

TRANSLATING THE U.S. LLM EXPERIENCE: THE NEED FOR A COMPREHENSIVE EXAMINATION

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The process of globalization has generated increasing interest in United States law. One consequence of this interest is the development of a new market for U.S. legal education: foreign nationals, both those who have previously studied law and those who are licensed to practice law in their home countries. These students frequently seek to gain fluency in U.S. law by enrolling in U.S. law school LLM programs. This essay will discuss the mismatch between the career interests of LLM graduates and the state bar licensing systems in which they participate, and will propose a unique comprehensive examination tailored to meet the needs of foreign LLMs.

THE PRESENT STATE OF EDUCATING AND LICENSING FOREIGN LAW STUDENTS

Prior to the 1990s, only a trickle of foreign-educated law graduates studied in U.S. law schools, generally on their way to academic careers in their home countries. Since then, U.S. law schools have experienced a deluge of foreign students, first in expanded or newly-created LLM programs and more recently in JD programs as well.¹ Today, LLM programs for foreign law graduates focus on practitioners rather than academicians, and the growth in these programs is striking. According to the ABA, 41 U.S. law schools awarded the LLM degree to 1047 foreign national students in 1996.² By 2005, more than twice as many law schools awarded LLM degrees to more than twice as many foreign nationals.³

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¹ Unlike LLM students, foreign nationals enrolled in JD programs need not have studied law in their home jurisdictions.

² Information on the number of LLM degrees granted by each U.S. law school was provided to Silver by the American Bar Association Section on Legal Education and Admission to the Bar.

³ The data provided by the ABA indicates that eighty-three schools awarded 2263 LLM degrees in 2005. According to information gathered from law school websites, approximately 100 U.S. law schools offer graduate programs for foreign lawyers. See Carole Silver, *Internationalizing U.S. Legal Education: A Report on the Education of Transnational Lawyers*, 14 *CARDOZO J. INT'L & COMP. L.* 143,

Foreign law students are a diverse group. They come from many home countries, include new law graduates and those with substantial work experience, and if they worked prior to the LLM, they did so in varying professional roles.⁴

In addition to the shift from academic to practitioner focus, we perceive certain shifts in the applicant pool during the last ten years. In the early period of the degree's expansion, during the mid- to late-1990s, Western Europeans, principally from the Continent, constituted a large proportion of applicants. Germans were especially well-represented and came to be appreciated particularly for their excellent English language skills. German law firms prized the LLM during this early period, and supported the trend both financially and otherwise.⁵ Today, however, Western Europeans are less likely to enroll in U.S. law graduate programs.⁶ Applicants from Latin America and Asia-Pacific are taking their places, and many of the Asia-Pacific applicants are not yet licensed to practice law in their home country.⁷ In addition, it is common for Asian employers to finance the

146 (2006) (link). Data on law school programs is provided by the American Bar Association Section on Legal Education and Admission to the Bar at Post JD/Non JD Programs at Law Schools, <http://www.abanet.org/legaled/postjdprograms/postjdc.html> (last visited 11/15/06) (link). For bar admission statistics. See National Conference of Bar Examiners, <http://www.ncbex.org/bar-admissions/stats/> (last visited Nov. 15, 2006) (link).

⁴ See Carole Silver, *The Case of the Foreign Lawyer: Internationalizing the U.S. Legal Profession*, 25 *FORDHAM INT'L L.J.* 1039, 1043–45 (2002) (link) [hereinafter Silver, *Case of the Foreign Lawyer*] (providing data on the backgrounds of 294 LLM graduates working in U.S. law firms in New York). No central organization has gathered statistics about LLM applicants, although the Law School Admission Council has initiated a credentialing service for foreign law graduate LLM applicants, and this may yield information in the future. See Law School Admission Council, LLM Credential Assembly Service for International Applicants, <https://llm.lsac.org/llm/logon/splash.aspx> (last visited Nov. 16, 2006) (link). We can offer some insight based on formal and informal discussions with students and LLM program directors and a research project focused on graduates of LLM programs. Silver is the principal investigator of a research project supported by a grant from the Law School Admission Council examining the careers of LLM graduates of 18 US law schools. Preliminary results of that study are described in a working paper by Silver. Carole Silver, *The Role of U.S. Legal Education in Careers of International Lawyers* (Nov. 16, 2006) (unpublished manuscript, on file with Silver) [hereinafter Silver, *Role of U.S. Legal Education*].

