

9-1-2001

## Toward General Principles of Academic Specialization by Means of Certificate or Concentration Programs: Creating a Certificate Program in International, Comparative and Foreign Law at Penn State

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# Toward General Principles of Academic Specialization by Means of Certificate or Concentration Programs: Creating a Certificate Program in International, Comparative and Foreign Law at Penn State

Larry Catá Backer\*

## Abstract:

Specialization in legal education, like that in private legal practice, has become more pronounced. Law schools have responded to the specialization trend by instituting programs leading to the award of post-J.D. degrees, primarily the LL.M., and by providing for recognition of specialization as part of the J.D. course of study through certificate or concentration programs. This article uses a case study—the presentation of a certificate program in international, comparative and foreign law at The Pennsylvania State University's Dickinson School of Law in 2001—as a basis for analyzing these emerging programs of concentration and to demonstrate why these programs should

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be promoted where appropriate. The Article explores the basis for specialization within law school curricula. It then explores the basic characteristics of the fields of international, comparative and foreign law which form the basis of the certificate program of the case study. Within that context, the author elaborates eleven general principles for the creation and implementation of certificate programs. These principles are then applied to assess the value of the proposed certificate program at Penn State as an example of the way in which the principles can be used to assess any certificate or other program of concentration.

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American law schools have had at least a decade to get accustomed to the idea that legal practice has become increasingly specialized.<sup>1</sup> Law schools, themselves, have not escaped the tendency towards hyper-specialization that has characterized the legal profession for at least a generation.<sup>2</sup> Not only have law school

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1. “[C]hanging law and new complexities have put an increasing premium on specialization to maintain competence and to keep abreast of subject matter. The process of professional differentiation has accelerated in clients served and kinds of legal work performed.” Legal Education and Professional Development—An Educational Continuum: Report of the Task Force on Law Schools and the Profession: Narrowing the Gap, 1992 A.B.A. Sec. Legal Educ. and Admissions B. 40-41 (the “McCrate Report”).

2. It is not uncommon for law schools to divide their curricula by fields of practice in ways that mimic the private sector. Like many of the larger national law firms in the United States, law school curricula are increasingly constructed “to provide a comprehensive general legal education and to offer many opportunities for specific areas of study.” Brooklyn Law School, *Areas of Concentration*, available at <http://www.brooklaw.edu/pages/index.php3?page=1009> (last visited Nov. 15, 2001). Consider the parallelism between that conception of the curriculum, and the self-conception of the larger law firms in the United States today, who

have specialized practice groups in each of our offices, we are proud of our ability to combine the talents of attorneys across different disciplines in all offices to meet our clients’ needs. At Baker Botts, we combine a multidisciplinary approach with our long-standing reputation as a provider of efficient legal services, using focused teams of attorneys and legal assistants in a cost-effective manner.

BakerBotts L.L.P., *Practice Profiles*, available at <http://www.bakerbotts.com/practice/practice.asp> (last visited Nov. 22, 2001). Shearman & Sterling now characterizes its practice as “divided into five major areas.” Shearman & Sterling, *Practice Areas*, available at <http://www.shearmansterling.com/practiceareas/practice.html> (last visited Nov. 20, 2001). Gibson, Dunn & Crutcher, LLP boasts that its “multidisciplinary approach spans 26 practice areas strategically positioned to support the broad spectrum of needs and ongoing growth of its clients [that] provides seamless collaboration across offices and disciplines to provide efficient and experienced service.” Gibson, Dunn & Crutcher, LLP, About GD&C, *Practice Areas*, available at <http://www.gibsondunn.com/About.asp> (last visited Nov. 16, 2001).

Even law schools that have “not developed discrete specialization programs” have parsed their curriculum to offer students “a number of areas of study, some of which tie uniquely to our area of the country and continent, which offer students the opportunity for in-depth study and exploration.” University of Arizona, The Curriculum, *Upper Level Electives*, available at <http://www.law.arizona.edu/academic/curriculum1.html> (last visited Nov. 13, 2001). For other examples, see, e.g., University of Akron School of Law, *Curriculum, Specialized Study*, available at <http://www.uakron.edu/law/special.htm>; Boston College Law School, Guidelines for Course Selection, available at [http://www.bc.edu/bc\\_org/avp/acadserv/genprincourse.html](http://www.bc.edu/bc_org/avp/acadserv/genprincourse.html) (last visited Nov. 15, 2001). Such specialization division might have struck a faculty member as odd half-a-century ago. See Alberto Bernabe-Riefkohl, *Tomorrow’s Law Schools: Globalization and Legal Education*, 32 SAN DIEGO L. REV. 137, 139 (1995). The nature of legal study today, however, has virtually eliminated the academic generalist. Today, it is harder for academics, like their colleagues in practice, to keep up in many areas of law. See, e.g., Ann M.

faculties evolved to reflect specialization, but the approach to training law students has changed as well. Law schools confront the new reality of specialization, or risk producing students less well equipped to compete in this new work environment.<sup>3</sup>

Law schools have responded to this reality of specialization in a variety of ways. One of the more successful responses to this trend has been the proliferation of post-J.D. programs in specialized fields.<sup>4</sup> Another response has been the creation of

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Griffin, *Department: Crossing the Bar: The Column of the Legal Education Committee: What's Your Major? BA Question for Law Students in Michigan*, 80 MICH. BAR. J. 72, 72 (2001) (citing Michigan State University-Detroit College of Law, *Special Curricular Programs*, available at <http://www.dcl.edu/catalog/18.html> (last visited Nov. 7, 2000)). As a result, law schools have begun to specialize, to some extent, emphasizing those areas of law in which there is a substantial specialized strength on their faculty. This trend has not gone unnoticed. Some of the popular press's ratings issues notes the "10 best" schools in particular practice areas. See, e.g., U.S. News & World Report, *Specialty Rankings*, at <http://www.usnews.com/usnews/edu/beyond/bclaw.htm> (last visited Nov. 10, 2001).

3. Such a risk might well prove unbearable in an era in which rates of law school applications are no longer rising, and reputations in the popular press are based, in part, on the ability of a law school to report successful rates of placement for its students.

When U.S. News and World Report first published its ranking of American law schools in 1987, a shock wave reverberated throughout the legal education world. U.S. News immediately had a new best-selling annual issue, and 176 of the 177 law schools ranked had a migraine headache, because they were not number one. Ours is a society mesmerized by rank-order listings of everything from the top twenty-five college basketball teams to the best-and worst-dressed celebrities. Even the most complex programs, products, and personalities have been ranked by so-called experts in easy to read, yet often highly superficial lists that often masquerade for substantive analysis. Despite the outcry in legal education over the reliability, weight, and relevance of the few simplistic factors used by U.S. News in compiling its rankings, it is fair to say that those rankings currently play a very substantial part in the law school selection process used by many prospective applicants.

Frank T. Read, *Legal Education's Holy War over Regulation of Consumer Information: the Federal Trump Card*, 30 WAKE FOREST L. REV. 307, 307-08 (1995). The U.S. News and World Report rating is based in part on placements of students. See *id.* at 308, n.5. Lower ratings may make a school less attractive to prospective students, which may further erode the ratings of a law school in these rankings. Such a "downward spiral" is likely to be resisted by law school administrators if at all possible, no matter how disdainful such administrators may be about those law school ranking surveys in the popular press.

Law school mission statements are full of the rhetoric of this new reality. See, e.g., Gordon T. Butler, *The Law School Mission Statement: A Survival Guide for the Twenty-first Century*, 50 J. LEGAL EDUC. 240, 247 (2000).

4. Post J.D. degrees are now offered in the fields of general legal education (25 law schools), general programs for foreign lawyers (37 law schools), Admiralty (1 law school), Agriculture (1 law school), Asian Law (1 law school), Bankruptcy (1 law school), Child Law (1 law school), Comparative Law (3 law schools), Corporate Law/Banking Finance Law (7 law schools), Criminal Law (1 law

certificate programs—programs of specialized study leading to a certificate or other document memorializing the successful completion of this program of specialized study.<sup>5</sup>

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school), Dispute Resolution/Trial Advocacy/Litigation (3 law school), Environmental Law (8 law schools), Estate Planning (1 law school), Health (6 law schools), Information Technology (1 law school), Insurance (1 law school), Intellectual Property (5 law schools), International Business & Trade Law/International Taxation (8 law schools), International Environmental Law (3 law schools), International Human Rights (1 law school), International Law (16 law schools), Judicial Process (1 law school), Labor Law/Employee Benefits (3 law schools), Latin American Law (1 law school), Law & Government/Government Procurement (2 law schools), Law & Religion (1 law school), Marine Affairs/Ocean & Coastal Law (2 law school), Public Service (1 law school), Real Estate/Real Property/Land Development (2 law schools), Tax Law/Taxation (24 law schools), Trade Regulation (1 law school), and Urban Affairs Law (1 law school). See, Jurist, The Legal Education Network, *LL.M. and S.J.D. Programs*, at <http://jurist.law.pitt.edu/gradprogs.htm> (last visited Nov. 8, 2001) (including a listing of law schools offering post J.D. degrees broken down by these categories). Dean Jeffrey E. Lewis recently noted that:

The advanced degree in legal education has become the market phenomenon in legal education. It is especially notable that this expansion of LL.M. education is not in the form of the traditional “general” LL.M. of old, which was offered by only a few of the most prestigious American law schools and principally designed to produce law teachers. While the number of LL.M. programs tailored for foreign lawyers continues to grow, the principle growth of LL.M. programs is in specialized areas of American law; and the students are American lawyers. The most popular LL.M. programs for American lawyers continue to be Taxation and International and Comparative Law. Their number continues to grow. But this genre has been around for many years. The new development is the proliferation of programs in other areas of specialization.

Jeffrey E. Lewis, “*Advanced*” *Legal Education in the Twenty-first Century: a Prediction of Change*, 31 U. TOL. L. REV. 655 (2000) (noting an 82% increase in number of LL.M. degrees awarded between 1990 and 1999). I will not consider LL.M. programs further in this essay.

5. See *id.* In some law schools, certificates are awarded for completion of ‘concentration’ requirements, but are in other respects essentially the same as the certificate programs which are the subject of this article. See, e.g., Boston University School of Law, *Concentrations*, available at <http://www.bu.edu/law/jd/concentrations/index.html> (last visited Nov. 12, 2001) (students “may be certified as having completed the Concentration in International Law by meeting” certain course completion and grade requirements. Boston University School of Law, *Concentration in International Law*, available at <http://www.bu.edu/law/jd/concentrations/international/requirement.html> (last visited Nov. 12, 2001); University of California, Hastings College of Law, Academics, *The Juris Doctor Programs at Hastings*, available at [http://www.uchastings.edu/hasjd\\_01/](http://www.uchastings.edu/hasjd_01/) (last visited Nov. 15, 2001) (“Concentrated studies certificates are available in four areas”).

