprenticeship and to pass a competitive examination.

The only reasonable comparison of a Latin Notary’s admission requirements is to an American lawyer’s typical three-year law school career after obtaining an undergraduate college degree, and passing a state bar examination. However, the legal services provided by Latin Notaries have been the exclusive domain of the attorney-at-law in the United States. The situation is further complicated by the “false cognate” embodied by the American “notary public,” who neither provides legal services,

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118 Id. at 963-64 (footnotes omitted). Latin notaries argue that their training is superior to American law students entering the legal profession after passing a state bar examination:

There is an important difference in the much increased level of educational specialization required of the notary. This is accomplished directly or indirectly. Direct, express requirements imposing specific notarial education, are not uncommon. This is the French voie universitaire. Indirect specialization requirements are imposed by the admission examinations themselves, which are specifically designed to determine the applicant’s ability to become a specialized legal professional. A notary, is required to obtain an educational degree, the general law certificate, as in Spain and Italy, and in the French voie professionnelle.

The difference between the specific notarial education and examination, on the one hand, and American legal education and bar examination, on the other, is not surprising. American lawyers are trained and tested, at least at the initial juris doctor level, as generalists. There is only one type of bar admission in each state, and there are no other subcategories of attorney for initial admission. Notaries on the other hand are seeking appointment to a legislatively-created specialty. Another significant difference is the apprenticeship requirement, and the series of specialized exams that candidates must take to be notaire stagiere and notaire assistant.

Id. at 964-65 (footnotes omitted).

119 Id. at 951-55, 964-65.  

120 For the nitty-gritty of legal services negotiations in GATS, the problem of the “false cognate” in translating between languages, cultures, and legal systems deserves careful and lavish attention:

There are linguistic traps, treacherous words, or false cognates that look almost alike in Spanish and English, but have different legal connotation such as “sentence” (sentencia), “jurisprudence” (jurisprudencia), “transaction” (transaccion) and “notary public” (notario publico). They look and even sound very much alike, but they point to different legal institutions.

The literal translation of some English legal terms into Spanish may become a prolific source of confusion or costly errors, such as the terms “Common Law” (derecho comun), “limitations” (limitaciones), “execute” (ejecutar). The problem of false cognates is aggravated in the United States, with a large Spanish-speaking population conversant in both languages, and where, to the delight of modern linguists, a genuine variety of Spanglish has been emerging. Most Spanish-speaking person who live in this country would understand what is meant by “aplicar” to a University; those who are lawyers would grasp without much difficulty what is meant by asking a borrower to provide
nor is comparable to either the American attorney-at-law or the Latin Notary. While that false cognate has, to date, primarily harmed immigrants in the United States who are misled into believing that notary publics in the United States are Latin Notaries, the American bar appears to have an ingrained view of American notaries public that may make it difficult for bar associations, as well as trade negotiators, to approach the trade in legal services by Latin Notaries from a culturally competent perspective. However, trade negotiators from countries in the Latin Notarial tradition could take a hard line about reciprocity in the United States, at least for purposes of transactional legal work:

In the English legal system, the notary never attained the stature of continental European notaries. This diminished role carried over to the United States, where 'the notary developed into a purely clerical position.' By contrast, Spain imposed on its Latin American colonies a process of careful screening and testing for competency for appointing notarios publicos, which appointment vested the holders with royal title. Indeed, such officers were considered so important that not even a Viceroy, only the Council of the Indies, was entrusted with their appointment.

In contemporary Latin America, a lawyer fortunate enough to become a notario publico is a private legal professional of immense prestige... Thus, American attorneys, bar associations, and trade negotiators may be in for a surprise. The differences between American and Latin Notaries, and the overlap of powers, duties, and

"collateral" to secure a loan. But these words have different meanings in Spain and Spanish-America.

Other concepts do not have an accurate one-word equivalent in both legal traditions, thus calling for more elaborate explanation of their meaning to our Latin American colleague. This is the case, for example, of estoppel, choses in action, arraignment, and discovery. Similar problems will be faced by a Latin American lawyer who attempts to explain to his or her American colleague the meaning of acto juridico, juicio ejecutivo, or Ministerio Publico.


121 The Foreign Notarial Legal Services Monopoly, supra note 59, at 964-65 ("The [American] notary public, whose ranks require no particular education beyond literacy, and are only sometimes required at most to take an elementary written exam, is not a pertinent comparison in the area."); Cisneros, supra note 59, at 294-99 ("What little information is available in the United States clearly indicates that the level of complexity of the transactions carried out by Latin notaries, the level of education and training required of them, and the amount of responsibility vested in their office, are nothing like those of their American false cognate "counterparts."); see, e.g., Closen, supra note 59, at 662 (observing that American notaries generally have other, full-time occupations).

122 Guerra, supra note 59, at 39; see Cisneros, supra note 59, at 303 ("Given the prestige and trust associated with the office of the notario publico in Latin America, it is precisely upon vulnerable immigrants that the stateside notarios prey.").

123 See Closen, supra note 59, at 655-56 (survey results concerning conceptualizations held by a sampling of American law students and American lawyers showed that "only about 11% [of lawyers] held the opinion that notaries serve as agents of the individuals for whom they notarize, and approximately 89% [of lawyers] believed notaries do not become agents of document signers").

124 See id.

125 Cisneros, supra note 59, at 295 (footnotes omitted).
functions between American attorneys and Latin Notaries, will present a very challenging inquiry for determining the extent to which Latin Notaries would be entitled to be seen by the WTO in a GATS context as providing "like services" under the WTO's extant "likeness" jurisprudence. Furthermore, there is likely to be further overlap and confusion if the recommendations of the American Bar Association's current Task Force on the Future of Legal Education ("Task Force") have their way. During a February 2013 meeting in Dallas, Texas, the Task Force held a public session, from which The New York Times offered takeaways that included the suggestion that "states should establish training for the legal equivalent of nurse practitioners." The State Bar of Washington has taken off with the analogy to "nurse practitioners" by establishing "a board to create a program for limited-license legal technicians, the first in the country," for which that board will "lay out the educational and professional framework for the technicians." This decision was likely made without much reflection on the GATS ramifications. If implemented, these moves will have serious consequences for the traditional American state bars' stance against liberalizing trade in legal services; the stratification of the American legal profession will open up new and compelling arguments for GATS trading partners who seek admission for their attorneys to state bars throughout the country.

From the perspective of the USTR and the state bar admission authorities, the threshold problem, then, with dealing with legal services under GATS is deciding which of the various legal service providers in other countries are "like service providers," comparable to American attorneys and, thus, entitled to whatever benefits the MFN and National Treatment rules may confer on them in seeking law practice privileges within the United States.  


128 Id. (noting that “[t]hey will have more training and responsibility than paralegals but will not appear in court or negotiate on their clients’ behalf”); see WASH. STATE CT. A.P.R. 28, available at http://www.courts.wa.gov/court_rules/?fa=court_rules.rulesPDF&ruleId=gaapr28&pdf=1. While it may sound "new," the legal technicians notion has been around since at least the 1960s, and, from time to time, the A.B.A and commentators have discussed the idea. See, e.g., Louis M. Brown, Education of Legal Assistants, Technicians and Para-Professionals, 22 J. LEGAL EDUC. 94, 97-100 (1969).

129 See Chapman & Tauber, supra note 65, at 952, 970; see also Dean N. Menegas, GATT as a Framework for Multilateral Negotiations On Trade In Legal Services, 7 MICH. Y.B. INT’L LEGAL STUD. 277, 285-86 (1985). As Chapman and Tauber elaborate,

Because substantial differences in education, training, and experience requirements exist between lawyers of different countries, [GATS] Members might argue that domestic and foreign lawyers do not provide “like services” and should not be considered “like service suppliers.” As a consequence, Members who have scheduled a National Treatment commitment on legal services may potentially restrict foreign access to the domestic legal market without violating their GATS obligations. Chapman & Tauber, supra note 65, at 970 (footnote omitted). Of course, the comparative aspects of analogizing between, for example, Civil Law lawyer classifications and the general, attorney-at-law classification in the United States, may not leave as much room for the play that Chapman and Tauber hypothesize, particularly in the face of experienced comparativists who can demonstrate just how many "lawyerly" service functions a Civilian notary performs, legal services that are the same as those performed in the law offices of many solo, general, and non-litigation practices in America. See The Foreign Notarial Legal Services Monopoly, supra note 59, at 952, 964.
7. The Ongoing Dialogue Within the United States About GATS’s Impact on the Legal Profession in America

As explained above, the legal services sector has been part of ongoing U.S. trade negotiations for almost two decades. Negotiations for the United States are coordinated by the Office of the U.S. Trade Representative. The place of legal services in GATS trade law is still emerging, and the place of domestic regulators, courts, bar associations, and attorneys in that arena is neither uniform, nor firmly established. The GATS process provides a framework for reducing barriers to transnational trade in services, but the commitments and details of proposals for effectuating that general purpose is left up to a fairly complex and multilayered process of both domestic vetting of a GATS member nation’s proposals, as well as presentation and negotiation of those proposals in a variety of negotiating groups. That may explain the exhortation over a decade ago of then-ABA President, Alfred P. Carlton, Jr., for attorneys and their state bar associations to become involved in the evolving landscape of America’s continuing negotiations over service-sector trade:

While U.S. lawyers have wrestled with issues of multijurisdictional practice, the World Trade Organization has moved forward under the General Agreement on Trade in Services (GATS) to include legal services under international trade agreements, which means the U.S. trade representative is involved in negotiations regarding the conditions under which foreign lawyers may provide legal services in the United States, and vice versa.

While there is general understanding by the U.S. trade representative about the primary role of the state judicial branch of government in regulating the legal profession, federal incursions into this arena are ongoing and likely to continue throughout the GATS negotiations. In response, Mr. Carlton exhorted that “[i]t is important that you work through your state, local and specialty bar associations to address these issues. But it also is vital that you add your voice to the dialogue and debate in the American Bar Association . . . .”

In 2005, the USTR placed legal services among the sectors up for negotiating for GATS compliance as part of U.S. trade policy. The USTR’s proposal has struck foreign ears as demanding much from other nations for making their domestic environments hospitable for U.S. legal services—which, as of 2009, were exported from the United States at $7.3 billion per year—and offering much less by way of making the American environment hospitable for foreign lawyers seeking to provide legal services in the United States. At the time the

130 See GATS/International Agreements, supra note 8.
133 Id.
134 Id.

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Doha Round was getting under way, the hope was that the Doha negotiations would result in legal services concessions that would "give U.S. attorneys more of the mobility they need to properly advise clients in these [cross-border] situations[,]" which "are complicated by the legalities of implementing . . . operations in a foreign legal system."37 Indeed, "[t]o encourage other nations to follow suit, The Office of the U.S. Trade Representative—supported by the ABA—is anxious to liberalize restrictions on foreign lawyers setting up shop in the United States."38 However, many feel that the liberalization of legal services through GATS negotiations will be an uphill battle for the United States, to the extent that the supreme courts in almost every state have regulations aimed at foreign lawyers, and that "regulatory overlay will make it very difficult for the United States to negotiate the liberalization of legal services."39

8. Why the United States Needs to Not Merely Comply with GATS, but Break Free of the "Prisoner’s Dilemma" and Become the Leader, Expanding the U.S. Market to Inbound Legal Services to Win Access For American Outbound Legal Services in Foreign Nations

GATS has not yet reached a stage of maturation to “require” the United States and, by extension, its various state sovereigns, to reduce barriers to foreign-educated lawyers seeking to practice law in the United States. But the essence of modern international trade law, which the United States has been championing vigorously since the inception of the WTO, is reduction of protectionism by negotiation, rather than prescription. Yet, even in the globalized economy, protectionism is ingrained, and progress in trade negotiations—particularly in service sectors, such as law practice, which had not been viewed in the United States prior to GATS as a tradable service—requires a considerable amount of readjustment of attitudes, not to mention trust that the system itself (rather than any particular negotiating party) will ensure reciprocity in the long term, even if not in the short term. While spoken of in theory, such readjustment and trust has been more the province of those writing about GATS negotiations, rather than those actually negotiating in GATS rounds themselves:

Multilateral trade agreements are difficult to craft in a world where states rigorously pursue self-interest with a one-way appetite for free trade. A state acting in its own interests will seek to maximize exports whilst minimizing imports; the state is exposed to the classic “prisoner’s dilemma.” In the prisoner’s dilemma, two prisoners are arrested, housed in separate cells and interrogated separately. The police offer the prisoners two choices: remain silent or confess. If one confesses and the other remains silent, the silent prisoner is jailed whilst the confessing prisoner goes free; if they both confess, they get a three year sentence; if they both remain silent, they get a one year...


138 Id.

139 Id. (quoting Don De Amicis, vice president and general counsel for OPIC and former chair of the Task Force) (internal quotation marks omitted).
sentence. The safest choice is to confess, but both are better off if they can trust each other enough to remain silent. In trade relations, the safest choice is to maximize exports while minimizing imports, but the more a state restricts imports, the more likely it will encourage other states to limit their exports. Comparative advantage dictates that if states can trust each other enough to stay silent, that is not restrict imports, states will have arrived at an optimal choice.\(^{140}\)

The problem of the prisoner’s dilemma is evident in the large-scale failure of the Doha Round, which is sputtering to get started twelve years after its initiation. Rudolf Adlung, of the WTO’s Secretariat-Trade In Services Division, clearly diagnosed this problem after the first nine years of Doha impotence:

There has been virtually no liberalization under the General Agreement on Trade in Services (GATS) to date. Most existing commitments are confined to guaranteeing the levels of access that existed in the mid-1990s, when the Agreement entered into force, in a limited number of sectors. The only significant exceptions are the accession schedules of recent WTO Members and the negotiating results in two sectors (financial services and, in particular, basic telecommunications) that were achieved after the Uruguay Round. The offers tabled so far in the ongoing [Doha] Round would not add a lot of substance either. Apparently, negotiators are ‘caught between a rock and a hard place’. For one thing, the traditional mercantilist paradigm, relying on reciprocal exchanges of concessions, seems to provide [sic] less momentum than in the goods area. For another, there are additional—technical, economic and political—frictions that tend to render services negotiations more complicated, time-consuming and resource-intensive. The novelty of the Agreement adds an additional element of legal uncertainty from a negotiator’s perspective.\(^{141}\)

The solution? The principle underlying virtually all of the suggestions to make GATS negotiations more effective is a bold embracement of unilateralism: “WTO Members[] [have a] particular need in services negotiations to supply ‘a large dose of unilateralism’ if they are to achieve the goal of uniform protection,” and, thus, “[t]he pattern of current commitments suggests that past services liberalization was mostly self-generated within individual countries/governments.”\(^{142}\)

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\(^{140}\) Simser, supra note 30, at 40 (footnotes omitted) (citing G. Richard Shell, Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization, 44 DUKE L.J. 829, 862 (1995)). At the end of his analogy between the prisoner’s dilemma and international trade negotiations, Mr. Simser observed that “[s] binding trade regime to temper the anarchy of international relations can engender such trust.” Id. at 41.


\(^{142}\) Id. at 11 & n. 47 (quoting Bernard Hockman & Patrick Messerlin, Liberalizing Trade in Services: Reciprocal Negotiations and Regulatory Reform, in GATS 2000: NEW DIRECTIONS IN SERVICES TRADE LIBERALIZATION (Pierre Sauvé & Robert M. Stern eds., 2000)).
What is the upshot, then, of this combination of international trade practice combined with game theory? That, in the huge legal services market, the proverbial game is worth the candle, i.e., that American leadership in unilaterally lowering barriers to law-practice admission for foreign-educated lawyers will, at the end of the day, prove incredibly beneficial to the American legal services sector, generally, because it will permit the U.S. trade negotiators to gain increased access for our own attorneys to perform legal services abroad as part and parcel of the globalized economy. As a result, the legal services sectors will enjoy unprecedented growth, both at home as well as in foreign markets.

By contrast and in contravention of much misguided conventional wisdom on the subject, protectionism will harm the American legal services market, rather than help it; there needs to be a sea change in the way state regulators in the United States see this issue. Small thinking will inhibit U.S. economic growth in the export of services; closed legal markets will keep legal markets closed to us. While we may take comfort in the strong export to import position America enjoys today in legal services, we would be “penny wise, and pound foolish” not to see that potential for considerable expansion of American legal services, by taking the initiative in opening law practice to foreign-educated lawyers, rather than persisting in the belief that the United States has held a trade advantage by keeping foreign lawyers out. Such instincts are those of small-time law practitioners.

Given America’s leading position in exporting legal services, America will also have to demonstrate leadership in opening up the American legal market. “If the United States can’t liberalize its own legal framework, its negotiators will find it impossible to make a credible case that a new GATS treaty should prevent signatories from imposing arbitrary impediments to foreign lawyers,” and, concomitantly, the United States “will have lost a golden opportunity to ease a problem for a host of U.S. multinationals who have American attorneys as their key consultants.” Or, to quote an oft-quoted, but contextually appropriate, phrase, in transnational legal services and GATS, the United States must “lead, follow, or get out of the way.”

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That expression ... is widely understood to mean “so unimportant that any time or effort spent on it would be wasted.” But who knows what game? Whose candle? We grasp the meaning without reaching for the resonance. The word picture was first drawn by the French essayist Michel de Montaigne in 1580: Le jeu ne vaut pas la chandelle. ... Those who wanted to gamble at night had to play by candlelight. If the stakes were insignificant, it would not be worth the cost of the candle that enabled the gamblers to see the cards or dice. Only when the stakes were high enough was the game worth the candle.

145 Id.

146 See, e.g., CHRISTIAN WILLIAMS, LEAD, FOLLOW, OR GET OUT OF THE WAY: THE STORY OF TED TURNER (1981). A leadership role is a critical component of a nation’s systemic reputation in the world trade
TRANSNATIONAL LEGAL SERVICES IN GLOBALIZED ECONOMIES

Indeed, observers have noted that progress in GATS talks about legal services have been "painfully slow"—primarily because the U.S. Trade Representative has had so little to offer in return for the concessions that the United States is seeking in foreign legal services markets.147

[Getting the protectionist states to change their minds has been a slow process. It has taken 31 years—since New York began the practice of registering and regulating foreign legal consultants in 1974—to bring less than half the states into the fold. And only a handful of the states that allow foreign lawyers have adopted the ABA Model Rules for the Licensing of Foreign Legal Consultants, which are based on the expansive New York rules. The remainder of states have their own detailed rules as to what foreign lawyers can do.148

However, the pressure for opening legal service markets continues to build, albeit largely behind the scenes. That is why "regardless of the position of dissenting states, the U.S. Trade Representative will be using the existing rules in the twenty-four states that allow foreign legal consultants as a basis for" a credible negotiating position.149

community. This idea is well situated within a model for international trade relations called "Cooperative Openness":

In the faulty frame of Best Practices, open markets are seen as rational for a national economy regardless of whether other nations have them. By contrast, the Cooperative Openness frame starts from a different premise. Whether the maintenance of an open market is a rational policy is said to depend on whether other nations have open markets. When adhering to this view, governments contend that fruitful liberalization needs to be reciprocal.

The challenge of setting trade policy is often analogized to the game of Prisoners' Dilemma. Since no state wants to act alone in giving up trade restrictions, the solution is for states to sign a contract to abandon them jointly. Unlike the prisoners who cannot communicate with each other, governments can set up institutions to work out the details of cooperation and watch for defection. The GATT evolved into such an institution.

José E. Alvarez & Steve Charnovitz, Triangulating The World Trade Organization, 96 AM. J. INT’L L. 28, 36-37 (2002) (footnotes omitted). Indeed, initiative and leadership in international trade negotiations under treaty frameworks, such as GATS, are really part of compliance, since the essence of the treaties is negotiating away of trade barriers. Non-compliance, in its various forms, harms nations that are attempting to gain strategic advantage through embracing open trade:

[A] State’s reputation at the systemic level bears on its attractiveness as a treaty partner to other States. The greater a State’s reputation for compliance, the greater the likelihood other States would be willing to enter into treaties with it. States that are interested in expanding their participation in the investment treaty system, therefore, have a vested interest in taking actions that do not undermine their commitment to the system.

At the systemic level, a State’s reputation can be harmed by actions that call into question its commitment to the international investment law system.


147 Melnitzer, supra note 137.

148 Id.

149 Id.
Yet, it is unlikely that such a modest offer will be enough to gain the kinds of concessions that American law firms, lawyers, and multinational corporations are seeking in foreign legal markets. As one observer described it, "[t]rade [negotiation] is like high-stakes poker, where the pot doesn't get big until later in the game." In action-oriented terms, that means that the U.S. Trade Representative may eventually need to press forward without the consent of recalcitrant state authorities in the United States and negotiate reciprocal concessions conditional on the adjustment of state regulation, thereby placing the pressure either on Congress to legislate on a national level (given the current state of Congress, a daunting undertaking), or—more helpfully—on the states to adopt a multifaceted approach to easing foreign-lawyer practice restrictions, while assuring the maintenance of law practice quality standards and consumer protection for which the states have traditionally been responsible. It is in support of either approach that the ABA’s Proposed Model Rule and Qualifying LL.M. Criteria offer an important—indeed, essential—part of the solution. The solution, of course, is multifaceted. There have been proposed, discussed, and, in part, implemented a number of other measures short of the outright reciprocity, which the states (justly) fear. These measures, however, can supply only part of the solution. The key is to offer general practice admission to those foreign-educated lawyers who gain admittance to, and successfully complete, a Qualifying LL.M. Program. That is the subject of Part III of this article. Taken together, state adoption of these measures would provide a realistic negotiating position for the U.S. Trade Representative, while protecting the legitimate domestic interests that have animated an (excessively) restrictive approach. From that position, the U.S. Trade Representative would have a basis for negotiating an unprecedented opening of legal service markets abroad. This action would create unprecedented growth in American legal services while stimulating the American legal academy and law-practice, as they finally join the globalization that has been happening all around them.

III. EFFORTS TO OPEN DOMESTIC LAW PRACTICE TO FOREIGN-EDUCATED LAWYERS: FOREIGN LEGAL CONSULTANTS AND ACCREDITATION OF FOREIGN LAW SCHOOLS

“Our federalism,” as Justice Hugo Black once famously referred to it, injects complexity into American efforts to conform domestic practices to international trade laws. The legal profession has provided some of the most sensitive of these complexities. As the
lobbying group, Public Citizen, has observed, "Because the practice of the legal profession is clearly regulated by states, the United States must tread carefully when making legal services commitments, and the U.S. schedule in this area has many state-specific limitations."153

While Congress’s international commerce power provides the authority to regulate state bar practices with regard to foreign lawyers, Congress has been loath to exercise it,154 and bar groups, not to mention the states themselves, have argued that it is neither "necessary [n]or appropriate for national oversight or preemption of the regulatory function of state bars or their procedures for allowing lawyers from other jurisdiction to offer services within the State."155 As another commentator observed, "A series of decisions by the Supreme Court during the last several decades lend support to the basic independence of states in this area, [i.e., admission to practice law,] and one might conclude that, if push came to shove, the states might even prevail against GATS and the United States Trade Representative."156

Instead, bar organizations have taken a lead into easing states into more incremental consent and compliance through the process of proposing rules for the consideration of the several state bar authorities. This leadership has resulted from pressure on state bars to deal with foreign lawyers, consistent with U.S. positions on free trade and the dynamic,

153 Business Service Professional Services, supra note 136.
154 As Peter Ehrenhaft wrote to the U.S. Trade Representative:

US trade agreements have traditionally expressed commitments of the national governments that negotiate and sign them. All of our free trade agreements of the United States beginning with the NAFTA, include provisions exempting existing State laws from complying with national treatment, most favored nation treatment, and other similar key obligations of the agreements without the specific consent of the affected individual States.

Memorandum from Peter D. Ehrenhaft to the U.S. Trade Representative 4 (Jan. 13, 2012), available at http://www.gbdinc.org/PDFs/TPP%20Ehrenhaft%20Comments%20rc%20Mexico%20and%20Japan%20%20 %20Jan%20%31%20Dec%202012.pdf (citing the US-Australia Free Trade Agreement, Annex I-U.S as an example of an FTA that exempts “[a]ll existing non-conforming measures of all states of the United States, the District of Columbia and Puerto Rico” from “national treatment” and similar obligations for all “Cross Border Trade in Services”). Ehrenhaft notes the narrow areas in which some states have provided consents to confirming state law to international trade commitments of the federal government, such as in government procurement. See id. at 4 & n.7. However, he observes, “there have been no such consents with regard to the professions generally or legal services in particular.” Id. at 4.
155 Id. at 4.

156 Churgin, supra note 99, at 113. Professor Churgin, however, notes that he does not mean “to suggest that the federal government is impotent when its own interests are at stake,” but rather “that, at minimum, it probably would take an act of Congress to override state authority for a GATS agreement.” Id. at 116. There is precedent for this, as Professor Churgin notes:

Congress has evidenced its ability to so act in another context involving cross-jurisdiction practice within the United States. For example, in 2005, Congress passed a measure as part of the Department of Defense Authorization Act that permitted military personnel to provide legal assistance to members of the armed services, their dependents, and their survivors as well as some civilian employees[]. . . . The Senate report noted that “questions have been raised by some as to whether attorneys providing such assistance outside the States in which they are licensed are engaging in the unauthorized practice of law. This provision would codify the long-accepted practice with respect to the provision of legal assistance.” The federal interest in the maintenance of its armed services trumped any state rule limiting the practice of attorneys.

transnational, cross-border growth in law practice opportunities, which has been steadily increasing for some time.\textsuperscript{157}

In response to those pressures, thirty-two states that have adopted the special status of the Foreign Legal Consultant (FLC).\textsuperscript{158} FLC status, however, is not the same as law-practice privileges afforded to attorneys. In its basic form, FLC “grant[s] an official status in that state for the limited purpose of giving legal advice regarding the laws of jurisdictions other than the United States.”\textsuperscript{159} No FLC, however, is allowed to give advice about a state’s local law, and eight FLC states, as of 2007, “restrict the foreign legal consultant to giving legal advice only on the laws of the country in which the attorney was originally licensed.”\textsuperscript{160} In addition, a majority of FLC-status states prohibit the FLC from “prepare[ing] any papers to be filed with, or appear[ing] before, any court or administrative agency in the state . . . and [from] . . . prepare[ing] any instrument affecting title to real estate located in the United States, [from] prepare[ing] any wills or trust instruments, or prepare[ing] any instrument with respect to marital rights or custody of a child of a [U.S.] resident.”\textsuperscript{161} The FLC status is attended by a host of other requirements,\textsuperscript{162} including, in some states, proof that the FLC’s home country would extend reciprocal practice privileges to a member of the state’s bar, and that has kept their numbers relatively low.\textsuperscript{163} Flawed by both the limits of its privilege as well as the hodgepodge of iterations in which states have adopted the status,\textsuperscript{164} FLC status is a step in addressing, but not a solution to, the legal services issues confronting the United States under GATS, as American attorneys who can do no better than hold that status in other countries have attested.\textsuperscript{165}

Of more recent vintage is the proposal that the ABA Section on Legal Education and Admission to the Bar (the “Section”) consider establishing standards and procedures for accrediting foreign law schools.\textsuperscript{166} The notion had its origins in requests for accreditation

\begin{thebibliography}{11}
   \bibitem{157} See, e.g., Bar Admission In The United States, supra note 10, at 503-505.
   \bibitem{158} Edna Udobong, Trends in Cross-Border Lawyering: The GATS Ideal or the Indian Reality for U.S. Lawyers?, 43 CAL. W. INT’L J. 343, 388 (2013). In 2007, Professor Needham reported, “the movement towards more states adopting foreign legal consultant regulations has slowed to a crawl,” with a “handful of states . . . reportedly studying adoption” yet “the past few years have been relatively quiescent” with “a lack of momentum at the state level.” Carol A. Needham, Practicing Non-U.S. Law in the United States: Multijurisdictional Practice, Foreign Legal Consultants and Other Aspects of Cross-Border Legal Practice, 15 MICH. ST. J. INT’L L. 605, 612 (2007) [hereinafter Practicing Non-U.S. Law in the United States].
   \bibitem{160} Id. at 1129-30 (footnotes omitted).
   \bibitem{161} Id. at 1131.
   \bibitem{162} Id. at 1129-38.
   \bibitem{163} Id. at 1134-1135.
   \bibitem{164} See id. at 1150; Carole Silver, Regulating International Lawyers: The Legal Consultant Rules, 27 HOUS. J. INT’L L. 527, 532 (2005).
   \bibitem{165} Persky, supra note 6 (describing practice limitations imposed by Brazilian law on an American attorney at Gibson Dunn & Crutcher’s São Paulo, Brazil Office licensed as a foreign legal consultant under Brazil’s law and observing that “[t]he fact that we can’t practice locally is certainly the largest challenge we face”); see, e.g., Andrew Pardieck, Note, Foreign Legal Consultants: The Changing Role of the Lawyer in a Global Economy, 3 IND. J. GLOBAL LEG. STUD. 457 (1996) (comparing FLC status in the United States, England and Japan).
\end{thebibliography}
made by the Peking University School of Transnational Law, an "American-style" law school, founded in 2007 by former Michigan Law School Dean Jeffrey Lehman, with a transnational program of legal instruction conducted in Chinese and in English. As a result of the work of two blue-ribbon panels of judges, attorneys, and law professors and deans, a recommendation was issued that the Section's Governing Council (the "Council") contemplate extending its accreditation power to overseas law schools that follow the U.S. model. In addition to the Peking University Transnational Law School, the Jindal Global Law School of the O.P. Jindal Global University informed the ABA that it was interested in the opportunity for a school like itself to one day become ABA-approved so that its graduates could engage in multi-jurisdictional practice for American clients in India and Indian clients in America from an Indian home base. The ABA Section sought comments on the proposal, and received numerous responses, some more useful than others. American law students' and lawyers' fear of "foreign competition" has hindered the effort, although those fears are utterly unfounded and reside in parochial misapprehensions of the global legal market emerging all around America. Those fears, coupled with resource concerns

167 Hylton, supra note 101. "The current ABA debate was prompted by the Peking University law school's application for ABA accreditation in 2010. It is the first, and so far only, non-U.S. school to make such an application." Id.


169 Hylton, supra note 101.


171 ABA Again Wades, supra note 168; Hylton, supra note 101.


174 See, e.g., Anthony Lin, ABA Law School in China Runs Up Against U.S. Job Fears, AM L. DAILY (May 24, 2011, 8:02 AM), http://amlawdaily.typepad.com/amlawdaily/2011/05/asianlawyer052411.html ("Fears of a tide of new overseas competition for scarce work were evident in many of the 60 comments the ABA received in response to a special-committee report released last fall recommending the accreditation section begin considering foreign schools.").

175 See id. ("[M]ost of [the Peking Transnational] students, graduates of China's elite undergraduate universities, are actually expected to stay in China working either with international-minded law firms or multinationals."). As Professor Chambliss has perspicaciously noted:

[What are the implications of foreign demand for domestic law school reform? Much of the current critique of U.S. law schools is parochial, taking little account of educational or political developments elsewhere. Yet while the domestic market for the J.D. appears, finally, to be contracting, the foreign demand for "American-style" (graduate) legal education is increasing, particularly in Australia, India, and East Asia.

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expressed within the Section, have fated the perfectly logical proposal for shunting to the legal equivalent of a rail-yard siding. At the August 2012 ABA Annual Meeting in Chicago, the Council "voted 15-0, with two abstentions, not to begin accrediting law schools outside of the United States," but "acknowledged . . . the need to identify and establish appropriate standards and procedures for the licensing of foreign lawyers who would like to practice in" the United States. Despite the Section’s tabling of the notion, and criticism of the notion offered by long-time luminaries of the Section, a very persuasive case has been made for it that effectively answers the critiques, and it is undoubtedly not the last we shall hear of it.