⁵ See Silver, *Case of the Foreign Lawyer*, *supra* n. 4, at 1040; see also John E. Morris, *U.S. Firms Woo Lawyers With Signing Bonuses and Above-Market Salaries*, *FOCUS EUROPE*, Summer 2001, at 13, 13–14.

⁶ Speculation about the reasons for this shift include price sensitivity, the availability of English-language and common law programs in Europe, changes in E.U. regulations supporting educational exchanges and uniform credentials, and the challenges posed by U.S. visa restrictions.

⁷ The decreasing enrollment of Europeans is evident in the research conducted by Silver's LSAC-sponsored research, see discussion *supra* at note 4, which covers the early years of the LLM expansion from 1996 through 2000. During that period, respondents to her survey of LLM graduates of 18 U.S. law schools who were born in E.U. member countries dropped from approximately 39% to approximately 27%.

LLM degree, but in return, the students are expected to return to their employers after graduation and also to focus on corporate law-related courses.⁸

The most common reasons offered for enrolling in the typical practitioner-oriented U.S. LLM program include an expansion of professional opportunities in the home country, an interest in a substantive area of law, and a desire to improve English language skills and to experience U.S. culture.⁹ For some, the prospect of obtaining a license to practice U.S. law is important;¹⁰ this is especially true for students from countries with extraordinarily low bar passage rates, such as Korea and Taiwan.¹¹

Foreign law graduates are frequently as interested in an employment opportunity in a U.S. law firm as they are in U.S. legal education. U.S. law firms, however, have yet to reciprocate this desire with opportunities to work in their U.S. offices. Most of the largest American Lawyer 100 firms host a few LLM graduates for brief internship-like positions following their graduation.¹² Many of these positions are so-called “political” hires, meaning that the LLM graduate brings the opportunity for business development. There is no hiring process similar to the on-campus interviews for JD stu-

⁸ Interviews with LLM graduates conducted by Silver from 2000 to the present, including, for example, the following from a Korean graduate, who reported: “My law firm wanted me to take M[ergers] & A[quisitions]; to do this, I had to take securities regulation and business associations, too [which were prerequisites at his law school]. ... My main purpose was to take M&A.” Just over a quarter of the respondents to Silver’s study who currently reside in countries in the Asia-Pacific region received financing for their LLM from their employer or another source (other than family or the U.S. law school). This was a larger proportion than for respondents residing in other world regions.

⁹ Silver’s interviews included a Latin American graduate, who stated that: “One main reason I’m here is to practice my English.... That’s important because 70% of clients are U.S. based companies. The better deals involve international parties. If you want to be on these deals, you must be able to speak, read, write in English as if it’s your own language.... [It is] almost mandatory. Most law firms require knowledge of English before hiring in a job as a lawyer.” A graduate from the Asia-Pacific region commented: “Having a masters degree in the United States allow[s] you to have more room to jump and to look for a higher kind of meaning. If you want to achieve you have to ... [have] a different perspective.”

¹⁰ On the importance of the bar, the comments of a Korean graduate are illustrative: “In Korea, LLM value is, first, [the] American license: [the] bar exam. [The] LLM is a process to get [that] license. The second value [of the LLM] is law school education.” Another graduate employed by a major Japanese corporation reported that “All [of the company’s] employees have passed the New York bar, and all take it after their LLMs.”