Dean Lewis posits that certificate programs will eventually replace LL.M. programs as the route to specialization among law school students in the coming years. On his vision of the third year certificate program, see *Lewis, supra* note 4 at 657-58. Schools like Boston University Law School appear to be moving in that direction. That school notes that “[b]y pursuing a concentration, students can

Certificate programs became more popular in the 1990s. Their popularity can be explained, in part by their flexibility. The programs are not directly regulated by the American Bar Association or other professional regulatory body.<sup>6</sup> The certificate earned upon completion of a program is not a “degree,” like a J.D., or other traditional indicia of completion of an academic program, all of which are heavily regulated within legal academia.<sup>7</sup> It has no formal institutional meaning other than set forth on its face. Nor is

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engage in advanced, in-depth study with the leading scholars and practitioners in a specific field, without having to pursue an advanced degree.” Boston University School of Law, *Concentrations*, available at <http://www.bu.edu/law/jd/concentrations/index.html> (last visited Nov. 12, 2001).

My sense is that Dean Lewis might have overstated his case. A certificate program is not an LL.M. Nor is the third year of legal education as pointless as some of its critics are fond of proclaiming. There is a difference in both scope and depth of coverage between certificate and LL.M. programs. And there should be such a difference. Converting the third year of legal education into a bargain basement version of an LL.M. detracts from the utility of the LL.M. as well as from the real value of certificate program. Certificate or concentration programs, appropriately developed, should seek to provide students with “a foundation for careers and further study in the” fields of law covered by the certificate program. University of Pittsburgh School of Law, *Certificate Programs, International and Comparative Law*, available at <http://www.law.pitt.edu/programs/certificate/international.html> (last visited Nov. 14, 2001). For an elaboration of my position, see Part III, *infra*.

6. See generally American Bar Association, *Standards for Approval of Law Schools and Interpretation*, Chapter 3, available at <http://www.abanet.org/legaled/standards/chapter3.html> (last visited Nov. 10, 2001) (The text of the ABA Standards do not encompass certificate programs) [hereinafter *Standards for Approval*].

7. Thus, for example, students at the University of Pittsburgh have held that “[c]hoosing a certificate program at Pitt is like declaring a major.” University of Pittsburgh School of Law, *Certificate Programs*, available at <http://www.law.pitt.edu/programs/certificate/index.html> (last visited Nov. 14, 2001).

The regulation of American law schools is undertaken, in part by the American Bar Association. See *id.* On the regulation of degrees which can be awarded by law schools, see for example Henry Ramsey, Jr., *The History, Organization, and Accomplishments of the American Bar Association Accreditation Process Cite*, 30 WAKE FOREST L. REV. 267 (1995). The power of accrediting agencies is, in turn, regulated in part by the federal government. See, e.g., Secretary’s Procedures and Criteria for Recognition of Accrediting Agencies, 59 Fed. Reg. 22,249 (1994) regulation codified at 59 Fed. Reg. 3577, 3597-98 (2000) (listing criteria necessary to be met in order to be listed by the federal government as a nationally recognized accrediting agency under the authority of the Secretary of Education to further consumer protection).

The ABA accreditation standards focus on the initial law degree, the J.D. With respect to post J.D. degrees, the ABA standards generally are designed to protect the integrity and quality of the granting institution’s J.D. program. American Bar Association, *Overview of Post-J.D. Programs*, available at <http://www.abanet.org/legaled/postjtdprograms/postjtd.html> (last visited Nov. 8, 2001).

the meaning of a certificate universal. Its academic “weight” is highly contextual. As such, it is worth “less” than a degree. But this freedom from regulation of programs, and this “worthlessness” of the certificate itself, will be crucial factors in the ultimate proliferation of certificate programs. These characteristics result in programs that are easy to implement and require substantially less administrative expense than their direct competitors—the LL.M. programs.<sup>8</sup> Though the LL.M. degree may be “worth” more—have

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8. LL.M. programs require compliance with the requirements for degrees of like kind set by the degree granting institution, and the Section of Legal Education of the American Bar Association with authority over such degrees. ABA accreditation rules require compliance with a variety of rules. The rules are set forth as follows:

**Standard 307. DEGREE PROGRAMS IN ADDITION TO J.D.**

(a) A law school may not establish a degree in addition to its J.D. degree program without obtaining the Council’s acquiescence. A law school may not establish a degree program in addition to its J.D. degree program unless the school is fully approved. The additional degree program may not detract from a law school’s ability to maintain a J.D. degree program that meets the requirements of the Standards.

(b) Without diverting teaching resources from the J.D. degree program, a program leading to an advanced law degree shall have sufficient resources to meet the objectives set by the law school offering the advanced degree program, including not fewer than one full-time faculty member or administrator who has primary responsibility for the advanced degree program. If an advanced degree program relates to a designated field of legal study or research, not fewer than one full-time faculty member or administrator who is identified with the field should be among the program’s instructors.

**Interpretation 307-1:** *Reasons for withholding acquiescence in the establishment of an advanced degree program include:*

- (1) *Lack of sufficient full-time faculty to conduct the J.D. degree program;*
- (2) *Lack of adequate physical facilities which has a negative and material effect on the education students receive;*
- (3) *Lack of an adequate law library to support both a J.D. and an advanced degree program; and*
- (4) *A J.D. degree curriculum lacking sufficient diversity and richness in course offerings. (August 1977; 1994; August 1996)*

**Interpretation 307-2:** *The acquiescence of the Council in a degree beyond the first degree in law is not an approval of the program itself, and, therefore, a school may not announce that the program is approved by the American Bar Association. (August 1996)*

Standards of Approval, *supra* note 7, at § 307.

Usually, compliance is expensive—it requires the hiring of additional faculty and the creation of a variety of new courses. Compliance can also be administratively costly, requiring a long and potentially complex process of review and approval by faculty, law school and university administration, and regulatory



more value as an academic credential—than a certificate added on to a J.D. degree, the cost of implementing and maintaining an LL.M. program will be substantially higher than the equivalent costs of a certificate program.

At schools with the necessary faculty resources and courses already in place, creation of such programs requires minimal modification to current practice—usually just adoption of a set of simple rules specifying the courses a student must successfully complete in order to obtain a certificate.<sup>9</sup> Thus, in their simplest

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agencies. Thus, for example, at Penn State, the master's program in law requires candidates to earn at least twenty-four hours of academic credit, while accumulating no more than six credit hours with grades of D or lower. LL.M. candidates must complete the three specific courses and requirements.

9. In terms of administrative costs, this simplicity makes adoption of such programs viable options. A program requiring no additional courses or faculty can avoid the often contentious faculty committee politics of curriculum and hiring. One merely reorganizes existing resources. And since there is no outside regulatory oversight, such programs, in their simplest forms, can be implemented immediately.

Of course, many programs in place are not of the "simplest" variety. Many programs include the creation of "centers" with "directors" (usually a faculty member of some prominence, at least political prominence, within a faculty, who has some established expertise in the subject matter of the program). Where the specialization is centered on international, comparative and foreign law, such centers may have responsibility for more than the administration of certificate programs—for example overseas programs, conferences, research, relations with other universities, and other matters. The three emerging models of "center" organization can roughly be illustrated by the approaches of New England Law School, the University of Texas, and Columbia University.

The New England School of Law has created a "New England Center for International Law and Policy" headed by a faculty member and assisted by a group of Associated Scholars (New England School of Law faculty) and a board of advisors (mostly outside people of some prominence). The purpose of the Center is "to promote the study and understanding of the relationship between international law and policy, with special emphasis on problems of an economic, environmental, criminal, or humanitarian nature. To this end, the Center sponsors research, publication, teaching, pro bono assistance, and the dissemination of knowledge in these areas." Center for International Law & Policy at the New England School of Law, *About the Center*, available at <http://www.nesl.edu/center> (last visited Nov. 10, 2001).

The University of Texas, on the other hand, "has made a major investment in the expansion and enhancement of its international and comparative programs and faculty." University of Texas, School of Law, *Brochure: International and Comparative Law*, September 2001, at 1, available at <http://www.utexas.edu/law/news/UTLawInterBrochure.pdf> (last visited Nov. 10, 2001). It has hired a number of high profile academics, inaugurated LL.M. programs in foreign and international law, and created an Institute of Transnational Law overseen by a faculty member imported from Europe. The Texas Law school operates, under the umbrella of its international and comparative law programs, a number of student programs abroad, a law journal devoted to issues of international and comparative law and symposia of interest to those in these fields. *See id.*

form, certificate programs are cost-effective means of providing academic guidance to students seeking some sort of specialized program of study. It has additional benefits. It provides a means of informing employers of the student's specialization, and of regularizing the course of study leading to that specialization—at least within each law school.<sup>10</sup> Certificate programs may also aid in

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Columbia University operates under a still different model. It has created a web of multiple centers, divided geographically, and a collaboration with the semi-autonomous Parker School of Foreign and Comparative Law. "This association began in 1931. Although affiliated with Columbia University, the Parker School retains its own Director and Board of Trustees." See Columbia Law School, *The Parker School of Foreign and Comparative Law*, at <http://www.law.columbia.edu/centers/parker.htm> (last visited Nov. 10, 2001). The Columbia Centers include The Center European Legal Studies, The Center for Japanese Legal Studies, the Center for Chinese Legal Studies, and the Center for Korean Legal Studies. Each of these centers is headed by a Columbia faculty member or "lecturer-in-law," and each is devoted to a variety of programs of teaching, research and outreach between the law school community and the nations which are of particular concern to each center. See *id.* "Since 1975, the Parker School has awarded certificates of achievement and achievement with honors to Columbia law students who have satisfactorily completed prescribed programs of studies in international and foreign law." See *id.*

The creation and function of academic "centers" within law schools is a fascinating subject, bringing with it a number of complexities and issues. There has been little written about such academic centers, even though academic and research centers within law schools appear to have proliferated over the last decade. I will avoid discussion of a center in this essay. I note, however, that sometimes the question of certificate programs can be intimately bound up with the issue of the creation of an academic center. Generally, the issue arises with respect to questions of administration of the certificate program where other programs already exist in the field of speciality. See discussion *infra* at Part III.7.

10. Because of a lack of regulation, or other agreement on standards between law schools, certificate program awards from different schools may mean very different things. This can be a cause for concern—the possibilities for misrepresentation rise in the absence of uniformity. On the other hand, certificate program requirements are usually public and written. A simple visit to a law school web page can reveal the extent of study necessary for the award of a certificate. It is hard to argue misrepresentation in this context unless one is willing to concede that employers, and especially law firm employers, are so simple minded or naive that they are incapable of even the most minimum due diligence in this regard. Even if one concedes this point, it is possible to minimize any misrepresentation by making available to all employers a listing of requirements for the award of the various certificates available at a law school.

Yet these concerns may well be misplaced.