In February 2013, the ABA House of Delegates took action to deal with barriers to foreign lawyers seeking practice privileges in the United States. The House of Delegates adopted, through resolution, a modification of Model Rule of Professional Conduct 5.5(d) "to permit limited practice authority for foreign lawyers to serve as in-house counsel in the United States, but not advise on the law of a U.S. jurisdiction except in consultation with a U.S.-licensed lawyer." While this is certainly a step in the right direction that lowers some

What do they see in us? Does this demand primarily represent a desire for access to international markets? Such a desire clearly motivates foreign enrollment in U.S. LL.M.s and may help to explain the rapid development of J.D. programs in foreign markets. Are these countries beefing up their "legal infrastructure" to support economic development? Research suggests that this, too, is part of the story, as East Asian countries move toward market economies.


See Schiller, supra note 89, at 437-48.


ABA House Passes Resolutions on Ethics Guidelines and Human Trafficking During Midyear Meeting, A.B.A. (Feb. 11, 2013, 11:00 PM), http://www.americanbar.org/news/abanews/aba-news-archives/2013/08/aba_house_passesres.html. As the ABA adds in describing this action:

The ABA’s Commission on Ethics 20/20 brought four resolutions to the House of Delegates as a result of increased globalization and technological advancements. Resolution 107A, as revised, amends Rule 5.5(d) of the ABA Model
Rules of Professional Conduct (Unauthorized Practice of Law; Multijurisdictional Practice of Law) to permit limited practice authority for foreign lawyers to serve as in-house counsel in the United States, but not advise on the law of a U.S. jurisdiction except in consultation with a U.S.-licensed lawyer. A complementing resolution, 107B, as revised, provides a mechanism to implement the limited practice authority in Resolution 107A through amendments to the 2008 Model Rule for Registration of In-House Counsel. Resolution 107B contains additional restrictions on the foreign in-house lawyer’s scope of practice as well as added requirements, including payment of bar dues, payment into the client protection fund, fulfillment of continuing legal education requirements and notification to disciplinary counsel.

Id. The pertinent emendations to Rule 5.5(d) & (c) are as follows:

(d) A lawyer admitted in another United States jurisdiction or in a foreign jurisdiction, and not disbarred or suspended from practice in any jurisdiction or the equivalent thereof, may provide legal services through an office or other systematic and continuous presence in this jurisdiction that:

(1) are provided to the lawyer’s employer or its organizational affiliates; are not services for which the forum requires pro hac vice admission; and, when performed by a foreign lawyer and requires advice on the law of this or another U.S. jurisdiction or of the United States, such advice shall be based upon the advice of a lawyer who is duly licensed and authorized by the jurisdiction to provide such advice; or

(2) are services that the lawyer is authorized by federal or other law or rule to provide in this jurisdiction.

(c) For purposes of paragraph (d), the foreign lawyer must be a member in good standing of a recognized legal profession in a foreign jurisdiction, the members of which are admitted to practice as lawyers or counselors at law or the equivalent, and are subject to effective regulation and discipline by a duly constituted professional body or a public authority.


[16] Paragraph (d)(1) applies to a U.S. or foreign lawyer who is employed by a client to provide legal services to the client or its organizational affiliates, i.e., entities that control, are controlled by, or are under common control with the employer. This paragraph does not authorize the provision of personal legal services to the employer’s officers or employees. The paragraph applies to in-house corporate lawyers, government lawyers and others who are employed to render legal services to the employer. The lawyer’s ability to represent the employer outside the jurisdiction in which the lawyer is licensed generally serves the interests of the employer and does not create an unreasonable risk to the client and others because the employer is well situated to assess the lawyer’s qualifications and the quality of the lawyer’s work. To further decrease any risk to the client, when advising on the domestic law of a United States jurisdiction or on the law of the United States, the foreign lawyer authorized to practice under paragraph (d)(1) of this Rule needs to base that advice on the advice of a lawyer licensed and authorized by the jurisdiction consult with a U.S. lawyer authorized to provide it that advice.

[17] If an employed lawyer establishes an office or other systematic presence in this jurisdiction for the purpose of rendering legal services to the employer, the lawyer may be subject to registration or other requirements, including assessments for client protection funds and mandatory continuing legal education. See Model Rule for Registration of In-House Counsel.
legal services trade barriers, it is restricted in effect only to a fairly elite group of foreign lawyers—primarily those employed as in-house counsel in Multi-National Enterprises—and does not address the wider constituencies of foreign lawyers who practice with firms, or who seek to represent the business or personal interests of clients outside the United States as their retained counsel, rather than as their employee.

Thus, dealing with GATS, globalizing law practice, and preventing the United States from shutting itself out of transnational legal education and law practice will fall squarely on the individual states to become well-versed in and forward-thinking about these issues. As Erica Moeser, the former Chair of the ABA’s Legal Education Section and President of the National Conference of Bar Examiners, has observed, the state high courts will have to make some difficult choices about foreign bar admissions, and “the wisdom that courts bring to their policy-making roles will depend upon their ability to understand a much bigger picture than the one normally presented when one applicant, or one rule, is at issue.”

Traditional educational qualifications as a component of bar admissions, for example, will be brought into question “[i]f.. . .policy changes occur that permit foreign-trained lawyers to be admitted by examination or on motion[.] [T]his will undoubtedly undercut the argument that bar examinations should be administered only to graduates of accredited American law schools.”

The common approach of “a waiver mentality,” in which state bars treat foreign-lawyer bar applicants on a sui generis basis as seeking exceptions to the general admission requirements, is untenable “because waivers will assume the place of policy in very short order—how else can the process be fair, and how wise is it to require bar admissions agencies to defend denials of waivers in appeal after appeal?” Instead,

[i]f [the state] courts wish to maintain an educational component in licensing, the approach must be comprehensive and the approach must acknowledge the law school graduate from accredited and unaccredited institutions; the applicant who did not attend law school at all; and the foreign trained lawyer (encompassing the range of variation in credentials and in training and in institutions) who may or may not have held a foreign legal consultant credential.


184 Id. at 1174-75.

185 Id. at 1175.

186 Id. For example, Ms. Moeser invites us to consider the following example:

Imagine this scenario: The court authorizes foreign legal consultants, satisfied that the rules preclude them from engaging in the unauthorized practice of law. The court then moves to permit these consultants to be admitted on motion or to sit for the bar examination. Graduates of unaccredited American law schools then argue that their credentials are equivalent to those of foreign-trained lawyers. (Here you must understand
In Parts IV and V, we address the LL.M. degree, earned at an American law school with a prescribed curriculum as delineated in a Model Rule proposed by the ABA, as one of the most promising ways in which state supreme courts may address the competing national obligations that the United States may undertake through GATS, with the state obligations to establish necessary processes and standards for the practice of law within their respective jurisdictions.

IV. THE EMERGENCE OF THE LL.M DEGREE AS A BAR ADMISSION QUALIFICATION FOR FOREIGN-EDUCATED LAWYERS IN THE U.S.

A. The Emergence of Foreign-Educated Lawyers as Consumers of American Legal Education—And Bar Admission Hurdles That They Face

The number of foreign-educated attorneys seeking admission to practice in the United States has been increasing. Concomitantly, multi-jurisdictional practice (MJP) has been the subject of increased study and discussion between the ABA and state bar authorities. The topic is hot, and developments are rapid. American law schools have

187 See Practicing Non-U.S. Law in the United States, supra note 158.
189 See, e.g., Sarah Kellogg, The Transformation of Legal Education, WASH. LAW., May 2011, at 18. Professor Carole Silver, Executive Director of the Center for the Study of the Legal Profession at Georgetown University Law School, in 2010 summarized the current state of the MJP issue:

The stakes are high in the global legal services market. Worldwide revenue from legal services in 2007 was estimated at $458.2 billion, according to the U.S. International Trade Commission. U.S. law firms (and their lawyers) have reaped enormous rewards in this activity, accounting for slightly over 50 percent of worldwide revenue. The Department of Commerce reported U.S. trade in legal services yielded a surplus of more than $5 billion in 2008. In addition to the revenue generated by lawyers in practice, at least two other categories of U.S.-based actors also participate in financial rewards related to increased mobility and globalization of legal services. First, U.S. law schools earn tuition from foreign law graduates in post-graduate one-year LL.M. degree programs, and from foreign nationals who pursue the three-year J.D. degree in the United States. In 2009, U.S. law schools earned an estimated $130-$160 million in tuition from foreign law graduate students enrolled in LL.M. programs. Second, regulators earn fees from foreign lawyers wishing to gain access to the United States, who apply for general admission or for the foreign legal consultant license. Foreign legal consultant application fees can be as high as $3,000 per application. Application fees for general admission by bar examination are $250 in New York, where more foreign law graduate applicants have taken the bar than in any other U.S. jurisdiction. These fees brought New York an estimated $1,131,500 in 2009, which might offset all or part of the costs of reviewing additional applications.

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responded to globalization by growing their Master of Laws (LL.M.) degree programs.190 Yet, despite the surge in the numbers of foreign-educated lawyers seeking additional legal education in the United States, it is very difficult in most states for foreign-educated lawyers to qualify for the bar examination—let alone actually pass and gain admission to practice.191 Major commercial states, particularly New York and California, have developed elaborate and sophisticated standards by which foreign-educated lawyers can be admitted to the state bar.192 Reciprocity or waiver is rare. Most commonly provided for are processes by which the foreign-educated lawyer can become qualified to sit for the state’s bar examination. In many instances, bar authorities require foreign-educated lawyers to complete course work at an ABA-approved law school in their state.193 In California and New York, however, foreign-

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Carole Silver, What We Don’t Know Can Hurt Us: The Need For Empirical Research In Regulating Lawyers And Legal Services In The Global Economy, 43 AKRON L. REV. 1009, 1022-23 (2010) [hereinafter What We Don’t Know Can Hurt Us].


191 See id. at 26. As the website, LL.M Guide—Masters of Laws Programs Worldwide, has observed:

Passing a US state bar exam has long been a hard-fought honor for many foreign lawyers who get their LL.M. in the United States, regardless of whether they intend to stay or return home. This is especially true for students interested in international business law or similar subjects.

“To go back home and say they’ve passed the bar in New York shows that they have a deep understanding of the US system,” says Bill Churma, assistant director of admissions of the International Legal Studies program at American University’s Washington College of Law.

“For employers back home – especially in a civil law society – this can only help when dealing with international and US-based clients,” adds Churma. “It also signifies a level of English that you not only passed the LL.M., but you are able to pass a state exam that is not an easy thing to do for Americans.”

Not easy, indeed. Of the 5,700 foreign lawyers who sat a US bar exam in 2010, only 31 percent passed.


193 For example, Tulane University adopted a one-year legal studies LL.M. designed to assist foreign-educated lawyers in seeking permission to take the bar examination in Louisiana after the adoption of a new foreign-lawyer admission rule by the Louisiana Supreme Court in 2009:

(B) Standard; Burden of Proof. The applicant shall bear the burden of proving that the legal education of the applicant is equivalent to that of the legal education offered in the
United States or its territories by a law school accredited by the American Bar Association. The American Bar Association standards for accreditation of law schools shall be relevant to any equivalency determination.

In addition, the applicant shall bear the burden of proving that the applicant has successfully completed a minimum of 14 semester hours of credit, or the equivalent, in professional law subjects from an American law school in any of the following categories: Constitutional Law, Contracts, Louisiana Obligations Law, Criminal Law, Corporations or Business Organizations, Evidence, Intellectual Property, Federal Civil Procedure, Louisiana Civil Procedure, Taxation, Uniform Commercial Code, and Torts, provided that no more than 4 credit hours in any one subject shall be counted toward this requirement.


New York's foreign-attorneys program is very complicated and in some areas unwritten. Section 520.6 of the Rules of the Court of Appeals sets forth a number of provisions governing the admission of foreign educated attorneys in New York. Generally, the applicant must submit proof that his or her "first degree" in law was based on a period of study that is (1) the durational equivalent and (2) the substantial equivalent of the legal education required for applicants with degrees from ABA approved law schools. To satisfy the durational requirement, the applicant must have a minimum of three years full-time or four years part-time law study in a law school recognized by the competent accrediting agency of the government of the foreign jurisdiction or a political subdivision thereof. The substantive requirement is satisfied by showing that the degree was obtained in a country whose jurisprudence is based upon the principles of the English common law and that the course of study was the substantial equivalent of the legal education provided by an ABA approved law school in the United States. Either a durational or a substantive deficiency may be cured by successfully completing a 20-credit program of the study of law at an approved law school in the United States. A master's degree or LL.M. from an approved United States law school satisfies the 20-credit program. Many New York applicants have taken only a two-year study of law in a foreign jurisdiction or have received their legal education in a non-English common law country. They tend to become eligible for New York's bar examination by successfully completing an LL.M. course at an approved American law school. The New York State Board of Law Examiners reviews thousands of applications each year from foreign educated attorneys who have an undergraduate legal degree of three years or less, are not admitted to the bar in the countries where they studied, and have no practical experience. Moreover, Board personnel in many cases have copies of documents in foreign languages and are not confident the translations are accurate.

Id. at 21.
prepared to be allowed to sit for a bar examination. Furthermore, there is confusion created for "foreign nationals, both those who have previously studied law and those who are licensed to practice law in their home countries," who "frequently seek to gain fluency in U.S. law by enrolling in U.S. law school LL.M programs" creating a "mismatch between the career interests of LL.M graduates and the state bar licensing systems in which they participate."

The Variable Value, supra note 23, at 18-20 (explaining the cause of the cognitive dissonance that bar admissions officers face in trying to make sense of the current LL.M.-degree landscape). According to Silver, typically, the LL.M. either has a substantive law focus--such as tax or intellectual property--and attracts both J.D. graduates of U.S. law schools and graduates of law schools outside of the United States, or it is aimed exclusively at students who completed their first degree in law outside of the United States and who are not J.D. graduates--and these programs, too, may have a substantive focus. Only the second category is discussed here.

This version of the LL.M. is intended as an add-on to a foundational law degree earned through study outside of the United States. It differs from the J.D. in important respects that limit its ability to serve as a similarly strong signal analogous to the J.D. First, the vetting process to gain entry to an LL.M. program is different from that of the J.D. J.D. applicants must take the LSAT, which, if nothing else, provides some foundation for comparing students across different undergraduate and law schools. There is no entrance exam for the LL.M. aside from a test of English language competency, and even that is not considered a particularly reliable screen. Second, there is no common set of courses that LL.M. Students take in their U.S. LL.M. programs, which means LL.M.s lack a core and comparable experience analogous to the first year law curriculum and classroom approach of the Socratic method shared by J.D. students. Third, grading for LL.M.s varies in different schools. Some schools assess LL.M.s separately from J.D.s, offering them a distinct curriculum and even a different faculty. Others combine LL.M.s with J.D.s in courses but assessment is separated for the two groups. Still other law schools combine LL.M.s and J.D.s in courses and impose a single grading scheme on all students; even here, though, LL.M. students sometimes experience different treatment by faculty in class. This variety renders it very difficult for potential employers to assess LL.M. graduates, either in comparison to other LL.M.s or in comparison to J.D.s. The only standards to which nearly all LL.M. programs for foreign law graduates adhere are those embodied in New York's rule on bar eligibility, which serve indirectly to shape the options offered by most U.S. law schools in programs targeting foreign law graduates. These are limited: twenty credit hours for receipt of the LL.M. degree, including a minimum amount of time spent in "basic courses in American law." Consequently, the LL.M. does not have a signal analogous to the J.D.'s (of grades and school reputation) about which employers feel confident. While earning a U.S. LL.M. offers an important experience to its graduates--including exposure to an international peer group and to English (and in particular, legal English), as well as to common law reasoning and concepts of U.S. law--these do not necessarily coalesce into one easily recognizable message that delivers the signal of professional competence to the same extent as does the J.D.

Id. at 18-20 (emphasis supplied) (footnotes omitted). Note that Professor Silver's article refers to the pre-revision N.Y. Ct. App. Rule 520.6. The revised rule heightens the LL.M. programmatic qualification standards considerably--and most existing LL.M. degree programs in the United States do not qualify their foreign-educated graduates to sit for the N.Y. Bar Examination.

B. The LL.M. Degree as a Path For Foreign-Educated Lawyers to Qualify for State Bar Examinations: The New York And California Experience

There are many LL.M. programs in the United States that seek to attract foreign lawyers. However, the standards that California and New York now require of LL.M. degrees involve a deal more designated coursework in bar subjects than the typical LL.M. program requires. The freewheeling days of the LL.M. as a ticket for foreign-bar admissions in New York, for example, ended with the adoption of a revised New York Court of Appeals Rule ("N.Y. Rule") 520.6. That Rule ratchets up the requirements for bar-qualifying LL.M. degrees—effective from 2012 forward—so much that most LL.M. programs will not satisfy the standards. California’s standards for qualifying LL.M.’s have long been quite demanding, and most LL.M. programs do not satisfy those standards, either.

Many existing LL.M. programs, even those labeled “American Law” or “American Legal Studies,” are not intended by the institutions that offer them to serve as a qualifying degree either for bar-examination or bar-admission purposes. Other LL.M. programs focusing on American law, like the Hastings College of Law’s program, offer their entire curriculum to the student, but actually require only a scholarly legal writing course for the thesis and selection of one first-year course.


199 See, e.g., Bar Exam Information for LL.M. Students, B. U. SCH. L., available at http://www.bu.edu/law/central/llm/graduate/american/bar.html; see also, e.g., U.S. Legal Studies for Foreign Attorneys, THOMAS M. COOLEY L. SCH., http://www.cooley.edu/international/ (last visited Apr. 8, 2014). Although Thomas M. Cooley Law School offers an LL.M. in U.S. Legal Studies for Foreign Attorneys that appears, on its face, similar to bar-exam-qualification-oriented LL.M. programs at Hofstra and St. John’s, their website says its “program is intended for well-qualified lawyers and law graduates from countries outside the United States who desire to immerse themselves in the study of the common law and then plan to return to their country to practice law.” Id. 200 UNIV. OF CAL. HASTINGS, LL.M IN U.S. LEGAL STUDIES (2012), available at http://web.archive.org/web/20120602031241/http://uchastings.edu/prospective-students/llm/docs/LLMbrochure.pdf (claiming that “[m]any of our LL.M. students wish to sit for the California or New York bar exam after graduation, so we also offer tailored workshops to help prepare students for these exams.”). Obviously, bar preparation for either California or New York will require more than a legal writing-research seminar coupled with one first-year course. Apparently, Hastings must be asking incoming LL.M. students to declare their intention whether they are going to use the LL.M. as a bar-examination qualifying credential, and strongly recommend a far more rigid and far less freewheeling approach than the general statement, “LL.M. candidates may select nearly any course with the consent of their faculty adviser and subject to prerequisites listed in the course catalog.” Id.
Georgetown may have the most impressive LL.M. program for foreign lawyers currently offered by any American law school. The program takes advantage of the school’s sheer size and resources, as well as its university affiliation. For example, the school offers under the rubric “Graduate Legal Writing Program” a series of courses for foreign-trained LL.M. program students to strengthen their English communications skills in the context of law study (with courses such as U.S. Legal Discourse 1, U.S. Legal Methods, Introduction to U.S. Contract Drafting, Writing for International Trade Practice, Writing for Tax Practice, Writing for Law Firm Practice, and Presentation Skills for Lawyers). It also maintains a Language Center that offers an English in Context program of “conversation groups [that] give you a forum for practicing your oral communication skills,” and a “Writing Workshop Series [featuring] writing groups [that] can assist you with enhancing your academic writing skills,” as well as a separate, two-year combined LL.M. degree and “Certificate In Legal English.”

In anticipation of N.Y. Rule 520.6, a number of law schools in New York have established new programs in “American” or “U.S.” Legal Studies. Hofstra’s and St. John’s programs are explicitly targeted at foreign-educated lawyers who seek to qualify to sit for the New York Bar Examination under the new LL.M. degree requirements created by Revised Rule 520.6.

For foreign-educated lawyers who will seek admission by examination to the California bar, qualifying LL.M. study at a law school outside of California will be very difficult for both the institution and the lawyer to accomplish. This is because the California LL.M. criteria require so much subject-specific instruction in California law, that it is hard to imagine that any law school will be able to provide all of this material to the student if it has not already incorporated some California bar preparation into its current curriculum. Moreover, it is doubtful that these schools have disposable resources to add professors to their payroll who can teach courses on California subjects.

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201 LL.M. Degree Programs, GEORGETOWN L., http://www.law.georgetown.edu/graduate/DegreePrograms.htm (last visited Apr. 11, 2014) (there are thirteen different LL.M. programs at Georgetown). There is even a separate link for New York Eligibility and Curriculum Requirements for Georgetown LL.M. students. See Curriculum to Prepare for the N.Y. Bar, GEORGETOWN L., http://www.law.georgetown.edu/academics/academic-programs/graduate-programs/current-students/us-bar/curriculum.cfm (last visited Apr. 11, 2014).


203 Id.

204 Two-Year (Extended) LL.M. with Certificate in Legal English for Foreign-Trained Lawyers, GEORGETOWN L., http://www.law.georgetown.edu/academics/academic-programs/graduate-programs/degree-programs/two-year/index.cfm (last visited Apr. 12, 2014). The Two-Year (Extended) LL.M. with a Certificate in Legal English is an intensive curriculum that allows highly qualified applicants to develop their legal English language skills in a legal context. Id. Students work closely with faculty members who have expertise in both law and linguistics, receiving feedback and individual attention that allows each student to work with his or her individual goals. Id. Students study both law and English to become better prepared to practice law in a global context. Id.

205 See Foreign Legal Education, supra note 17; see also LL.M. in American Legal Studies, supra note 21 (“The program helps to qualify a candidate for eligibility to sit for the New York State Bar Examinations and to be admitted to practice law in New York”); U.S. Legal Studies, LL.M, supra note 21 (“You will also earn fourteen credits taking courses in subjects covered on the New York Bar Exam, as well as other courses offered in the Law School’s J.D. program.”).
V. THE ABA SECTION ON LEGAL EDUCATION AND ADMISSION TO THE BAR’S PROPOSED MODEL RULE

A. The Origins of the Proposed Model Rule and Qualifying LL.M. Criteria

It is into this inconsistent and largely unexplored territory206 that the ABA Legal Education Section has decided to wade in response to calls for promulgation of a uniform standard by which state bar examiners in other states can measure the value of an LL.M. degree obtained by a foreign lawyer.207

206 The problem has been recognized for some time, and has only grown more pressing. As an observer noted in 1998:

Almost half the American states permit persons who have completed their legal education in foreign countries to take a state bar examination under certain circumstances. The rules are varied, complex, and often involve discretion by the bar examiners. States usually distinguish between common law and civil law nations, trying to ascertain legal education equivalency. Some states require an American LL.M., frequently based on specific bar subjects. Some states require three to five years of legal practice in the applicant’s foreign country.

About ten states are now willing to accept an American LL.M. degree as an equivalent qualifying basis for foreign law graduates to take their bar examinations. Arizona, Michigan, New York, North Carolina, Texas, and Virginia are leaders in this regard. California, Kansas, and Massachusetts take a more discretionary attitude toward determining eligibility, while Connecticut only accepts LL.M. students who first trained in common law countries. To some extent these ten states are collectively acting as a magnet for foreign law students who can become eligible to take an American bar exam that will permit them to practice as an attorney after only one year of law study in the United States


207 See, e.g., Conference of Chief Justices, Regarding Accreditation of Legal Education in Common Law Countries by the ABA Section on Legal Education and Admission to the Bar, C.C.J. Res. 8 (Feb. 7, 2007), available at http://ccj.ncsc.org/~media/Microsites/Files/CCJ/Resolutions/02072007-Accreditation-Legal-Education-Legal-Education-and-Admission-to-the-Bar.aspx; Jeffrey Clay Clark, supra note 30 (explaining that another approach being advocated in academic circles is the creation of a “new examination for LLM graduates, an alternative comprehensive exam of U.S. law (‘CEUSL’)”); Silver & Freed, supra note 190, at 29. Silver and Freed advance the following arguments—presumably targeted at the National Conference of Bar Examiners—in support of such an examination:

While the CEUSL will not result in being licensed to practice law in the U.S., it will satisfy several interests of LLMs and their prospective employers. First, it will provide comparability among LLM graduates. Second, the CEUSL will require comprehensive substantive preparation, which will supplement the educational experience of LLM students who typically cannot enroll in first-year law school courses. This will provide comfort to employers regarding an applicant’s familiarity with U.S. law. Third, for LLM graduates of lower-ranked U.S. law schools, the CEUSL offers an opportunity to compete with graduates of higher-ranked schools. This, in turn, may provide important information to potential LLM applicants about the relative educational strengths of U.S. law school LLM programs.

Id. at 30. Note, however, that the ABA Proposed Rule would appear to be the accomplishment of those results—and results not attainable by a comprehensive examination that Silver and Freed concede would not be a substitute for a state bar examination. See id.
The ABA's Section of Legal Education and Admissions To The Bar appointed a "Special Committee on International Issues," which, in 2009, released its report. The Special Committee circulated a comprehensive survey to state bar examiners covering a variety of issues raised by MJP and the role that the ABA might play in facilitating the admission of foreign lawyers. The Committee made specific findings about the growth of foreign-educated lawyers seeking admission to various state bars across the country:

The demonstrated interest in additional information regarding qualifications of foreign attorneys was bolstered by an examination of the historical data from the National Conference of Bar Examiners. This data shows that, overall, there was a 268% increase in the average number of foreign-educated applicants who sat for a bar examination during the first three years for which there are statistics. (1171 average per year for 1992-95 compared to 4315 average per year for 2005-07). There was a 129% increase even if one excludes California and New York, which have the largest number of foreign-educated applicants who sit for a bar examination.

The Conference of Chief Justices reaffirmed the ABA Special Committee's findings and urged the ABA Section to adopt a program that "would certify the quality of the legal education of foreign trained . . . applicants seeking permission to take a bar examination and qualify for admission to the bar."210

B. Commentary on the Proposed Model Rule and Qualifying LL.M. Criteria

The Council has approved for notice and comment a proposed Model Rule on admissions of foreign-educated lawyers and proposed criteria for ABA certification of an LL.M. degree for the practice of law in the United States.211 The proposed Rule212 sets out

208 Lacy Report, supra note 170.
209 Id. at 11 (emphasis added).
210 A.B.A. SEC. LEGAL EDUC. & ADMISSION B. REP., supra note 18 at 1. A number of other state bars have formed committees tasked with studying ways in which to increase the number of foreign-educated lawyers admitted to practice in their state. See, e.g., Order Establishing The Task Force On International Law Practice In Texas, No. 09-9141 (Tx. Sup. Ct. Aug. 24, 2009). The Texas Task Force continues to meet, and has drafted a Texas Rule XIII "to conform to the recent changes adopted by the New York Bar." Mins. of Meeting July 7, 2011, available at, http://www.supremecourts.state.tx.us/lptf/pdf/minutes/070711Minutes.pdf; see also Laurel Terry, Professor, Penn State Dickinson Sch. of Law, Testimony to the Minnesota State Board Of Law Examiners (Dec. 3, 2009), http://www.personal.psu.edu/faculty/l/s/1st3/presentations%20for%20webpage/Laurel_Terry_MN.pdf.
211 See Lacy Report, supra note 170, at 3-4.
212 See Jay Conison, The Architecture of Accreditation, 96 IOWA L. REV. 1515, 1526-27 (2011). As Dean Conison notes, [today, however, many law schools have degree-granting programs other than the J.D. Moreover, some of these programs are large, and some (in particular, the LL.M for foreign-trained lawyers) are intended (like the J.D. program) to be a "gateway to the legal profession." As a result, there is increasing concern with ensuring quality in some of these other programs, and an important question now is whether the Section should provide quality assurance by accrediting some or all of them. If the Council chooses to accredit other degree programs under the ABA Standards, then the purpose of the
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standards that would create an ABA-certification program for LL.M. programs that meet very specific requirements. Foreign-educated graduates of Qualified LL.M. Programs would be deemed "bar-ready" by those states that choose to adopt the ABA standard. The proposed ABA Rule was distributed by the ABA Council Chair and the ABA Consultant earlier in the year in solicitation of comments from interested constituencies, and established a July 15, 2011 deadline for the receipt of comments. Several comments were received after that date. Some of the expected commentary proposed that the ABA add additional numbers of credit hours and additional required subjects to the LL.M. certification requirements.

accreditation system would change, since the "educational program" at the heart of the Standards' purpose would expand [beyond their current, sole concern with J.D. programs]. With such an enlargement of purpose, there would have to be Standards to ensure the quality of these other programs.

Id. at 1526-27 (emphasis added) (footnotes omitted). One motivating factor in the ABA's consideration of such measures at this juncture may well be the concern that has been expressed in some quarters that the way in which American jurisdictions are handling bar admissions for foreign-educated lawyers may well violate treaty obligations under the General Agreement on Trade in Services (GATS), which is enforced by the World Trade Organization and which the United States has ratified. See, e.g., Ross, supra note 7, at 790; see also GATS' Applicability to Transnational Lawyering, supra note 8, at 997-98 (discussing that due to increasing global multijurisdictional practice, U.S. regulators will likely need to confront GATS' effect on U.S. regulation of foreign lawyers); Burr, supra note 8, at 677-78 (discussing that each state has the power to regulate the practice of law and that foreign lawyers are subject to individual state rules on the practice of law); Materials about the GATS and Other International Agreements, supra note 8.

See ABA Again Wades, supra note 168; see also ABA Proposes Big Changes, supra note 8.

The ABA Legal Education Section also considered a second pathway for making foreign-educated lawyers ready and eligible for U.S. bar examinations—an ABA accreditation for foreign law schools. See Kane Report, supra note 170 (recommending that "[t]he Council should authorize the Accreditation Project to go forward with considering the accreditation of law schools outside the United States borders that meet all of the prevailing Accreditation Standards and Rules of Procedure for the policy reasons discussed in Part I."); see also Karen Sloan, Panel Recommends the ABA Accredit Overseas Law Schools, Nat'l L.J., Aug. 17, 2010, http://www.law.com/jsp/law/international/LawArticleIntntl.jsp?id=1202470008986&slreturn=20131001163229; see also Carole Silver & Mayer Freed, supra note 190.


See Letter from Ian Weinstein, President, Clinical Legal Educ. Assoc., to Hulett H. Askew, Consultant on Legal Educ., Section of Legal Educ. and Admissions to the Bar (July 15, 2011), http://clea.memberlodge.org/Resources/Documents/CLEA%20lit%20model%20rule%20on%20admission%20of%20foreign%20LLM%20in%20U.S. pdf (arguing that foreign-educated LL.M. bar applicants be required to have instruction in "trial and appellate advocacy in the dual-sovereign system of United States, use of alternative methods of dispute resolution, basic fact investigation obligations, how to counsel and interview a U.S. resident, or how to draft effective legal instruments and pleadings" in order to protect "clients and the public"). The Clinical Legal Education Association (CLEA) stated its support for the rule, but argues strongly for an additional requirement: [T]he Council has failed in this Model Rule to recognize the importance of professional skills instruction prior to bar admission. The criteria for ABA certification of LL.M. programs should also include a minimum of 1400 minutes of instruction in professional skills with the insertion of criterion 3(c):
The ABA Consultant’s Office has established a web repository containing the commentary that the Legal Education Section received through September 27, 2011, on the Proposed Model Rule and Qualifying LL.M. criteria. This commentary consists of thirty-six letters, memoranda, and email messages that were received from individual academics, law schools, and legal education organizations. At present, the ABA has yet to publish a summary or an analysis of the commentary. For present purposes, the most significant commentary is that coming from Boards of Bar Examiners, which we shall examine first. Then we will consider commentary from various educational institutions, as well as from groups within the world of legal education.