¹¹ David Gurnham, Book Review of *Legal Reform in Korea*, <http://www.bsos.umd.edu/gvpt/lpbr/subpages/reviews/ginsburg1004.htm> (last visited Nov. 15, 2006) (link) (discussing 2% bar pass rate in Korea); *Examination Yuan to Lower Bar on Licensing Exams*, Min Sheng Daily, Nov. 22, 2001, available at http://th.gio.gov.tw/show.cfm?news_id=12038 (last visited Nov. 15, 2006) (link) (discussing 20% bar pass rate in Taiwan). Japan’s recent reform of the legal profession has ameliorated this issue; for information on pre-reform bar pass rates. See Sorimachi Katsuo, Sorimachi Speaks: The Shape Of Japan In The 21st Century Series No. 33, http://www.lec-jp.com/speaks/info_033.html (link) (discussing pre-2005 2.3% bar pass rate in Japan).

¹² See, e.g., Sullivan & Cromwell LLP, Visiting Lawyers, <http://www.sullcrom.com/careers/visitinglawyers/> (last visited Nov. 16, 2006) (link); Curtis, Mallet-Prevost, Colt & Mosle LLP, Recruiting: LL.M. Students, http://www.cm-p.com/recruiting_llm.htm (last visited Nov. 16 2006) (link); see generally, Silver, *Case of the Foreign Lawyer*, *supra* note 4, at 1058–65.

dents that offer LLMs substantial opportunities to work in the U.S.¹³ As a result, for most LLM graduates, a job in the U.S. is extraordinarily difficult to secure. Time is also an issue in the search for employment in the U.S., since graduates face constraints imposed by their visas and limited financial resources.

Bar admission poses another barrier for LLM graduates interested in working in the U.S. Most LLM graduates are ineligible to sit for the bar in most U.S. jurisdictions, either because the state requires a three-year JD degree or because it recognizes only certain foreign degrees, usually common law-based, that it deems comparable to degrees from an ABA accredited law school.¹⁴ New York has one of the most liberal eligibility standards and many LLM graduates sit for its exam.¹⁵ Relatedly, law firm offices in New York employ more LLM graduates than perhaps those in any other U.S. jurisdiction.¹⁶ Even in New York opportunities for LLM graduates are scarce. Outside of New York, law firms use bar ineligibility in their jurisdictions as one justification for not hiring many—or any—LLMs.¹⁷

This lack of jobs in the U.S. should not be taken as an indication that the LLM degree is without value to U.S. interests. LLM graduates make substantial contributions to multinational companies and U.S.-based law firms by working for them offshore.¹⁸ They help multinationals navigate the business and legal environments in their foreign operations, often interacting with regulators to shape policies beneficial to their employers. Their understanding of the U.S. legal system and legal English skills enable them to work effectively with U.S. lawyers and business executives and perform the role of legal, cultural and language translator. For law firms, LLMs are the bridge between U.S.-educated lawyers offering U.S. law expertise and

¹³ NYU and Columbia host job fairs for LLMs each year, but few of the jobs available through these fairs are situated in the U.S. Silver, *Case of the Foreign Lawyer*, *supra* note 4, at 1061.

¹⁴ See ABA Comprehensive Guide to Bar Admission, Chart 10 – Foreign Law School Graduates, available at <http://www.abanet.org/legaled/publications/compguide2006/chart10.pdf> (last visited 11/15/06) (link).

¹⁵ See Carole Silver, *Regulatory Mismatch in the International Market for Legal Services*, 23 NW. J. INT'L L. & BUS. 487, 512–14, 527 (2003) (link).

¹⁶ See Silver, *Case of the Foreign Lawyer*, *supra* note 4, at 1043, 1065.

¹⁷ In an email survey conducted by Silver in 2000 of hiring partners at AmLaw 100 firms regarding LLM hiring policies, the issue of bar ineligibility was highlighted: “U.S. JD requirement for bar admission in [the state jurisdiction where our firm has its largest office] has hampered our ability to hire law students graduating with only an LLM degree. Our New York office, in contrast, is able to hire LLM students because such a degree satisfies the requirements for admission to the NY bar.” A partner in a different firm, based in a different U.S. jurisdiction, made a similar comment: “[O]ne hitch is that the [state] bar exam requires a U.S. awarded JD... so the opportunities for foreign nationals are somewhat limited in [this state].”