Most employers participating in a Michigan State University-Detroit College of Law series of focus group discussions indicated that the study of a specific substantive area was not a significant factor in the hiring decision. Far more important to the employer was the student's ability to write well. In this respect, law schools may need to market concentrations and theoretical perspectives courses differently to employers. Employers uniformly appreciate students who are able to do both traditional library and computerized research well and who

recruitment of prospective students. Students may be drawn to an institution that provides specialized study, leading to a recognition of that specialization, especially if they have an interest in the areas of the specialization available.<sup>11</sup> Even if this is not the case, a prospective law student may use certificate programs as a proxy for faculty quality in a particular area of law, or depth of faculty coverage in these areas.<sup>12</sup> Both surmises work to the benefit of the recruiting law school offering the programs—and to the detriment of competitor institutions that fail to act. Ironically, certificate programs may also provide another long-term conventional benefit—they may serve to prepare an institution for a solid investment in an LL.M. program.<sup>13</sup>

The decision to create a certificate program in any area of legal specialization may be a difficult one for a law school. Successfully designed and implemented certificate programs require a substantial amount of attention to detail to ensure that they complement a law school's mission and appropriately deploy institutional resources. Successful certificate programs are those that manage to increase generally the quality of an institution and

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communicate well both orally and in writing. These are precisely the skills that students learn in concentrations and specialty coursework, particularly if the course(s) are taught in a seminar or other small group setting.

Patricia Mell, *Law Schools and their Disciples*, 79 MICH. B.J. 1392, 1395 (2000).

11. Thus, Associate Dean Mell notes that:

According to an informal poll of mid-western admissions and career services professionals, law students like to have more practical training and concentrations in specific subject matters. The general consensus of students seems to be that having a critical mass of courses in specific subject matter areas (concentrations) and trial advocacy courses (clinic or otherwise) will make them more marketable in a tight job market.

*Id.* at 1395. Moreover, certificate programs may also appeal to students who are interested in specialization but cannot afford the expense of another degree (the LL.M.) and another year of additional student loans.

12. Butler, *supra* note 3, at 261.

13. Thus, all of the elements of a certificate program, properly conceived and implemented, are those which are also of central importance in the construction of an LL.M. program. Butler, *supra* note 3, at 261-62. LL.M. programs, properly conceived, are a more intense, rigorous and focused approach to the study of a particular field of law. It shares however with certificate programs a similar structural kernel: specialized faculty, library resources, and administration. As such, the goals of both programs and their respective benefits to law schools are related. For instance, both LL.M. and certificate programs strive to identify course concentrations which offer a "low-cost" way of marketing the existing curriculum to prospective students. Also, by allowing faculty members to focus on a specific area of law, both certificate and LL.M. programs allow the faculty to distinguish themselves as an expert in a certain field. This reputation grows out CLE course offerings, annual institutes and annual symposiums. See *id.* at 261.

provide aggregate benefits to students and faculty greater than the costs of operation of the program over the long-term life of the institution.<sup>14</sup> To help demonstrate the way the process of certificate program creation and adoption can work, I offer this case study of the development of a proposal for adoption of a certificate program in international, comparative and foreign law at the Pennsylvania State University, Dickinson School of Law, from its conceptualization to its structuring and its presentation to the faculty for approval.<sup>15</sup>

This case study has three general purposes. The first is to explore the academic context in which certificate programs in international, comparative and foreign law are designed. The second is to attempt to develop those basic principles common to all successfully structured and implemented certificate programs in any field of law.<sup>16</sup> The third is to apply the principles to a particular proposal—the Law School's Certificate Program in International, Comparative and Foreign Law.<sup>17</sup>

The case study is divided into several parts. Part I, which follows, introduces the reader to the institution-specific context at the Law School in which the decision was made to offer for faculty consideration a certificate program in international, comparative and foreign law. The focus shifts in Part II, to an exploration of the substantive issues basic to the study of international, comparative and foreign law.<sup>18</sup> Part III then focuses on the development of

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14. Academic theories may contribute significantly to a realistic assessment of utility. Among the theories that have attracted a wide audience in recent years are those that have been labeled together as public choice theory. On the insights that these academic theories can contribute to this assessment, see for example MAXWELL L. STEARNS, *PUBLIC CHOICE AND PUBLIC LAW: READING AND COMMENTARY* (1997); DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE* (1991); and JERRY L. MASHAW, *GREED, CHAOS, AND GOVERNANCE* (1997). For a summary discussion of the legal scholarship influenced by public choice theory, see David A. Skeel, Jr., *Public Choice and the Future of Public-Choice-Influenced Legal Scholarship*, 50 VAND. L. REV. 647 (1997).

15. On the pedagogical value of case studies, see for example Carrie Menkel-Meadow, *Telling Stories in School Using Case Studies and Stories to Teach Legal Ethics*, 69 FORDHAM L. REV. 787 (2000); PHILIP B. HEYMANN & LANCE LIEBMAN, *THE SOCIAL RESPONSIBILITY OF LAWYERS: CASE STUDIES* (1988). For a discussion of the nature of the fields of international, comparative and foreign law set text, *infra*, at notes 42-64.

16. These principles, of course, ought to have a wider application at their greatest level of generality. To that extent, this section may prove useful for those contemplating the creation of certificate programs in other fields.

17. The proposal itself, as considered by the faculty, is reproduced, *infra* at Annex A.

18. Such an understanding, of course, is vital in the construction of any program. Yet it can be surprising how little is known about fields of specialization

those substantive and conceptual principles important for the construction of certificate programs. Part IV then presents and analyzes the Law School's certificate program in light of these principles and substantive considerations.

### I. Legal Specialization at Penn State: The Context

On November 12, 2001, the faculty of the Pennsylvania State University's Dickinson School of Law (the "Law School") first formally considered a proposal to establish a certificate program in international, comparative and foreign law (the "Proposal").<sup>19</sup> The advocates of the program were hopeful that the Proposal would be adopted. The faculty had, in the prior year, agreed to the creation of a Certificate Program in Dispute Resolution and Advocacy,<sup>20</sup> the first certificate program of its kind approved at the Law School. Moreover, the form of the Proposal had been informally vetted to many of the faculty members and had been favorably reviewed by two faculty committees.<sup>21</sup> But, as the second such program to be considered, issues about specialization or concentration programs in general, and specialization in the fields of law identified by the proposal in particular, now become more urgent among the faculty.

Faculty consideration of the Proposal marked the culmination of a process that had its origins in the prior academic year. Its beginnings could be traced to conversations between faculty members at the Law School.<sup>22</sup> The Proposal that resulted was animated by a particular view of the Law School and legal education in general, shared to varying degrees by those responsible for drafting the Proposal. What was now Penn State's Law School had undergone a tremendous set of changes over the course of the prior decade. In 1990, the Pennsylvania State

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even by very learned colleagues in other fields. In a sense, then, one of the benefits of merely proposing a certificate program is educational. Faculties can use the opportunity to become better aware of the nature and extent of fields of study with which they may have little contact. Such information is always useful for faculties considering important issues of law school governance, especially active in governance matters.

19. That proposal is reproduced as Annex A, *infra*.

20. For a description of that program, and the certificate requirements, see Penn State-Dickinson School of Law, *Certificate in Dispute Resolution and Advocacy* (copy on file with author).

21. The proposal was reviewed by the law schools' international programs committee and its curriculum committee before it was presented to the faculty for its formal review.

22. The names of all faculty members involved in the process have been omitted on the theory that this paper is about the process of adoption, and not about the psychology or politics of that process.

University did not include a law school. The Dickinson School of Law existed as an independent law school, as it had for some time.<sup>23</sup> Its primary focus was litigation training, with a growing involvement in commercial and cross-border legal issues.<sup>24</sup> By 2001, what had now officially become the Dickinson School of Law of the Pennsylvania State University had begun to realize the benefits of cultivating an increasingly significant set of resources in the fields of international, comparative and foreign law. These included a large core of faculty, relative to overall faculty size,<sup>25</sup> who devote a substantial amount of their scholarly and teaching time to the fields of international, comparative and foreign law.<sup>26</sup> The Law School also acquired long experience running two programs for students

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23. The Dickinson School of Law was founded in 1834. It existed as an independent Law School between 1834 and 1997. After extensive negotiation, it merged into Pennsylvania State University in 1997 in a multi-stage process that became final in 1999. Since then, and only recently, the Dickinson School of Law became an integral part of the Penn State "family." For a history of this merger see *Dickinson at a Glance*, at <http://www.dsl.psu.edu/glance.html> (last visited Nov. 10, 2001).

24. For a number of years before the merger with the Pennsylvania State University, and continuing thereafter, the Law School operated first one and then two programs of summer study abroad. In addition, informal relationships were established with a number of institutions in Europe, some of whose faculty members would visit the Carlisle, Pennsylvania campus of the Law School to offer short courses in European, comparative or international law. During the 1990s the faculty, and especially the faculty with domestic legal specialties, began to profit from exposure to foreign and comparative law issues in a variety of contexts, including participation as faculty in the summer programs abroad. The Law School also operated a small program leading to the award of an LL.M. for foreign law graduates. For a description of these programs, see Penn State-Dickinson School of Law, *Introduction to the Master of Laws Program*, at <http://www.dsl.psu.edu/llm/llmintro.html> (last visited Nov. 10, 2001).

25. In the Academic year 2001-2002, there were a total of thirty-one full time tenure track faculty at the Law School, including the dean and the Director of the Law Library (both of whom teach) but not including lawyering skills faculty.

26. Out of a faculty of thirty-one, at least six faculty members fit this description. They include, among others, (1) a faculty member who was assigned responsibility for the overseas and LL.M. programs for foreign law students, with a speciality in European Union, comparative, and international private law; (2) a faculty member with experience working in international humanitarian organizations and a research specialty in international law and human rights law; (3) a faculty member with a speciality in international environmental law; (4) a faculty member with a specialty in multi-disciplinary practice; (5) a faculty member with a speciality in European (including E.U.) and comparative law and (6) a faculty member with a specialty in public and private international law. Other members of the faculty had developed subatantial expertise in other areas, though most of their work and teaching was centered on traditional areas of American law. Included among these are faculty members with interests in comparative and foreign law, comparative constitutional law and a number of fields.

for summer study abroad.<sup>27</sup> During the 2000-2001 Academic year, an additional program of study—a semester program in London—had also been approved.<sup>28</sup> Like many peer institutions, and following the lead of American business, government and public interest institutions, the Law School also began to establish a network of contacts with sibling institutions in other parts of the globe.<sup>29</sup> Moreover, the Law School's worldwide alumni base, consisting of graduates of its advanced degree program for foreign law students, provided a valuable and deepening connection with the law of an increasing number of foreign jurisdictions.<sup>30</sup>

Underlying the effort to create a focal point for study in the fields of international, comparative and foreign law were several premises and assumptions about the changing nature and direction of legal education and the legal marketplace. A central premise was that great changes are taking place within the constituencies close to the School of Law.<sup>31</sup> The legal profession itself appears to

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27. All of these programs are located in Europe. One of the summer programs is based in Florence, Italy, and the other consists of a series of short stays in a number of central European cities. Each of the programs is described in some detail at <http://www.dsl.psu.edu/london/cover.html> (last visited Nov. 10, 2001).

28. The semester program is operated in conjunction with the Institute for Advanced Legal Studies in the U.K. The programs is described in some detail at <http://www.dsl.psu.edu/london/cover.html>.