1. Comments From State Bar Admission Authorities And Bar Examiners

a. The Georgia Board of Bar Examiners

The Georgia Board of Bar Examiners provided the Deans of the ABA-approved law schools in Georgia with a copy of the Board’s response to the ABA Proposed Model Rule. While largely supportive of the Model Rule, the Board expressed concern with the 12,000 minutes of instruction (out of the ABA’s required 18,200 minutes of aggregate instruction for the LL.M. degree) in “only four required courses.” The Board requested that the ABA “consider expanding the number of minutes and courses to include other first-year doctrinal courses, such as Contracts and Real Property, as well as skills courses to enable the applicant to learn to practice U.S. law in context.” As examples of the skills courses it had in mind, the Board listed “trial techniques, transactional practice, negotiation, arbitration, and mediation” as courses that “could be required depending on the applicant’s anticipated

(e) A minimum of 1400 minutes in other professional skills generally regarded as necessary for effective and responsible participation in the legal profession.

Substantial instruction in professional skills is one of only three specific areas of instruction (together with professional responsibility and legal writing) already required of all J.D. students in Accreditation Standard 302(a)(4). Yet, it is the sole subject area in Standard 302(a)(1)-(5) that the Council has omitted from the proposed criteria for LL.M. students.

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Many foreign-educated lawyers come to LL.M. programs with what amounts to an undergraduate degree in this country and with little or no prior legal practice experience in any setting, including their own country.

Id. at 2.


218 See Memorandum from Sally Evans Lockwood, Dir. of Admissions, Supreme Court of Ga. Office of Bar Admissions, to Charlotte (Becky) Stretch, Assistant Consultant, Section of Legal Educ. and Admission to the Bar, A.B.A. (July 14, 2011), http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/2011 0927_comments_proposed_rule_criteria_foreign_educaed_lawyers.authcheckdam.pdf.

219 Id.

220 Id.
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practice." When Georgia adopted its own Rule and Qualifying LL.M. Criteria in February 2014, it implemented the suggestions it had made to the ABA in 2011.222

It should be borne in mind, however, that the more "additions" to the twenty-four credit hours prescribed in the ABA Proposed Rule, the more challenging it will become for law schools to structure a qualifying LL.M. program that can be completed in one academic year (i.e., a Fall and a Spring Semester). Swelling the requirements becomes even more challenging because courses completed in a summer session will not be counted223 towards compliance with the ABA Proposed Rule's instructional minutes or course content.224

It may well be that some jurisdictions which adopt the ABA Proposed Model Rule (as it is currently configured) will also impose additional course work and instructional minutes requirements for bar-examination eligibility in that jurisdiction, above and beyond the ABA Rule. That will make it more difficult for law schools to structure a uniform program that would satisfy the requirements of every ABA Rule jurisdiction to which the foreign-educated lawyer may want to seek admission by examination.

b. The Kentucky Office of Bar Admissions

While supportive of the Proposed Model Rule and Qualifying Criteria, the Kentucky Board of Bar Examiners focused more on the prospect of bar admissions authorities having an external authority on which to rely in assessing the foreign educational credentials of foreign-educated lawyers seeking admission to a state bar. Chief Justice John D. Minton, Jr. of the Kentucky Supreme Court forwarded the following comment from the Director of Kentucky’s Office of Bar Admissions:

My initial reaction to the proposed rule is that it could be very helpful to bar admission administrators and our boards because it would place the responsibility for evaluating a foreign education curriculum on the ABA Accreditation Committee and on the law schools that will be accredited to grant LLM degrees for this purpose. The accredited law schools should be required to evaluate the foreign law school education and determine that it

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221 Id. The Board also noted that "[t]he deans of the Georgia law schools explained to the Board the need for the schools to have flexibility in the way it would integrate the LL.M. program with the school's current curriculum ...[and] [e]xpressed willingness to work with the Board in crafting a rule and criteria that would make the LL.M. program cost effective for the law schools." Id.

222 See supra notes 16, 19.

223 Hence, summer LLM programs offered over two successive summers, like the ones offered at U.C. Berkeley-Boalt Hall School of Law and University of Houston, cannot qualify the degree holder under New York’s Section 520.6 or the proposed ABA Model Rule and LLM Certification criteria. See LL.M. Professional Track, BERKELEY L. U. CA., http://www.law.berkeley.edu/5652.htm (last visited Jan. 7, 2014); LL.M Program Overview, U. HOUSTON L. CENTER, http://www.law.uh.edu/llm/ (last visited Jan. 7, 2014); see also ABA Again Wades, supra note 168.

224 Moreover, as available credit hours in an LLM program are consumed with 1L and 2L required courses, there will be few opportunities for foreign-educated lawyers to include specialized electives in their study. "It sounds to me like students would be able to take the bar in other states, which is great for us ... But I think the curriculum requirements would piss off a lot of our students who want to take more advanced courses like corporate finance." ABA Proposes Big Changes, supra note 8 (quoting Stephen Presser, Raoul Berger Professor of Legal History, Northwestern University School of Law).
meets certain basic core requirements, or that any deficiencies could be cured by the required courses in the LLM program, before admitting the applicant into the LLM program. The law schools and the ABA accreditation teams are better equipped to evaluate legal education curricula than we are.225

Of course, interpreting the credentials of a foreign-educated lawyer is no simple task; but it is one from which the ABA-approved law schools should not shy away. In Part V.M, infra, the author provides thoughts on how law schools—following the lead of medical schools in the United States—can accomplish just what the Kentucky Bar Examiners have in mind.

c. Texas Law Examiners, Texas Task Force, and the Conference of Chief Justices

The Texas Board of Law Examiners adopted a resolution at a July 2011 meeting by which it "expresse[d] support for the Proposed LLM. Degree Criteria, as they represent a timely and important step toward aiding all U.S. jurisdictions in their efforts to evaluate LLM. programs that seek to prepare graduates of foreign law schools to practice law in U.S. jurisdictions."226 As the Texas Board saw it, "[a]n important benefit" of the Proposed LLM. Degree Criteria "would be the certainty that we can easily identify LLM. programs that have been certified as meeting the specified criteria designed to prepare graduates of foreign law schools to take the Texas Bar Examination and to be prepared to practice law in" Texas.227 The Texas Board emphasized that its support "assumes that the American Bar Association Section of [sic] Legal Education will, in due course, create the certification program and that the certification process will be binding, enforceable, and transparent."228 The Texas Board

225 See E-mail from John D. Minton Jr., Chief Justice, Supreme Court of Ky., to Charlotte (Becky) Stretch, Assistant Consultant, Section of Legal Educ. and Admission to the Bar, A.B.A. (July 15, 2011), http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/2011 0927_comments_proposed_rule_criteria_foreigneducatedlawyers.authcheckdam.pdf (emphasis added) (quoting Bonnie Kittinger, Director of the Kentucky Office of Bar Admissions). Of course, the ABA Accreditation Committee will not be, under the Model Rule, engaging in evaluation of foreign legal educational credentials or of the LLM. programs themselves; the ABA Consultant’s Office is envisioned as providing implementation of the Qualifying LLM. Program Criteria and issuing certifications based thereon. Certifications of an LLM. program, moreover, are quite distinct from the accreditation function of J.D. programs exercised by the ABA’s Legal Education Committee, pursuant to authority delegated from the U.S. Department of Education.

226 Letter from Julia E. Vaughan, Exec. Dir., Bd. of Law Exam’rs, to Charlotte (Becky) Stretch, Assistant Consultant, Section of Legal Educ. and Admission to the Bar, A.B.A. (June 13, 2011), http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/2011 0927_comments_proposed_rule_criteria_foreigneducatedlawyers.authcheckdam.pdf. As to the Proposed Model Rule, the Texas Board did "not comment" because the state Supreme Court “ha[d] appointed a Task Force on International Law practice in Texas, independent of the Texas [Board of Law Examiners], which has undertaken to study the Texas Rules of Admission concerning foreign-educated lawyer applicants.” Id.

227 Id.

228 Id. It is unclear from its letter exactly what the Texas Board of Law Examiners sought to convey by the trilogy of “binding, enforceable, and transparent,” taking the words either as a whole or individually. For example, the ABA’s own commentary on the criteria make it clear that the ABA is assuming a function of certification for those law schools who seek to have their LLM. programs certified, not an accreditation function like that exercised with respect to approval of J.D. programs. Similarly, it is not clear by whom, or against whom, the Texas Board expects the LLM. certification process to be enforced. The ABA’s commentary on the Criteria again makes it clear that it is creating a voluntary, opt-in kind of program, more
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made a point of noting that the Criteria “appear to represent a substantial step in the direction requested by the Conference of Chief Justices, recently chaired by Chief Justice Wallace Jefferson, of the Supreme Court of Texas, to address the need for a uniform, rigorous, and reliable approach to evaluate and certify the quality of the legal education of foreign trained applicants seeking permission to take a state bar examination.”229 The sanguineness of this last observation makes all the more puzzling the comment submitted by the Conference of Chief Justices itself, little more than six weeks later, in which the conference withdrew its 2007 resolution230 (that had called upon the ABA Legal Education Section “to consider developing and implementing a program to certify the quality of the legal education offered by universities in other common law countries” and in “a regime that certified legal education in other countries combined with LL.M. programs as a reliable basis for authorizing non-U.S. trained lawyers to sit for state bar examinations”) on the grounds that the Section determined that “assessing the quality of legal education in other countries is beyond the capacity of the Section.”231

akin to the recognition conferred by a Good-House Keeping Seal, rather than a mandatory accreditation program. Indeed, as letters from several law schools currently offering broader LL.M. programs indicate, those schools would not support making the Qualifying LL.M. program the only bar-qualifying LL.M. degree, since they maintain their current, general LL.M. degree programs have been preparing foreign-educated lawyers successfully for state bar examinations. See, e.g., Letter from Christopher Edley, Jr., Dean, U. C., Berkeley Sch. of Law, to Charlotte (Becky) Stretch, Assistant Consultant, Section of Legal Educ. and Admission to the Bar, A.B.A. (July 15, 2011), http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/20110927_comments_proposed_rule_criteria_foreign_educaed_lawyers.authcheckdam.pdf (asserting that “Berkeley Law’s Summer LL.M. Program will provide 2 weeks and 28 units of instruction in American law subjects and exceeds the ABA’s core course requirements,” and arguing, therefore, that “ABA’s proposed limitation on summer-only credit for its ABA Certified LL.M. Degree is overbroad because it fails to recognize our intellectually rigorous Summer LL.M. Program which complies in every respect with the Proposed Criteria except for the season – Summer – in which the courses are offered”); Letter from Larry D. Kramer, Dean, Stanford Law Sch., to Charlotte (Becky) Stretch, Assistant Consultant, Section of Legal Educ. and Admission to the Bar, A.B.A. (July 5, 2011), http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/20110927_comments_proposed_rule_criteria_foreign_educaed_lawyers.authcheckdam.pdf. (noting that, although Stanford’s three specialized LL.M. programs are not structured so as to satisfy either the course requirements or instructional minutes of the ABA qualifying LL.M. criteria, Stanford foreign-lawyer LL.M. graduates who took the New York Bar examination after graduation during 2007-2010 passed at an 84% rate.).

229 Letter from Julia E. Vaughan to Charlotte (Becky) Stretch, supra note 226.

230 See Conference of Chief Justices, supra note 207. With respect to the Australian resolution, Professor Churgin has observed that:

[T]here has been a charm offensive by some foreign bars to obtain approval in the United States. For example, the organized bar of Australia, the Law Council of Australia, attended sessions of the Conference of Chief Justices and lobbied heavily to arrange some form of admission, including inviting state judges to Australia for meetings. The conference passed resolutions in 2007 urging state boards of law examiners to consider permitting Australian attorneys to sit for the bar examination in various states and in 2009 to consider some form of reciprocity.


231 Conference of Chief Justices, supra note 207.
It is the author's view, however, that the Conference's latest resolution does not undermine the intrinsic value and force of the ABA's Proposed Model Rule and Qualifying LL.M. Criteria, for the Conference's original 2007 resolution operated only as a catalyst for—not as a delegation to or retention of—the ABA Legal Education Section to undertake the investigation and deliberation that resulted in the Model Rule and Criteria. In turn, the ABA's Proposed Model Rule and Criteria were adopted, with emendations, by the Georgia Supreme Court and Office of Bar Admissions in February 2014.  

Thus, the Conference's latest resolution appears to be the product of disappointment in the ABA's (very wise) realization that the Section on Legal Education—which is composed of the bar, bench, and academy—is not in the best position to evaluate the plethora of foreign legal educational programs that foreign attorney applicants bring in seeking admission by examination to a state bar. The ABA, more realistically, has placed the onus on individual law schools operating a Qualifying Program to make that investigation as part of their own admissions process, in a case-by-case, country-by-country basis. And that is wise because law schools with such programs have both the incentive, and a range of options, to make the certification that the foreign-educated lawyer is prepared to enter that law school's Qualifying LL.M. Program. Thus, the operating assumption is that by successfully completing the course of LL.M. study, certified in accordance with the ABA's Qualifying Criteria, the foreign-educated lawyer will, as a result of the LL.M. program, be qualified to sit for a state bar examination. That makes infinitely more practical and educational sense than trying to assess the foreign-legal education for purposes of American law practice itself. The law schools can, and need only, determine that the foreign-educated lawyer is prepared to enter the Qualifying LL.M. program. Whether that lawyer is also educationally ready to sit for the bar examination will then, as it should, depend on their success in the Qualifying LL.M. program. If successful in that program, then the state's own bar examination will determine—as it does for domestic applicants—whether the lawyer is competent to practice law in that state.

It should also be noted here that if American state jurisdictions drag their feet in liberalizing bar admission for qualified foreign-educated lawyers, they risk two unintended, but counterproductive, consequences. First, in future GATS negotiations, American negotiators may have good reason to make commitments that, among the complex horse trading transpiring, require the United States to open the legal services market here. In that event, a future Administration in Washington might well decide to seek Congressional action affecting state bar admissions, invoking interstate and international commerce powers enumerated to Congress in Article I, Section 8. Such action is possible, and supported by

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232 See authorities cited supra notes 16, 19. Among these emendations, the qualifying LL.M. degree is not subjected to “certification” by the ABA Section on Legal Education. See Order Amending Rules Governing the Admission to Practice Law (Ga. Sup. Ct., Feb. 21, 2014) (to be codified at GA. CODE ANN. PT. B, § 4), available at http://www.gasuprcme.us/rules/amended_rules/ORDER_FEBRUARY%202014%20Amendments%20_FINAL.pdf. Rather, it appears that the Board of Bar Examiners will create a form on which the LL.M.-awarding law school is to certify that “[t]he degree program meets the requirements set forth in the Curricular Criteria for LLM Program for the Practice of Law in the United States adopted by the Board of Bar Examiners and published on the website of the Office of Bar Admissions.” Id.

233 U.S. CONST. art. I, § 8, cl. 3 (giving Congress the power “to regulate commerce with foreign nations, and among the several states”).
the Supremacy Clause in conjunction with the Treaty Power under Article II, and is incontrovertible as to the admission to practice before the federal courts and to the rendering of legal advice on U.S. federal law. Professor Needham suggested fifteen years ago that Congress would be unlikely to federalize bar admissions standards under the then-prevailing circumstances—

[T]he history of deference to the states in this area combined with the lack of a united group committed to organizing constituent pressure on this issue makes it unlikely that federal legislation will be enacted. The potential sponsors of such legislation would need strong motivation to overcome constituents' distaste for legislative actions that appear to benefit lawyers.

—that was written when GATS and the WTO were barely three years old, and it did not consider the subject from the perspective of American treaty obligations undertaken pursuant to GATS or from the narrower range of potential bar applicants—foreign-educated lawyers—in whose interest the legislation might run. GATS trade-in-services agreements would provide the very "strong motivation" for potential sponsors of federalizing admission standards, at least to the extent needed to secure the opening of foreign legal markets to the American legal services juggernaut.

2. **Comments From Law Schools**

The ABA's online database of comments received on the Proposed Model Rule on Admission of Foreign-Educated Lawyers and Qualifying LL.M. Criteria for Practice of Law

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234 U.S. CONST. art. VI, § 2.
235 U.S. CONST. art. II, § 2, cl. 2 (giving the Executive, "by and with the advise and consent of the Senate," power to make treaties, "provided two thirds of the Senators present concur").
237 Splitting Bar Admission into Federal and State Components, supra note 236, at 503.
in the United States contains comments (most by letter, and a few by e-mail) received from various law schools, usually through their deans, associate deans, or LL.M. program directors, although a few came directly from faculty members. Some were supportive, and offered constructive suggestions. Others sought to position the conversation around their own current LL.M. programs. Many of those institutions seem to interpret the Qualifying LL.M. Criteria as an implicit threat to their franchises. Of those, two schools sought special treatment for their own existing LL.M. programs under the Qualifying LL.M. Criteria. At the margins, there were comments of a very specific nature offered by very experienced law school deans, along with one comment condemning the LL.M. Certification Criteria in their entirety.

In this section, we explore and evaluate the categories of concern expressed by various law schools, using as a model for the categories the commentary provided by American University Law School, with several additional categories gleaned from other law school letters. Those categories are: (1) ABA certification of LL.M. degrees; (2) amount of required coursework; (3) requirement that full-time or emeriti faculty teach the bulk of the program; (4) requirement that English is the language of instruction; (5) limitation of counted coursework to that offered in the United States or U.S. territories; (6) exclusion of distance-learning courses from counted coursework; and (7) requirement that the LL.M.-granting law school certify to state bar authorities that a graduate’s foreign law degree meets the Model Rule’s requirements. The tone, texture, and content of law school commentary are explored for each of those categories in the succeeding sections.

a. Law School Commentary on the ABA’s Involvement in Certifying LL.M. Degrees as Meeting the Qualifying Criteria

Many law schools with national “name-brand” recognition have criticized the idea either of having the ABA certify LL.M. programs at all or having criteria for certification that do not align with their school’s current LL.M. program curricula. Such critiques ought to be treated with caution, particularly since they take no account of the GATS purposes to be served by the having a national regime of consistent foreign-lawyer admission standards or of the GATS consequences of their own preferred approaches.

Paradigmatic are the “strong objections” voiced by Stanford Law School to the entire proposal. Among other things, Stanford asserted that “[t]he curriculum specified by the proposed criteria for certification improperly restricts each law school’s ability to decide

239 All of the commentary referenced and quoted in this section is accessible from the webpage of the ABA Section on Legal Education and Admissions to the Bar, via the following link: http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/2011_0927_comments_proposed_rule_criteria_foreign_educated_lawyers.authcheckdam.pdf.


241 The author offers the following discussion with the caveat that the very process of summary and synthesis involves his interpretation and categorization of the underlying letters and emails. The author has studied these communications objectively, in a good faith effort to situate them in a larger fabric of context. The authors of those letters and e-mails, or their institutions, however, may very well hold different views.

242 Letter from Larry D. Kramer to Charlotte (Becky) Stretch, supra note 228.
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independently the proper substantive content of their curriculum” and “restricts each law school’s ability to develop innovative teaching programs for JDs and LLMs alike, a particularly unwise restriction in an era of significant change in the profession.”243 Complaining, too, that injecting foreign lawyers into first-year required courses would “irretrievably chang[e] the first-year experience” and might require the addition of class seats or class sections that “would also have an incredibly damaging effect on the experience of J.D. students,” Stanford asserted that “each of our highly specialized LL.M. programs has a carefully crafted curriculum that would be impossible to continue under the proposed criteria.”244

Iowa offered a more tempered iteration of Stanford’s complaints, arguing that the ABA proposal for a qualifying LL.M. program is too “exclusive” because foreign-educated lawyers with an LL.M. in International and Comparative Law or a Tax or Business LL.M. would be excluded from U.S. practice under the ABA proposal, despite the fact that these LL.M. programs “expose[] [foreign-educated lawyers] to key areas of U.S. domestic law, the U.S. legal system and U.S. legal policy.”245 Interestingly, Iowa further argued that “the

243 Id.
244 Id.
245 Letter from Marcella David, Professor of Law & Int’l Stud. and Assoc. Dean for Int’l Comparative Law, Univ. Iowa Coll. of Law, to Charlotte (Becky) Stretch, Assistant Consultant, Section of Legal Educ. and Admission to the Bar, A.B.A. (Sept. 20, 2011), http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/20110927_comments_proposed_rule_criteria_foreign_educated_lawyers.authcheckdam.pdf. That viewpoint, however, is more sanguine than reality may dictate, given recent state high court decisions denying bar-examination certification of foreign-educated lawyers holding such boutique LL.M. degrees. For example, the Kentucky Board of Bar Examiners denied bar-examination certification to a foreign graduate of a law program at a Dominican Republic university who was “fluent in English,” had earned an LL.M. from Georgetown, and had been certified to take—and had passed—the N.Y. bar examination. In re Sara Paniagua de Aponte, 364 S.W.3d 176 (Ky. 2012). The Kentucky Supreme Court affirmed the state’s bar examiners’ decision, in part on the ground that the student’s LL.M. did not meet Kentucky’s standard that “[e]very applicant for admission to the Kentucky Bar must have completed degree requirements for a J.D. or equivalent professional degree from a law school approved by the American Bar Association or by the Association of American Law Schools.” Id. at 179 (quoting Ky. Sup. Ct. R. 2.014(1)) (internal quotation marks omitted). The court emphasized that not all LL.M. degrees are created alike:

The Applicant argues that her LL.M. degree in International Legal Studies from Georgetown, an ABA-accredited institution, is an “equivalent professional degree” that would satisfy the basic educational requirement in this state and make her eligible to sit for the bar examination.

This Court has previously denied an application by the holder of an LL.M. in taxation from a properly accredited American law school, when the applicant’s J.D. was from an unaccredited American school. See In re Teel, 150 S.W.3d 56 (Ky. 2004) (Graves, J. dissenting). Though the Court issued only a one-line order denying the applicant’s motion for review, it is apparent from the content of the vigorous dissent in that case that the Court was apprised of the applicant’s educational background. Though the rules have been amended slightly since that case, the basic requirement of a J.D. or equivalent degree from an accredited school is the same. It is reasonable, then, to infer that this Court has previously found that an LL.M. in a narrow topic from an accredited, American law school is an insufficient equivalent degree.

Presumably, this is because an LL.M. program, like that in Teel, is usually a focused educational program, often with an emphasis on a single subject, whereas the J.D. degree requires a broad-ranging education in a variety of legal subjects. To obtain a
requirement of the ‘practice’ LLM track is potentially misleading” because it is “a qualification that it is hoped will be accepted by bar associations” and “students wishing to qualify to practice in non-adopting jurisdictions will be disappointed to discover that the designated LLM for the practice of Law in the United States does not serve the purpose of qualifying them to sit for the bar in their desired jurisdiction.”

Similarly, Iowa deemed the ABA proposal as “based on an unrealistic assumption that” foreign students will have bar admission as an objective of enrollment in a U.S. LLM. program, citing “[o]ur experience . . . that the interest often develops more gradually, after students have spent time in the U.S. and are more aware of the available options.”

J.D. degree from an American institution, almost every student will take first-year courses in torts, criminal law, contracts, property, civil procedure, and constitutional law.

\textit{Id.} at 179. However, the Court also said, “[W]e cannot say that an LLM. degree could never satisfy the requirement of SCR 2.014(1),” because

[a]t least some LLM. programs are designed specifically to offer foreign law graduates sufficient exposure to American law and to allow them to take some states’ bar examinations. For example, Georgetown itself offers a General Studies LLM. to foreign law school graduates, which is different from the International Legal Studies LLM. earned by the Applicant. Similarly, the Indiana University Robert H. McKinney School of Law offers an LLM. program described as an “American Law for Foreign Lawyers Track,” which, among other things, is intended to “create[ ] opportunities for foreign law graduates and lawyers to . . . [o]btain a degree permitting them to sit for bar examinations in several American jurisdictions.” And clearly some states allow such degrees to substitute for the usual educational requirements.

\textit{Id.} at 180-81 (adding that “the possibility remains that a general LLM. program in American law. . . essentially, a bridge program aimed specifically at preparing foreign lawyers for practice in the United States—could be an equivalent professional degree sufficient under SCR 2.014(1).”); accord Osakwe v. Board of Bar Exam’rs, 858 N.E.2d 1077, 1083 (2006) (certifying Nigerian lawyer with a Nigerian L.L.B. and an U.S. Legal Studies L.L.M. because “[w]hatsoever deficiencies there may have been in Osakwe’s exposure to American law in particular were . . . cured by his LLM. program,” which included “graded course work in American civil procedure, American criminal procedure, immigration law, Federal taxation, torts, and United States law and legal institutions,” a program that largely tracks the education that a first-year law student gets at an American law school); Wei Jia v. Board of Bar Exam’rs, 696 N.E.2d 131 (1998) (rejecting relevance of Chinese lawyer’s Tulane L.L.M. because, although he had been admitted in New York and Louisiana after spending a significant amount of time studying at an American law school, the applicant’s LLM. courses at Tulane focused almost exclusively on international business transactions, and it included only one of the basic J.D. courses, contracts).

Letter from Marcella David to Charlotte (Becky) Stretch, \textit{supra} note 245. Of course, proper counseling and disclosures, clearly envisioned by the ABA proposal, would eliminate that problem.

\textit{Id.} Columbia expressed similar sentiments about “expect[ing] the foreign-trained lawyer to decide prior to the start of the LLM. program whether she will sit for a bar exam so that she can plan her schedule accordingly” when “most L.L.M.s arrive in the U.S. with plans to stay just one year[,]” but “many will change their focus once they arrive and exciting career opportunities present themselves.” Letter from David M. Schizer, Dean, Columbia Univ. Law Sch., to Charlotte (Becky) Stretch, Assistant Consultant, Section of Legal Educ. and Admission to the Bar, A.B.A. (July 13, 2011), http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/20110927_comments_proposed_rule_criteria_foreign_educated_lawyers.authcheckdam.pdf. The phenomenon described is one that has been observed by others. See, e.g., Carole Silver, \textit{States Side Story: Career Paths of International LLM. Students, or “I Like to Be in America,”} 80 \textit{FORDHAM L. REV.} 2383, 2394-2405 (2012). However, legal education tourism is not the focus and purpose of the ABA proposal; the ABA proposal deals with the needs of practicing lawyers who seek to represent client interests transnationally, and the need of the U.S. to not just talk the GATS talk, but to walk the GATS walk. See \textit{supra} Part III; see also Mary C. Daly, \textit{Thinking Globally: Will National Borders Matter to Lawyers a Century from Now?}, 1 \textit{J. INST. STUD. LEGAL ETHICS} 297 (1996); Fried, \textit{supra} note 236.
In a similarly tempered tone, Northwestern weighed in with the opinion that, "[a]lthough the proposal moves in the right direction," it has "some concern that it is too restrictive, especially in provisions that would exclude LL.M. programs offered overseas and in summer terms," noting that "Northwestern has, for almost ten years, offered LL.M. programs overseas and in summer terms," and that it "is also experimenting with summer Executive LL.M. programs of the same quality." Thus, Northwestern urged that the Criteria should not exclude Northwestern's programs because "our experience—over ten years of providing Executive LL.M. classes overseas to more than 500 students—demonstrates that these programs can be quite successful in educating students in U.S. Law." Berkeley takes a similar position in its submitted comments, arguing that its Summer LL.M. program—two, ten-week summer terms over two annual summer sessions—"meets all of the" Qualifying LL.M. Criteria "except for the season . . . in which the courses are offered." More pointedly than Northwestern or Berkeley, and in tone similar to that of Stanford, American University Washington College of Law denounced the Qualifying LL.M. Criteria for the ABA certification feature, which it contended "implies that other LL.M. programs are not certified and are, therefore, inferior in inadequate." Thus, American argues, it "support[s] changing the terminology so that no LL.M. program is called ‘ABA certified’ unless the ABA certifies all categories of LL.M. degrees." Of course, an obvious answer to these kinds of criticisms is that there is nothing in the ABA proposal to require any law school to change a single thing that they presently do. The proposal—if adopted—merely presents an opportunity to add an LL.M. program in which foreign lawyers can have clarity and certainty about what is required to qualify to take state bar examinations across the country. The purpose and focus of the ABA’s proposal is to provide standards for an LL.M. qualification that is recognized by state bar authorities in all fifty U.S. states along with U.S. commonwealths and territories. The course of study provided by the ABA proposal is exactly the kind of competence in bar-tested subjects that is more likely to persuade examiners to seat the foreign-lawyer applicant, even in states in which the LL.M. is one of many factors for determining eligibly. One reading these critiques cannot help but notice that they are centered on the commenting law school’s own extant LL.M. programs, more so than on an independent evaluation of the ABA proposal’s merits or potential to benefit the work of bar examiners, the challenges faced by foreign lawyers seeking admission to practice in the United States, the long-overdue reckoning with the


249 Id.

250 Letter from Christopher Edley, Jr., to Charlotte (Becky) Stretch, supra note 228.

251 Letter from Theresa Kaiser to Charlotte (Becky) Stretch, supra note 240.

252 Id. American also argued that, given that some states such as New York have established their own rules for a qualifying LL.M. degree and given that these rules differ from the ABA Model Rule, it is possible that some LL.M. programs would not be ABA certified but would, in fact, allow students to take a US bar and practice law in the United States.
requirements of GATS, or the opportunities that could be generated for J.D. holders by razing traditional barriers to transnational law practice.253

Juxtaposed to comments from Stanford, Iowa, and American are those of Touro College Jacob D. Fuchsberg Law Center, whose dean saw clear and worthwhile benefits from the ABA proposal:

Certification is an excellent idea . . . [T]he lack of regulatory reach into LL.M. programs has had two unfortunate effects. On the one hand, few states other than New York have permitted foreign lawyers with LL.M. degrees to take their bar examinations, limiting the opportunities of such lawyers and putting the U.S. at a disadvantage in negotiations for reciprocal bar admission access with other countries. Meanwhile, foreign law graduates seeking an LL.M. program in the U.S. have had little to guide them in locating programs that will be truly helpful in preparing them for a bar examination or for practice in the U.S. The proposed certification process would do much to solve both of those problems.254

Indeed, the ABA proposal responds to a very real need for a more uniform transnational legal education, which has traditionally been "done school-by-school," and has left "American legal education . . . somewhat without direction."255 The ABA proposal is an important step for American legal educators, who are "naturally tasked with the responsibility of developing a 'vision' for its future."256

b. Law School Commentary on Requiring Bar Passage Rates for Graduates of the Qualifying LL.M. Programs to be Posted on Each Program's Website

One of the most controversial aspects of the Qualifying Criteria is the requirement that "[a] law school must publicly disclose on its website the first-time bar passage rates by state of its most recent class of graduates of" a Qualifying LL.M. Program.257

253 The institutional effects of viewing issues and challenges in such a self-referential way have been documented in other disciplines. See, e.g., Arijit Chatterjee & Donald C. Hambrick, It's All about Me: Narcissistic Chief Executive Officers and Their Effects on Company Strategy and Performance, 52 ADMIN. SCI. Q. 351 (2007).