¹⁸ Of course, LLMs also make important contributions in the U.S. See Silver, *Case of the Foreign Lawyer*, *supra* note 4, at 1071–72.

locally-educated lawyers advising on local law. Finally, LLM graduates generally increase the likelihood that a knowledgeable and sympathetic approach to the U.S. legal system will inform the work of institutions where they work, thus facilitating interaction with U.S. counterparts and furthering the rule of law generally.

While U.S. law schools have accommodated increasing numbers of foreign nationals in their LLM programs, these programs remain inaccessible for many foreign law school graduates. Post-9/11 immigration restrictions prevent many from entering the U.S. and have been particularly challenging for students from Asia and the Middle East. Cost, too, is an important factor, with tuition ranging from as low as \$18,000¹⁹ to approximately \$40,000,²⁰ on top of U.S. living expenses and the lost wages resulting from a year away from home.²¹ Furthermore, U.S. law schools must limit the size of their LLM classes because of facility and faculty constraints.

To address these access problems, several U.S. law schools, including our own, have developed offshore educational offerings.²² These range from mini-courses to full-blown degree programs, taught by the U.S. law school's residential or, in certain cases, adjunct faculty. Through these programs, U.S. law schools are seeking to develop new markets for their services.²³

There are substantial differences between the offshore and residential experiences. The opportunities to study with a richly diverse group of

¹⁹ Tuition for the LLM at University of the Pacific, McGeorge School of Law, for example, is \$18,000. McGeorge Law School LLM Scholarship Page, <http://www.mcgeorge.edu/salzburgLLM/llmscholarships.htm> (last visited Nov. 15, 2006) (link).

²⁰ Columbia University's tuition for the LLM year is \$40,024. Columbia Law School LLM Tuition and Fees, http://www.law.columbia.edu/llm_jsd/grad_studies/Tuition#93178 (last visited Nov. 15, 2006) (link).

²¹ Harvard estimated that total costs for the LLM year could exceed \$56,000. Harvard Law School LLM Information Page, <http://www.law.harvard.edu/academics/graduate/admissions/llm.php> (last visited Nov. 15, 2006) (link).

²² Northwestern's Executive LLM programs in Korea and Spain, with which the authors are involved, are examples of offshore programs. See Northwestern Executive LLM Programs, <http://www.law.northwestern.edu/graduate/llmexec/> (last visited Nov. 15, 2006) (link). Other examples include Temple University's offshore program in China, see Temple Prospective LLM in China, http://www.law.temple.edu/servlet/RetrievePage?site=TempleLaw&page=Prospective_Masters_China&menuitem=p18 (last visited Nov. 15, 2006) (link), and NYU's program with the National University of Singapore, see Dual LLM Degree Program, http://newshub.nus.edu.sg/headlines/0602/nyu_15feb06.htm (last visited Nov. 15, 2006) (link).

²³ The LLM programs offered by Northwestern and Temple Universities, and one planned by the University of Minnesota, each include a period of study in the U.S. Northwestern Executive LLM Programs, <http://www.law.northwestern.edu/graduate/llmexec/>; Temple Prospective LLM in China, http://www.law.temple.edu/servlet/RetrievePage?site=TempleLaw&page=Prospective_Masters_China&menuitem=p18; see also University of Minnesota Law School, *International and Graduate Programs 2006-08*, at 18, available at http://www.law.umn.edu/uploads/images/3130/FINAL_BOOKLET.pdf (last visited Nov. 15, 2006) (link) (discussing planned expansion of program in Beijing).

classmates, to immerse one's self in the English language and U.S. culture, and to gain the self-awareness that comes from living outside of one's home country are traded for the opportunity to avoid the financial and time costs of living in the U.S., the immigration struggles of obtaining a visa, and the resulting disruption to work and family relationships.

As increasing numbers of foreign educated students earn an LLM degree, whether in the U.S. or in one of the principally-offshore programs, the value of the LLM as a mark of distinction is diluted. Moreover, the LLM is itself very difficult for prospective employers to assess. Employers of U.S. JD 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.