29. It has become common for academic institutions to affiliate by creating cross-border relationships of virtually unlimited description. These include arrangements for faculty and student exchanges, the establishment of special programs for American law students in the affiliated foreign institution, encouragement of joint research and conferences, and the establishment of focused semi-autonomous institutes made up of members of the various faculties meant to take advantage of the synergies possible through cross border affiliations focused on consultation, research and teaching. For example, on July 17, 2001, Columbia University announced the creation of its Columbia London Law Institute, as the focal point for its London-based academic degree programs, continuing legal education programs, and interdisciplinary legal research programs.

30. This resource is usually underutilized by most academic institutions. *But see* New York University, Office of Development and Alumni Relations, *International Alumni for Masters of Law in International Taxation*, at <http://www.law.nyu.edu/alumni/intltax/index.html> (last visited Nov. 10, 2001). (Separate section of site devoted to alumni of New York University's School of Law Masters of Law in International Taxation). The Law School has been more aggressively utilizing its overseas alumnae network in recent years.

31. Some of these changes have been apparent for some time. With respect to law firm organization and governance, see for example Marc Galanter & Thomas Palay, *The Transformation of the Big Law Firm*, in *LAWYERS' IDEALS / LAWYERS' PRACTICES: TRANSFORMATIONS IN THE AMERICAN LEGAL SYSTEM* (Robert L. Nelson, et al. eds., 1992). With respect to the internal economics and efficiencies of law practice, see for example Ronald J. Gilson & Robert H. Mnookin, *Coming of Age in a Corporate Law Firm: The Economics of Associate Career Patterns*, 41

be moving to cross-border practice.<sup>32</sup> Law firms, governments and businesses—the traditional employers of Law School students—are increasingly becoming involved in cross border and international

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STAN. L. REV. 567 (1989); Ronald J. Gilson & Robert H. Mnookin, *Sharing Among the Human Capitalists: An Economic Inquiry into the Corporate Law Firms and How Partners Split Profits*, 37 STAN. L. REV. 313 (1985); and S.S. Samuelson & L.J. Jaffe, *A Statistical Analysis of Law Firm Profitability*, 70 B.U. L. REV. 185 (1990).

32. Indeed, law firm rankings in the popular press now consider categories such foreign and cross border categories as “Leading International Firms in China” (*Global Equities Survey*, International Financial Law Review, October 2000); “Cross Border Representing Target Side—# of deals—U.S. Law Firms” (Thomson Financial Securities Data, February 2000); “Foreign Equities, Issuer’s Counsel” (“Corporate Scorecard Issue” The American Lawyer, April 200), all available at Shearman & Sterling, *Published Law Firm Rankings, 2000 Equities and IPOs*, available at <http://www.shearmansterling.com/tables/tables.html> (last visited Nov. 13, 2001). See, e.g., Debra Baker, *New Push for Going Mobile European-style Cross-border Practices May Be the Next Big Wave Here*, 85 JUL. A.B.A. J. 18 (1999) (This article compares the European approach to attorney regulation with that of the United States. The author concludes that state-by-state regulation of lawyers in the United States is impractical considering the advent of recent technologies and the mobility of clients throughout the states); Laurel S. Terry *A Primer on MDPs: Should the ‘No’ Rule Become a New Rule?*, 72 TEMPLE L. REV. 868 (1999). The American Bar Association has formed a commission to study the feasibility of multi-jurisdictional practice both within and outside the U.S. For a listing of the cross-border and multi-jurisdictional practice activities of the ABA and related entities, see <http://www.abanet.org/cpr/multicom.html> (last visited Nov. 16, 2001).

This is a worldwide trend. “What have been the major developments in this growth in the range of legal practice? Of major symbolic importance in the late twentieth century has been the freeing of legal practice from a requirement of national citizenship, in North America and Europe.” H. Patrick Glenn, *Comparative Law and Legal Practice: on Removing the Borders*, 75 TUL. L. REV. 977, 981 (2001). The European Union has recently reduced the barriers to practice within the Member States of the E.U. by reducing the ability of Member States to limit legal practice to those completing their legal education within the licensing Member State. See Council Directive 98/5/EC, 1998 O.J. (L 77) 36 (E.U. wide requirement that Member States “facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained”); D. Bruce Shine, *The European Union’s Efforts to Allow Professionals to Cross Borders to Practice Their Calling*, 49 LAB. L.J. 848 (1998). The opening of practice opportunities may extend eventually within the United States, Canada and Mexico. See Julie Barker, *The North American Free Trade Agreement and the Complete Integration of the Legal Profession: Dismantling the Barriers to Providing Cross-Border Legal Services*, 19 HOUS. J. INT’L L. 95 (1996). For a discussion of an even broader scope for the integration of the market for legal services, see Mara M. Burr, *Will the General Agreement on Trade in Services Result in International Standards for Lawyers and Access to the World Market?*, 20 HAMLINE L. REV. 667 (1997).



practice.<sup>33</sup> Thus, the Dean of the SMU Dedman School of Law School has noted that:

law schools are merely following the legal marketplace. The effectiveness of traditional legal institutions increasingly is being challenged, eroded, and transformed by the development of more vigorous transnational markets and by the exponential, innovative growth of information technology. This emerging "global environment" will necessitate the development of alternative legal arrangements, standards, and institutions and fundamental constitutional, economic, and commercial law reform within and among the nation-states of the world. To remain competitive, indeed relevant, lawyers must be capable of shaping and functioning within this new "law-based" environment.<sup>34</sup>

This emerging international practice market is also being touched by great changes in the nature of the business of law as well—multi-disciplinary practice issues are rendering old divides between the law and other professions obsolete. Business itself is beginning to demand changes in the nature of practice, in part based on experiences with foreign legal regimes.<sup>35</sup> These issues are

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33. Thus, there are few impediments today to the establishment of a legal practice spanning the United States and the European Union. See Carl Bevernage, *Presented by the Council of the Bars and Law Societies of the European Community*, 18 DICK. J. INT'L L. 89, 101 (1999). Commentators have begun to notice the impact of cross border practice on the business of law. There are a number of examples. "International labor and employment law, as a practice area, is still just a tiny corner of labor and employment law practice, but its importance in the new millennium is exploding." Donald C. Dowling Jr., *The Practice of International Labor & Employment Law: Escort Your Labor/employment Clients into the Global Millennium*, 17 LAB. LAW. 1 (2001). The rise of international markets in securities has demanded that lawyers practicing in the field become conversant with the securities regulatory regimes of other states. For an example, see *Regulatory Competition in International Securities Markets: Evidence from Europe in 1999-Part I*, 56 BUS. LAW. 653 (2001). Bankruptcy has also leaped the boundaries of single nations to contain them. See, e.g., Andre J. Berends, *The UNCITRAL Model Law on Cross-border Insolvency: A Comprehensive Overview*, 6 TUL. J. INT'L & COMP. L. 309 (1998).

34. John B. Attanasio, *A Global Law School for the Metroplex*, Southern Methodist University Dedman School of Law, available at [http://www.law.smu.edu/lia/html/a\\_global\\_law\\_school.htm](http://www.law.smu.edu/lia/html/a_global_law_school.htm) (last visited Nov. 20, 2001). "As the social, political, and economic systems of different nations become ever more interconnected and interdependent, so too will their legal systems. Already, an increasing proportion of what most lawyers do brings them into contact with this transnational system. The globalization of law is already happening; and judges, lawyers, and legal academics must be prepared to deal with it." New York University School of Law, *Global Studies*, available at <http://www.law.nyu.edu/globalawschool/studies.html> (last visited Nov. 12, 2001).

35. See, e.g., Richard J. Agnich & Steven F. Goldstone, *What Business Will*

contributing to a slow but now noticeable change in the nature of the market for law students and for academic legal writing.<sup>36</sup> The market for law students might not be changing only with respect to the course mix necessary to produce successful and employable law graduates at the highest levels of the profession. The changing nature of practice might also be changing the nature of the lawyer's mission in transnational legal practice.<sup>37</sup> Lastly, the traditional employers of law school graduates no longer appear to have a monopoly on law graduate hiring.

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*Look for in Corporate Law in the Twenty-first Century*, 25 DEL. J. CORP. L. 6 (2000) (view of flexibility of American approach to corporate contracting contrasted to civil law approaches to contract).

36. For a discussion of some of the issues, see for example Laurel S. Terry, *A Primer on MDPs: Should the "No" Rule Become a New Rule?*, 72 Temp. L. Rev. 869 (1999); Mary C. Daly, *Choosing Wise Men Wisely: the Risks and Rewards of Purchasing Legal Services from Lawyers in a Multidisciplinary Partnership*, 13 GEO. J. LEGAL ETHICS 217 (2000); Bernard L. Greer, Jr., *Professional Services in the Global Economy: The Implications of "One-Stop Shopping,"* in PRIVATE INVESTMENTS ABROAD 3-6 (1995). Professor Daly notes. For example, that the world's largest accounting firms, forming something approaching an accounting oligopoly, have made significant inroads in the business of law services.

The Big Five have not been shy about their intentions. Their publicly stated goals are to become major players in the global marketplace for legal services. PwC, for example, has boasted of its aim to build the fifth largest law firm in the world by the year 2004, estimating that it will employ three thousand lawyers and generate one billion dollars in revenue. To achieve this end the Big Five have adopted the dual strategies of increasing their substantive law capacity and expanding geographically.

*Id.* at 231-32.

37. Dennis Curtis, *Can Law Schools and Big Law Firms Be Friends?*, 74 S. CAL. L. REV. 65, 77 (2000). Roger Goebel has expressed this well:

I have long been accustomed to telling young lawyers and law students that, although the development of competent legal skills is always important, at least half of the role of the transnational lawyer lies in assisting the client to bridge this cultural gap. This assistance covers a wide spectrum: helping clients (including in-house counsel and domestic outside counsel unfamiliar with foreign practice) to convert their normal legal and business methods into those that can be successfully employed in a foreign environment; conducting negotiations and general business dealings between a client and his commercial adversary in such fashion as to help both sides understand the reasons for each other's basic concerns and desires so that a successful business deal can be struck; helping a client properly manage a subsidiary or other foreign investment vehicle in the light of the customary ways of operation in a local environment; and drafting a contract in a manner that can facilitate a practical application, by both the client and the other contracting party, which is not basically disruptive of either party's cultural or social traditions.

Roger J. Goebel, *Professional Qualification and Educational Requirements for Law Practice in a Foreign Country. Bridging the Cultural Gap*, 63 TUL. L. REV. 443, 447-48 (1989).