256 Id.

257 A.B.A. SEC. LEGAL EDUC. & ADMISSION B. REP., supra note 18, at 7. It is noteworthy that, in adopting its own version of the ABA Model Rule and Qualifying LL.M. Degree Criteria, the Georgia Supreme Court and Office of Bar Admissions did not prescribe a posting or disclosure of bar passage rates by LL.M. graduates of a
Of those schools that commented on the bar passage rate posting requirement, there was a surprising chorus of hostility expressed. For example, the University of Pennsylvania Law School communicated its opposition in the following strong terms:

While many students enroll in these programs with the idea that they may sit for the bar exam of a particular state, these are not bar preparation courses. The LL.M. program at Penn Law attracts professors, in-house counsel, judges, governmental officials and attorneys of all stripes, many of whom intend to return to their home jurisdiction. This requirement would likely lead to the perception that the "success" of international LL.M. programs can or should be measured by bar passage rates. Moreover, since LL.M. programs are only two semesters, students will be exposed to only a fraction of the material covered on any state's bar exam. As such, responsibility for bar exam preparation falls squarely on the shoulders of students. The publication requirement improperly suggests that applicants should perceive LL.M. programs as preparation for state bar examinations. That is simply not the case.258

For its part, Boston University offered the (rather counterintuitive and almost startling) rationale for opposing the publication requirement, which included the concern that "[b]road[-]stroked information on LL.M. bar passage rates would mislead candidates about the quality of the LL.M. program they might otherwise express interest in attending."259 That assertion, however, makes little sense for the foreign, practicing lawyer, for whom passing a state bar exam will be a paramount concern when deciding to attend a Qualifying LL.M. Program. Boston University's view, however, is less surprising when considered in light of its further commentary that "[p]ublishing passage rates will also create incentives to 'teach to the bar,' perhaps in contravention to the educational and pedagogical mission of a law school."260 But what else, one might fairly ask with some incredulity, should a Qualifying LL.M. program be doing, particularly when the students in that program will already have legal training and admission to practice in their home country?261


260 Id.

261 Thus, American University's comment opposing bar passage rate disclosure seems to miss the point of a Qualifying LL.M. Program:

Most LL.M. students do not come to the U.S. with the intention of taking a U.S. bar. In fact, we have found that most of our LL.M. students come here with the intention...
Of the schools that commented on the passage rate posting requirement, only the University of Washington's School of Law spoke in favor of it. Washington explained, "We have been concerned that for some schools [LL.M. programs] serve as 'cash cows' and are not quality programs . . . . The model rule also includes required reporting of student bar passage rates, which we strongly support. In the view of this article's author, the reporting of bar results is a non-negotiable issue. Standing in the shoes of a foreign-educated lawyer who desires to qualify for U.S. bar admission, the bar passage rate from programs that are ABA certified is one of a number of facts that the lawyer will want to know in selecting an LL.M. program before investing six figures in a venture that is entirely a business development project, rather than an extension of education for foreign-educated law students. The Qualifying LL.M. degree is primarily a degree for working professionals, not educational tourists, and many foreign lawyers will need sponsorship to undertake the degree. Even those already working in the United States with a transnational law firm will require of earning the degree and then returning to their home countries to practice law. Just as we have seen happen in K-12 education, measuring programs by the passage rate of a standardized test causes schools to teach to that test. Reporting bar passage rates forces programs to cater to the small percentage of students who intend on taking the bar.

Letter from Theresa Kaiser to Charlotte (Becky) Stretch, supra note 240 (emphasis added). As discussed in the text and notes in Part V.B.2.a supra, requiring universities to report bar passage rates does not force universities to "cater" to a contingent of students. But, rather, the Qualifying LL.M. and its requirements help: (a) foreign-educated, practicing lawyers who seek practice privileges in the United States and (b) American lawyers, seeking access to practice in those foreign countries. Similar to American University, Cardozo Law School has said:

[Cardozo is] skeptical about the utility of posting bar passage rates for LL.M. students. First of all, some of our LL.M. students are domestic candidates who pass the bar during the year that they study with us. Would they be included in these rates? More importantly, [the correspondent] think[s] there is a sizeable proportion of foreign students who approach the bar from a much less serious perspective—i.e., they "give it a try" to see if they can pass it, or they figure they will take it the first time just to see what it is like and then take it seriously the second time—and that skews passage rates. A more relevant statistic would be for those who prepare seriously for the exam, but [the correspondent] do[esn't] think those statistics are kept.

E-mail from Amy Sugin, Assistant Dean for Graduate & Int’l Programs, Cardozo Sch. of Law, to Charlotte (Becky) Stretch, Assistant Consultant, Section of Legal Educ. and Admission to the Bar, A.B.A. (July 14, 2011, 6:44 PM).

262 Letter from Kellye Y. Testy to Charlotte (Becky) Stretch, supra note 254.

263 See Chantal Thomas et al., The Globalization Of The American Law School, ASIL PROC., 2007, at 183, 197 (discussing "shallow, intellectual tourism" in some graduate-level law and foreign exchange programs).

264 See, e.g., Sang-Hyun Song, Legal Education in Korea and the Asian Region, 51 J. LEGAL EDUC. 398, 401-02 (2001). As Professor Song observes: The Korean government, recognizing the importance of American legal concepts in the formation and administration of domestic and international law and legal institutions, sponsors one- or two-year expense- paid sabbaticals for study abroad for government officials, judges, and prosecutors . . . . Many law firms also offer their associates the opportunity to study for one or two years in the U.S., followed by practical training at an American law firm. In both cases, the students usually acquire an L.L.M. degree from an American law school, and some pass one of the state bar exams, adding the prestige of an American law degree and membership in an American state bar to an already rewarding educational and professional experience.

Id.
before undertaking such an investment, any sponsor, as well as any applicant, will want to know how Qualifying LL.M. graduates from a particular law school's program are faring on the bar examination. In the absence of Qualifying LL.M. standards, the unregulated LL.M. market, as a whole, is producing less than overwhelming results for foreign lawyers taking examinations in a number of leading jurisdictions. Based on data cited by Professor Gillers, the bar-passage landscape for foreign-educated lawyers in 2010 portrays a daunting landscape:

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Passing % ABA J.D. graduates</th>
<th>Passing % Foreign-Educated Lawyers</th>
</tr>
</thead>
<tbody>
<tr>
<td>NY</td>
<td>77%</td>
<td>34%</td>
</tr>
<tr>
<td>CA</td>
<td>60%</td>
<td>13%</td>
</tr>
<tr>
<td>TN</td>
<td>79%</td>
<td>28%</td>
</tr>
<tr>
<td>DC</td>
<td>47%</td>
<td>18%</td>
</tr>
<tr>
<td>LA</td>
<td>62%</td>
<td>15%</td>
</tr>
<tr>
<td>IL</td>
<td>84%</td>
<td>17%</td>
</tr>
<tr>
<td>TX</td>
<td>76%</td>
<td>33%</td>
</tr>
<tr>
<td>MA</td>
<td>85%</td>
<td>50%</td>
</tr>
</tbody>
</table>

Of course, what percentage of the foreign-educated lawyers taking these bar examinations qualified for them by, inter alia, holding an LL.M. degree from an American law school is not revealed in this data. Yet, the general terrain itself is more than enough to demonstrate why Qualifying LL.M. programs should disclose the bar results achieved by their graduates.

c. Law School Commentary on the Instructional Time Required and Courses Designated as Required

A number of law schools contested the inclusion of certain courses among those required for the Qualifying LL.M. degree because instruction in those courses does not match the school's current offerings. For example, the University of Pennsylvania complained about "requiring three credits of civil procedure and another three credits of U.S. constitutional law, on top of the legal writing and professional responsibility requirements." It added, "What attracts a large percentage of students to participate in these programs is the flexibility they have to choose courses in their area of interest[,]" which at Penn, "is most often in the field of corporate or business law." Penn asserted that "classes in civil procedure and constitutional law are heavily skewed toward a litigation framework" and characterized those two courses as "six additional credits of specialized coursework [that] is

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265 See David E. Van Zandt, Global Strategies For Legal Education, 36 U. TOL. L. REV. 213, 217 (2004) (observing that "[m]any non-U.S. firms and businesses realize that in order to provide value for their clients, their young attorneys need a basic understanding of Anglo-American law," and that "[o]btaining an LL.M. degree has become important and sometimes necessary for a young foreign lawyer to advance at his or her firm and practice").

266 See Gillers, supra note 192, at 1013-16.

267 Id.

268 Letter from Matthew Parker to Charlotte (Becky) Stretch, supra note 258.

269 Id.
overly burdensome" and suggests this can be covered in an introduction to U.S. law course. 270 Similarly, Stanford complained that "[t]o increase the instructional time for legal analysis, research and communication and to add the proposed number of minutes of Professional Responsibility, Constitutional Law and Civil Procedure would increase the number of minutes of instruction required for graduation [from Stanford's current LL.M. programs] by up to 31%." 271 Likewise, Iowa suggested that the ABA proposed criteria "require ... more generally 'courses from the first[-]-year curriculum that highlight key concepts of the common law and the relationship between federal and state law,' instead of requiring specific courses in Constitutional Law and Civil Procedure" so that "an LLM student isn't foreclosed from a desired course solely because it conflicts with Civil Procedure or Constitutional Law." 272 Northwestern urged relaxation of both the credit-hour total (to accommodate its twenty-hour programs) and the courses to be required, since Northwestern requires LLM. students to take its course "on U.S. legal history and structure (called 'American Jurisprudence')" that is "both required and one of the most popular classes." 273 Stanndard complained that the requirement has no "demonstrated" purpose because "[m]any states have been permitting LLM. students

270 *Id.* Cardozo also questioned requiring civil procedure, on the grounds that the school's current course "is 5 credits, which is a significant portion of the credits they will take [ ] at Cardozo, and almost no student in the past five years" in Cardozo's LLM program "has elected to take it." E-mail from Amy Sugin to Charlotte (Becky) Stretch, *supra* note 261. Assistant Dean Sugin's comments, however, suggest one of a number of good reasons why the ABA proposal requires civil procedure. Washington also opposes requiring civil procedure or constitutional law, but instead suggests requiring eight to ten hours from a menu of courses, including "Torts, Contracts, Property, Civil Procedure, Evidence, Business Organizations, Criminal Law, and Constitutional Law," since "a model rule should allow for diversity of choice for the student as long as minimal quality standards are satisfied." Letter from Kellye Y. Testy to Charlotte (Becky) Stretch, *supra* note 254; accord Letter from David M. Schizer to Charlotte (Becky) Stretch, *supra* note 247 (urging a broader list of "basic courses in American law," similar to New York's requirement, and urging "the practical experience that students acquire in the fieldwork portions of externships and clinical offerings" to count toward the U.S. law course requirement); Letter from John Ricardi to Charlotte (Becky) Stretch, *supra* note 259 (observing that "[a] 26-hour program . . . may impose unnecessary burdens for students" but seeking more specific rules on credit hours for required courses and specification of other courses that satisfy the requirement of "address[ing] principles of domestic United States law").

271 Letter from Larry D. Kramer to Charlotte (Becky) Stretch, *supra* note 228. Continuing the self-referential theme, Stanford's letter decried that the ABA proposal "would either force [it] to extend the LLM. program, thereby increasing the cost for students and further stretching the law school's resources or it would require the law school to abandon the specialty programs altogether or so dilute them as to make them unattractive to students and ineffectual in achieving their educational objectives." *Id.* As pointed out in Part V.B.2.a *supra*, the ABA proposal does not purport to disallow LLM. programs that do not meet the Qualifying Criteria. Rather, those other LLM. programs will continue their current academic focus, and leave the bar and practice preparation to programs that are already up and running at a number of other law schools, as described in Parts V.D & G *infra*.

272 Letter from Marcella David to Charlotte (Becky) Stretch, *supra* note 246. Iowa also said that it "suggest[s] that all of the curriculum requirements, including those related to Professional Responsibility and Legal Analysis, Research, and Writing, be revised to be less prescriptive as to content" and that the credit-hour total of twenty-six be reduced to twenty-four credits, the number that Section 520.6 of New York's Rules of the Court of Appeals for the Admission of Attorneys and Counselors at Law requires. *Id.*

273 Letter from Kimberly A. Yuracko & James Speta to Charlotte (Becky) Stretch, *supra* note 248. Northwestern adds, "[W]hile we believe that students should have a fundamental grounding in U.S. constitutional law and legal structure, we believe that the proposal should be limited to 2 mandatory classes, chosen from the list of four currently in the proposal (although one of them should be Professional Responsibility)." *Id.*
to take the bar examination without having completed any of the courses now proposed as required .......

What these kinds of comments seem to miss is two-fold. First, LL.M. programs remain free to do as they wish. The ABA’s proposal simply provides the program for an LL.M. degree with wider bar examination acceptability because it emphasizes bar-tested subjects. Second, Civil Procedure is heavily tested on state portions of bar examinations, and U.S. Constitutional Law is a major part of the Multistate Bar Examination as well as state portions. To expect foreign lawyers to pick up what they need for bar passage in these areas from a general introductory course is simply unrealistic.

Letter from Larry D. Kramer to Charlotte (Becky) Stretch, supra note 228.

This clear-eyed viewpoint has been articulated by a number of law school deans to those whose tendency is to see problems where there are none. E.g., E-mail from Kellie Early, Chair, Bar Admissions Comm., to Charlotte (Becky) Stretch, Assistant Consultant, Section of Legal Educ. and Admission to the Bar, A.B.A (Sept. 15, 2011, 2:10 PM) (reporting that, during the ABA Legal Education Section’s Bar Admission Committee meeting, some deans “noted that this is just one specific type of LL.M. program designed to qualify for the bar examination, and [that] the criteria do not impact the content of other types of LL.M. programs”). See Part V.B.3 infra.

See Douglass G. Boshkoff, Access to State Bar Examinations for Foreign-Trained Law School Graduates, 6 HOFSTRA L. REV. 807, 825 (1977). As Professor Boshkoff insightfully observed:

The significance of the rigor and structure hopefully found in the American educational experience cannot be overemphasized. Our concerns will not be allayed if the applicant presents a certificate simply showing completion of a specified number of hours of study at some ABA-approved law school. That his curricula include certain types of courses is important. Instruction in comparative law will do relatively little to prepare the graduate from a civil law jurisdiction for practice in the United States. Courses in civil procedure, federal taxation, contracts, and constitutional law, on the other hand, are valuable. Credit hours are not fungible.

Id. (emphasis added). In adopting an emendation of the ABA’s Proposed Qualifying LLM. Criteria, the Georgia Supreme Court and Office of Bar Admissions set forth a curriculum that is more prescriptive than the ABA’s original proposal. The Georgia criteria state:

1. The curriculum includes a minimum of 18,200 minutes of instruction, typically through 26 credit hours;

2. Of the 26 hours of instruction, 18 hours must be taught by full-time or emeritus faculty, and 18 hours must be taught during the regular academic year excluding inter-sessions and summer terms;

3. Of the 26 hours of instruction, 13 credit hours must include instruction in the following courses:

(a) Introduction to United States Law, 1400 minutes (2 credit hours);

(b) Legal Research and Writing, 2080 minutes (3 credit hours);

(c) United States Constitutional Law, 2080 minutes (3 credit hours);

(d) Civil Procedure or Georgia Practice and Procedure, 2080 minutes (3 credit hours);

(c) Professional Responsibility, with required emphasis on both the ABA Model and Georgia Rules of Professional Conduct, 1400 minutes (2 credit hours).
d. Law School Commentary on the Requirements that Require Full-Time or Emeriti Faculty Teach the Bulk of the Program

A number of law schools raised objections to the ABA’s staffing requirement that eighteen of the required LL.M. program units “must be taught by full-time or emeritus faculty at the law school” because it is asserted to be “potentially onerous for students and the school.” The University of Pennsylvania explained that the requirement was unnecessary because “members of [its] adjunct faculty are fully qualified to provide instruction at Penn or any other U.S. law school.” Stanford declared that the requirement “is an example of rule-making without demonstrated need” and that there are no findings “that even begin to indicate an issue with the qualifications of those teaching in LL.M. programs at ABA-accredited schools” and, thus, “no demonstrable need for depriving students of the expertise that practitioners can bring to the classroom.” Northwestern observed that the “supposition is that this requirement is intended to address LL.M. programs that have a curriculum separate from the law school’s J.D. curriculum and the possibility that such a separate curriculum would be staffed entirely by part-time or adjunct faculty (and be of lesser quality)” and suggested amending the rule to read that eighteen required units “must be taken from classes in the school’s J.D. curriculum or taught by full-time or emeritus faculty at the law school.” Columbia similarly complained about the requirement, describing how its “adjunct faculty undergo a very rigorous vetting process before being hired;” have, for the most part, “taught at the Law School for many years;” and demonstrate to “foreign-trained attorneys how U.S. lawyers think.” Cardozo was perhaps the least critical of the critics. It called the requirement “unnecessarily restrictive” and observed, “Though certainly our full-time faculty bring an academic perspective that adjuncts do not, we have excellent part-time and visiting faculty who are experts in their field and who provide a stellar education for our students.” By contrast, Berkeley—which offers its LL.M. entirely in two summer semesters over two consecutive years—observed that “[f]rom its inception, Berkeley . . . has

4. Of the remaining 13 credit hours:

(a) At least one course must be selected from Contracts, Torts, Property, Corporations, Administrative Law, Evidence, and Commercial Law (Uniform Commercial Code); and

(b) At least one course or equivalent must be selected from Trial Advocacy, Appellate Advocacy, Negotiation, Mediation, Transactional Practice, Alternative Dispute Resolution, Fundamentals of Law Practice, Externship Placement, and Legal Clinic.

5. The requirements 3(a) and 4 are waivable by the law school for appropriate candidates from common law countries.

SUPREME COURT OF GA. OFFICE OF BAR ADMISSIONS, supra note 16.

277 Letter from Kimberly A. Yuracko & James Speta to Charlotte (Becky) Stretch, supra note 248. Georgia, however, has adopted that ABA model criterion. See SUPREME COURT OF GA. OFFICE OF BAR ADMISSIONS, supra note 16.

278 Letter from Matthew Parker to Charlotte (Becky) Stretch, supra note 258.

279 Letter from Larry D. Kramer to Charlotte (Becky) Stretch, supra note 228.

280 Letter from Kimberly A. Yuracko & James Speta to Charlotte (Becky) Stretch, supra note 248.

281 Letter from David M. Schizer to Charlotte (Becky) Stretch, supra note 247.

282 E-mail from Amy Sugin to Charlotte (Becky) Stretch, supra note 261.
been committed to providing [its] students with teachers and scholars of the highest caliber drawn from among our world-renowned full-time faculty” and that “[i]f the 28 units [Berkeley] will offer to [its] students who enroll in [its] summer LL.M. Program, . . . all but 5 will be taught by full-time faculty, far exceeding the ABA Criteria[on] 3(g) that 18 of 26 credits be taught by full-time or emeritus faculty.”

There is no question that an adjunct faculty cannot provide anything remotely resembling the quality of education that a full-time faculty brings to any program. As practitioners in markets that have grown more competitive, adjuncts have much less time, and focus, to prepare for classes and to develop as teachers. The demands of the market come first and foremost, no matter how well intentioned they may be. Clients have to come before students—not only economics, but also, the Rules of Professional Responsibility dictate that. Hearings and crises come before syllabi, exam writing, and classes. That is the lesson of prior enterprises that did not succeed in gaining accreditation through an adjunct-heavy model, and that is a lesson that hopefully will not have to be repeated at the expense of students, even in this age of discomfort, sometimes seeming to verge on mild panic, in American legal education. It would be especially unfortunate to see the use of adjuncts championed in the LL.M., or any other legal education vehicle, given the years that it took legal writing to emerge from a largely ineffective adjunct model to a full-time, professional skills professor model.

The ABA proposal’s requirement is, in fact, well aligned with the ABA’s standards for J.D. programs that substantially all first-year instruction must be by full-time faculty.
and that, adjunct professors, who were not counted at all before 1996,\textsuperscript{291} each count as twenty percent of a full-time faculty member.\textsuperscript{292} There is a good reason for that, however. Unlike adjunct faculty,

[a] full-time faculty member is one whose primary professional employment is with the law school and who devote substantially all working time during the academic year to the responsibilities described in Standard 404(a), and whose outside professional activities, if any, are limited to those that relate to major academic interests or enrich the faculty member’s capacity as a scholar and teacher, are of service to the legal profession and the public generally, and do not unduly interfere with one’s responsibility as a faculty member.\textsuperscript{293}

Moreover, students get no discounts when adjuncts teach their classes, but they do often get distracted teachers.\textsuperscript{294} Considering that the required curriculum of the Qualifying LL.M. program is designed to compensate for the fundamentals of U.S. law taught primarily in first-year courses that foreign-trained lawyers lack, there is no good reason that the teaching standards should not be at least as demanding—and even more so—than those for J.D. programs.

e. Law School Commentary on Limiting Qualifying Credits to Courses Offered in the United States or U.S. Territories, and Mandating English as the Language For Instruction

A number of law schools have objected to the U.S. territorial requirement in the ABA proposal, as discussed in Part V.B.2.a. (Further discussion in the context of online programs appears in Part V.B.2.h.) Primarily, the objections arise from the fact that some law schools have LL.M. programs that include coursework that takes place outside of the United States. These are international or transnational programs, which have not been viewed as bar preparatory in a specific sense. American University argued that “[l]aw school-sponsored summer programs abroad should not be off limits to LL.M. students.”\textsuperscript{295} Northwestern asserted that its LL.M. classes abroad are “taught in English . . . by Northwestern Law faculty, who cover the same substance as is covered in classes held” at the School’s Chicago campus, and that “a physical presence in the United States, during the LL.M. classes, is [not]
necessary to acquire the legal knowledge and judgment necessary to be an effective legal practitioner.”

It should be noted here, however, that a Qualifying LL.M. is intended to do more than merely allow students “to acquire . . . legal knowledge and judgment.” In a recent article, Professor Stephen Gillers pointed out that the territorial requirement speaks to quite a different concern: “Many foreign law graduates may not ever have visited, let alone lived in, the United States,” and thus there are “observers [who] view absence of experience with American culture, including legal culture, gained by living in the United States and attending a U.S. law school, as a critical deficiency.” According to Professor Gillers, “This view explains the New York Court of Appeals’ requirement that those foreign applicants who must earn graduate law degrees from a U.S. law school in order to qualify to take the state examination study physically in the United States.”

Similar observations apply to the objection lodged against the English-language mandate. Perplexingly, American University has insisted that the English-as-instructional-language mandate would prevent “LL.M. students who are interested in learning about other legal systems from a more local perspective” from taking courses such as American University’s “elective course taught in French covering the civil law system and . . . elective course taught in Spanish covering the continental legal system.” However, this view makes little sense. The entire point of the Qualifying LL.M. program is to immerse the foreign-educated lawyer in the Common Law legal culture of the United States in order to prepare the lawyer for a U.S. bar examination. Electives in French about French Civil Law or in Spanish about the Civil Law of Spain and her former colonies may very well be fascinating, but they are wholly irrelevant to the degree needed to become bar-examination qualified (even in Louisiana, which follows the Civil Law tradition).

Separate and apart from acculturation, there is a serious flaw in suggesting that even one precious instructional moment for an English as a Second Language (ESL) foreign-lawyer in a Qualifying LL.M. program should be spent in any language other than the one in which they will be examined and the one in which they will have to function in practice.  

296 Letter from Kimberly A. Yuracko and James Spets to Charlotte (Becky) Stretch, supra note 248.

297 Indeed, one of the certifications required by Georgia’s newly adopted rule is that “[t]he degree program prepares students for admission to the bar, and for effective and responsible participation in the United States legal profession.” Order Amending Rules Governing the Admission to Practice Law (Ga. Sup. Ct., Feb. 21, 2014) (to be codified at GA. CODE ANN. PT. B, § 4), available at http://www.gasupreme.us/rules/amended_rules/ORDER_FEBRUARY%202014%20Amendments%20_FINAL.pdf.

298 Gillers, supra note 192, at 1020.

299 Id. at 1020 n.295 (noting that “[a] degree earned abroad, from the same school with the same requirements, is not acceptable,” and citing N.Y. Ct. App. R. 520.6(b)(3)(v)).

300 Letter from Theresa Kaiser to Charlotte (Becky) Stretch, supra note 240.

301 Again, as noted in Part V.B.2.a, n.238 (discussing In re Sara Paniagua de Aponte, 364 S.W.3d 176 (Ky. 2012)), better awareness of the case law reporting the challenges that foreign-lawyer applicants face would better inform the law schools’ positions. See, e.g., In re Application of Singh, 800 N.E.2d 1112, 1116-17 (Ohio 2003). Although the lawyer in that case had been educated in India and practiced law there, the court upheld the denial of the lawyer’s application to sit for the Ohio bar examination. Id. at 1117. The court stated, “In light of this applicant’s deficiencies in speaking and writing English and in comprehending the speech and writing of others, we share the board’s doubts about his fitness to practice law. Communication skills are central to the practice of law.” Id. at 1116-17. Nonetheless, the court left open opportunity for the lawyer to reapply after
On this point, commentary provided by the Association of Legal Writing Directors (ALWD) is spot on.\textsuperscript{302} In objecting to another portion of the ABA proposal, one that, "under specified circumstances, would allow a law school to waive the required course in legal analysis and reasoning, legal research, problem-solving, and oral and written communication," ALWD observed:

> [S]tudents whose first language is other than English may be misled into believing they can pass an American bar examination without a thorough understanding of the United States legal system, the unique hierarchy of legal authorities, and American legal writing conventions. Research and writing skills are essential for lawyers, whether they practice in the United States or abroad. Omitting a rigorous writing experience from the proposed criteria for certified LL.M. programs . . . would undermine the goal of effective law practice by graduates.\textsuperscript{303}

Thus, ALWD urged, "[t]he proposed certification standard should not mislead foreign law students whose first language is not English by suggesting they can pass the state bar exam without successfully completing a rigorous legal writing course," and "[s]tate supreme courts cannot be expected to allow foreign lawyers to seek licensure in their states without the Council's assurance that those lawyers are well-prepared to competently practice law in this country."\textsuperscript{304}

f. Law School Commentary on the Exclusion of Distance-Learning Courses From Counted Coursework

Alabama's then-Dean, Kenneth Randall, raised an interesting point about the rejection of any distance-education component in fulfillment of the instructional credits required by the LL.M. Certification Criteria.\textsuperscript{305} Dean Randall focused, in particular, on Section (4) of the Criteria, which provides that "[a]ll courses must be taught . . . in the United States or its territories," and observed:

> [T]he requirement that courses must be taught "in" the U.S. is unclear. The language could be read to mean that both the teacher and student must be in the U.S. If so, then section (4) would impinge on the progressive use of technology-based education, or a hybrid model of traditional and non-traditional education. Having served as the first Chair of the Section's Committee on Technology, I assure you that the Standard on distance learning eighteen months because "[i]n time, however, applicant's education and intelligence may enable him to overcome the language barrier that now stands in his way." \textit{Id.} at 1117.


\textsuperscript{303} \textit{Id.}

\textsuperscript{304} \textit{Id.}

\textsuperscript{305} Interestingly, unlike New York's and the ABA's LL.M. criteria, Georgia's newly adopted Rule and criteria do not address whether any portion—or even all of—the LL.M. coursework can be offered through distance learning. See authorities cited supra note 16.
education was not intended to apply to graduate programs. Maybe the drafters do not mean to address technology-based learning, but that is unclear from section (4). This requirement is potentially difficult to reconcile with the Standards on distance education.\textsuperscript{306}

Section (4)'s restriction is reinforced by New York's revised Court of Appeals Rule 520.6, which specifically states that "[n]o credit shall be allowed for correspondence courses, on-line courses, courses offered on DVD or other media."\textsuperscript{307} As the author of this article has written elsewhere, the brick-and-mortar restricted paradigm of the Proposed Criteria and of N.Y. Rule 520.6 unreasonably restricts foreign-educated lawyers and prevents them from obtaining the benefit of the American legal education paradigm.\textsuperscript{308} This is a viewpoint shared by at least one other law school dean who commented on the Proposed LL.M. Certification Criteria by requesting that Section (4) of the Criteria "be revised to clarify that it does permit courses to be offered in the United States through distance education" when the "[c]ourses [are] taught by U.S. law professors from law schools in the U.S. by distance education technology."\textsuperscript{309}

Faced with a concrete example of the effects of excluding online coursework, Florida Coastal urged the ABA to modify its Qualifying LL.M. Criteria, not only to allow credit for online courses, but to allow for a degree—such as Coastal's LL.M. Program for International Lawyers—that is delivered entirely online:

An international lawyer otherwise meeting the qualifications to take a U.S. bar exam should not be forced to spend six-figures in tuition, living, and lost wages—sometimes giving up her job and leaving her family—to earn a graduate law degree. Distance education levels the playing field for lawyers of diverse backgrounds.\textsuperscript{310}

Coastal criticized the ABA proposal as "unreasonably . . . treat[ing] all technology-based programs the same—even if they involve real-time interactive learning where international lawyers log into the courses while the professor is teaching them and have an opportunity for interaction."\textsuperscript{311} Thus, Coastal insists that the ABA either change the Qualifying LL.M. Program Criteria to embrace online coursework, or make "[a]n exception"—of what type it is

\textsuperscript{306} E-mail from Kenneth C. Randall, Dean, Ala. Univ., to Hulett H. Askew, Consultant, Section of Legal Educ. and Admission to the Bar, A.B.A., et al. (May 22, 2011).


\textsuperscript{308} See Jeffrey A. Van Detta, A Bridge To The Practicing Bar Of Foreign Nations: Online American Legal Studies Programs As Forums For the Rule Of Law And As Pipelines To Bar-Qualifying LL.M. Programs In The U.S., 10 S.C. J. INT'L L. & BUS. 63 (2013).

\textsuperscript{309} Letter from C. Peter Goplerud, Dean, Fla. Coastal Sch. of Law, to Charlotte (Becky) Stretch, Assistant Consultant, Section of Legal Educ. and Admission to the Bar, A.B.A. (July 15, 2011), http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/20110927_comments_proposed_rule_criteria_foreign_educated_lawyers.authcheckdam.pdf. In the alternative, Dean Goplerud proposed that "the ABA should grand-father the LL.M Program for International Lawyers at Florida Coastal School of Law," because "the school and its applicants and students have relied on [the 2010] acquiescence [of the ABA] in offering and participating in" Florida Coastal's online LL.M. program, and thus, Section (4) of the proposed Criteria "would take away the value of what the Section of Legal Education previously provided to Florida Coastal when acquiescing in its LL.M. Program for International Lawyers." \textit{Id.}

\textsuperscript{310} \textit{Id.}

\textsuperscript{311} \textit{Id.}
unclear — "for programs such as Florida Coastal's, which existed prior to the proposal of the Model Criteria." 312

g. Law School Commentary on the Model Rule Requirement that the LL.M.-Granting Law School Certify to State Bar Authorities that a Graduate's Foreign Law Degree Meets the Model Rule's Requirements

As discussed in Part V.K, one of the most controversial aspects of the ABA proposal is requiring law schools offering Qualifying LL.M. programs to certify specific aspects of each foreign-lawyer LL.M. student's foreign legal education. The law schools which addressed that requirement of the Qualifying Criteria were unanimously opposed to it, and their comments are addressed in Part V.K of this article. The author shares some of the expressed concerns but believes, as explained in Part V.K, that law schools can formulate a plan for discharging that obligation.

3. Comments From Other Organizations Within Legal Education

In addition to the commentary provided by ALWD discussed in Part V.B.2.e, supra, two other prominent organizations responded to ABA Consultant Askew's invitation for commentary on the ABA proposal from the larger legal community (i.e., organizations in addition to State Supreme Courts, bar examiners, and law schools): the Bar Admissions Committee of the ABA's Section on Legal Education and Admissions to the Bar and the Clinical Legal Education Association (CLEA). We shall examine them seriatim.