A BETTER SOLUTION: TESTING COMPREHENSIVE COMPETENCY IN U.S.
LAW

As a result of the difficulty of assessing LLM students based on their educational program alone, both LLM graduates and prospective employers rely on bar passage to provide an evaluative assessment of the LLM experience. For prospective employers, especially those situated outside of the U.S. who have less experience in assessing U.S. law graduates and less information about U.S. legal education generally, the bar is an objective distinction useful for separating LLM graduates. For LLM graduates, passing the bar is a demonstration of the value of their experience and indicates that

they have an adequate grounding in U.S. law. However, for the 60% or more of foreign-educated applicants who fail the state bar exam they take in the U.S.,²⁴ the reliance on this criterion leaves them without a mechanism to distinguish themselves or reveal their gains from the LLM experience.

Prospective employers of LLM graduates face much the same problem as professional schools would if, in assessing college graduates, they were without assessment tools such as the LSAT or the MCAT. They need a metric to allow them to compare and rank the LLM experience. The bar exam is the only mechanism that currently is available for this purpose, but it operates as a blunt instrument—categorizing into black and white what in fact falls along a continuum of understanding. The up-or-down assessment of the bar makes sense for the vast majority of applicants who intend to practice in the U.S. and rely on their licenses; bar regulators are rightfully concerned about protecting the public from incompetent advisors. But for LLMs, the one-size-fits-all approach of the bar is an unjustifiable and extreme barrier. The vast majority of LLM graduates return to their home countries whether or not they pass a bar in the U.S. With bar passage as the only transparent, objective assessment providing comparability among LLMs, most LLMs are left without any means of translating their LLM experience into comprehensible information. What they need is a mechanism for translation that will provide information about their substantive understanding and enable comparability among graduates, regardless of their coursework, the ranking of their U.S. law school or home country.

We propose the creation of a new examination for LLM graduates, an alternative comprehensive exam of U.S. law (“CEUSL”). Substantively, the CEUSL will address areas of U.S. law relevant to foreign lawyers. Our starting point for coverage includes basic commercially-oriented areas, such as contracts and the law governing business organizations, and would extend to administrative law, civil procedure, constitutional law and federal jurisdiction. One of the advantages of such an exam would be its ability to focus on the law of those important commercial jurisdictions, such as Delaware corporate law, that might not otherwise be the subject of intense study because of restrictions on bar eligibility for foreign law graduates. Preparation for the CEUSL will thus require study of a wide range of subjects, but would be directed towards those areas most relevant to international lawyers. Substantive coverage might change from time to time in response to the global economy and business. In addition, the CEUSL may offer the opportunity for specialization, along the lines of the British A-level exams, so that, in addition to evaluating a graduate’s understanding of a broad swath of U.S. law, expertise in particular substantive areas, such as

²⁴ For bar passage statistics based on the source of legal education, including foreign legal education, see National Conference of Bar Examiners, 2005 Statistics 3–4, *available* at http://www.ncbex.org/fileadmin/mediafiles/downloads/Bar_Admissions/2005stats.pdf (last visited Nov. 15, 2006) (link).

the law related to capital markets, would be tested.

Rather than the single pass/fail option of existing bar exams, our test will yield a score that will enable comparability among test-takers. Test-takers will receive their actual score, and the range of scores will be publicly available to allow for ranking. The score and ranking information will be useful to potential employers, and also to LLM graduates, whose only existing alternative for this purpose is the bar exam. Because most LLM graduates who sit for a U.S. bar exam do not pass the exam and therefore gain little in terms of objective information about the value of their LLM from the experience, our alternative exam will provide important information even for those who sit for a bar, as well.

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.

The CEUSL bridges the gap between the role of U.S. legal education in the global economy and its role in preparing students to represent clients in the U.S. Law schools in the U.S. are partners with bar regulators in preparing students to work as lawyers in a responsible and competent manner, but they do much more than that. They also attempt to prepare students to serve as leaders, policy makers, scholars and activists. In this respect, and particularly in the context of an international arena, law schools have forged a path unaccompanied by bar regulators. The CEUSL recognizes this role of U.S. legal education and offers one method of translating the experience into a universal, comprehensible asset.