A new development, from the law schools' perspective, is that investment banking, accounting, and consulting firms now routinely interview at the law school. In one of my seminars last year, three of the fourteen students were going to work at consulting firms. "I-bankers" are similarly knocking on the door, and the word is that they want new recruits right out of law school before they have been exposed to law practice. The consulting firms view lawyers as "narrow" and lacking in creativity—and therefore want to rely on law school selection processes to employ our students before they are "contaminated" by legal practice.<sup>38</sup>

In order to remain responsive to these developments, the Law School would have to better and more efficiently focus its resources. A foundation for an institutional framework would be indispensable to the optimization of the deployment of the Law School's current resources and the development of its readily realizable potential by more focused deployment of resources in the fields of international, comparative and foreign law. That foundation was being expanded through establishment of cross-border relationships with institutions overseas.<sup>39</sup> The Proposal could constitute another important step in effective resource deployment. Indeed, there existed some anecdotal evidence that similar certificate programs at other law schools appeared to produce benefits to their law schools in a number of respects, or that law schools had learned how to derive such benefits from these programs. It was thus also possible to profit from their experiences in building a certificate program at the Law School.

The Proposal that emerged for consideration by the faculty was the product of many hands. It circulated as an increasingly finished draft for several months before formal consideration by two committees of the School of Law—the International Programs Committee and the Curriculum Committee.<sup>40</sup> The final form of the

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38. Curtis, *supra* note 37, at 77.

39. In particular, the establishment of a working relationship with the Institute of Advanced Legal Studies in London, through which the Law School's semester program abroad was to be implemented, appeared to represent a large step in that direction. See Penn State-Dickinson, *Center for International and Comparative Law*, at <http://www.dsl.psu.edu/london/cover.html> (last visited Nov. 10, 2001).

40. One of the issues that requires some sensitivity is that of the approval process applicable to certificate programs. Foremost among these issues is that of committee consideration of any proposal. While the procedures at most law schools differ in some small respects, generally, at least one committee generally has the task of reviewing proposals, such as certificate proposals, before they are brought to the faculty for its formal consideration. In the case of the Law School two Committees appeared to have some authority over some or all of the portions

Proposal was thus a collaborative effort on the part of many people. The benefits of collaborative efforts are well known.<sup>41</sup> The sections that follow develop, in a theoretical context, many of the conversations that occurred along the path from conception, to drafting, to finalization. The ideas developed are then applied to the Proposal itself.

## II. Basic Characteristics of the Fields of International, Comparative and Foreign Law in United States Law Schools

At the heart of any specialization is a field of law. While fields of law within the American legal academy are generally easy to discern, at least at their core,<sup>42</sup> the same may not be true of the fields of international, comparative and foreign law. In creating certificate or concentration programs in these fields, it is therefore critical, before the program is actually created, to develop an understanding of the nature of these fields as understood within the United States. It is also helpful to come to grips with the most important subsidiary issues of these fields—the need for foreign language proficiency and the appropriateness of linking the three fields within a single program of specialized study. The sections that follow attempt to examine the borders of these fields and their interrelationship.

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of the Proposal. As a result, the committees with potential review authority were consulted, and the Proposal submitted to those committees as appropriate.

41. There is a growing literature on collaborative decision-making in a variety of contexts. See, e.g., Clifford S. Zimmerman, *"Thinking Beyond My Own Interpretation:" Reflections on Collaborative and Cooperative Learning Theory in the Law School Curriculum*, 31 ARIZ. ST. L.J. 957 (1999); Susan Bryant, *Collaboration in Law Practice: A Satisfying and Productive Process for a Diverse Profession*, 17 VT. L. REV. 459 (1993); Mark V. Tushnet, *Evaluating Students as Preparation for the Practice of Law*, 8 GEO. J. LEGAL ETHICS 313 (1995); Rowe W. Snider, *True Partnership: Overcoming the Barriers to Collaboration Through Knowledge Management*, in MANAGING THE LAW LIBRARY 1999: Forging Effective Relationships in Today's Law Office Practising Law Institute PLI Order No. G0-0035 (February-April, 1999); and Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1 (1997).

42. There is, of course, a substantial amount of overlap even within traditional areas of specialization. Thus, it is not uncommon when dividing the curriculum by 'practice areas' that law schools tend to acknowledge the overlap – the utility of one course for more than one field of specialization. See, e.g., The University of Akron School of Law, *Curriculum/Specialized Study, Opportunities for Concentrated Study*, available at <http://www.uakron.edu/law/special.htm> (last visited Nov. 15, 2001) (for example, Antitrust Law listed for concentrated study of 'business' and 'intellectual property').

1. *Understanding the Nature of the Fields of International, Comparative and Foreign Law.*

American legal academics have come to understand that law neither starts nor ends at the borders of any state, or of our nation. Over the course of the last decade, some of the foremost official institutions of legal academics have begun to emphasize to American law schools the importance of integrating international, comparative and foreign law into their core curriculums.<sup>43</sup> Others have criticized the current marginal state of international, foreign and comparative law within the standard curriculum.<sup>44</sup> Still others have called for a more radical restructuring of the curriculum to integrate international and foreign law into core courses to routinize the comparative element inherent in all law.<sup>45</sup> To those who suggest that there is little need to worry overmuch in a large country like the United States about laws outside the national borders, one influential commentator responds quite sensibly that:

Of course one can reply that comparative law is no worse off than many other noncore subjects such as jurisprudence, legal philosophy, or legal history. But in our day and age, this argument, even if correct, simply has no force. The increasing internationalization of business, of communication, and of life in general, plainly requires that we imbue today's students not only with an international but also with a comparative perspective on law.<sup>46</sup>

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43. See, e.g., Judith Wegner, *The Association of American Law School's Role as an International Learning Society*, THE NEWSLETTER, Aug. 1995 (No. 95-3), at 1, 3; *Symposium on Globalization*, 46 J. LEGAL EDUC. 311 (1996).

44. John Langbein, *The Influence of Comparative Procedure in the United States*, 43 AM. J. COMP. L. 545, 546 (1995).

45. Mathias Reimann, *The End of Comparative Law as an Autonomous Subject*, 11 TUL. EUR. & CIV. L.F. 49 (1996). This idea is not new. Over a century ago, a French comparativist scholar, Edouard Lambert, considered by many as a founder of the study of comparative law, urged a place for comparative law in national legal curricula equal to that of national law. See KONRAD ZWEIGERT & HEIN KÖTZ, INTRODUCTION TO COMPARATIVE LAW 4 (3rd ed. 1998).

46. Reimann, *supra* note 45, at 52-53. The push towards unification or harmonization of laws is especially strong in the commercial and banking areas, where capital and goods have long surmounted national barriers, but where legal differences, like differences in currencies, continue to add unnecessarily perhaps to the cost of trade and commerce. "From at least the time of Cicero, differences between legal systems have been regarded as inconveniences which have to be overcome." PETER DE CRUZ, COMPARATIVE LAW IN A CHANGING WORLD 481 (2nd ed. 1999). Globalization fosters technological, economic, and normative processes that "tend to reduce local and regional constraints on conduct." David J.

Moreover, as two leading German comparativists have noted, cross border comparative law has a long and important history in Common Law countries other than the United States.<sup>47</sup>

If it is clear that there is an important place for integrated courses of study of comparative, foreign and international law, it is less clear to many lawyers that there are significant differences between each of these disciplines.

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Gerber, *Globalization and Legal Knowledge: Implications for Comparative Law*, 75 TUL. L. REV. 949, 951 (2001).

47. "Courts in England, Australia, Canada and other Commonwealth countries have long made reciprocal reference to each other's decisions and are now invoking continental law to a remarkable degree." ZWEIGERT & HEIN, *supra* note 45, at 19. Indeed, the core of comparative law, the study of foreign but related systems of national law, has a long history within the English speaking world. However, the courts of the United States, like the faculties of many law schools, have remained remarkably opaque to the value and use of comparative, international or foreign law. In the past, some Supreme Court Justices were famous for their use of foreign law, primarily the law of Great Britain, to inform their decisions. Some members of the current court continue that tradition, looking not only to the laws of Great Britain, but to other states as well. However, currently, influential members of the Supreme Court have argued that comparison is constitutionally impermissible. See George P. Fletcher, *Comparative Law as a Subversive Discipline*, 46 AM. J. COMP. L. 683, 691 (1998) (on the provincialism of American jurists in this respect).

Yet there is irony in this reluctance to make use of the possibilities of a cross border comparative method.

American lawyers are natural comparativists. American lawyers, judges and legislators look to other jurisdictions for solutions to similar problems. Legislators, in particular, have done much to harmonize the laws as between the states. This harmonization has been accomplished through the adoption of uniform laws, developed, in part through the efforts of non-governmental organizations, like the American Law Institute. The essence of legal training for American lawyers is built on a foundation of multi-jurisdictional analysis. It is not unusual for American lawyers, and judges, to seek answers to legal questions within the law of their own jurisdiction first, and then look to the law of sister jurisdictions for persuasive approaches where the answer is not locally available. American legislators look to the legislative approaches of sister states in fashioning legislation. Sometimes other states have innovated in particularly successful ways, sometimes other states have found a solution to a problem which had yet to be addressed in the home state. American non-governmental organizations have also been at the forefront of harmonization of law. The Model Business Corporations Act, now adopted by close to a majority of the states in some form attests to the naturalization, in the United States, of the comparative law process. Thus, the American legal system is accustomed to the use of the comparative method: (i) as a model, (ii) to gain perspective; (iii) as a means to harmonize the laws between jurisdictions; or (iv) as part of a plan of unification of the law.

LARRY CATÁ BACKER, *COMPARATIVE CORPORATE LAW* (forthcoming 2001) at Chapter 2.

Public international law (often, simply, 'international law') refers to the body of law that governs relationships between States and is, thus, primarily concerned with the rights and duties of States *inter se*. Comparative law is a method of analyzing the problems and institutions originating from two or more national laws or legal systems, or of comparing entire legal systems in order to acquire a better understanding thereof, or provide information, and insight into, the operation of the systems themselves.<sup>48</sup>

Likewise, comparative law is not the same thing as foreign law.<sup>49</sup> The field of foreign law involves a concentrated study of one foreign legal system or part of one legal system. In a sense, the field of foreign law mimics the core content of the traditional American law school curriculum, changing primarily the focus of study from the law of the United States to that of a foreign state.<sup>50</sup> The study of

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48. CRUZ, *supra* note 46, at 9.

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One can speak of comparative law only if there are specific comparative reflections on the problem to which the work is devoted. Experience shows that this is best done if the author first lays out the essentials of the relevant foreign law, country by country, and then uses this material as a basis for a critical comparison, ending up with conclusions about the proper policy for the law to adopt, which may involve reinterpretation of his own system.

ZWEIGERT & KÖTZ, *supra* note 45, at 6. But comparison can as easily highlight seemingly unbridgeable difference as it can highlight a model worthy of emulation. For a defense of the comparative method in rights discourse, see MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* (1991).

50. Of course, study of the substantive law of a foreign state may involve more than a change of substantive focus. The study of law in common law countries differs in significant respect from the accepted course of study in civil law countries. Moreover, what is considered an accepted pedagogy for the mastery of French law, for example, is substantially different from the pedagogy leading to a mastery of German law, at least for purposes of the state exams.