The Bar Admissions Committee provided feedback from its July 2011 meeting, at which the ABA proposal was discussed. Interestingly, while the bar examiners and state courts who have commented on the ABA proposal are largely positive and supportive, the Bar Admissions Committee's "members expressed a variety of views and opinions and there was little consensus." 313 Some expressed the concern shared by law school deans that the ABA is "dictating content of courses" through the proposal, while "[o]thers pointed out that the model is designed to qualify foreign-trained students to take the are examination and, therefore, regulation of content is appropriate," noting "that this is just one specific type of LL.M. program designed to qualify for the bar examination, and the criteria do not impact the content of other types of LL.M. programs." 314 Committee members—like the law schools themselves—were divided on the bar-passage reporting criterion. Some contended it "would not serve any purpose," while others observed that it "provides a necessary consumer protection." 315 Other concerns and questions were expressed about three issues: whether a

312 Id. Georgia's newly adopted rule and criteria do not address whether any portion—or even all of—the LL.M. coursework can be offered through distance learning; thus, whether LL.M. course work completed by uncertain, and may one day be tested by LL.M. holders from Florida Coastal, as well as other law schools offering American Legal Studies or United States Legal Studies LL.M. Programs. See Van Detta, supra note 308, at 116-19.

313 E-mail from Kellie Early to Charlotte (Becky) Stretch, supra note 275.

314 Id.

315 Id. Other members of the Committee questioned whether "law schools would be able to gather bar passage information to report it accurately." Id. That is a puzzling statement, given that a principal feature of the
better alternative might be to "amend[ ] the Standards to allow law schools to grant up to two years of credit towards a J.D. degree for study at a foreign law school;" whether the phrase "authorized to practice law" in a foreign jurisdiction is sufficiently defined; and "what th[e] certification process [for the Qualifying LL.M. program] would look like[,] [and] [h]ow it would be carried out."

The CLEA, "the nation's largest association of law teachers," wrote to express CLEA's agreement "with the Council's proposed Model Rule's requirement that an approved curriculum for an LL.M. Degree for the Practice of Law in the United States must include instruction in constitutional law, civil procedure, professional responsibility, and legal analysis, reasoning, research and communication," particularly because ABA "Standard 302(a) requires substantial instruction in these areas for J.D. students, and foreign-educated LL.M. students are equally in need of these courses." Stressing the "importance of professional skills," however, CLEA recommended that "[i]nstruction and experience in professional skills should be a mandatory component" of the Qualifying LL.M. Criteria. CLEA proposed "the insertion of [a] criterion 3(e)," which would state "[a] minimum of 1400 minutes in other professional skills [is] generally regarded as necessary for effective and responsible participation in the legal profession." As CLEA pointed out, "[l]icenses awarded to foreign-educated lawyers do not restrict the types of clients they may represent, the kinds of cases they can handle, or the types of proceedings in which they may appear," and sufficient exposure to skills training cannot be assumed since "these LL.M. candidates..."
come from widely disparate legal cultures—some common law, some civil law, some
autocratic, and others strictly administrative in nature."

The author endorses CLEA’s recommendation and would further recommend that
this requirement be added as an addition, rather than a substitution, to the twenty-six-credit
hours stipulated in the ABA’s proposal. This is good pedagogical practice, in light of the
privileges that flow from American bar admission (as contrasted with the stratified bars of
many other countries). Moreover, it is prescient, since California—along with New York, one
of the two most sought-after U.S. bar admissions by foreign lawyers—is quite seriously
studying (in preparation to implement) a mandatory legal skills education requirement for all
attorneys seeking California bar admission.

C. A Qualifying LL.M. Program of Study Under the ABA Model Rule

In its proposed form, the ABA Model Rule’s requirements would translate into a
LL.M. program that must be completed within thirty-six months. Of course, realistically,
students will seek programs that allow them to complete the LL.M. in a single academic year
and are likely to seek permission from state bar authorities to sit for examination in the July
administration immediately following graduation. The coursework must include at least
twenty-six credit hours, and, of those hours, sixteen are allocated to course work of the
student’s choice, and ten are required in the following subjects: U.S. Constitutional Law
(three hours), State-Federal Civil Procedure (three hours), Professional Responsibility (two

321 Id.

322 Georgia’s new rule and qualifying LL.M. criteria essentially adopt that approach. In addition to requiring a
three-hour course in Legal Research and Writing, Georgia’s Curricular Criteria mandate that “[a]t least one
course or equivalent must be selected from Trial Advocacy, Appellate Advocacy, Negotiation, Mediation,
Transactional Practice, Alternative Dispute Resolution, Fundamentals of Law Practice, Externship Placement,
and Legal Clinic.” SUPREME COURT OF GA. OFFICE OF BAR ADMISSIONS, supra note 16.

323 See TASK FORCE ON ADMISSIONS REGULATION REFORM, PHASE 1 FINAL REP. 1 (2013), available at
http://www.calbar.ca.gov/Portals/0/documents/bog/bot_ExecDir/ADA%20Version_STATE_BAR_TASK_FORCE
REPORT_(FINAL_AS_APPROVED_6_11_13)_062413.pdf. “The Board of Trustees of the State Bar of
California charged the Task Force on Admissions Regulation Reform with ‘[c]xamin[ing] whether the State
Bar of California . . . should develop a regulatory requirement for a pre-admission competency training
program, and if so, proposing such a program’ for submission to the Supreme Court.” Id. The Task Force
recommends that the state bar pre-admission competence program require that “all new Bar admittees
demonstrate that they have taken at least 15 units of practice based, experiential coursework while in law
school, in addition to existing requirements for licensure,” id. at 15, or that “they have completed a ‘pre-
admission externship, clerkship, or apprenticeship alternative,’” id. at 18. The Task Force is quite conscious
that what it is proposing may be tantamount to a national standard:

When we examined what other state bars are doing in this area, we found that
most states have already begun implementing new requirements to enhance competency
training. A clear trend toward enhanced competency training for new lawyers is evident.
That trend points toward taking action, not shirking away from it. Our State Bar, with
230,000 licenses, is the largest organized bar in the country, by far. If we take a leading
position on this issue, as New York has already done, we suspect that we do may
point the way towards ultimate national uniformity.

Id. at 22-23 (footnotes omitted) (emphasis added).

324 See A.B.A. SEC. LEGAL EDUC. & ADMISSION B. REP., supra note 18, at 6-7. Notably, the new Georgia
qualifying LL.M. criteria do not state a limit. See SUPREME COURT OF GA. OFFICE OF BAR ADMISSIONS, supra
note 16.
While the sixteen courses of the student’s choice obviously include elective courses, a foreign-educated lawyer would, in most instances, be well advised to enroll in doctrinal courses that further enhance his or her preparation to pass the bar examination administered by the jurisdiction(s) in which he or she seeks admission to law practice.

N.Y. Rule 520.6 appears to be in harmony with the ABA proposed Model Rule. The New York Bar examiners, unlike those in California, do not prescribe particular courses for the LL.M. program, and require only twenty-four credits (16,800 instructional minutes) compared to twenty-six credits (18,200 instructional minutes) that the ABA proposed Model Rule requires. However, to the extent that an LL.M program take up the Georgia Bar Examiner’s suggestion (which has now become a part of Georgia’s newly issued Rule and qualifying LL.M. criteria) of adding “skills courses,” such as “trial techniques, transactional practice, negotiation, arbitration, and mediation,” N.Y. Rule 520.6 limits “other courses related to legal training” to a maximum of six hours. It is unclear, which, if any, of the kinds of skills courses enumerated by the Georgia Bar examiners (and other commentators on the Proposed Model Rule) would fall within New York’s interpretation of “other courses related to legal training.”

Georgia’s new rule and LL.M. curricular criteria have adopted most (but not all) of the ABA’s proposed qualifying LL.M. criteria. In terms of mandated course work, Georgia has mandated thirteen hours of required coursework—more than what the ABA’s proposed criteria included—and within that required coursework, Georgia has added an hour to the required course in Legal Research and Writing, and has added a required two-hour course introducing foreign-educated lawyers to the study of U.S. law. Consistent with the Georgia Office of Bar Admissions’ comments submitted to the ABA Consultant about the ABA proposals in 2011, the Georgia criteria have added more specificity both in terms of doctrinal courses as well as skills courses. Unlike the ABA proposed criteria, the Georgia criteria require that, among the credit hours, there must be “at least” one course completed in Administrative Law, Commercial Law (Uniform Commercial Code), Contracts, Corporations, Evidence, Property, or Torts; and that, among the credit hours, there must be “at least” one skills course completed in Alternative Dispute Resolution, Appellate Advocacy, Externship Placement, Fundamentals of Law Practice, Legal Clinic, Negotiation, Mediation, Transnational Practice, or Trial Advocacy.

How would the ABA Proposed Model Rule and Criteria comport with California’s current Guidelines For Implementation of Rule 4.30 (“California Guidelines”), which govern

325 A.B.A. SEC. LEGAL EDUC. & ADMISSION B. REP., supra note 18, at 6-7. The ABA proposed Model Rule would allow waiver of U.S. Constitutional Law, State-Federal Civil Procedure and Legal Writing, Research, and Analysis, if the student presents adequate proof that he or she “has taken a substantially equivalent course.” Id.
326 See N.Y. COMP. CODES R. & REGS. tit. 22, § 520.6 (2013).
327 Memorandum from Sally Evans Lockwood to Charlotte (Becky) Stretch, supra note 218; see SUPREME COURT OF GA. OFFICE OF BAR ADMISSIONS, supra note 16.
328 § 520.6(3)(vii)(b).
329 SUPREME COURT OF GA. OFFICE OF BAR ADMISSIONS, supra note 16.
330 See supra notes 16, 19, & 29 for details on the Georgia requirements, which became effective by order of the Georgia Supreme court on 21 February 2014.
331 SUPREME COURT OF GA. OFFICE OF BAR ADMISSIONS, supra note 16.
Again, the ABA proposed Model Rule exceeds California’s credit hour minimum of twenty (14,000 instructional minutes). However, California—unlike New York—prescribes required subjects. California’s rule overlaps somewhat with the ABA Proposed Model Rule, mainly in that both require courses in Constitutional Law, Civil Procedure, and Professional Responsibility. In addition, the California Guidelines mandate that the Professional Responsibility course “cover[ ] the California Rules of Professional Conduct, relevant sections of the California Business and Professions Code, the ABA Model Rules of Professional Conduct, and leading federal and state case law on the subject.” Thus, an American Legal Studies LL.M. degree program sufficient for bar-examination seating in California must have a Professional Responsibility course expanded to include coverage of the California version of the Rules of Professional Conduct as well as the California Business & Professions Code.

How, then, does a law school make its American Legal Studies LL.M. degree compliant both with the ABA Model Rule and California’s rule? First, the LL.M. program will have to mandate the Professional Responsibility course and expand its content to encompass the specifically prescribed elements of California law. Second, the LL.M. program will need to mandate the first-year courses in Civil Procedure and Constitutional Law, as the ABA Proposed Model Rule also requires. Third, to complete the instructional requirements of the California Guidelines from its bar subjects and to satisfy the ABA Proposed Model Rule’s credit-hour totals, the most effective strategy will be to mandate the first-year courses in Torts and Contracts. It otherwise appears fairly straightforward to make a qualifying LL.M. program compliant with California’s requirements by mandating the first-year courses in Torts, Contract, and Civil Procedure, which, coupled with the Constitutional Law course required by the ABA, will exceed the California Bar subject requirement.

There is, however, a caveat. The California Bar Examiners also list specific California laws which are tested within the required bar subjects. What is not clear from the California Guidelines is whether credit for bar subject courses, beyond the Professional Responsibility course, would depend on those LL.M. program courses having California-specific content. It would be useful for the California Board of Bar Examiners to clarify

332 See COMM. OF BAR EXAM’RS/OFFICE OF ADMISSIONS, STATE BAR OF CAL., GUIDELINES FOR IMPLEMENTATION OF CHAPTER 2, RULE 4.30 OF THE ADMISSIONS RULES (2009) [hereinafter GUIDELINES].
333 Compare id. § 1.2, with A.B.A. SEC. LEGAL EDUC. & ADMISSION B. REP., supra note 18, at 6.
334 Compare GUIDELINES, supra note 332, § 1.2, with N.Y. COMP. CODES R. & REGS. tit. 22, § 520.6.
335 See GUIDELINES, supra note 332, § 1.2; A.B.A. SEC. LEGAL EDUC. & ADMISSION B. REP, supra note 18, at 6.
336 GUIDELINES, supra note 332, § 1.2.
this point. Perhaps with the emergence of the ABA proposed Model Rule and Qualifying LL.M. Criteria, the California Bar Examiners will have occasion to do so. 338

At the very least, matriculating LL.M. students should submit to the director of a qualifying LL.M. program a list of the states in which they will seek bar admission. The director should counsel each student to contact those bar examiners directly in order to check on state-specific variances from national subjects as tested in particular states. Students should then consult with law school’s faculty, appointed to serve as advisors to qualifying LL.M. students, for guidance in selecting courses to meet the requirements that the bar examiners communicate. Those LL.M. students intending to take the California Bar Examination should make specific inquiries about the California-specific content noted above. 339

In sum, an ABA curriculum could satisfy the California Rule in subject coverage by requiring, in addition to the ABA’s three credits of Constitutional Law and two credits of Professional Responsibility (as modified with modules included in California’s Rules of Professional Responsibility, and Business & Professions Code), at least seven credits in basic first-year courses, i.e., Civil Procedure, Contracts, Real Property, and/or Torts. Of course, among the sixteen ABA credit hours of electives, upper-division courses that are required, at least at some law schools, such as Criminal Law, Criminal Procedure, Evidence, Remedies, Business Organizations, or Wills, Trusts & Estates, could also be credited to the twelve-hour minimum of California Bar subjects.

D. Approaches to Curricula for a Qualifying LL.M. Program: Matching the ABA’s Qualifying LL.M. Criteria to Existing Programs Within a Law School

One of the most attractive features of hosting a qualifying LL.M. program is that it does not necessarily require the addition of new sections or new faculty. Qualifying LL.M. programs are founded upon integrating the foreign-educated lawyer into regular J.D. division required courses. 340 For example, a law school with a full-time day division and a part-time division in the evening and/or day has the option to place foreign-educated LL.M. students into regular day division first- and second-year required courses, either full time or part time; into regular evening division courses; or into the required courses offered in the consolidated format of more specialized, existing J.D. Programs 341 (such as the program Atlanta’s John

338 See Memorandum from Gayle Murphy, Senior Dir., Bar Admissions, to the Cal. State Bar Comm. of Bar Exam’rs (Apr. 20, 2011) (transmitting to the California State Bar’s Committee of Bar Examiners a copy of the ABA Proposed Model Rule and Qualifying LL.M. Program Criteria along with “a copy of the Committee’s current information and guidelines regarding the use of an LLM degree in determining the eligibility of the foreign-educated applicants to take the California Bar Examination.”). The memorandum concludes with a recommendation “that this item be referred to the Subcommittee on Educational Standards for further review and study and that a response to the proposal be included on the Subcommittee’s goals for this year.” Id.

339 It would also be worthwhile to suggest to LL.M. students that they contact the bar examiners and confirm to the qualifying LL.M. program director that they have done so. The program should establish a deadline for this notification as a means of keeping this task at the forefront of our LL.M. candidates’ attention.


341 For a discussion of trends and view in the development of concentration programs for J.D. study in American Law Schools, see Kevin E. Houchin, Specialization In Law School Curricula: A National Study
Marshall Law School offers). To ensure that LL.M. students can function appropriately in existing J.D. classes, a minimum set of TOEFL scores are recommended as well as collaboration with the language institute at the law school's university, or at a neighboring institution, of the kind epitomized by Georgia Tech's Language Institute, to assist LL.M. students who need to hone their English language skills. As a Qualifying LL.M. program grows and matures, a school may wish to consider a number of additional forms that might be added to, or substituted for, the original iteration of the program. LL.M. candidates should also have the option of enrolling in one additional course in the spring semester, with prior approval of the program Director. For those students interested in taking the New York or Washington D.C. bar examination, for example, taking or auditing the course in Evidence should be strongly recommended.

(2003) (J.D. seminar paper, University of Iowa College of Law), available at http://www.woodenpencil.com/research/JDspec041403.pdf. The kind of programs referenced here are those in which credit-hours for required courses have been redistributed to create an emphasis, in required as well as elective courses, in their chosen area of concentrated study. Mr. Houchin, in proposing a nomenclature of five distinctly different kinds of concentration programs, refers to such a program as a "track":

"Track" programs could require students to take a specific set of classes, and write within the area of specialization. A minimum grade point within the specialization and higher or additional admissions standards could also be required. Additionally, students would take classes in a specific order allowing classes to be specially planned to give students within the specialization a more in-depth study of the subject matter, potentially studying how there area of interest applies to other substantive areas of law that are not commonly part of the particular specialized area of study.


342 The pedagogy of placing foreign-educated LL.M. program students in classes with J.D. students has been recognized as both sound and desirable—indeed, some experts, such as N.Y.U. Law School’s most successful dean, say that this option is essential. See John Sexton, Structuring Global Law Schools, 18 DICKINSON INT’L. L. ANN. 451, 454-55 (2000) (“It ultimately comes down to integration—full integration into the heart of the school.”).


344 For example, for law schools in metropolitan legal markets, a Qualifying LL.M. Program might be modified to, or supplemented by, an all-evening format to be completed over two years for foreign lawyers who are working in residence to obtain an LL.M. while working full time in area law firms. Or, the program might be modified to, or supplemented by, a weekend class format to be completed over two years for foreign lawyers who are working in the United States, outside of the law school’s metropolitan area, and who need to commute to and from the city to study in the program, or are working in the metropolitan area, but whose work schedules make weeknight classes untenable.

The Qualifying LL.M. Program might be offered in a two-year iteration, to permit admission of foreign-educated lawyers whose English skills will require a slower pace of course work and more support from an external English skills-building program, such as the Language Institute at Georgia Tech. For some students who fall in this category it might be more appropriate to offer an entire fourteen-week summer session of intensive Legal Writing, Research and Analysis training, along with intensive external English-skills building program before taking up the regular studies of the one-year LL.M. Qualifying Program in the Fall Semester. In other words, foreign-educated lawyers with stronger English skills would have the following programmatic options: (1) start in the Fall Semester, in either in a one-year or two-year LL.M. track; (2) start in a two-year track in the Fall, with intensive work in the English skills-building program contemporaneously with law study at AJMLS; or (3) attend the intensive fourteen-week summer LRWA session while studying at the Language Institute, and then start in either the one-year or two-year LL.M. program track in the Fall. (The author is indebted to Professor Liza Karsai for her comments on an earlier draft that provided the basis for the options presented here.)
E. Factors to be Considered in Determining How Well-Positioned an American Law School is to Offer an American Legal Studies Program

Law schools offering a Qualifying LL.M. program must seek out and develop ties between themselves and those entities and organizations with foreign-educated lawyers. Many foreign law firms have a U.S. presence in major cities beyond the New York metropolitan area that we typically associate with trans-national commerce and law practice.\footnote{See, e.g., Kochar & Company, Advocates & Legal Consultants, WORLD SERVICES GROUP, http://www.worldservicesgroup.com/members-alpha.asp?action=display&cmm=5746 (last visited Feb. 1, 2014) (having its main office New Delhi, India). “The Atlanta office provides legal support to US & Canadian companies in setting up business operations in India. The office also assists Indian companies having business expansion plans in the US & Canada.” Id.} Law firms in those cities also seek to hire foreign-educated lawyers to assist clients with operations in their home countries.\footnote{See, e.g., Carole Silver, Lawyers on Foreign Ground, in CAREERS IN INTERNATIONAL LAW 12-13 (Mark W. Janis & Sallie A. Swartz eds., 2d ed. 2001). Employment of foreign-trained lawyers can be expected to increase as a result of the ABA Ethics Opinion that confirmed that it is permissible for American law firms to outsource legal work to foreign-educated lawyers under certain circumstances. See ABA Comm. on Ethics & Prof'l Responsibility, Formal Opinion 08-451 (Aug. 5, 2008) (discussing a lawyer's obligations when outsourcing legal and nonlegal support services), available at http://www.aapiparama.org/File/Main%20Page/ABA%20Outsourcing%20Opinion.pdf.} Cities also attract foreign-educated lawyers through initiatives such as the establishment of an international commercial arbitration center.\footnote{See, e.g., Bi-National Chambers of Commerce, GA. DEP'T ECON. DEV., http://www.georgia.org/business-resources/international-trade/bi-national-chambers-of-commerce/ (last visited Apr. 12, 2014) (“There are currently 42 bi-national chambers of commerce actively involved in Georgia’s international business community. These organizations work to assist their members develop business contacts, and they foster, promote and develop commercial relations and exchanges between Georgia and their countries.”).} In addition, law schools should forge relationships with the foreign-country chambers of commerce or other business societies located in their metropolitan area,\footnote{See Phil Bolton, Atlanta Aims for Arbitration Center to Ease Global Business, Global Atlanta (Mar. 24, 2011), http://www.globalatlanta.com/article/24640/.} whose activities include the promotion of business expansion, creating a need for foreign-trained lawyers to help expatriates bridge the gap between home legal systems and America’s legal system. Likewise, and perhaps most obviously, students for Qualifying LL.M. degree programs are often foreign lawyers providing legal services for foreign clients in the United States, such as the BridgehouseLaw Alliance.\footnote{See, e.g., About Us, BRIDGEHOUSELAW, http://www.bridgehouselaw.de/en/about-us.html (last visited Feb. 7, 2014).}

In addition, international firms of all sizes participate in referral networks of independent local firms, some of which cooperate on training, too. In this way, they offer the potential for more integration among member firms and more opportunities for LL.M. program candidates and subsequent employment of LL.M. program graduates. Law schools offering a Qualifying LL.M. program should work to ingratiate themselves with the leading referral networks such as Lex Mundi, Alfa International, LEGUS, International Network of Boutique Law Firms, and International Lawyers’ Network.\footnote{What We Don’t Know Can Hurt Us, supra note 189, at 1061-63, 1061 n.117, & 1062 n.118.} Likewise, company in-house counsel who are reassigned to the United States or who are hired abroad for U.S.-based parents or subsidiaries will have an interest in bar admission in the United States, and active
participation in organizations catering to such groups, such as the Association of Corporate Counsel, can create valuable contacts within that community, which will help law schools draw foreign corporate counsel to their LL.M. programs. These contacts will prove invaluable to marketing the Qualifying LL.M. program to groups of lawyers who have a real need for it. They will also prove invaluable as critical starting points from which a referral network among foreign law firms and foreign-educated lawyers can develop to create a steady stream of students for the Qualifying LL.M. program. The next logical constituency after law firms are organizations that sponsor, facilitate, or provide information to foreign-educated law students and lawyers about opportunities for graduate legal study abroad, particularly in the United States. For example, the Deutsch-Amerikanischen Juristen-Vereinigung (DAJV), known in English as the German-American Lawyers Association, is the kind of organization with which a law school offering a Qualifying LL.M. program can establish an ongoing relationship to create a funnel for foreign-educated lawyers to participate in both online Global Law Forums and Qualifying LL.M. programs in America Legal Studies.

Organizations such as DAJV provide an additional, long-term source of potential students for American Legal Studies LL.M. Programs.

F. Cohort Size of Each Qualifying LL.M. Class

The size of a qualifying LL.M. program depends on a range of factors, including the level of J.D. enrollment (i.e., availability of seats into 1L doctrinal classrooms); the level of enrollment in any specialty J.D. program in which LL.M. students maybe integrated (i.e., availability of seats in the condensed 1L course sections currently available); the size of the faculty (i.e., the availability of faculty to teach additional condensed 1L course sections should the specialty J.D. program grow too large to accommodate LL.M. students in its classes, or in the event that the law school decides it is more appropriate to establish separate, condensed first-year course sections specifically for the Qualifying LL.M. program); and external economic factors.

Among American-studies style LL.M. programs, the upper limit of most is about twenty-five foreign-educated students, although some large law schools have reported higher enrollments. Over what time period and at what rate programs have been ramped up to that level is not widely reported. However, UNC School of Law at Chapel Hill has shed some light by unveiling its plans for an American studies program. UNC will open its program with three to five foreign-educated lawyers integrated into its J.D. program classes. Over the course of five years from the entry of this first, small class, UNC’s objective is to

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352 See, e.g., What We Don’t Know Can Hurt Us, supra note 189, at 1069-70, 1070 n.140.
355 See, e.g., LL.M. in Legal Studies Overview, UCONN SCH. L, http://www.law.uconn.edu/admissions/llm-us-legal-studies (last visited Feb. 9, 2014) (noting that the University of Connecticut U.S. Legal Studies LL.M. program usually has between twenty and thirty students).
gradually increase the number of accepted foreign-educated lawyers each year until a stable enrollment of twenty-five is reached. News reports about UNC's plans did not mention the other side of the equation—anticipated number of applications.

G. English Proficiency and Other Admission Criteria for Qualifying LL.M. Program Students

An important issue not addressed in the ABA Proposed Rule or most bar admission standards is the role of proficiency in the English speech and writing in determining qualifications for a foreign-educated lawyer to take the bar examination. The issue has come up in a major state supreme court as one of character and fitness. The Supreme Court of Ohio sustained its character and fitness board of commissioner's denial of admission to an applicant from India whose English skills the bar examiners had found seriously wanting. There is, however, no clear standard yet articulated by most state high courts or bar examiners, although the problem has been recognized in academic literature.

How to deal with language proficiency raises questions that each Qualifying LL.M. program will have to answer for itself. First, in setting an English proficiency standard, the program will need to balance considerations of the minimum level of English proficiency needed to succeed in the LL.M. program and a bar examination against the number of interested and otherwise qualified foreign-attorney applicants who may be screened out by that standard. Second, the program will need to consider strategies that improve the English skills of students to the point that they can satisfy that standard and complete the LL.M. program.

In looking generally at somewhat similar, extant American legal studies programs, one finds that the TOEFL examination is often used, with a minimum score of 600 out of 777


358 *In re Application of Singh*, 800 N.E.2d 1112, 1117 (Ohio 2003); see also *Foreign Lawyer’s Difficulty with English Renders Him Unfit to Practice Law in Ohio*, in 20 LAWYERS MANUAL OF PROFESSIONAL CONDUCT 39, 39 (A.B.A./B.N.A. 2004).


360 See Julia E. Hanigsberg, *Swimming Lessons: An Orientation Course for Foreign Graduate Students*, 44 J. LEGAL EDUC. 588, 598 (1994) (“Those who make graduate admissions policy should recognize that students admitted with insufficient language skills face obstacles difficult to surmount”).

361 See id. (“The best solution seems to be to direct students towards English language programs, preferably in the summer before they commence LL.M. study.”); Teresa Brostoff, Ann Sinshmeer & Megan Ford, *English for Lawyers: A Preparatory Course for International Lawyers*, 7 LEGAL WRITING 137 (2001) (providing a model for an English for Lawyers (EFL) course that law schools could offer to prepare foreign lawyers to meet the language requirements of LL.M programs in the United States); Mark E. Wojcik & Diane Penneys Edelman, *Overcoming Challenges in the Global Classroom: Teaching Legal Research and Writing to International Law Students and Law Graduates*, 3 J. LEGAL WRITING 127 (1997) (recommending that professors “meet[ ] with [foreign] students at a greater frequency throughout the year, either individually or in small groups,” and that the students themselves have mentors and meet with specialists in the school’s writing center).
for the paper-based version or 250 out of 200 for the computer based version.\textsuperscript{362} As set out in the accompanying footnote, Boston University School of Law’s LL.M. program requirements offer a typical example of the English language requirement appropriate for foreign-educated lawyers in American LL.M. programs.\textsuperscript{363} Before setting English proficiency standards, law schools might consider undertaking a complete survey of the published English proficiency standards among U.S.-based LL.M. degree programs. In addition, a law school considering a Qualifying LL.M. Program should consider consulting with directors of other LL.M. degree programs, particularly those in the American Legal Studies area, to gain more insight into their experiences with various English proficiency standards.

Some schools provide for intensive English training for foreign-educated students lacking English proficiency. For example, an LL.M. program can provide admission conditioned on participation in an intensive English skills building program and retaking of the TOEFL test.\textsuperscript{364} For a law school’s Qualifying LL.M. Program, it will be helpful to identify intensive English training programs to which conditional admittees can be referred to improve their English skills before matriculation. In Atlanta, for example, Georgia Tech’s Language Institute offers such programs.\textsuperscript{365} "Georgia Tech’s Language Institute is a member of both the UCIEP (Consortium of University and College Intensive English Programs), and the AAIEP (American Association of Intensive English Programs), organizations that

\textsuperscript{362} Carole Silver, \textit{Internationalizing U.S. Legal Education: A Report on the Education of Transnational Lawyers}, 14 \textit{CARDOZO J. INT’L & COMP. L.} 143, 157 (2006). Boston University’s LL.M. program materials includes the following Q & A:

\textbf{Should I apply if my TOEFL score is below 250/600/100?}

Proficiency in English is a significant factor in our admissions decisions. A minimum total score of 250 with 25 in each subscore on the computer-based TOEFL; a minimum total score of 600 on the paper-based TOEFL; or a minimum total score of 100 on the internet-based TOEFL, with subscores of 25 (reading), 25 (listening), 25 (writing) and 23 (speaking) are generally required and most admitted LL.M. applicants have substantially higher scores. If you scored below 250/600/100 on TOEFL, but are otherwise qualified, you may still apply, but we may ask you to re-take TOEFL. In that case, we will hold off on making an admissions decision until we receive a higher score.


Applicants whose college education was in a language other than English are required to present a recent score from one of the following: the Test of English as a Foreign Language (TOEFL), the International English Language Testing System (IELTS), or the International Legal English Certificate (ILEC). Hofstra Law will look for a minimum TOEFL score of 250 on the computer-based test, 600 on the paper-based test, or 100 on the Internet-based test. The minimum accepted IELTS score is a 7 and the minimum on ILEC is a CAE/CI level. International applicants who can demonstrate that their college education was taught in English do not need to take TOEFL/IELTS/ILEC but must indicate this exemption at the time of applying for the J.D. or LL.M. program.


\textsuperscript{363} See \textit{Frequently Asked Questions}, supra note 362.

\textsuperscript{364} See id.

promote standards of excellence in English as a second language training in the US. The Language Institute’s programs are comprehensive, geared to specific levels of proficiency required for specific undertakings, and extensive in their development of English language skills. The program is open to students outside of the Georgia Tech community, and the application processes are straightforward and accessible. The program tuition is $2,140 per session for F-1 visa holders. Courses are offered in evening sessions, online sessions, and summer sessions. Foreign lawyers matriculating into a Qualifying LL.M program in Georgia, for example, would be most likely to attend one of the summer sessions preceding the start of their fall semester. They will find an assortment of programs at Georgia Tech to meet both their incoming skill levels and the programmatic language demands of a Qualifying LL.M. program.

In addition, variations on the basic Qualifying LL.M. program can be envisioned in which otherwise qualified foreign lawyers with English proficiency challenges can build English proficiency while at the same time commencing their LL.M. studies. For example, such students might start in a two-year LL.M. track in the fall, with intensive work in an English skills-building program contemporaneously with LL.M. study. Alternatively, such students might attend an intensive fourteen-week summer Legal Writing, Research and Analysis session while studying in an English skills-building program, and then start in either a one-year or two-year LL.M. program in the fall. There is precedent for such programmatic options. Georgetown’s LL.M. programs include a program with a certificate in legal English for foreign law graduates. That program “provides international lawyers the opportunity to obtain an LL.M. degree while improving and enhancing their English. It is a program of four semesters of full-time study at Georgetown Law, offered for foreign law graduates, leading to both a Master of Laws degree (LL.M.) and a Certificate in Legal English.” However, such a program can be challenging to administer outside of the large, well-financed private university environment. Georgetown, for example, is able to offer “an intensive curriculum that allows highly qualified applicants to develop their general and legal English language skills in a legal context” by virtue of its University resources that permit “[s]tudents [to] work closely with faculty members who have expertise in both law and linguistics, receiving

366 Id.
369 Costs, GA. TECH. LANGUAGE INST., http://www.csl.gatech.edu/iep/costs (last visited Feb. 22, 2014). The complete cost estimate, including other fees and room and board for those who require it, comes to a minimum of $5,352.00. Id.
372 See id.
373 See Two-Year (Extended) LL.M. with Certificate in Legal English for Foreign-Trained Lawyers, supra note 204.
374 Id. As basic requirements for its two-year program, Georgetown asks for “a strong record of academic achievement in law studies; a TOEFL iBT (Internet-based) score of 85-100 points; and professional legal experience.” Id.
feedback and individual attention that allows each student to work toward his or her individual goals.\textsuperscript{375} For any law school seeking to inaugurate a Qualifying LL.M. program, or seeking to expand an existing LL.M. program to embrace a Qualifying LL.M. option, a similar undertaking would require working closely with faculty outside of the law school.

Given its mission, preparing foreign-educated lawyers to qualify for and pass state bar examinations, a Qualifying LL.M. program will need more stringent admission requirements than typical LL.M. study in the United States would require because the Qualifying LL.M. program obviously involves more than an informative conversation about law. The Qualifying LL.M. program involves a course of instruction with specific bar-examination and post-admission law practice objectives that are not sought by those who prefer the LL.M. degree for other reasons. Thus, the admission criteria for a Qualifying LL.M program will need to be developed with these additional, specialized aspects of its mission in mind. The criteria should internalize the mission. In doing so, the Qualifying LL.M. Criteria should include the Bachelor’s degree or its equivalent in the foreign-educated lawyer’s home country; legal education, whether at undergraduate or graduate level, in the lawyer’s home country; a record of accomplishment in previous education predictive of academic success in response to the special demands of the Qualifying LL.M. program; and admission to the practice of law by the relevant authorities in the lawyer’s home country.

However, a law school implementing a Qualifying LL.M. program should be cautious about trying to set detailed or numerical academic achievement standards in advance. Given the plethora of educational institutions, the variety of legal cultures, and the unique structure of the bar in each country, assessment of individual records will be needed in order to make fair and effective admission decisions. Therefore, the admissions process will work best if done on a case-by-case basis, by someone with expertise in reviewing transcripts and other records of foreign degree programs and related foreign educational and professional credentials.

Admission requirements for American Legal Studies LL.M. programs vary in some phraseology, but they essentially boil down to a “law degree (J.D., LL.B., or equivalent) from a non-U.S. law school,” along with English proficiency requirements.\textsuperscript{376} While the typical American Studies LL.M. program has fairly generalized admissions requirements,\textsuperscript{377} a

\textsuperscript{375} Id.

\textsuperscript{376} See, e.g., U.S. Legal Studies, LL.M., supra note 21.

\textsuperscript{377} See, e.g., LLM Admissions, VT. L. SCH., http://www.vermontlaw.edu/Admissions/LLM_Admissions.htm.

The University of Connecticut Law School’s U.S. Legal Studies program has one of the more specific, published admissions requirements:

[Applicants are required to hold or expect to receive a degree from a recognized law faculty outside the United States before the start of the LL.M. academic year. The admissions committee considers the applicant’s academic performance, intellectual curiosity and professional experience. The School of Law admits approximately 20 LL.M. candidates each year; the number of applications and expressions of interest significantly exceed that number. Consequently, admission is selective and limited to those who demonstrate academic excellence.

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Unless the applicant qualifies for an exemption as outlined below, any international applicant who earned his or her first law degree outside the U.S. must obtain a minimum TOEFL IBT® score of 85 or a minimum IELTS score of 6.5, in order to be considered for admission to the LL.M. Programs at UConn Law. However, if the
Qualifying LL.M. Program will need to set its requirements in accordance with the proposed ABA Model Rule, which requires the kind of legal education and law-practice admission standards as proposed above.

H. Immigration Matters

Since the student population sought by Qualifying LL.M. programs are foreign-educated lawyers, a law school can expect that a significant portion of its LL.M. students will be citizens of other countries. That fact, in turn, raises the potential that there will be accepted students who face issues under U.S. immigration law, many of which will involve visas. 378 A law school offering a Qualifying LL.M. program needs to consider what its stance will be vis-à-vis students who find themselves with immigration law issues. 379 Many schools advise students of the potential for immigration law issues and counsel students to take personal responsibility for resolving them. Some institutions, such as St. John’s University, have an “International Student and Scholar Services Office” dedicated to advising and

applicant meets this required minimum but does not attain a score of 90 or higher on the TOEFL IBT® or 7.0 or higher on the IELTS, the applicant must further substantiate proficiency in English through additional evidence of English language skills. This substantiation must include, but is not limited to, a strong writing sample in conjunction with an interview with an Admissions representative, conducted in-person, by phone, or online (using Skype or similar service).

If the applicant’s TOEFL IBT®/IELTS score is lower than the required minima of 85 on the TOEFL IBT® or 6.5 on the IELTS (or if the applicant is unable to substantiate proficiency in English through additional evidence as defined in the prior paragraph), the applicant may nevertheless be considered for conditional admission.

How to Apply, LL.M in U.S. Legal Studies, UCONN SCH. L., https://www.law.uconn.edu/admissions/llm-us-legal-studies/?qt-field_collection_quicktabs=3 (last visited Feb. 22, 2014). In some ways, Thomas E. Cooley Law School’s admissions requirements are even more detailed and include:

- an earned first degree in law, or its equivalent, from a recognized university outside the United States that is duly accredited in the country; a distinguished academic record, or has clearly demonstrated by experience, academic performance or other qualifications, the ability to perform well in the LL.M. program; certification, or capability of certification, to practice law in their country; undergraduate major and academic performance; a written personal statement; a letter of recommendation; and a writing sample.


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assisting foreign students.\textsuperscript{380} Of course, not all law schools have a major university on which to fall back or a specialized office for international students. In that event, a law school’s administration must determine whether to create such a function in-house or seek assistance from another area school that has such an office and more routinely has had to assist foreign students in dealing with immigration status matters.

I. Assessing Applicant Credentials

Law schools experienced in offering LL.M. programs have developed standard practices and employ a third-party service provider to assess credentials of foreign applicants for their LL.M. programs. A typical example of the approach comes from the American Legal Studies LL.M. program at Boston University, which “strongly recommend[s] that international applicants register with the LL.M. Credential Assembly Service provided by the Law School Admission Council (LSAC)[,]” which “collects and authenticates the academic records and TOEFL scores of international lawyers who are applying for admission to U.S. LL.M. programs, and sends reports to participating LL.M. programs to which these lawyers have applied.”\textsuperscript{381} It should be noted that “[t]he LSAC LL.M. Credential Assembly Service


Every foreign law school graduate who is not a U.S. citizen is responsible for providing complete information to the St. John’s University’s International Student and Scholar Services Office so it will be able to assist in processing requests for a Form I-20. Foreign LLM applicants who received an admission letter from the Law School for the LLM Program in US Legal Studies must fill out the following form.

Please note that the University is not involved in Visa issuance and is thus not responsible if the federal authorities do not issue a Visa.

Foreign law school graduates who are in F1 or J1 status must comply with the U.S. Citizenship and Immigration Service (USCIS) regulations. The LL.M. application procedure requires F1 or J1 students to show financial autonomy for the entire length of the program through financial affidavits and financial documentation. Projected expenses for a 9-month academic year are about $60,000 (USD), inclusive of tuition, books, room and board, living, and laundry, recreational and miscellaneous expenses. However, this estimate could vary depending on particular circumstances of each student. If the LL.M. candidate holds a F1 visa he/she cannot work outside of St. John’s University.

Once accepted into the LL.M. Program, foreign law school graduates will be directed to the University’s International Student and Scholar Services department for completion of their I-20 applications if necessary. Afterwards, they will be required to apply to the U.S. Consulates or Embassies in their countries to obtain the proper Visa. Different regulations may apply if the foreign graduate already resides in the U.S., depending on immigration status.

If you come to the US on an F-1 student visa you must take a minimum of 9 credits each semester as required by immigration.

\textsuperscript{381} Frequently Asked Questions, supra note 362.
serves only to authenticate non-U.S. or Canadian academic credentials and to provide TOEFL scores to schools.382 When a law school decides to adopt a Qualifying LL.M. program, the institution will need to further explore the details of how it might augment its current relationship with LSAC to add the services of the LL.M. Credential Assembly Service. A law school may wish to consider, as do some schools,383 allowing foreign-educated LL.M. applicants a choice between LSAC and another reliable credential assembly service, which is frequently the World Education Services (WES) Credential Evaluation program.384

Law schools offering a Qualifying LL.M. program will need to determine what kind or level of non-U.S. legal degree they will require for foreign-educated lawyers to qualify for admission. One of many examples of foreign degree qualifications is provided by the University of Virginia Law School’s LL.M. programs:

Lastly, on the . . . LSAC Web site, the School of Law is listed as one of the schools that has minimum degree requirements for certain countries that differ from those listed in the booklet. The School of Law requires that an applicant hold the academic degree regarded as his or her country's first professional degree in law (equivalent to the U.S. juris doctor degree). From France we require either the Maitrise en Droit or the Magistere de Juriste. From Germany we require the First State Exam in Law. For students who obtained their legal education under the Bologna degree system in Europe, we require both the bachelor and master degrees or their equivalents. From the United Kingdom we will consider an application where the bachelor degree is in a non-law subject if the applicant has also completed the two-year program at a college of law required to qualify as a solicitor if the applicant does not have a first degree in law. Contact the Graduate Studies Office if you have any questions regarding your eligibility to apply to our LL.M. program based on your legal education.385

The factors that a law school should consider in making this determination might be somewhat different, given the bar-qualifying nature of the on-campus Qualifying Program, than a traditional, academic LL.M. degree program. In addition, since applicants will likely come from areas in addition to the E.U. countries mentioned in Virginia’s requirements, a law school will need to undertake an appropriate assessment of minimum degree requirements for foreign-educated lawyers from other areas of the world, in order to determine whether the applicant has attained the education level required for (1) success in the LL.M. program directed at bar-examination qualification and (2) success in applying for permission to take a state bar examination. Eventually, a law school might also wish to consider recruiting as a consultant an experienced international student advisor who has worked in another American

385 LSAC LL.M. Credential Assembly Service, supra note 382.
law school’s LL.M. program and has a track record of experience in successfully assessing the foreign legal educational credentials of LL.M. applicants.386

J. Transitioning Legal Systems387

The great challenges facing law schools and their international LL.M. program students—especially those who were educated in the Civil Law tradition—is the students’ translation of and transition into the study of law in a markedly different legal tradition.388 The Civil Law-to-Common Law tradition translation and transition is fraught with challenges for student and teacher at many levels.389 The difficulty in the Civil Law lawyer’s transitioning to study within a Common-Law system is well illustrated by the reverse transition and translation problem created for American lawyers who tried to understand and comment upon the Italian criminal proceedings in the high-profile murder trial in Italy of

386 The author is indebted to Professor Karsai for pointing out that many university-based LL.M. programs designate an international student advisor to assess whether a program of foreign legal education qualifies.

387 See Julie M. Spanbauer, Lost in Translation in the Law School Classroom: Assessing Required Coursework in LL.M. Programs for International Students, 35 INT’L J. LEGAL INFO. 396 (2007), for a study that treats many of the issues discussed in this subpart. For a first-hand account of what it is like to be a Civil-Law-trained lawyer in an American law school classroom, see Mirjan Damasˇka, A Continental Lawyer in an American Law School: Trials and Tribulations of Adjustment, 116 U. PA. L. REV. 1363 (1968). For a first-hand account of what it is like to be a Common-Law teacher working to help Civil-Law LL.M. students make the intellectual transition to Common-Law methodologies, see Helena Whalen-Bridge, The Reluctant Comparativist: Teaching Common Law Reasoning to Civil Law Students, 58 J. LEGAL EDUC. 364 (2008) (observing that “civil law students have considerable difficulty grasping the structure of common law reasoning, in part because common law rules are a different sort of rule compared to the type of civil law rule the student is familiar with.”).


389 See id. at 3-4. For example, two commentators, describing the analogous effort to translate Common-Law approaches in criminal procedure to a country with a strong Civil-Law tradition, observed:

On October 24, 1989, the Republic of Italy adopted a new Code of Criminal Procedure incorporating significant adversarial procedures into what had previously been a purely inquisitorial system. The architects of the new Code hope that giving the parties, rather than a judge, primary control over the investigation and resolution of cases will yield much-needed efficiencies: Italy, like all Western countries, is burdened with a tremendous backlog of criminal cases that its old inquisitorial system proved unable to handle.

So radical are the changes embodied in the new Code that the Italian reforms have no modern precedent. Rather, one must look back two hundred years to the period following the French revolution, when France gazed across the Channel and tried to build a justice system based on the English common law model. History teaches us that the English transplant did not long survive in France. The pervasive ethos of the inquisitorial system provided a climate hostile to adversarial reforms, which were either discarded or neutralized so as to fit within the civil law tradition.

Italy now faces the same problem that post-revolutionary France confronted: the new Code of Criminal Procedure attempts to build an adversarial trial system on institutions that remain strongly rooted in the tradition and ideology of civil law. The result is a system caught between two traditions. Unless the Italian legal system comes to grips with this philosophical tension, the procedural reforms that Italy desperately needs in order to cope with its judicial backlog will never be effective.

Id. at 2-3 (footnotes omitted).
Amanda Knox, an American student accused of conspiring to slay her British roommate in a study-abroad program in Italy. The American press decried procedural aspects of the

390 For an accurate summation of the events leading to criminal charges against Ms. Knox, the events of the trial in Italy, and the public reaction to it in both Italy and the United States, see Times Topics: Amanda Knox, N.Y. TIMES, http://topics.nytimes.com/top/reference/timestopics/people/k/amanda_knox/index.html (last visited Mar. 3, 2014), and articles listed therein, including Rachel Donadio & Elisabetta Povoledo, In Italy, Acquittal Stirs Concerns About Legal System, N.Y. TIMES, Oct. 5, 2011, at A18. A law student author, who performed a calm, dispassionate, and well-informed dissection of the Italian proceedings in the Knox prosecution, wrote:

While differing foundations in inquisitorial and adversarial systems explain much of the perceived peculiarities of the Amanda Knox trial, the general criticism of the trial is inevitably informed by the biases Americans bring to the table in their analysis of the Italian criminal system. In particular, lawyers face two major challenges when attempting to assess a foreign legal system: (1) parochialism and (2) the “endowment effect.”

Parochialism describes an individual’s limitation in understanding a new culture’s processes because of sheer ignorance and the weight of his or her own experiences. It takes a great deal of effort to gain a deep understanding of how a foreign country’s legal processes work and have evolved. By contrast, it is easy to fall into the trap of drawing broad generalizations or type-casting a country and its institutions. To judge the Italian reform of criminal procedure simply on the basis of how closely it resembles the U.S. model misses a crucial insight of contemporary comparative methodology: wholesale “transplants” are impossible. Instead, legal concepts are “translated” from one legal culture into another, and in the process of translation different but equally plausible legal categories may come into being. In adopting features of the adversarial system, Italy did not simply transplant U.S. features into its legal system; rather, it translated such features into an entirely different legal language.

One manifestation of parochialism in American criticism of the trial is the way in which Americans measured the success of Italy’s new adversarial procedures. In assessing the Italian judicial process as it functioned for Amanda Knox, Americans were, in large part, disappointed that Italy’s adversarial elements did not work exactly the same way as their U.S. equivalents. In fact, it is unclear what exactly should constitute an adversarial system—must an adversarial system have the exact same trial practices as the United States to be valid? Or, alternatively, are successful adversarial systems ones that place emphasis on separating preliminary investigations from the trial and insist on preventing the introduction of inflammatory evidence in court? Most of the criticism surrounding the Knox case drew explicit comparisons to the U.S., intimating that Italy had not transplanted American criminal procedure successfully. Meanwhile, little of the criticism around the Knox case analyzed Italian criminal procedure as a new (and translated) form of criminal procedure to be assessed on its own merits - one that may be criticized for not meeting core adversarial goals unrelated to American processes.

Another instance of parochial bias is Americans’ discomfort with the fact that the trial court openly hypothesized about motive in the published opinion. However, these critics are ignoring one key fact: in the American jury system the jury is a black box. Juries in the United States are not required to explain what evidence they use to support their conclusions. Americans cannot restrict hypothesizing similar to that of the Italian court, because no one knows the type of discussion that takes place in the jury room and jurors do not need to release a written opinion. Thus, jurors could possibly draw on their own experiences or their own ideas in discussion and no one outside the jury room could prevent it. In the Italian system, while the hypothesizing is strange, it provides a record from which the defense can appeal when inappropriate evidence is used. Furthermore, if mistakes in the use of evidence consistently occur, the Italian legislature could potentially amend the evidentiary rules in the future. A parochial analysis ignores these redeeming qualities of a foreign system.
A second methodological shortcoming evident in the American criticism of the Knox trial lies in what economists have termed "the endowment effect;" people tend to overestimate the value of what they possess. In legal comparisons, this means assuming that the legal system with which one is familiar is the better system. When Americans compare the proceedings in the Knox case to American trials they tend to be disappointed in the outcome of the Italian process. Their comparison juxtaposes highly idealized versions of adversarial and inquisitorial systems, leaving little space for recognition of mixed systems and assuming only the best of adversarial processes.

The skepticism surrounding Italy's mixed criminal procedure system is founded in the American anti-inquisitorial tradition. As David Sklansky noted, Americans have generally considered inquisitorial procedural structures by looking to "the Continental, inquisitorial system of criminal adjudication for negative guidance about [American] ideals" and thus "[a]voiding inquisitorialism is taken to be a core commitment of [American] legal heritage." Thus, in comparing the American system against the Italian system in the Knox case, Americans often seem to be comparing a utopian ideal of the adversarial system to the facts of the actual Italian case. In reality, the "American adversary system in practice often fails to deliver anything remotely close to the kind of substantive or procedural justice it promises in theory." Economic inequalities are the norm in the adversarial process with a prosecutorial team that "typically has greater resources than the defense, including a professional police force to carry out investigations and a whole legal department of well-paid prosecutors who are generally skilled and enthusiastic," a far cry from defendants who are often represented by overworked court-appointed attorneys. These inequities compromise the goals of the adversarial system of protecting defendant rights, controlling government power, and finding the truth - instead, the "unfair procedures and unreliable outcomes . . . undermine the system's legitimacy." Faced with these deficiencies, defendants like Knox could be convicted under the same circumstances here in the United States.

The same "endowment effect" informs American criticism of the Italian court's "failure" to sequester the Knox jury. What many Americans do not realize is that in the United States, jury sequestration has "fallen so far out of favor that judges rarely bother anymore," even when faced with high profile cases. Research has found that removing jurors from their personal lives through jury sequestration accentuates the stress jurors already experience because of the intensity of trial testimony and the weight of their decisions. The stress may lead to fights between co-jurors, rushed deliberations, or resentment of the defendant "who is blamed for having caused the entire unpleasant situation," which may ultimately undermine the "justice" sequestration was meant to achieve. The Knox case was held twice a week and lasted for over eleven months; such a burden on jurors would have been extreme and an American judge faced with the same situation would probably have ruled against sequestration.

Julia Grace Mirabella, Note, Scales Of Justice: Assessing Italian Criminal Procedure Through The Amanda Knox Trial, 30 B.U. INT'L L.J. 229, 255-59 (2012) (footnotes omitted); see also Reneta Lawson Mack, The Importance Of International And Comparative Law: Exploring Complex Issues In A Global Community, 1 CREIGHTON INT'L & COMP. L.J. 3, 3-4 (2011) ("the criminal justice processes that resulted in Knox's conviction are probably a mystery to the vast majority of American observers," and thus, "this lack of familiarity with the Italian system led many Americans to disparage the Italian process as unfair and biased against foreign defendants" such that "while Ms. Knox's guilt or innocence was the focus of the criminal trial in Italy, the Italian criminal justice system was indicted and put on trial in the United States").

Concomitantly, Italian lawyers trained in the Civil Law would find equally baffling the proceedings and many of the procedures in an American criminal prosecutions.

Professors Pizzi and Marafioti—one from the United States, the other from Italy—give us a good sense of the challenge facing a Civil-Law trained lawyer in an American criminal procedure class in their description of how the Civil-Law lawyer steeped in the "inquisitorial system" encounters Common-Law concepts that emanate from the "adversarial system." While the quotation from their work is lengthy, the length is justified by the perspective it affords us in understanding how the Civil-Law lawyer will encounter Common-Law subjects in a Qualifying LL.M. program:

To appreciate the effect of switching from a civil law trial system to a more adversarial trial system, it is important to understand some of the fundamental differences between the two paradigmatic systems.

As an initial matter, the central issue in a civil law trial is very different from the central issue in an adversarial trial. In an adversarial trial, the central determination is whether the prosecution can prove the defendant’s guilt beyond a reasonable doubt. If the prosecutor fails to meet this burden, whether because of negligence or simply a lack of evidence, the rules of the adversarial system dictate that the prosecution loses. The judge in the adversarial system is kept largely unfamiliar with the pretrial file in an effort to preserve neutrality. Once at trial, the judge plays only a passive role in the development of evidence.

Judges are far more active trial participants in civil law systems. The judge, rather than the parties, is responsible for developing the evidence at trial, calling and questioning witnesses himself. To aid in his investigation, the judge has access to the pretrial file prior to the trial’s commencement. The involvement of the public prosecutor and defense attorney is generally limited to asking occasional follow-up questions or suggesting other lines of inquiry. As the name implies, the inquisitorial system places primary responsibility for developing the facts in the hands of the judge.

Because the civil law system places singular importance on ascertaining the truth at trial, it erects few evidentiary barriers that restrict the information the judge can consider in determining guilt. Continental systems of criminal justice have no equivalent of the Federal Rules of Evidence, since fixed evidentiary rules might lead to the exclusion of important probative evidence. Constitutional exclusionary rules, such as those that have been read into the Fourth Amendment, similarly are anathema. In contrast, the U.S. system of criminal justice frequently subordinates the finding of truth to the protection of constitutional rights. Exclusion is used to deter improper police conduct and

Defendant participation also differs greatly under the two systems. The trial in a civil law system usually begins with an examination of the defendant by the judge, exploring the defendant's background as well as his knowledge of, or participation in, the alleged crime. Questions are frequently directed to the defendant throughout the remainder of the trial. While the defendant has the right to refuse to answer any questions, such refusals are exceptional; the presumption in civil law systems is that the defendant should cooperate with the trial judge and answer questions completely. The defendant's cooperation is also encouraged by the fact that his sentence, as well as his guilt, is determined at a single trial. A defendant who wishes to offer evidence of mitigating circumstances thus must speak at trial in order to place such evidence before the court. Since pretrial investigations usually are quite thorough, and since most defendants also cooperate with the pretrial investigation, the inquisitorial system presents less potential for evidentiary surprises than a criminal trial in the United States.

The system creates a danger that the judge who has already studied the case file will come to the trial convinced of the defendant's guilt or innocence. The civil law system tries to protect against prejudiced judges in two ways. First, in all but the most minor cases only one member of the panel of judges who tries a case will have examined the file. This collegial approach to decision-making counterbalances at least some of the inherent dangers of the inquisitorial system.

Second, in contrast to the U.S. system, the trial does not result in a simple verdict of guilty or not guilty. Instead, the court prepares a written judgment that summarizes the evidence developed at trial, the conclusions drawn from the evidence, and any legal issues that arose during the trial. Because a civil law trial determines both guilt and sentencing, if the defendant is found guilty the judgment will also state the sentence and why the court considered this sentence appropriate.

Forcing the fact-finder to justify its conclusions facilitates the appeals process. The civil law system accords a verdict none of the finality given a jury verdict in a common law system. Extremely broad rights of appeal are extended to both parties after a trial. The parties can appeal the judgment's factual conclusions as fully and easily as its legal conclusions. The parties may even introduce new evidence on appeal if the appellate court deems it necessary. Not even an acquittal is final: the prosecutor may appeal if he believes that the trial court mistakenly reached a judgment of not guilty. The trial is viewed as simply one step in a process that will lead to the resolution of the criminal charges—it is not the "all or nothing" struggle that it often seems to be in the U.S. system.

A concomitant of the civil law system's strong commitment to discovering the truth at trial is an emphasis on uniformity. The U.S. system
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relies on lay juries, believing that they serve as a valuable check on the criminal justice system. Civil law systems, on the other hand, strongly disfavor lay juries because they introduce uncontrolled and unreviewable decision-making into the system. Obviously, the civil law system finds jury nullification and inconsistent verdicts unacceptable, although they are generally accepted in common law systems.

If lay jurors are used at all in civil law systems, they serve on hybrid panels alongside professional judges. These panels permit judges to benefit from the experience of laypersons while maintaining control over the development of evidence and the application of law. Since professional judges are always involved in the deliberations, there is no need for a lengthy set of jury instructions. Any legal advice needed during the deliberations of a mixed jury is provided by one of the participating professional judges. Like all-judge panels, mixed juries are expected to set forth the verdict in a thorough written judgment.

The civil law emphasis on uniform results manifests itself in a strong aversion to prosecutorial discretion. The civil law system has no counterpart to the broad prosecutorial discretion existing in the United States. The very notion that a prosecutor would have any leeway in choosing whether to file a criminal charge is alien to the civil law ethos. Instead, prosecutors must file criminal charges whenever the evidence indicates that the suspect has violated the law. If, for example, some evidence indicated that a suspect committed a serious crime, but the prosecutor believed that there were reasons for not prosecuting the case, the prosecutor would be expected to file a formal criminal charge and seek dismissal of the charge by a judge, who has the authority to review the prosecutor's decision.

Consequently, a system of plea bargaining like that existing in the United States is viewed as fundamentally inconsistent with the sacrosanct civil law values of uniformity and truth. While the U.S. system has come to accept the practice of plea bargaining, seemingly motivated by the belief that half a loaf is better than none, civil law systems have made no such compromise. Indeed, so inflexible is the civil law's commitment to its principles that, even where a defendant has fully admitted his guilt and offered a detailed confession, the law still requires a full trial. The court, not the defendant, determines guilt. 393

What does all of this tell us about the transition of Civil-Law trained lawyers to the study of Common Law in a Qualifying LL.M. program? First and foremost, it tells us that we, as American law professors, need to acquire a good understanding of the Civil-Law background of our Civilian lawyer-students, so that we may build the bridge that links their understanding to the new understanding we seek to impart via an American Legal Studies program. The encounter between Civilian-trained lawyers and the Common Law is not new in the United States.

Professor Josef Redlich of the University of Vienna's law faculty, who also taught at Harvard Law School, prepared a detailed report in 1914 on the case method in American law

393 See Pizzi & Marafioti, supra note 388, at 7-10 (footnotes omitted).
schools. The report was written from the Civilian lawyer-teacher's perspective and was the result of extensive personal observation in American law schools. 394 This is the place for all present-day law teachers of LL.M. students from Civil Law countries to begin a journey to better understanding their foreign students' viewpoint and legal acculturation. 395 What has long been the focus of Redlich's very thorough report is a single chapter—a chapter balancing his admiration of some aspects of case-method teaching with some probing criticisms from the Civilian perspective—which has been oft-quoted. 396

There is also a literature from American law professors encountering the first influx of Civilian-trained lawyers as LL.M. students. As Professor Mitchell Franklin of Tulane University observed at an AALS Round Table meeting on “Problems of Graduate Training for Foreign Students” in 1949, “[a]t the end of the Second World War the American law school became a center of attraction for advanced legal students from other countries,” many of who were “civilians, educated in the traditions of Roman and of Modern Roman law.” 397 Of great relevance to our present subject, Professor Franklin addressed the translation-and-transition problem by placing the burden squarely on faculty to make themselves fit guides for Civilians, warning us to “recognize[ ] the possibility that unsatisfactory work by advanced foreign civilian students in American law schools may reflect the weakness of the American law school, which has entered this period without complete readiness or requisite ability to meet its responsibility toward the foreign student.” 398 One way for a professor who teaches a mixed group of American J.D. students and foreign-lawyer qualifying LL.M. students to approach the problem is to study the way that law faculty at law schools in mixed Civil-Law

394 See JOSEF REDLICH, THE COMMON LAW & THE CASE METHOD IN AMERICAN UNIVERSITY LAW SCHOOLS: A REPORT TO THE CARNEGIE FOUNDATION FOR THE ADVANCEMENT OF TEACHING (1914); see also Charles C. Burlingham, Josef Redlich, 50 HARV. L. REV. 389, 393 (1937) (noting a dinner guest’s expression of “astonishment that a lawyer trained in the Roman law could speak on the common law with knowledge, penetration and facility in a language not his own.”).


396 Josef Redlich, Weaknesses of the “Case Method” in American Law Schools; Suggestions Looking Toward Improved Instruction, 4 AM. L. SCH. REV. 1 (1915). For a response to Redlich, see Simeon E. Baldwin, Education for the Bar in the United States, 9 AM. POL. SCI. REV. 437 (1915).


398 Id. at 457. To that end, Professor Franklin urged that law professors not only “be master of his [or her] own Anglo-American legal system, its history, its social history” but also that s/he “must be master, in its entirety, of at least one Romanist legal system, its history, its social history.” Id. at 456. That is the basis of building the bridge of understanding between the two legal systems for the foreign-educated Civilian lawyer. However, Franklin urged that, in all other relevant respects, the teaching of the American J.D. student and the Civilian LL.M. student transpire using the same method:

Concerning teaching method, the essence of the modern American casebook method of teaching should be kept in the teaching of all advanced law students. The chief contribution of the American law school has indeed been its teaching method. The essence of this method should be preserved even in the teaching of advanced foreign civilians, though such students have been trained previously by the lecture method.