Moreover, it would follow that where the study of foreign law involves the laws of nations whose legal language is not English, then a fundamental requirement for that study is a proficiency in the language of the law in that nation. Thus, the study of the laws of the Chad would require a knowledge of French, the working language of legal discourse, as would a study of the laws of France. A study of the laws of South Africa, or of Nigeria, on the other hand, requires knowledge of English. On the other hand, a study of the law of the European Union requires knowledge of English because English is one of the official languages of the European Union. However, because the working language of the European Court of Justice is French, it would be necessary to develop a proficiency in French only if one were to seek to work in the European Court of Justice. For a discussion of the comparative law of the Common Law nations, see for example ZWEIGERT & KÖTZ, *supra* note 45, at 218-37.

a branch of foreign law thus remains a course in foreign law, not a course of comparative law.<sup>51</sup>

The two fields of law, however, are intimately related in the United States. For American lawyers particularly, and many American academics, the limited, and limiting, perspective of national law and legal problems sometimes covers over the difference between fields as a matter of theory as well as practice:

From the standpoint of an American practitioner faced with legal problems arising from international transactions, the term Comparative Law . . . may be defined as the body of knowledge and techniques that one has to assimilate in order to deal successfully with the *foreign law* elements of such problems. For some purposes it may be proper and indeed necessary to distinguish between comparative and foreign law. But from the point of view of one who aims to handle actual legal problems presenting foreign aspects, the distinction has little utility: comparative law, or the comparative method, can be learned and practiced only by dealing with foreign law materials; while learning and understanding foreign law inevitably involves comparisons with the law with which one is already familiar.<sup>52</sup>

Indeed, foreign and comparative law study are related in many respects. Yet the differences between these disciplines can be significant, even for the practitioner. For the practitioner, the difference may most significantly revolve around the use to which each discipline may be put.

Global changes, legal disciplines other than comparative law might be better situated to analyze foreign legal systems. For example, if knowledge about a foreign system per se is required, then a foreign law scholar rather than a comparativist will be the appropriate source. When issues connected to globalization and internationalization arise, then public and private international lawyers, international legal organization specialists, and conflicts of laws scholars are considered better qualified to respond than comparativists.<sup>53</sup>

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51. See ALAN WATSON, *LEGAL TRANSPLANTS* 17 (1974). "As has often been observed, the mere study of foreign law falls short of being comparative law." ZWIGERT & KÖTZ, *supra* note 45, at 6.

52. RUDOLPH B. SCHLESINGER ET AL., *COMPARATIVE LAW* 30, 30 n.4 (6th ed., 1998).

53. Nora V. Demleitner, *Combating Legal Ethnocentrism: Comparative Law Sets Boundaries*, 31 ARIZ. ST. L.J. 737, 739 (1999) (taking the position that the unique contribution of comparative law in the "understanding of, respect for, and engagement of foreign legal systems rather than their mere tolerance will allow us



In the same fashion, the field of private international law is distinct from the field of public international law, foreign law or comparative law. "Private international law is a discrete body of law which is also known as the conflict of laws, or the laws of conflicts, because it is a form of private law which deals with situations involving private individuals, in which there is a possible conflict of applicable laws."<sup>54</sup>

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to appreciate cultural, gender-based, religious and legal differences at home to a greater extent." *Id.*, at 762).

54. CRUZ, *supra* note 46, at 8. See also ZWEIGERT & KÖTZ, *supra* note 45, at 6-7. Americans tend toward a similar but less restrictive definition.

Private international law (or conflict of laws). International law, which in most other countries is referred to as "public international law," is often distinguished from private international law (called conflict of laws in the United States). Private international law has been defined as law directed to resolving controversies between private persons, natural as well as juridical, primarily in domestic litigation, arising out of situations having a significant relationship to more than one state. See RESTATEMENT (SECOND) CONFLICT OF LAWS § 2. In some circumstances, issues of private international law may also implicate issues of public international law, and many matters of private international law have substantial international significance and therefore may be considered foreign relations law, § 1. In recent years, private international law has been coordinated and harmonized among states, and many of its rules are, and considerations that inform private international law also guide the development of some areas of public international law, notably the principles limiting the jurisdiction of states to prescribe, adjudicate and enforce law.

RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 101 (International Law Defined) at Cmnt. c. The problem of definition boundaries remains quite real in the field of international law generally, especially as the old and at least mythically rigid divisions the nation-state and everything has begun to crumble. Some have recently suggested changes in the way the subsets of the field of international law is conceived. William Tetley, of McGill University recently offered this attempted redefinition:

International Public Law (or public international law) concerns the legal relationships between States. Private international law (or conflict of laws) is the collection of rules used to resolve disputes as to choice of law, choice of jurisdiction and recognition of foreign judgements between private parties subject to the laws of different states. International private law concerns the legal relationships between private parties of different states.

William Tetley, *Uniformity of International Private Maritime Law-the Pros, Cons, and Alternatives to International Conventions-How to Adopt an International Convention*, 24 TUL. MAR. L.J. 775, 781 (2000). Others that private and public international law are merging in ways that require other forms of redefinition and approaches by the courts, at least in the United States. See, e.g., ANDREAS F. LOWENFELD, *INTERNATIONAL LITIGATION AND THE QUEST FOR REASONABLENESS: ESSAYS IN PRIVATE INTERNATIONAL LAW* (1996).

The links between comparative law and private international law, like those between comparative law and foreign and international law are as strong as the differences between them. Comparative law and private international law both

The preceding discussion should make clear that international, comparative and foreign law comprise different fields. Each is related to the other in the way that the various fields of American law are interlinked, e.g., the way the law of tort and contract are related in American law. A single or unified course of study of these fields is not possible, except at the greatest level of generality.<sup>55</sup> It follows that a well structured academic program which is meant to systematize and encourage the more detailed study of any one of these fields must be sensitive to the differences between them. Consequently, a well structured program of study should have as its primary object the exposure of students to the basic principles of international and comparative law and to at least one system of foreign law. Having provided this basic grounding, students should be free, with guidance from the faculty, to devise a course of study more carefully focused on their individual interests, to the extent of institutional resources and expertise.

Flexibility, and the most efficient use of available resources, are thus the keys to any successful program. A student seeking to focus her study in these interlinked but separate fields ought to receive a basic grounding in the general principles of international

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deal with the operation of specific rules in several systems, the focus of private international law being quite narrow. Though public international law is a distinct body of law, the determination of the content of that law, with respect to the meaning and interpretation of general principles of law, sometimes relies on the methodology of comparative law. Likewise the study of foreign law, like the study of American law, though each a distinct body of law, relies to a great extent on comparative law principles for purposes of interpretation.

55. A generation or so ago, it was popular to attempt a merged study of the fields of international law, comparative law and conflicts of laws in an integrated course of study. See, e.g., J.B. Howard, *International Legal Studies*, 26 U. CHI. L. REV. 577 (1959). For the past fifty or so years, however, Law Schools have chosen a piecemeal approach—distinguishing between the fields in general and offering an integrated approach only in the context of a specific subset such as international business transactions. Cf. Milton Katz, *The International Legal Education Act of 1966: The Place of Law and Law Schools*, 20 J. LEGAL EDUC. 201, 204-05 (1967) (This source is a report prepared by Professor Katz in response to a request from then Assistant Secretary of Education Paul A. Miller to discuss the place of law and law schools under the International Education Act of 1966. The report stratified the "Subject Matter" of international legal study into five categories including: public international; international and regional organization; comparative and foreign law; law of private international transactions and relations and multinational private enterprises; and legal aspects of development. The fourth category, the law of private international transactions and relations and multinational private enterprises includes such sub-categories as the law of international transactions and relations and international business transactions. Thus, this single category necessarily suggests that aspects of the other four were being integrated by American law schools within specific sub-fields, each, however, treating only a limited area of study.).

and comparative law, and be exposed to the basic study of a system of foreign law. On the basis of this basic exposure, she should be free to devise a course of study best suited to her needs and goals, consistent with a thorough basic grounding in the area chosen for study. For this purpose, it is necessary for faculty to help guide students through the creation of suggested programs of study consistent with a rigorous basic course of study of any of these fields, and sensitive to the needs of students as they seek a place within the legal, business, and public interest communities.

## 2. *Language Proficiency*

One of the great difficulties of the study of non-American systems of law, as well as of international law, has been the lack of multi-lingual proficiency among U.S. law professors. That deficiency is reflected in the monolinguality of many American law students. In the past, this deficiency was nearly fatal to the study of international and foreign law. The language of international law had been French. The language of comparative law scholarship had been German. The language of foreign law varied, with the exception of the law of the former colonies and possessions of the United Kingdom, a portion of which was accessible in English. Much has changed. International law and legal materials are now available in English. Indeed, English has largely replaced French as the language of international diplomacy and, more importantly, of commerce. Most German comparativists migrated to the United States after 1933.<sup>56</sup> Their work is now available in English, as is much current work. One of the primary reasons for this availability has been the integration of the United Kingdom into the European Union. With English established as one of the more important official languages of the E.U., much scholarship, previously unavailable in English, has now been translated. Moreover, the official documents of the E.U. are now available in English. Indeed, most of the basic law of European countries and Japan is now available in English, or standard commentaries have become available in English.<sup>57</sup>

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56. See Vivian Grosswald Curran, *Dealing in Difference: Comparative Law's Potential for Broadening Legal Perspectives*, 46 AM. J. COMP. L. 657 (1998).

57. See, e.g., HOWARD D. FISHER, GERMAN LEGAL SYSTEM AND LEGAL LANGUAGE: A GENERAL SURVEY TOGETHER WITH NOTES AND A GERMAN VOCABULARY; NIGEL FOSTER, GERMAN LEGAL SYSTEM AND LAWS (2d ed. 1996); ALEXIS MAITLAND HUDSON, FRANCE: PRACTICAL COMMERCIAL LAW (1991); CHRISTOPHER JOSEPH MESNOOH, LAW AND BUSINESS IN FRANCE: A GUIDE TO FRENCH COMMERCIAL AND CORPORATE LAW (1994); YOSIYUKI NODA,

Where knowledge of a non-English language remains crucial, however, is in connection with the study of foreign law. Study of French, Spanish, Chinese, Japanese or German law, for example, requires proficiency in the language of the legal system to be studied. To some extent, language proficiency may be desirable, especially if the object of comparative study involves the laws of states with non-English language legal cultures.<sup>58</sup> Such study is seriously neglected in the United States. It behooves leading academic institutions with the appropriate institutional resources to foster and reward such study. A preliminary step in this regard is to reward such study by students with special recognition. An additional step, and one with ultimate positive effects on student interest, is to encourage faculty expertise in foreign law. The Law School, like many others with a growing web of institutional connections outside the United States, is in an excellent position to facilitate the realization of this potential.<sup>59</sup>

What this suggests is that language proficiency is necessary with respect to at least one portion of the field of foreign law, and may be desirable with respect to comparative and international law.<sup>60</sup> It also suggests that, from the perspective of an English

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INTRODUCTION TO JAPANESE LAW (Anthony H. Angelo, trans. 1976); AND JOHN OWEN HALEY, *AUTHORITY WITHOUT POWER: LAW AND THE JAPANESE PARADOX* (1991).