Id. at 464.
and Common-Law areas—such as Louisiana, Puerto Rico, and Canada—have approached the challenge of reaching students training in both traditions.399

While neither required by the ABA’s proposed Qualifying LL.M. Criteria nor exclusively required by N.Y. Court of Appeals Rule 520.6,400 an opening course in legal

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399 One of the earliest—and most insightful—discussions of law school instruction in “mixed” jurisdictions is Edouard Lambert & Max J. Wasserman, The Case Method in Canada and the Possibilities of its Adaptation to the Civil Law, 39 YALE L.J. 1 (1929). For greater insight into the mixed-system experiences of lawyers in Puerto Rico and Louisiana, see, e.g., Liana Fiol Matta, Civil Law and Common Law in the Legal Method of Puerto Rico, 40 AM. J. COMP. L. 783, 792 (1992) (noting the experience of Puerto Rican lawyers who are used to courts ‘double reasoning,’ meaning that they “justify their conclusions, according to the fundamental concepts of both” the American Common Law and the Spanish Civil Law). Of considerable interest is the effort that the law faculty at McGill University have inaugurated to teach Civil Law and Common Law simultaneously in the same course and classroom. See, e.g., H. Patrick Glenn, Doin’ the Transsystemic: Legal Systems and Legal Traditions, 50 MCGILL L.J. 863, 865 (2005) (“The Faculty of Law of McGill University has recently embarked on a programme of legal education in which students study simultaneously, in the same classroom, civil and common law subjects,” which the faculty has dubbed “transsystemic legal education”). While qualifying LL.M. programs should not—indeed, cannot—become exercises in comparative law or “transsystemic” law, Qualifying LL.M. program faculty can gain very valuable insights from the transsystemic-law teaching techniques, strategies, and styles that they may apply in their own classrooms and in their own office hours to help their LL.M. lawyer-students who were trained in the Civil Law. Reading widely in the legal scholarship yields many rewards for the innovative professor who teaches mixed classes of J.D. and American Legal Studies LL.M. students. See, e.g., Jeffrey L. Friesen, When Common Law Courts Interpret Civil Codes, 15 WIS. INT’L L.J. 1 (1996); H. Patrick Glenn, Are Legal Traditions Incomensurable?, 49 AM. J. COMP. L. 133 (2001); William Tetley, Nationalism in a Mixed Jurisdiction and the Importance of Language (South Africa, Israel, and Quebec/Canada), 78 TUL. L. REV. 175 (2003) (discussing the First Worldwide Congress on Mixed Jurisdictions); Dan E. Stigall, From Baton Rouge To Baghdad: A Comparative Overview of the Iraqi Civil Code, 65 LA. L. REV. 131 (2004); Catherine Valcke, Legal Education in a “Mixed Jurisdiction”: The Quebec Experience 10 TUL. EUR. & CIV. L.F. 61 (1995). Professors may also benefit from understanding more about America’s own 19th-century codification movement. See, e.g., Aniceto Masferrer, The Passionate Discussion Among Common Lawyers About Postbellum American Codification: An Approach to its Legal Argumentation, 40 ARIZ. ST. L.J. 173 (2008). Of course, the place for any American or Common-Law trained professor to begin grappling with the Civil Law system is John Henry Merryman and Rogelio Pérez-Pedromo’s classic book, “The Civil Law Tradition: An Introduction to the Legal Systems of Europe and Latin America.”

400 The New York Board of Law Examiners may have unintentionally introduced confusion about this point in their current summary, available on the Board’s website, of that which Rule 520.6 requires:

**Required Coursework.** For applicants who commence a program in the 2012-2013 academic year, the LL.M degree program must include: (i) at least two semester hours of credit in professional responsibility, (ii) at least two credits in a legal research, writing and analysis course (which may NOT be satisfied by a research and writing requirement in a substantive course), (iii) at least two-credits in a course on American legal studies, or a similar course designed to introduce students to U.S. law, and (iv) at least six credits in subjects tested on the New York bar examination (where a principal focus of the course includes material contained in the Content Outline published by the Board).

**Foreign Legal Education.** supra note 17 (emphasis added). However, the paraphrase of Rule 520.6 is misleading when compared to the N.Y. Court of Appeals rules themselves, which establish:

(c) a minimum of two credit hours in American legal studies, the American legal system or a similar course designed to introduce students to distinctive aspects and/or fundamental principles of United States law, which may be satisfied by a course in United States constitutional law or United States state civil procedure; credit earned in such course in excess of the required two credit hours may be applied in satisfaction of the requirement of subdivision (b)(3)(vi)(d).
method will be essential in assisting foreign-educated law students in transitioning from the differing approaches to legal education, role of courts, role of lawyers, use of logic,\textsuperscript{401} and regulation of lawyers in their home countries to the American perspectives with which their LL.M. program experiences will be imbued.\textsuperscript{402} Although some schools permit LL.M. students to apply for a waiver from such courses,\textsuperscript{403} the better path is to start all LL.M. students with the same instructional base, even if some hail from another Common Law jurisdiction.\textsuperscript{404} Numerous law schools offer such a course under a variety of names and in two different settings—pre-matriculation (summer preceding the start of the LL.M. program year) or during the course of the LL.M. program.\textsuperscript{405} The content of this kind of course is far from standardized, and one would expect the course would need to be tailored in different ways depending on the student cohort, taking into account factors such as language facility, actual law practice experience in their home countries, and whether the cohort comes significantly or predominantly from Civil-Law system countries. Vanderbilt Law School's one-credit "Life of the Law" gives a good sense of the fundamentals that need to be conveyed generally to incoming foreign law-school graduates.\textsuperscript{406} Penn State-Dickinson College of Law treats similar material as a two-credit, pass-fail course that is required for its LL.M. students.\textsuperscript{407}

At a school where Qualifying Program LL.M. students take the first-year, first-semester legal writing course (called by various appellations including "Legal Writing I"; "Legal Method I"; "Legal Writing and Research I"; or "Legal Research, Writing, and Analysis I"), the purpose of the pre-matriculation introductory seminar should be to prepare foreign lawyers well enough in basics of our legal system, legal history, and legal culture to permit them to receive effectively the instruction they will be given in the first-semester legal
writing course, as well as to function in their other fall semester courses at least as well as the average J.D. program classmate. The content of this course will require development to synthesize the necessary information into a course that may be delivered in a condensed (usually, one, two, three, or four-week) format during the summer before each Qualifying LL.M. cohort matriculates. After development, the planned facilitator of that course should contact various legal publishers’ representatives, as well as law professors at other institutions with such courses, for more information about syllabi and materials used in such courses.

As part of rolling out an American Legal Studies LL.M. program, a law school should consider finding a foreign-educated lawyer who has completed American Legal Studies to work with LL.M. students to provide academic support and help resolve the unique issues arising from the dissonance between the students’ home and American legal systems.

In his communications with an Aspen Legal Publishers Representative, the author was advised that the Florida Coastal online foreign-attorneys’ LL.M. program uses two Aspen publications for its introduction to U.S. law courses: “The International Lawyer’s Guide To Legal Analysis And Communication In The United States,” by Deborah B. McGregor & Cynthia M. Adams, and “Legal Reasoning, Research, and Writing for International Graduate Students,” by Nadia E. Nedzel. A number of LL.M. programs use, and hold in high regard, an introductory book by Professor William Burnham titled, “Burnham’s Introduction to the Law and Legal System of the United States.” In October 2011, the author met with a Foundation Press representative who informed him that Foundation Press, at that time at least, did not publish any similar titles.

For example, Georgetown offers a course called Foundations of American Law and Legal Education, which is part of “an intensive summer learning opportunity for incoming foreign-educated LL.M. students.”

Three courses are offered during the summer before classes begin for students who want to get a head start on their legal education—or just hone their English language skills in the United States while becoming acclimated to living in Bloomington:

Introduction to American Law is a two-week intensive course that offers an overview of the American legal system and is designed for foreign law students in the LLM and MCL programs. (If you’re matriculating in the fall, credits for this class count toward your degree.)

Legal English is a seven-week course offered by the IU Department of Second Language Studies. This course will help you develop competencies that will propel you toward success in law school, such as critical thinking, classroom interaction, active listening, note-taking, reading and analyzing legal texts, understanding and using legal writing and structure, and increasing your legal vocabulary.

Intensive English Program, also offered by the IU Department of Second Language Studies, gives foreign students the opportunity to become accustomed to using English before starting law school. If you come to Bloomington early to enroll in this program, your visa documents will be issued by the Center for English Language Training rather than by the Office of Graduate Legal Studies. Spouses of students are also welcome to enroll. (Please note that CELT students who are not enrolled at the Law School will also require an F-1 visa.)

and cultures. A number of American Studies LL.M. programs currently offer and tout the availability of Academic Support for foreign-educated lawyers. 410

As is the more commonly occurring case with J.D. program students, individual foreign-educated lawyers within a Qualifying LL.M. Program will have plans to take the bar examination in a variety of American jurisdictions. However, unlike J.D. program students, LL.M. students will not likely be able simply to rely on state-specific commercial bar review courses to give them the state-specific orientation that they will need to pass that state’s bar examination. Indeed, given the magnitude of transition between legal systems and cultures that foreign-educated lawyers are trying to make with a one- or two-year LL.M. program, the elective coursework they complete in the LL.M. program needs to be tailored as closely as possible to the any peculiar requirements of the states whose bar examinations they plan to take.

Accordingly, a Qualifying LL.M. program should feature a “review of the bar examination from each state wherein a qualifying student intends to take the bar combined with a review of that student’s foreign law school transcript in order to ascertain what electives should be taken.” 411 Each LL.M. student, therefore, needs to have a faculty advisor willing and able to make these kinds of assessments. 412 In particular, members of the law school’s faculty admitted to state bars which the LL.M. students seek to take should be available to assist students in planning to prepare for those bar examinations and deal with the bar examiners. 413 For these reasons, among others, it is not uncommon for American Studies LL.M. programs to assign each LL.M. student to a faculty advisor. 414

Another transition-related option that a law school might consider is providing the opportunity for foreign-educated LL.M. program students to remain for an additional semester 415 of study if the institution and/or the LL.M. student concludes that additional coursework would be valuable to qualifying the student for, and/or enhancing the student’s potential to pass, a state bar examination. For example, in Penn State University-Dickinson College of Law’s U.S. Legal Studies LL.M. program, a “third-semester option” allows “[a] select number of LL.M. students . . . to stay an additional semester,” during which “[s]tudents

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410 See, e.g., LL.M. Program for Foreign Lawyers, ST. LOUIS U. SCH. L., http://www.slu.edu/x49102.xml (last visited Mar. 3, 2014) (“Students also receive intensive academic support services, writing support services, assistance in locating housing and acclimating to SLU LAW.”).

411 The author quotes Professor and Dean Emeritus Robert J. D’Agostino, who provided this suggestion as part of his very helpful review of an earlier draft.


414 See, e.g., LL.M. Program for Foreign Lawyers, supra note 410 (“Each LL.M. student is partnered with a faculty member who provides guidance on class selection and professional goals.”).

415 For a one-year LL.M. program student, the additional semester would be a third semester. The additional semester would be a fifth semester for a two-year LL.M. program student. An extension of the one-year program by a semester would appear not to pose any problem under the New York, California, or ABA proposed Model Rules. Extending a two-year LL.M. program by a semester would exceed New York’s rule, but not the California or ABA proposed Model Rules. In any event, however, if the degree is awarded based on the work done before the additional semester, there would appear to be no conflict with any of the three rules.
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take bar related courses and begin an intensive study for the bar exam in this final, third semester.” 416 This would be a potentially valuable option for students who are strong bar candidates and seek additional coursework to enhance employability, as well as for at-risk bar candidates, who will need study in additional subject areas to enhance bar-passage opportunities.

Finally, a well-crafted handbook for LL.M. students can bring the foregoing, and quite a bit more, information into focus, thereby easing the transition. Some law schools prepare a special handbook for their American legal studies, foreign-educated LL.M. students, separate from the handbook for J.D. students. An excellent example of a specially tailored, detailed, and comprehensive handbook is the “Master of Laws in the Laws of the United States (L.O.T.U.S.) Program Handbook” issued by the University of Baltimore School of Law,417 and NYU Law School’s “LL.M. Student Handbook 2013-2014.”418 Such handbooks will provide useful models for law schools undertaking to implement Qualifying LL.M. programs.

K. Prospective and Accepted Students’ Pre-Matriculation Educational Review

The LL.M program should advise prospective and accepted students to check with the bar examiners in the state or states in which they will seek to qualify to sit for the bar examination. 419 Various state bar examiners take varying approaches to assessing foreign-educated lawyers’ qualifications. New York’s procedures under the revised Rule 520.6 appear by far the most detailed. Foreign-educated lawyers hailing from Common-Law jurisdictions may find that their foreign education is assessed as more qualifying than applicants from Civil-Law jurisdictions. It is possible that the bar examiners could conclude that a foreign-educated applicant requires no additional education in order to qualify to sit for the bar examination—but that typically is done only after the bar examiners evaluate the sufficiency of the foreign legal education as preparation for the state’s bar examination and practice of law in the state. In this regard, Rule 520.6 provides the most systematized and organized of foreign credentialing evaluations. The Program Director of a Qualifying LL.M. program will need to become fluent in the varying approaches to credential evaluation among the state bar examiners in order to assist students in making the proper choices before they matriculate into the Qualifying LL.M. Program.

It should also be noted that the ABA Section of Legal Education intends for the law schools, as part of their process of admitting a foreign-trained lawyer to their Qualifying LL.M. programs, “to certify to the state court” in which a graduate seeks to take the bar examination “that the applicant’s foreign law degree was granted by a foreign law school that

416 Information for LL.M. Candidates about Bar Preparation, Examination, and Admission, supra note 413.
419 See, e.g., LL.M. FAQs, supra note 362 (informing students in the American Legal Studies Program that they must submit a “Request for Evaluation of Foreign Academic Credentials” to sit for the New York Bar Exam and recommending that the students submit the request prior to commencing an LL.M. program).
satisfies the requirements of the Model Rule." The Model Rule, in turn, requires the LL.M.-granting law school to be able to certify, inter alia,

that the applicant received his or her law degree at a foreign law school that:

(a) is government sanctioned or recognized, if educational institutions are state regulated within the country; or

(b) is recognized or approved by an evaluation body, if such agency exists within the country; or

(c) is chartered to award first degrees in law by the appropriate authority within the country.

This is a requirement that existing American Studies LL.M. programs have generally not been required to meet. That the burden is now to be placed directly on the law schools is precisely what the Section of Legal Education intends. In the Section’s Report on its proposed Model Rule, the Section says:

[The proposal requires the law school to certify to the state court that the applicant has completed the “certified” LL.M. degree and that the applicant’s foreign law degree was granted by a foreign law school that satisfies the requirements of the Model Rule. Placing the burden on the schools encourages schools to consider whether the applicant’s foreign degree satisfies the Model Rule requirements when making a school’s admission decision. If a school does that, the school will have the appropriate documentation in the applicant’s file.]

Given the diversity of national legal cultures and approaches to legal education, this could be a daunting task, as Dean Schizer at Columbia has pointed out to the ABA Consultant’s Office:

[We do not believe it is efficient to rely on the schools to certify the accreditation or regulation of foreign law school education. Without one entity certifying foreign law school education, how can state bar authorities guarantee that certification by one U.S. law school . . . is the same as that of another U.S. law school? With more than one hundred law schools (with varying admission standards) certifying documents, there is the potential for tremendous variation . . . . In many countries it is nearly impossible to obtain documentation regarding accreditation of law schools — and in many of those same countries, there may be more than one authority that issues such documentation if it does exist.]
Boston University has pointed out in great detail specific problems that the educational criteria in the ABA’s proposal could cause for applicants from traditional markets (Japan, Korea, and China) because such markets, “do not require ‘legal education at a law school’ to join the practicing bar” since, “[i]n these countries, passing the highly competitive national bar exam (which one can do without attending law school) is the gateway to licensure.”

Similarly, Boston University points out that the Qualifying LL.M. Criteria should clarify whether a “first degree in law” requirement will “be read into the ‘legal education’ requirement,” not only because “[s]ome states require first degrees [in law] (i.e., New York)” while “others do not (i.e., California),” but also because “some countries (Japan and Korea) have recently introduced three-year ‘professional schools’ awarding the J.D. degree, while “[t]he LL.B. degree is being phased out in Korea” but “remain[ing] in place in Japan, thus begging the question: What is Japan’s first degree in law?”

However, as the Section of Legal Education explained in its proposal that “[s]chools currently have resources available to aid them in this determination,” citing the LSAC’s “LL.M. Credential Assembly Service for International Applicants which schools can require or recommend that foreign applicants use.” However, LSAC’s role should not be overstated. LSAC simply compiles the educational records and synthesizes them into a report. It does not purport to provide an evaluative service of the credentials it has compiled. However, it does collaborate with the American Association of Collegiate Registrars and Admissions Officers’ (AACRAO) International Education Services to obtain evaluations for law schools.

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specific government issues (if any)? What if two applicants from the same country supply documents from different governmental agencies? What if one law school judges the documentation submitted by an applicant to be insufficient while another law school deems it sufficient? What if the law school makes a mistake?

*Id.*

424 Letter from John Riccardi to Charlotte (Becky) Stretch, supra note 259. Assistant Dean Riccardi also points out that the ABA proposal would “disqualify the 20 percent of U.K. solicitors who now enter England’s legal profession through the non-law graduate route,” i.e., solicitors who pursue non-law undergraduate degrees and then pursue the Common Professional Examination, or Graduate Diploma in Law, followed by a “Legal Practice Course,” both of which may be obtained at educational institutions not traditionally known as ‘law schools.’”

425 Assistant Dean Riccardi sees similar problems where a candidate has a non-law undergraduate degree “but has a second-level law degree from a governmental sanctioned and qualified law school (i.e., a Masters of Laws degree, which one can obtain without a first degree in law in several Asian countries),” whom “New York, for example, would not deem . . . qualified even if he or she is a licensed member of the foreign country’s bar.”

*Id.* It is noteworthy that as for each of the problem areas he has identified, Assistant Dean Riccardi offers specific proposals for modifying the Qualifying LL.M. Criteria and accompanying commentary to resolve or avoid those problems. See *id.*

426 *A.B.A. SEC. LEGAL EDUC. & ADMISSION B. REP.*, supra note 18, at 3.

427 See Letter of Dean David Schizer, to Charlotte (Becky) Stretch supra note 247 (“While we encourage our applicants to use LSAC’s services at the admission stage, we do not require them to do so in part because of the added expense to applicants.”).


429 See *id.* As LSAC explains on its webpage to prospective applicants to U.S. LL.M. programs, “How you use LLM CAS is determined by where you earned your first degree in law and the requirements of the law schools to which you apply.” *Id.* The LSAC goes on to explain that “[i]f you earned a JD from a law school in the US, purchase only the Document Assembly Service. LSAC will include copies of your transcripts and letters of
The AACRAO, in its own right, specializes in foreign educational credential evaluative services, and it appears to be one of the leading services in the industry. It is unclear whether AACRAO’s services, if obtained directly, would include an enhanced evaluative function beyond the basic evaluation to which LSAC’s description alludes. In addition, although AACRAO is experienced in evaluating foreign educational credentials for American LL.M. programs, that evaluation may not have included the more probing inquiry into the nitty-gritty details of the legal education from the perspective of ultimate certification to a board of bar examiners, not merely admission to graduate law study generally. More investigation into the relative scope of LSAC’s and AACRAO’s services is in order by a law school considering a Qualifying LL.M. program. In addition to LSAC and AACRAO, there is also World Educational Services (WES), a not-for-profit organization specializing in foreign credential evaluation for higher education institutions in North America, which provides a compilation service similar to LSAC’s but, unlike LSAC, offers extensive evaluation services and expertise.

A law school’s evaluation might also be informed by the process by which the New York Bar Examiners require foreign-educated applicants to submit their educational credentials for evaluation, which largely mirrors the ABA required certifications. Thus, if an applicant is one who seeks to take the New York bar examination, among others, there will be a credential assessment that a law school may require Qualifying LL.M. program applicants to submit with their application to the LL.M. program. Logistically, this appears

recommendation in your law school report—no transcript analysis is necessary.” Id. By contrast, “[i]f you earned your first degree in law from an institution outside of the US, you may purchase the Document Assembly Service to have your letters of recommendation, English proficiency score(s), and electronic applications forwarded to participating law schools.” Id. LSAC further advises that “[i]n addition to the Document Assembly Service, you may need to purchase the International Transcript Authentication and Evaluation Service, which is offered in cooperation with the American Association of Collegiate Registrars and Admissions Officers (AACRAO)” and “includes the evaluation and authentication of transcripts/mark sheets, copies of degrees/diplomas, degree and graduation certificates, and rank statements so that US law schools better understand your academic credentials.” Id.

AACRAO explains its bona fides in this area as follows:

In addition to AACRAO being the premier publisher of references on foreign educational systems since the mid-1950s [sic] with the World Education Series, the Projects for International Education Research (PIER), the AACRAO Country Studies, and the recent web based Electronic Database for Global Education (EDGE), AACRAO has been evaluating foreign credentials since 1965. From 1965 until 1991, AACRAO was responsible for evaluating foreign education for the US Agency for International Development (USAID), Office of International Training, Academic Advisory Service. In 1991, with the end of USAID’s scholarship program for developing nations, AACRAO created International Education Services to provide evaluations for AACRAO member institutions as well as the general public.

Id. It appears that to obtain the kind of evaluation services or training a law school will need, it will require becoming a member institution of AACRAO.

For a discussion of the specific kinds of issues that might be presented in educational credential fraud, see Joan E. Van Tol, Detecting, Deterring and Punishing the Use of Fraudulent Academic Credentials: A Play in Two Acts, 30 SANTA CLARA L. REV. 791 (1990).


Foreign Legal Education, supra note 17.
feasible, since the New York State Bar Examiners encourage foreign-educated applicants “to seek an evaluation at least one year in advance of taking the bar exam,” and require them to “submit all documentation at least six months prior to the first day of the application period of the examination . . .”435 A law school whose LL.M. applicants are not planning to take the New York bar, or who have not yet received an evaluation of their credentials from the New York Bar Examiners, will have to turn to a third-party credentialing service. Depending on the expense and the utility of the work product, it may be more cost-effective in the long run for a law school to develop an in-house capability for assessing applicants’ foreign-education credentials.436

To this end, a law school might consider developing relationships with one or more consultants to assist it in developing the necessary protocols for assessing legal education credentials earned in foreign countries.437 For example, a law school might seek a consulting relationship with one or more former members or employees of the New York Board of Bar Examiners, who conducted foreign-credential evaluations, and use their expertise to review applicant credentials as well as to develop processes and training to permit the law school’s personnel to perform such evaluations. And while perhaps not as specialized in their work as former employees of the New York Bar Examiners, AACRAO also provides training in “international admissions and the evaluation of foreign educational credentials.”438 Depending on the real depth of AACRAO’s experience in the particular task of evaluating foreign legal education credentials that it has performed for LSAC, this might prove the most cost effective way to train a law school’s in-house employees to conduct credential reviews.

As a law school considers these options in implementing the Qualifying LL.M. program, it might be quite helpful to have the benefit and guidance of an experienced academic who is familiar with the kind of LL.M. program that the institution is establishing, as well as with the issues of evaluating foreign-educated lawyers for admissions purposes.

Two final thoughts seem appropriate on the matter of applicant credential evaluation:

First, it might well be the case that the ABA Consultant’s Office—which has been charged with the separate, but arguably related, role of developing the procedures which schools must follow to seek certification of LL.M. programs439—will provide suggestions or identify resources to assist law schools in the educational-credential certification task. The Section on Legal Education apparently recognizes that this area could use more clarity, for in

435 Id.
436 Some of the issues of foreign-credential recognition at the institutional level are similar to, or overlap with, credential recognition by professional governing bodies and governments. The latter topic was the subject of a set of articles published in Volume 11 of the Asper Review of International Business and Trade Law at the University of Manitoba, Canada. The eight articles, co-authored by Professor Bryan Schwartz with a number of co-authors, are available at http://www.asper-chair.com/asper-review.
437 Law firms have found evaluation of foreign lawyer educational credentials to be challenging. See Carole Silver, The Case of the Foreign Lawyer: Internationalizing the U.S. Legal Profession, 25 FORDHAM INT’L L.J. 1039, 1065 n.71 (2002) [hereinafter The Case of the Foreign Lawyer]. Expertise in credential verification issues can be found in analogous fields, such as employment law. See, e.g., Creola Johnson, Credentialism and the Proliferation of Fake Degrees: The Employer Pretends to Need a Degree; The Employee Pretends to Have One, 23 HOFSTRA LAB. & EMP. L.J. 269 (2006).
439 A.B.A. SEC. LEGAL EDUC. & ADMISSION B. REP., supra note 18, at 3.
its Report it states that "[t]he ABA is continuing to investigate whether the ABA or others could provide useful information to states and law schools that are evaluating foreign law credentials."\(^{440}\)

Although a law school may utilize consultants or established third-party services to evaluate foreign lawyers' educational credentials, LL.M.-offering institutions must keep in mind that the proposed Model Rule very firmly makes the law school itself responsible for substantive evaluation of whether an applicant's foreign legal educational credentials meet ABA proposed Model Rule standards. That evaluation is not merely one used for admissions decisions by the Qualifying LL.M. program. It is also the one on which the law school will rely when the law school certifies to a state board of bar examiners that one of the school's Qualifying LL.M. program graduates is qualified to sit for the bar examination by virtue of his or her foreign legal education as combined with the education s/he received in the LL.M. program.

Second, a law school offering a Qualifying LL.M. program should explore what it needs to do in order to screen foreign-educated lawyers, not only for their educational and law practice credentials, but also to screen their backgrounds. While their admission to and service in a foreign bar would suggest that a foreign-educated, practicing lawyer's background and conduct have been examined in more detail than the background and conduct of the typical foreign student seeking American graduate education, it nonetheless behooves a law school to ensure the success of a Qualifying LL.M. Program (or any of its programs that seek to attract international students) by ensuring that it admits students whose backgrounds have been properly checked and vetted.\(^{441}\) This would seem mandated, too, by the likelihood that boards of bar examiners will expect law schools with LL.M. programs certified under the proposed ABA Model Rule also to certify the foreign-educated applicant's character and fitness, much as American law schools currently do for their J.D. graduates.\(^{442}\)

\(^{440}\) Id.


\(^{442}\) See Admissions Officers Do More Online Background Checks of Law School Applicants Than Those Applying to Other Programs, LEGAL SKILLS PROF. BLOG (Oct. 30, 2011), http://lawprofessors.typepad.com/legal_skills/2011/10/admissions-officers-do-more-online-background-checks-of-law-school-applicants-than-those-applying-to.html. Similarly, in the medical education field, the American Medical College Application Service (AMCAS) facilitates background checks on conditionally accepted medical school applicants, which the Association of American Medical Colleges recommends:

[A]ll US medical schools [should] procure a national background check on applicants upon their conditional acceptance to medical school. The rationale for performing criminal background checks on accepted medical school applicants is based on a number of issues, including the need to enhance the safety and well-being of patients and, in so doing, to bolster the public's continuing trust in the medical profession, and to ascertain the ability of accepted applicants to eventually become licensed physicians.

\[\text{The } \text{AMC-facilitated Criminal Background Check Service, } \text{AMCAS,} \]

TRANSNATIONAL LEGAL SERVICES IN GLOBALIZED ECONOMIES

L. The Advantages of a Bar-Oriented American Legal Studies Curriculum and Satisfying Accountability Standards

Featured prominently in the discussion of the ABA Proposed Model Rule and the revised New York Court of Appeals Rule are the challenges that foreign-educated students who earn LL.M.s in the traditional-style LL.M. programs—those that do not prescribe required coursework, but rather, permit students to take non-bar-examined electives and write an academic thesis—face on bar examinations. It is not clear how many students from traditional-style LL.M. programs enroll in bar review courses before taking a state bar examination. Nor is it clear to what extent those students who do enroll in bar review courses actually complete the work. For the 2012 New York Bar Exam, a leading bar preparation program designed for foreign-educated LL.M. degree holders claimed a 78% bar passage rate among its LL.M. completers. Likewise, schools that take care in advising foreign-educated LL.M. students who plan to take a bar examination, such as Stanford, boast passage rates around 80%.

443 See ABA Proposes Big Changes, supra note 8. As Ms. Sloan pointed out:

Low bar-passage rates among foreign-trained attorneys had raised red flags for regulators. Nearly 6,000 foreign-trained attorneys took bar exams in the United States last year, according the National Conference of Bar Examiners—the vast majority, 4,596, in New York and another 724 in California. Their passage rate was 31 percent, significantly lower than the 74 percent among graduates of ABA-accredited law schools. Legal educators attributed that showing to language challenges, a lack of background in common-law systems and the difficulty of the New York and California exams relative to other states.

Id. It appears that information reflecting bar-passage rates has been collected from bar examiners, although many schools do not post data about the numbers of their LL.M. graduates who take bar examinations, let alone their bar pass rate cumulatively or by jurisdiction. For example, during the years 2008-2013, the New York Bar Examiners reported passage rates for “foreign-educated” examinees between 46% and 55% for first-time July bar takers, and between 33% and 43% for first-time February bar takers. New York Bar Exam Pass Rates 2008-2013, N. Y. ST. BOARD L. EXAMINERS, http://www.nybarexam.org/ExamStats/NYBarExamPassRates2008_2013.pdf (last visited Mar. 9, 2013). During the same period, the overall pass rate on July administrations was between 76% and 83%, and, on February administrations, it was between 74% and 81%. Id. However, the New York Bar Examiners’ statistics do not list a separate category for foreign-educated, American LL.M.-degree holders who take the bar exam based on the LL.M. degree. See id. Instead, they simply group all foreign-educated lawyers who take the bar examination into the “foreign-educated” category, regardless of whether they qualified by obtaining the LL.M. degree or otherwise. See id. Of schools that have made public statements, Stanford Law School claims an 84% bar pass rate among its LL.M. students in a letter to the ABA regarding the proposed Rule. Letter from Larry D. Kramer to Charlotte (Becky) Stretch, supra note 228. Also of interest is that Stanford’s dean notes that Stanford’s LL.M. programs accept only 10% of the applicants each year, but does not state what percentage of the 10% accepted actually sit for an American bar examination upon graduation. See id. For Georgetown’s LL.M. program, there is also an anecdotal report, purportedly derived from information posted to the “admitted students’ website” of “a bar pass rate for our foreign lawyers that is higher than the average of 47% (it was 50% in 2010 and 60% in 2009).” Applicant 25, Comment to Georgetown + NY Bar?, LLM GUIDE (Mar. 30, 2011, 11:24 AM), http://www.llm-guide.com/board/102734 (internal quotations omitted).


445 See, e.g., Letter from Larry D. Kramer to Charlotte (Becky) Stretch, supra note 228. Interestingly, some national schools, such as Berkeley Boalt Hall, decline to provide bar passage rates for their LL.M. degree examinees: “Because historically so few LL.M graduates have been eligible to take the California bar, we do not have data on their pass rates.” Memorandum from Christopher Edley, Dean, et al., to Third Year and LLM
This has led the ABA Section on Legal Education to include among its proposed LL.M. Qualification Certification standards the requirement that "[a] law school must publicly disclose on its website the first-time bar passage rates by state of its most recent class of graduates of an LL.M. program specifically designed to comply with this rule and to prepare its students for the practice of law in the United States."446 Thus, bar-passage success of LL.M. graduates will be the single most accessible and, therefore, important factor for foreign-educated lawyers to consider in selecting a Qualifying LL.M. program. Moreover, a law school that offers an ABA-certified LL.M. program will have to account bar-passage results to the ABA Council. After receiving initial review (which appears to be envisioned as a "desk audit") for purposes of certifying its LL.M. program as qualifying, a law school can expect that "[d]uring subsequent regularly scheduled site visits, site teams will gather the facts necessary to determine if the LL.M. program continues to satisfy the Criteria."447 The ABA’s proposed Model Rule and Criteria do not prescribe a specific bar-pass benchmark for continuation of certification. However, the Section on Legal Education’s Report notes that:

The question of whether a law school should be required to publish the bar pass rate for the graduates of a “certified” LL.M. program did divide the Committee. Consistent with the spirit of Standard 509, the Criteria include a requirement that the pass rate be made public on a school’s web page.448

Students, Berkeley Sch. of Law (April 17, 2008), http://boaltalk.blogspot.com/2008/04/administration-response-email-on-bar.html (expressing and addressing concerns over the “82% pass rate [which was] the lowest recorded by Boalt graduates in the past 10 years” for the California Bar Exam). However, in a PowerPoint Presentation for Berkeley/Boalt Hall foreign LL.M. students, the school stated that “22 out of 33 LLM takers passed the NY Bar in 2010 (approx 67%); 25 out of 49 LLM takers passed the NY Bar in 2009 (approx. 51%); and 16 out of 33 LLM takers passed the NY Bar in 2008 (approx. 48%).” MINJI KIM, BAR EXAM (NY & CAL) PREPARATION TIPS FOR LL.M.S 11 (2011). American Legal Studies LL.M. programs at other law schools either do not mention bar passage rates, or describe them in vague terms such as those used by Vermont: “Students in our LLM program have taken either the New York or Washington DC bar exam, and have an excellent pass rate.” Vermont Law School, LSAC, http://www.lsac.org/llm/guide/3946 (last visited Mar. 9, 2014). As one observer has noted, some of the newer American Legal Studies programs, like the one adopted in 2010 by Albany Law School, the “LL.M. For International Law Graduates,” are clearly designed to meet the new [New York] bar admission requirements and [are] an interesting first detailed response to them. It will be interesting to see whether, like Albany, law schools will open up more clinical opportunities for LL.M. students now that the New York Bar permits clinical credits. It will also be interesting to see whether law schools will reorganize some LL.M. programs with the principal aim of ensuring bar passage, and how they will organize their programs with that in mind. I expect the response to be variegated. At least some law schools appear to tolerate comparatively low bar passage rates for their LL.M. graduates. And many point out that their programs are not designed for bar passage anyway . . . . These schools are more likely to create minimal changes to meet the requirements for bar eligibility in New York.


446 A.B.A. SEC. LEGAL EDUC. & ADMISSION B. REP., supra note 18, at 7.
447 Id.
448 Id. at 2.
TRANSNATIONAL LEGAL SERVICES IN GLOBALIZED ECONOMIES

Standard 509 deals with basic consumer information that law schools are required to publish in a fair and accurate manner. Specifically, Standard 509(b)(8) requires bar-passage data. The current ABA documentation of the proposed Model Rule and Qualifying LL.M. Certification standards do not make express reference to the bar-passage standard articulated as Interpretation 301-6 to Standard 301. Thus, as the criteria for LL.M. Certification now stand, bar pass rate itself is not made a measure of whether the LL.M. program "continues to satisfy the Criteria," only that the Criteria require prominent disclosure, on a jurisdiction-by-jurisdiction basis, of the pass rates of Certified LL.M. program graduates.

This facet, in particular, of the Qualifying LL.M. degree program should be very appealing to those law schools that may not have had many, or any, LL.M. programs previously, but where bar passage has been a primary objective of the program of legal education—which will distinguish those schools from many schools that offer, or would aspire to offer, an LL.M. program to foreign-educated lawyers who seek to qualify for bar admission by examination. Collectively, faculty and administration at such schools have spent more time than most of the traditional LL.M. schools considering a question analogous to the one facing foreign-educated lawyers—how to build the study skills, reasoning, writing, and communication skills of non-traditional law students. Even with the ups-and-downs of bar passage cycles, graduates of many law schools with a practical orientation have achieved remarkable results that significantly exceed the predictors with which they entered law school.

STANDARDS & RULES OF PROCEDURE FOR APPROVAL OF LAW SCHS. Interpretation 301-6.
THE JOURNAL OF INTERNATIONAL BUSINESS & LAW

M. Synergies Realized by Integrating Foreign-Educated Lawyers From a Qualifying LL.M. Program Into the Required Course Sections: Building and Enhancing Cultural Competency

Obviously, law schools that choose to integrate LL.M. students into their J.D. programs or Honors J.D. Programs, such as Atlanta's John Marshal Law School's Criminal Justice Honors Program (HPCJ), will be vigilant to ensure that placing foreign-educated lawyers into required course sections does not adversely impact the mission and goals of that program. Part of this vigilance will include a close examination of the ratio of LL.M. students to Honors J.D. Program students who are to attend the program in any given year. Ratios are more meaningful than numerical limits because of the anticipated growth of such Honors J.D. Programs each year, beyond their initial enrollments that tend to be modest as a J.D. Honors Program establishes itself and gains a growing reputation. In all likelihood, the numbers of LL.M. students will be modest for a number of years after a program is launched, as the program establishes its reputation and penetration into the relevant markets for practicing lawyers, and as the process of states considering and adopting the ABA proposed Model Rule and Qualifying LL.M. Criteria gets under way. In its early years, a reasonable expectation, using the HPCJ as an example, would be that there will be five foreign-educated lawyers taking basic required courses with the HPCJ students. Maintenance of a 4:1 ratio between a J.D. Honors Program's students and foreign-educated lawyers in the LL.M. program should be expected.

As enrollments in both programs increase over time, and a law school gains more experience with the dynamics of the collaboration of the two groups, law schools offering LL.M. students opportunities within their J.D. Honors Programs may find that even a 3:1 ratio is tenable. If both programs grow and mature as 21st-century law school would anticipate, there will come a point where the size of the LL.M. student population may justify the creation of separate four-credit required course sections for the LL.M. program.

In reality, however, the presence of foreign-educated lawyers in the classes of a J.D. Honors program, such as the HPCJ program, should not be detrimental to either program. Rather, it is a significant asset. To be hesitant about integrating LL.M. students into the J.D. classroom, and particularly into the J.D. Honors Program classrooms, is to miss the real opportunity that integration presents. Integration of foreign-educated lawyers from the Qualifying LL.M. program into J.D. Honors Programs will promote for both groups an objective legal educators are coming to recognize as crucial to 21st-century lawyering: cultural competency. As Professor Jon A. Barrett, Jr., has observed,

There is no doubt that we are living in a shrinking world; the world is just a mouse click away. In this era of international commerce, transportation, and communication, legal service providers must be prepared to confront international legal issues, if not on a daily basis, at least on a periodic one. The lawyer of the twenty-first century will undoubtedly have an international practice, no matter where that lawyer is located or what type of law he or she practices. Given this reality, it is incumbent upon legal educators to ensure that today's students are adequately prepared to deal with the international

451 Trakman, supra note 412, at 549-50.
Indeed, one of the areas that Professor Barrett considers as comprising international law, in his intentionally comprehensive definition of it, is comparative law, which "provide[s] a variant to purely domestic treatment of legal issues and ... help[s] explain how other nations have dealt with these issues." What better source of these comparisons, it may be asked, is there than foreign-educated lawyers attending as LL.M. students first-year law classes with American J.D. students? With foreign-educated lawyers in the classroom, law teachers and J.D. students are not limited to the mere confines of casebook notes and law review articles on comparative aspects of foreign law—they have in their midst the living, thinking, and interactive embodiment of that foreign law in the person of a trained practitioner of that law. The foreign-educated lawyer as LL.M. student brings a huge synergy in legal studies to the U.S. classroom, as those who have taught such students can attest. For example, in arguing over a decade ago on behalf of the United States as the nexus for hosting "truly global" law schools, David S. Clark, currently the Maynard and Bertha Wilson Professor of Law and Director of the Certificate Program in International and Comparative Law at Willamette College of Law, pointed out that there is another dimension to enrolling foreign law students that is relevant for the global law school, which is to improve the multinational mix of the student body. Since students learn from each other and teachers learn from students, foreigners are vital to the quality of teaching. This is true not only in courses with an explicit international dimension, but in all courses where comparison with another approach lends insight on the issues. Foreign students challenge our assumptions about law; they remind us that each culture might have a distinctive way of dealing with conflicts and human behavior in general.

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453 Id. at 977-79.
454 Id. at 978.
455 Clark, Transnational Legal Practice, supra note 206, at 271-72 (emphasis added). In commenting upon the University of Lucerne’s efforts to tap into what foreign students bring to what the Swiss are conceptualizing as a global law school with a transnational curriculum, commentators have observed: Establishing a sustainable culture of internationalization hinges upon the efforts of both the incoming and outgoing student populations. The former will have an established presence on campus and attract more local students to the ranks of those vying for international placements. Fundamentally, they will also introduce a distinctly international viewpoint into each and every class they will attend. The group of students who go abroad will spread the news of the merits and virtues of internationalization amongst the general student body and act as public relations executives on behalf of both our initiatives and the schools they have visited during their course of studies.

Indeed, the presence of the foreign-educated LL.M. student in an American classroom is an underappreciated resource; law teachers in American law schools need both to recognize this resource, and to put it to effective use in service of law school pedagogy, for—

most foreign graduate students come to our classrooms with prior legal experience. Most of them who come to get LLM degrees in the United States are not newly minted graduates, but often have a fair amount of experience in their own legal systems and other legal systems in which they have been practicing. One recurrent problem in “globalizing” the curriculum at our schools is our lack of substantive knowledge about other legal systems. But we have foreign lawyers sitting in our classes with deep substantive knowledge of other systems. They can be asked to present on relevant class topics from the perspective of their own legal systems. These students are often much more comfortable as presenters than in the give-and-take of classroom discussion.

Foreign students also bring cultural and business knowledge to the classroom. A great many of my students come from corporations in Asia or have been business lawyers in Asia or the European Union. They bring a great deal of practical knowledge about international transactions that is invaluable to our JD students who will be practicing in a global market. Finally, the very fact that they are studying law in the United States suggests that they have particular interest in transnational legal issues and hold an understanding that many of our own students have not yet developed regarding the pervasiveness of these issues.456

The potential for foreign-educated lawyers as LL.M. students to contribute meaningfully to an American law school’s J.D. program classrooms is well illustrated by the example of the HPCJ. The perspectives, cultures, and experiences brought by foreign-educated lawyers to the HPCJ student population should be mutually beneficial and particularly helpful to the HPCJ students, who will enter into criminal-law practice in an age in which many future clients will present a range of diversity for which it will be essential for the HPCJ graduates to embrace and to work with effectively. In addition, foreign-educated lawyers’ perspectives on traditional American legal subjects will be invaluable to J.D. students generally, and HPCJ

456 Lauren K. Robel, Opening Our Classrooms Effectively to Foreign Graduate Students, 24 PENN ST. INT’L L. REV. 797, 798 (2006). Professor Robel suggests treating foreign-educated lawyers-LL.M. students as the legal professionals that they are, rather than as fledgling apprentices, if we are to fully tap into this “major resource sitting in our classrooms”:

"[F]or many of the foreign LLM students, it is a much more comfortable situation to be asked to present as opposed to participate in Socratic dialogue. Ask students to present something discrete in class that is comparative or confronts a particular transnational dispute. If institutions make it a priority to assure each first year class provides an opportunity for foreign graduate students to present on a relevant issue, these students will provide amazing contributions to class. Such presentations bring a transnational perspective to class, permit JD students to get to know their foreign colleagues better, and develop a greater respect in JD students for the skills, the experience, and the knowledge that LLM students bring."

Id. at 800; see also Sang-Hyun Song, Korean Students in U.S. Law Schools and Foreign Students at Seoul National University Law School, 18 DICK. J. INT’L L. 467, 468 (2000).
students in particular, especially when they relate to topics often taken somewhat for granted in American legal education, including the rule of law, respect for and protection of individual rights, and transparency and consistency of the legal system.

Educators have come to call this "cultural competency," a term which has recently entered the discourse of legal scholars from medical education, where it "is a term often used . . . to explain the ability to look at situations from a variety of perspectives as well as the ability to embrace diversity." Professor Beverly Moran has written of problems in "cultural competency" of American law school graduates and the need for law schools to increase cultural competency as a systemic part of their programs of legal education:

[Attributes such as] gender, race, ethnicity, and class . . . [can be examined to] discuss how United States legal education responded to the MACCRATE REPORT's and EDUCATING LAWYERS' [i.e., Carnegie Report] call to include practical skills and professional values in the law school curriculum. Th[at] [discussion] reveals that, while the clinical movement (and its further iteration in the new curriculum reform movement) has increased law students' access to practical skills training, United States law schools are much less advanced in their path to teaching professional values. Unlike, for example medical education, legal education has not adopted cultural competency as a value much less a fundamental practice skill.457

"[L]aw schools," Professor Moran wrote, "are at an earlier stage than medical schools in their path toward cultural competency."458 Medical schooling "recognizes that many aspects of practice require doctors to understand a wide array of social difference."459 However, "law school faculties are not yet fully aware that gender, race, ethnicity, and class sometimes influence legal rule making."460 To help lawyers embrace the twenty-first century's diversity, law schools must "introduce[e] law students to the evidence that gender, race, ethnicity, and class might sometimes influence law."461 "The foundations of cultural competency," she emphasizes "go well beyond merely mentioning gender, race, ethnicity, and class in the classroom to the assertion that law students should actually graduate with some ability to deal with difference."462 Including foreign-educated lawyers in required J.D. course classrooms is a compelling methodology for fostering an environment for building cultural competency into the traditional law school curriculum. For example, a lawyer educated in China may well have striking insights to offer to her classmates in the honors program about the dramatic changes that criminal procedure in China has undergone in the last fifteen years.463 Among

458 Id. at 32.
459 Id.
460 Id.
461 Id.
462 Id.
463 As a scholar at the University of Hong Kong has described it:
Over a decade ago, the promulgation of the 1996 Criminal Procedure Law drastically improved the criminal justice system in China by introducing some key rights and procedural safeguards for criminal defendants. Unfortunately, in practice many of the rights introduced lacked real substance. The reforms were intended to introduce
the many fascinating and illuminating points of comparison between the two legal cultures, the role of Chinese-educated lawyers in controversial criminal proceedings would be especially compelling for Chinese LL.M. program students to share with their Honors Program classmates.4

For HPCJ students growing up and attending college in a culture where such rights and procedural safeguards are interwoven into the societal fabric, first-hand descriptions of the growing pains of China’s efforts to implement some of the same rights and safeguards in a aspects of the adversarial system of justice to the historically inquisitorial system, however the safeguards introduced lacked the necessary guarantees to ensure compliance and the right to a fair trial is still far from a reality for China’s criminal defendants.


4 Whitfort provides illuminating details:

Even the All China Lawyers Association’s efforts to protect its members have compromised their autonomy. In March 2006 the Association issued a Guiding Opinion on Lawyers Handling Collective Cases. This directive advises lawyers handling sensitive cases or cases involving more than 10 defendants to submit themselves to the guidance of the local judicial administration. Cases involving large numbers of defendants generally relate to class action type challenges made to government policies. Lawyers who act for such groups are often those most in need of external assistance, yet the Guidance Note provides that contact with foreign organizations and the media is expressly discouraged in such cases. Locally issued guidance notes placing similar restrictions on lawyers’ independence have also been issued by justice bureaus in Nantong, Guangdong, Henan, Shenyang and Shenzhen.

Such interference in lawyers’ work is now deemed necessary as simple harassment has failed to stop lawyers such as Zheng Enchong who acted on behalf of evicted residents against local government in Shanghai. After intimidation tactics failed, Zheng was eventually prosecuted for leaking state secrets to an international human rights group and sentenced to 3 years imprisonment. His licence to practice law was also revoked by the Ministry for Justice.

Reluctance in China to take criminal defense work is further enhanced by the practice of many lawyers in touting themselves as “connection specialists.” Lawyers can provide the crucial link between local government and foreign parties wishing to invest in China. By fostering close connections with government, lawyers seek to gain access to privileged policies and internal documents which facilitate the deals of their commercial clients. In also acting for criminal clients, lawyers may place these financially important ties in jeopardy, for little remuneration and great personal risk.

Id. at 148-49 (footnotes omitted). Similar synergies can come from Chinese-educated lawyers familiar with the methods of civil-side practice in China:

The Western notion of enforcing one’s legal rights through litigation does not sit well with the Chinese. Not only is the concept of a legal right a foreign concept, but the pursuit of self-interest through adverse litigation is at odds with the paramount virtue of social harmony. It is difficult for the average Chinese person to conceive of a court as other than a place where bad people go or where bad things happen to people at the hands of government. The top-down view of law as an instrument of government with citizens as the objects of legal regulation remains influential in China today. Courts generally do not welcome litigation and often try to discourage it. Far more than in many other systems, the Chinese legal system is willing to forgo the enforcement of rights when other pressing values seem to be at stake, to the point where it might be more accurate to say that the system recognizes interests more than rights.

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vastly different cultural context are very important. Not only would such eyewitness testimony elicit sober reflection by American HPCJ students; it would also help HPCJ students realize why future clients from other cultures and legal systems may have very different reactions to, and perceptions of, commonplace events in American law enforcement and the operation of America’s state and federal criminal justice systems.465

We find another example of the potential for foreign-educated lawyers in our LL.M. degree programs to enrich our J.D. students’ experience in the area of what has come to be called “cultural defenses” in both Criminal and Civil Practice Law subjects.466 As a commentator observed earlier in the decade,

There are practical, nuts-and-bolts reasons for addressing cultural defenses in Criminal Law. In particular, litigants often raise cultural issues in both civil and criminal cases. Plus, the extraordinary numbers of individuals from other countries who are currently prosecuted and incarcerated in the United States could give rise to more opportunities for courts to consider cultural arguments. In addition, the influx of immigrants into the United States in recent years will likely add to the cultural diversity already existing in our society. The majority of immigrants living in the United States come from non-Western-based traditions and legal principles, and nearly half of these foreign-born individuals have entered the United States since 1990.467

Among the objectives, therefore, of addressing cultural-based defenses not only in Criminal Law, but also in a spectrum of other courses including Torts, Contracts, and Domestic Relations, is to increase the students’ cultural competency, preparing them for the increasing number of instances in which culture clashes within the United States give rise to legal problems:

Discussing the use of or the potential for using cultural defenses creates space within the classroom discussion for considering perspectives other than those inherent in traditional legal analysis. This not only affirms the relevance of other worldviews, but also calls into question the illusion of objectivity that cloaks our laws. . . . [B]y addressing this matter, . . . students will learn to recognize the cultural assumptions imbedded in the cases they are reading and gain a deeper understanding of the law.468

467 Kuo, supra note 466, at 1299-1300 (footnotes omitted).
468 Id. at 1299. Professor Kuo observed, “Considering that an individual’s culture has an undeniable influence on his or her perceptions or behavior and thus may impact an individual’s motivations, litigants and their attorneys are likely to continue petitioning the courts to recognize cultural defenses.” Id. at 1300 (footnotes omitted).
It does not take an elaborate, geometric proof to demonstrate the value of the foreign-educated lawyer in the American J.D. classroom, and to see that the synergies are great, and the benefits mutual:

N. Debunking the “Taking Our Jobs” Myth

Whenever the subject of foreign-educated lawyers becoming qualified to practice law in the United States comes up, inevitably someone raises the objection that he or she will compete with American law school graduates for jobs and take jobs away.469 Indeed, the only law student comment received on the ABA’s proposed Model Rule declared “[b]efore allowing additional job-seekers into the market, the U.S. economy should be given the chance to rebound, and the job outlook to improve.”470 When scrutinized logically, however, these visceral assertions are proven to be misplaced, and to a great extent, fallacious.

Many foreign-educated lawyers do not seek bar admission to enter into the general practice of law in America,471 nor would their unique situations make them a suitable alternative to J.D. program graduates for the large majority of American legal employment.472 As a scholar of, and leading educator in, this field has aptly observed,

the need for dual-trained lawyers is limited. While U.S. law schools attract increasing numbers of foreign lawyer students, U.S. law firms have exhibited little interest in hiring and training them; nor have the firms learned how to efficiently use LL.M. graduates in innovative positions that might allow the firms to strengthen their knowledge and relationships with local lawyers and businesses in the LL.M. students’ home countries. Rather, the largest market for LL.M. graduates is more likely situated in the local foreign-based firms competing with the offshore offices of U.S. law firms.473


470 E-mail from Scott C. Denlinger, J.D. Candidate 2012, Penn State Dickinson Sch. of Law, to Charlotte (Becky) Stretch, Assistant Consultant, Section of Legal Educ. and Admission to the Bar, A.B.A. (Apr. 30, 2011, 6:00 PM).


473 Id. As this commentator observed elsewhere:

Th[e] distinction for foreign lawyers between capitalizing on their foreign law training and its value to U.S. law firms and other employers, on the one hand, and presenting themselves as substitutes for U.S. lawyers based upon their LL.M. education and general legal knowledge, on the other hand, is one that besets foreign lawyers throughout their LL.M. year and beyond. Only a few U.S.-based law firms have a sufficient stream of work involving the law of a particular foreign country to provide a foreign lawyer with a steady diet, and most of these are headquartered in New York. Gaining access to these firms depends upon a combination of the role of the foreign lawyer’s home country in the global economy as well as the credentials of the individual applicant. Another approach that capitalizes on the foreign expertise of LL.M. graduates is to find positions with U.S. law firms that have offices in the lawyer’s home country,
As Professor Silver at Northwestern has advised foreign-trained lawyers who earn an American LL.M.:

In thinking about job search strategies, foreign LL.M. graduates might identify law firms with foreign offices in their home countries as good prospects for employment, on the theory that these firms would likely have business related to their home countries. In addition, the firms may hire LL.M.s with the agreement of training them for a period in the United States, after which the LL.M. graduate returns to his or her home country to work in the firm’s foreign office there. It is difficult for U.S. firms to staff their foreign offices, and the fact that foreign offices have grown in size in recent years only exacerbates the staffing problems. A number of law firms hire LL.M.s for brief periods of training in the United States before sending them to foreign offices in their home countries.474

American J.D. holders will not be competitive in jobs that require the language and cultural affinities that foreign businesses seek to have as their legal counsel (outside or in-house) in the United States. That is the niche that these foreign-educated lawyers overwhelmingly seek to fill—not to hang a shingle next to one of our J.D. graduates, vie for assistant D.A. jobs with J.D. grads, or work in traditional J.D. grad areas such as criminal defense, insurance defense, personal injury, premises liability, or worker’s compensation.475

Indeed, such an ambition is prohibitively unrealistic:

United States firms’ reluctance to hire foreign-trained lawyers likely relates to three factors: first, the assumption that most foreign lawyers will return to their home jurisdictions after a relatively brief period in the United States; second, a concern that training foreign lawyers may require more time than

with the plan of obtaining training in the United States before transferring to the firm’s foreign office.

The Case Of The Foreign Lawyer, supra note 437, at 1064-65. Indeed,

[c]xperience shows that only a very, very small percentage of LL.M. graduates from all United States law schools find work here. We want you to be very clear about this before enrolling in the Law School, and so we provide the following information for you to consider carefully. . . . While you can expect to receive an excellent education at Penn, we state again, as we did in the Admissions brochure, that it is extremely difficult to find law-related employment in the U.S. upon graduation, even for the period of practical training that is allowed under current U.S. immigration law. Unfortunately, the number of employers who are interested in hiring LL.M.s is very small. More specifically, very few U.S. legal employers are interested in hiring lawyers from abroad unless they have earned their law degree (J.D.) in the United States.

Id. at 1060 n.60 (University of Pennsylvania School of Law, Career Planning Information for Prospective LL.M. Candidates) (emphasis supplied).

Id. at 1070.

474 Id. at 1070.

475 See, e.g., id. at 1075-76; see generally Mary C. Daly & Carole Silver, Flattening The World Of Legal Services? The Ethical And Liability Minefields Of Offshoring Legal And Law-Related Services, 38 GEO. J. INT’L L. 401 (2007) (noting “the reluctance of U.S. law firms to hire foreign lawyers and train them in their domestic offices where opportunities for monitoring are substantial,” and observing that therefore “it is unlikely that these firms would feel comfortable sending work offshore to be performed by similarly educated individuals in circumstances that make monitoring and training difficult”).
training their U.S.-educated counterparts; and third, the nature of the work assigned to new law graduates, which is intensely language-focused and consequently presents a considerable challenge to lawyers whose first language is not English.476

For domestic legal employers, a holder of a J.D. degree from an American law school—regardless of where s/he hails from originally—is a far easier job candidate to assess and train than a foreign-educated lawyer admitted to practice here upon earning an American LL.M. degree. The realities are clear—and stark:

[T]he LLM is itself very difficult for prospective employers to assess. Employers of U.S. J[uris] D[octorate] graduates rely on several indicators to evaluate applicants: grade point average or class rank; other indicia of academic achievement, such as law review; the relative ranking or status of the law school; and other special qualifications, such as a clerkship, specialized or technical education, or foreign language ability. Employers can also rely on the JD degree as providing a substantive common grounding because of the largely standardized first-year curriculum. In addition, employers require applicants to pass the bar, sometimes before they are hired and certainly within a reasonable period afterwards; the bar, however, serves more as a requirement than an evaluative asset.

For foreign LLM graduates, the information available to employers is both qualitatively and quantitatively different than for JDs. The grades that LLMs earn are more ambiguous for several reasons. First, U.S. law schools currently take a wide variety of approaches in grading LLMs. Second, the grades are earned in a completely heterogeneous array of courses that do not provide either the baseline competence or comparability of the required first-year JD curriculum. Even within a particular law school, the absence of a core LLM curriculum makes comparison between LLMs more difficult. In addition, the ranking of U.S. law schools that prospective employers use to assess JD graduates is less reliable for LLMs, because information about LLM programs typically is not included in compiling the ranking.477

476 Daly & Silver, supra note 475, at 413; see Larry E. Ribstein, The Future of Legal Education—Practicing Theory: Legal Education for the Twenty-First Century, 96 IOWA L. REV. 1649, 1671-72 (2011) (noting that “the LLM degree plus passage of the New York bar, which is open to non-JD LLMs, gives Chinese students access to jobs in Chinese law firms in the United States or as legal counselors in Shanghai, Beijing, or Taipei”).

477 Silver & Freed, supra note 190, at 28. While a qualifying LL.M. program under the proposed ABA Model Rule will provide a measure of uniformity and comparability among non-thesis LLM. programs that law schools choose to create, or modify from existing U.S. legal studies programs, the LLM. still cannot—as the ABA admonished state bar examiners in 1999—substitute for the J.D. degree. See, e.g., Gilligan, supra note 402, at 8 (noting that basing bar-exam eligibility for foreign-educated lawyers on one-year of course work in an American law school, whether in an LL.M. program or otherwise, is of “concern to the ABA Council of the Section of Legal Education and Admissions to the Bar and resulted in the Spring 1999 letter of [Indiana Supreme Court] Chief Judge Shepard [then-chair of the ABA Council on Legal Education and Admissions to the Bar] to the Chief Justices of State Supreme Courts and the Directors of Boards of Bar Examiners questioning the equation of an LL.M. or one year of courses plus a foreign degree with the Juris Doctorate programs in the US.’”).
There are other facts that act as reality checks as well. There are, for example, those who assert that foreign legal educations cost less than American ones, therefore supposedly making the foreign-educated lawyer willing to take employment for lower pay than their student-loan burdened American counterpart. 478

The reality is that the foreign-educated lawyer will have very substantial expenses in pursuing American bar admission. First, the lawyer will not be practicing law in his/her home country during the period of LL.M. study, bar review, and bar examination. Therefore, their professional income will be lost for that period. Second, the cost of an LL.M., when one includes all of the expenses attendant to a foreign-educated lawyer spending two years in the United States, at the least, before s/he would even be eligible to take the bar examination, hardly give him or her a competitive advantage.

While it is true that some countries help to defray some of lawyers’ expenses for graduate study in the United States, any nation that does so must, logically, expect that the lawyer will be returning sooner, rather than later, to the home country to confer on it the benefit of the skills the taxpayers there assisted the lawyer in acquiring. Thus, even if some foreign-educated lawyers receive financial assistance for their LL.M. study so that they are freer to accept legal employment at lower pay, they will not be long-term, let alone permanent, fixtures in American law offices, since they will have an obligation to the home country. That fact will not escape employers. Even those who might seek the salary leverage of hiring a foreign-educated lawyer will be chary of hiring him or her, considering the training that will be required to get him or her up to speed with American-educated counterparts, when that investment appears unlikely to pay off for the employer in the long run. The economics of the LL.M. degree for a foreign-educated lawyer, therefore, aren’t directed primarily in some notion that s/he will enter the America market to compete with J.D. graduates of American law schools. To the contrary, foreigners who wish to emigrate to practice law in the United States are much more likely to enroll in J.D. programs here, and are doing so in increasing numbers. 479

That this is a trend that will be embraced by most ABA-approved law schools, not merely a few, is suggested in Professor Clark’s report that “in another twenty years, many American law schools will have 20 to 25 percent of their J.D. enrollment from foreign countries.” 480 Thus, while a Qualifying LL.M. program serves a very real and very substantial market of foreign-educated lawyers, those who wish to emigrate to the United States and compete with American J.D.-program graduates for American legal jobs are far more likely to have the ambition and foresight to put themselves on a more equal footing by earning the J.D. degree in the United States.

VI. CONCLUSION

Globalization in the provision of legal services is here, and we in the American legal profession, who have so much to offer the rest of the world, should be the first to celebrate it.

478 See, e.g., Comments, supra note 469.
That will permit the U.S. Trade Representative to have the kind of support needed to make liberalization of trade in legal services a long-deferred reality under the GATS and, in turn, will open new and expansive markets to U.S. legal service providers that have, up to now, been closed or fettered by barriers to entry. The way to change that, however, and create a truly international market for our lawyers' outstanding skills is by being bold enough, as a nation and a legal profession, to take the first—and truly significant step—to open our own bar admissions to foreign-educated attorneys who seek more than what the Foreign Legal Consultant status allows.

Three recent innovations have paved the way for this, and the state high courts and bar examiners should embrace them. Those developments include one in New York, another in the ABA Legal Education Section, and another in Georgia: (1) New York's Court of Appeals Rule 520.6, heightening the core course work required for an LL.M. degree that will qualify a foreign-educated lawyer to take the state bar examination in New York, where over 1,000 LL.M. graduates take the bar exam each year; (2) the nearly simultaneous announcement by the ABA Legal Education Section of its proposed Model Rule for foreign-lawyer bar-examination eligibility and Qualifying Criteria that will permit law schools to offer special ground-based LL.M. programs to foreign-educated lawyers who will seek them to qualify for the bar examination in every state that adopts the ABA proposed Model Rule; and (3) the Georgia Supreme Court's adoption of the first rule and qualifying LL.M. curricular criteria in the country that is based on the ABA's proposed Model Rule and Criteria.

The American legal profession should not stay the hand of trade negotiation, and intercept the steps of progress, out of understandable, yet nonetheless illogical, fears. While it is true that the period since 2008 has produced some very challenging times for both segments of the bar in America and their clients, that is an internal problem that will not be impacted in any significant way by opening reasonable market access to foreign-educated lawyers who earn a Qualifying LL.M. degree. To be sure, segments of the bar have opposed assisting foreign-educated lawyers to earn eligibility to sit for American bar examinations on the belief that this is contrary to the interest of American J.D. holders. However, the evidence discussed in this article indicates quite the contrary. Not only will foreign-educated lawyers not be competitive for most attorney jobs available in the United States, but, also, most foreign-educated attorneys are seeking admission to an American bar for other reasons. Perhaps even more significantly, the LL.M. programs will create real benefits for J.D. graduates. The connections American law schools will make with foreign-educated lawyers through these LL.M. programs open up opportunities and connections at the transnational practice level for their J.D. holders to which most of the J.D. holders would otherwise not have access. They may be opportunities as varied as introduction to foreign clients; collaboration with foreign law firms as local counsel; and placement of the J.D.-program graduates into companies and firms who employ, or deal with, foreign-educated lawyers who have earned their LL.M. degrees in the law school's programs. Furthermore, both J.D. students and their faculty have much to learn from the international array of foreign-educated lawyers, who will bring to U.S. classrooms new and important perspectives on law and its many roles in society—perspectives that are important for us to recognize in our age of globalization, and perspectives to which we otherwise have little direct access.