58. Yet the desirable does not rise to the level of the necessary. The availability in English of much foreign law material makes the *basic* comparative study of non-English legal systems possible. Advanced study of non-English systems may require language proficiency, but the choice of languages is difficult. Study of Japanese systems may require proficiency in German as well as Japanese, because of the profusion of writing in German on Japanese law. Yet French or German or both may be necessary for the study of European Civil law. Latin, rather than German, may be appropriate for Roman and Canon Law, but German and French may be helpful in reading the secondary sources. On the other hand, the secondary sources are increasingly available in English.

59. Faculty must be encouraged to travel to and become involved in the scholarly life of non-English speaking nations. That is not as difficult as it might appear. A step in that direction is to encourage exchanges of faculty with collaborating institutions. In this connection, academic institutions, like the School of Law, should be encouraged to strengthen the ties it has already made and to make new ties in under-represented areas that are growing in importance in world affairs. For the School of Law it means strengthening its institutional connections in Europe, and primarily Britain, Austria and Italy. It also means using those connections to make new institutional connections in South America, Asia, and Africa.

60. Even so, it is not clear whether, at a basic level of study, lack of cultural understanding, rather than lack of language proficiency is the greater impediment to a satisfactory study of comparative law.

Although some blame the malaise on parochial and monolingual American students or the obsession with case analysis in law school

monolingual nation, the appropriate language to study will be as varied as the language available for study. Programs of international, comparative and foreign law should encourage the study of non-English languages, though not the study of any particular language. However, programs in foreign law should require proficiency in the language of the nation the laws of which are the object of study. This proficiency must, of course, be required of faculty as well as students. Proposals for certificate programs based on this understanding of the relationship of language and the fields of international, comparative and foreign law can provide a solid basic proficiency in these fields. Where the study undertaken in a particular field of foreign law is grounded in proficiency in a non-English language, demonstrated proficiency in that language will be required as a prerequisite for a certificate. However, for basic study of comparative law, and for study of international law at the J.D. level, *required* demonstration of foreign language proficiency is inappropriate because it may unnecessarily divert students from enrollment in law school courses and may not be directly related to the focus or requirements of the course of study undertaken.<sup>61</sup> Yet, where language proficiency has

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pedagogy, most commenters eventually conclude that the prevailing method of studying foreign legal systems does not lead to a satisfactory inside understanding of that system. This is what Hicks meant when he stressed the importance of looking at Japan's social order from within the self-image of the Japanese and perhaps what Savigny meant when he stressed that law was as embedded in culture as language. According to this view, comparativists must overcome their American biases and attempt to understand alien legal practice as a native would. Before they can begin to gather concrete legal data, therefore, they must be able to understand on a subjective level the natives' range of experience and way of thinking and feeling about the world. Otherwise, comparative law is no more than the assembly of facts with no hope of a true understanding of what the system means to the foreigners living and practicing within it.

Frank K. Upham, *The Place of Japanese Legal Studies in American Comparative Law*, 1997 UTAH L. REV. 639, 650-51.

61. Some schools take a different approach. At Ohio State, the emphasis is on an integrated, multi-disciplinary approach to the specialization offered in International Trade and Development.

In addition to possessing specialized legal knowledge, the modern international transactions lawyer must also have a sophisticated background in international economics, politics, history, and culture. Thus, an important component of the Certificate Program is an emphasis on interdisciplinary study. Students will be required to take appropriate courses among the extensive offerings in the various University departments and colleges. Perhaps even more important, the international transactions lawyer should have facility with a foreign language. Thus, students will normally also be required to take foreign language courses offered by the University.

been demonstrated by the candidate for the certificate, or where the certificate is to be awarded for the study of foreign law, then the certificate can be modified in appropriate cases to acknowledge the proficiency and the connection between the proficiency and the course of study undertaken for the certificate.<sup>62</sup>

In line with the modern understanding of the fields of international, comparative and foreign law in the Western world, a certificate program should permit focused study within any of these

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Ohio State University, College of Law, *Courses and Curriculum, Certificate Programs, Certificate in International Trade and Development*, available at <http://www.osu.edu/units/law/law6.htm> (last visited Nov. 15, 2001). On the other hand, the Program at Ohio State can be characterized as more like an LL.M. than a certificate within a J.D. For example, unlike most programs that require anywhere from 12 to 20 semester hours of course work to earn the certificate, the Ohio State program provides that in "order to fulfill the requirements of the Program, students must complete the equivalent of 30 semester hours of course work." *Id.*

As such, unlike programs designed to serve as focused introductions to an area of specialization, basic foreign language proficiency may become more appropriate as a general requirement for the award of the LL.M. or S.J.D. Such an advanced program of study would be based on the sort of intense study and specialization that may make such proficiency an indispensable part of the program. See UGO MATTEI, *COMPARATIVE LAW AND ECONOMICS* (1997) (monolingualism in the academic community produces a paucity of robust cross border scholarship). Indeed, there is a large amount of scholarship related to language, culture and thought. See MICHEL FOUCAULT, *THE ORDER OF THINGS* 78-120 (1994) (grammar is logic and shapes and limits thinking).

But even in any advanced degree program, the issue of language proficiency is not without a number of conceptual difficulties. For instance, even if language proficiency is thought pedagogically necessary in an advanced degree context, a troubling question arises—*which language?* Certainly the language of the state the law of which is to be studied. But where that language is not one of common discourse, say perhaps Slovak or Hungarian, ought a more commonly used language of scholarly discourse—French or German—also be required? A more interesting set of problems arise where study is limited to Common Law systems, or to regional trade associations or the World Trade Organization, one of the official languages of which is English. At first blush, the practical *necessity* of additional language proficiency is not obvious, except for purposes of enrichment and increased sensitivity to the limitations of the subject. Yet, even if another language is thought desirable in that context, the question previously asked arises in more acute form—*which language?* I leave a more complete discussion of the "language issue" for another day.

62. In this sense, there should be recognized a distinction between the inappropriateness of a requirement of foreign language proficiency for beginning law students interested in international, comparative or foreign law, and the *appropriateness* of recognizing, of encouraging, the attainment of a focused language proficiency applied to the study of international, comparative or foreign law. The importance of the connection between language proficiency and focus of study ought to be emphasized. Thus, for example, demonstrated language proficiency in Spanish, for example, little advances the study, either focused on comparative, foreign or international law, of Shar'ia in Sudan.

fields. Thus, for example, a student may wish to concentrate on the comparative law of common law and common law mixed states: South Africa, the United Kingdom, Canada, Australia, Nigeria, Singapore, and related states.<sup>63</sup> Likewise, a student may wish to concentrate on international (or supra-national) law, such as the law of the European Union, in many respects the emerging United States of the Twenty-First Century.<sup>64</sup> Here again, American students are at an advantage: English being one of the official languages of the European Union, it is possible to become proficient in the field without gaining mastery of another language.

### 3. *Integration and Systemization of Interlinked Fields of Law.*

In a sense, however, language proficiency is what in other disciplines is called a “red herring.”<sup>65</sup> It serves as a distraction from the close look at an interlinked and under-served set of fields of legal study. It also serves as a proxy for issues related to the general qualification of college graduates for the study of law rigorously taught at institutions that aspire to national recognition, such as the School of Law.<sup>66</sup> Critical to any successful program of more focused study at any American law school in the twenty-first century are both a well thought through set of curricular offerings, and the ability to convert that well thought through set of offerings into programs of study that can be achieved by interested students. Many certificate programs consider it sufficient merely to announce or describe the minimum requirements for the award of the certificate. I consider that statement of minimum requirements merely a start of a certificate program’s obligation. That obligation to strive for curricular integration and individualized counseling for

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63. Of course, such study reduces the need to master a language other than English. Yet, comparative study of this kind forms the core of the most traditional view of comparative law. “At the turn of the century the axiom ‘only comparables can be compared’ was taken to mean that comparison was possible only between systems whose structures and concepts were comparable.” ZWEIGERT & KÖTZ, *supra* note 45, at 62.

64. See Larry Catá Backer, *The Extra-National State: American Confederate Federalism and the European Union*, 7 COLUM. J. EUR. L. 173 (2001).

65. The term, of course, had its origin in the practice of dragging a herring across the track in hunting to confuse the dogs.

66. There have been a number of studies published in the past which look to various criteria, including language study, as a predictor of success in graduate school. Moreover, in an increasingly diverse world, it may be useful for all law school graduates, whatever their field of interest, to learn at least one additional language—if only to deal with the clients they might seek to serve in their communities.

the maximization of student utilization of the program runs both to the institution and to the students.

As a consequence, a certificate program striving for excellence must be the focal point of a sustained and ongoing review by the faculty researching and teaching in the area to systematize and integrate the Law School's curricular offerings in the fields of study covered by the certificate. One of the great benefits of a certificate program in any field ought to be its power to act as a focus for sustained review of curricular offerings. Any such review within any field will inevitably conclude that offerings in a field are neither complete, integrated nor systematized. The inevitable arises from the common practice of most faculties to vest power over course development, outside of "core" courses,<sup>67</sup> to the peculiar interests of individual faculty members.<sup>68</sup> These peculiar interests give rise to courses after review by a curriculum committee that may not have regularization or systemization *within* a field at the top of their policy agendas.<sup>69</sup>

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67. Whatever its merits, and there is increasing debate on this score, most law schools continue basing their curriculum on that developed in elite East Coast institutions well over a century ago. Roy T. Stuckey, *Education for the Practice of Law: The Times They are a Changin'*, 75 NEB. L. REV. 648 (1996). That curriculum emphasizes the great common law fields of contract, tort and property and focuses on litigation for the development of law. Over the last fifty years, there has been an increasing nod to changing patterns of legal structure in the United States with some greater nod to constitutional law, and statutory courses. That traditional curriculum was mimicked in the examinations established in all states to regulate entry into the active practice of law. These examinations show no signs of changing soon. *See id.* at 665. As a result, Law Schools are now, in some sense, a captive of their own creation. Those institutions prepare bar examinations that mirror this traditional curriculum. Having established this mutually reinforcing structure, it is difficult for law schools to deviate substantially from the areas of substantial coverage on most state bar exams. *See id.* at 665. Changes have occurred in the margin—the minimum credit hours devoted to basic courses, the sequence in which such courses are taught, the inclusion of additional courses within the mandatory curriculum. The latter, of course, has seen its greatest recent turmoil in the practice area. *See* Section of Legal Education and Admissions to the Bar, American Bar Association, *A Vision of the Skills and Values New Lawyers Should Seek to Acquire*, in LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT: AN EDUCATIONAL CONTINUUM 129 (Robert MacCrate ed., West Publishing 1992) (advocating the need for courses that emphasize practical skills).

68. In many law schools, faculty members are given authority to propose new or additional courses for inclusion in the curriculum. Given the great inertia of the basic curriculum, proposals usually occur at the margins of the mandatory curriculum. *See, e.g.,* Robert F. Blomquist, *Symposium on Legal Education: Some Thoughts on Law School Curriculum Reform: Scaling the Mountainside*, 29 VAL. U.L. REV. 641 (1995) (discussing current curriculum-related tensions in the law school environment). Many faculty tend to view these proposals as "enrichment" or "additions" or supplements to the "real" curriculum. *Id.*

69. The curriculum remains one of the few areas in which faculty are



The need for focus becomes acute in new or non-traditional fields of law with which many members of most faculties are unfamiliar, such as international, comparative and foreign law. First, there may be little depth to faculty understanding of the fields.<sup>70</sup> Second, the fields are viewed as “specialty” or “enrichment” or “capstone” courses, of little utility to law students stereotypically viewed as desperate to pass a state bar exam, especially among faculty with a traditional or narrow view of curriculum offerings. Most important, perhaps, because of the traditional view of course offerings in these fields as occupying the margins of the curriculum, faculty tend to pay little attention to these fields, as long as some requisite minimum number of basic courses are offered.<sup>71</sup> As a result, the usual offerings in the fields of international, comparative and foreign law, to the extent they may exist at all in a law school’s curriculum, tend to be serendipitous.<sup>72</sup>

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permitted, within fairly narrowly drawn borders, to engage in conflict to their heart’s content. Jerry Frug, *No Ivory Tower: McCarthyism and the Universities*, 22 Harv. C.R.-C.L. L. Rev. 665, 691 (1987) (cited for the proposition that faculty disagree over curricular matters). And many faculties do.

70. As a result, many faculty may consider the “field” of international, comparative and foreign law adequately covered with the basic introductory courses in international law and comparative law. In faculties with a “progressive” self image, the odd international human rights course may also be offered. Where there is sufficient faculty expertise, or in schools that attempt to project an image of an institution more closely patterned after any one of several conceptions of a stereotypical elite legal institution or federal government practice, and in self-consciously traditional institutions, the basic course in international business transactions or trade organization law may be offered. Of course, ideology does not necessarily dictate curricular offerings. Even traditionalists for example, have discovered the utility of human rights. See, e.g., Brigham Young University, J. Reuben Clark Law School, *International Center for Law & Religion Studies*, available at [http://www.law2.byu.edu/Law&Religion/About\\_the\\_Center.htm](http://www.law2.byu.edu/Law&Religion/About_the_Center.htm) (last visited Dec. 25, 2001).

71. Of course, the minimum will differ with each law school and their own self-image within the field of legal education. For instance, the Law School requires its students to enroll in fifteen courses in its core curriculum. These courses are spread over the student’s first and second years and comprise approximately forty-two credit hours of a student’s eighty-eight total credits. There are no required courses in the student’s third year other than the requirement that a student successfully complete a seminar. In comparison, at University of Southern California, students are required to enroll in eight courses during their first year. These courses comprise thirty-seven credit hours of the student’s eighty-eight. During their second and third years, the students may select elective courses entirely. Upper division students are required to complete a writing requirement as well. For curricular requirements, see Student Handbook §§ 5.2-5.4a. available at <http://hal-law.usc.edu/stuserv/HDBKcon.html> (last visited Nov. 10, 2001).

72. The Law School offers approximately seventeen courses in international, comparative and foreign law. This is in comparison to the 110 courses that comprise the whole of the Law School’s course offerings. For a comparison, see for example University of Georgia, School of Law, *Course Clusters*, available at

Systemization and coherence are best accomplished by periodic comprehensive review of course offerings by faculty with the greatest expertise in the fields. One of the benefits of the creation of a certificate program is that it may serve as a means through which a faculty can identify those among them who would likely be most responsible for providing course and scholarly leadership in the fields covered by the certificate. These identified faculty members can then review course offerings. Systemization and coherence requires some attention to patterns of course offerings based on something other than personal predilection or the accidents of history. It is dependent on faculty strengths but exists independent of preference. Thus, for example, in a faculty with strengths in European Union law, courses ought to include not only the basic introduction to E.U. law, but also advanced courses in E.U. law and policy.<sup>73</sup> These courses can focus on E.U. as a foreign law system, or be included as part of a comprehensive package of comparative law courses.<sup>74</sup> Such a scheme of courses would have an internal coherence. When such series of courses are then considered in light of other course offerings within the field, then certificate program courses can be viewed as systematized. Thus, for example, a focus on the substantive law of the E.U. in a faculty with strong business expertise can be tied to international and comparative law courses of a business or commercial nature. Where human rights expertise exists, E.U. courses (to continue the example) could include advanced courses on the systems of human rights protections within the E.U.<sup>75</sup>

In addition, the certificate program ought to take advantage of the scholarly interests of participating faculty. These interests

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<http://www.lawsch.uga.edu/facstaffstu/students/habdbbook/course.html> (last visited Nov. 15, 2001); Boston College Law School, Academic Services, *Course Offerings by Subject Matter*, available at [http://www.bc.edu/bc\\_org/avp/law/acadserv/genprimcourse.html](http://www.bc.edu/bc_org/avp/law/acadserv/genprimcourse.html) (last visited Nov. 11, 2001); Syracuse University College of Law, *Academic Programs*, available at [http://www.syu.edu/academics/academics.asp?what=global\\_academic](http://www.syu.edu/academics/academics.asp?what=global_academic) (last visited Nov. 14, 2001.)

73. For example, competition law of the E.U., commercial or environmental law and policy of the E.U., agricultural policy and the like can be the subject of course or seminar study.

74. Thus, for example, courses in Comparative Constitutional Law and Comparative Competition Law can focus on issues of E.U. and U.S. law, among others.

75. Here is an example of a nexus between foreign law study (that of the E.U.) and international law (the law of the European Convention for the Protection of Human Rights and Fundamental Freedoms (Convention for the Protection of Human Rights and Fundamental Freedoms, November 4, 1950, 213 U.N.T.S. 222.)).

ought to be integrated within the program as appropriate. Critical to this endeavor will be the efforts of those who are given the laboring oar in these fields. Thus, an integral part of any certificate program must be a charge to the program committee to exercise continual oversight of the offerings available to the students and to work to (at the home institution and abroad), faculty capacity and faculty and student interests. They must continue to systematize those offerings in the most appropriate way given institutional resources.

But institutional course systemization and coherence is hardly enough. Students tossed into the minutiae of typical certificate course requirements are usually lost. Less expert than those interested in the fields of endeavor, students are hardly ever in a position to judge for themselves, without more, what would constitute the most advantageous program of study leading to the awarding of the certificate. As such, it is vital that faculty, and principally faculty teaching or pursuing scholarship in these fields, assume primary responsibility for the creation of suggested programs of study leading to the certificate.<sup>76</sup> Students interested in public international law ought, perhaps, to take a combination of courses different from those interested in comparative aspects of dispute resolution or the comparative aspects of business transactions. Students seeking particularized instruction in foreign law, and in the case of the School of Law this would entail primarily study of the law of the European Union or of those nations whose legal language is English, might well need to choose a different set of courses, or participate, in a more focused way, in the programs of study offered by the School of Law abroad.

Yet it is the faculty, rather than the students, who are in the best position to advise students on the utility of particular courses for these purposes. Thus, an integral part of any certificate program ought to be the construction of proposed, if generic, programs of study emphasizing different aspects of the fields

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76. A number of law schools are moving toward this approach. The Law School, for example, has created a listing of J.D. electives clusters, in which courses deemed important in one of several practice areas are grouped together. In this way, students are afforded some sort of general guidance with respect to course selection. See Penn State-Dickinson, *J.D. Electives Clusters*, available at <http://www.dsl.psu.edu/courses.html> (last visited Nov. 10, 2001). The University of Georgia's "law school faculty has designed a course cluster system to guide upper-level students toward curriculum which may more effectively support their area of special interest." University of Georgia Law School, *Curriculum*, available at <http://www.lawsch.uga.edu/academica/curriculum/index.html> (last visited Nov. 15, 2001).

covered by the certificate. Complementing the creation of these generic suggested programs of study ought to be a commitment to advise the individual student from the time she indicates an interest in the certificate until graduation. The generic programs of study provide an excellent vehicle through which such counseling can take place.

### III. General Principles of Certificate Program Creation

Certificate programs will vary considerably in their scope and content. Every certificate program must conform to the nature of the field that is the subject of study. As a consequence, such programs can vary considerably in form and detail. At some level of generality, however, all certificate programs contain common elements. This “commonality” is a function of shared principles underlying the creation and implementation of these programs. An understanding of these underlying principles is critical to the creation of sound certificate programs. My purpose in this section is to draw out those general principles, with a view to applying these principles to Penn State’s Certificate Program in the section that follows.

*1. Differences in form between programs should be minimized.*—At least within any institution, minimizing variation in the form between certificate programs offered by that institution will increase the marginal utility of the programs as a whole.

There are several ways one can understand the utility of uniformity among programs. Having approved one general form of certificate program, an institution might receive the most benefit from all subsequent certificate programs created by insisting on some basic level of conformity among the programs at some basic general level. *That*, I believe, is perhaps the most important principle of certificate program construction. There are important pedagogical, administrative and institutional advantages derived from application of the principle of internal consistency in the construction of certificate programs within any institution.

There is pedagogical value in establishing a similarity of form among all certificate programs offered at a particular institution. An overall consistency among programs may reduce student confusion. It serves, as well, to decrease the likelihood that students will fail to fulfill the requirements of a particular certificate program.<sup>77</sup> Overall macro-consistency may also reduce faculty

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77. There may be a temptation at this point to argue the reverse: that consistency as an aid to relieve student confusion amounts to unnecessary coddling

confusion, or indifference to programs. Reduction of faculty confusion may encourage faculty to better counsel students seeking their advice. Reducing indifference may encourage faculty curiosity and the advancement of knowledge through conversations across disciplines. Lastly, basic similarity of organizational form may make it easier for certificate program directors to interact, from simple matters such as sharing information on administration and student concerns, to matters of substantial institutional advancement such as the creation of joint endeavors.<sup>78</sup>

There are administrative advantages to macro-similarity as well. Program similarity may serve to reinforce the distinctive culture of an institution. Macro-uniformity makes it easier to structure and implement other programs of concentration. Each concentration can make use of a basic structure that experience has shown works successfully within the academic and administrative context of the institution in which the concentration is to be adopted.<sup>79</sup> Thus, program similarity reduces the cost of administration. Deans, associate deans and others charged with multi-program administration may find such tasks easier where the basic organization and functioning of programs share basic components in common. Such similarity may also encourage uniform treatment of programs by senior administrators. Perceptions of fairness tend to reduce friction within a faculty; a culture of uniform treatment is a basic component of that perception of institutional fairness that reduces the usual habits of faculty to seek individual advantage

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of students, that students are not so simple that differences between programs could cause them to fail to fulfill program requirements, and that, in any case, it is appropriate to create traps for the unwary law student, since ours is a profession in which careful reading and the parsing of small differences fall within the core of a student's learning experience. However, creating unnecessary confusion compounds a problem that law schools and legislatures have been fighting for decades. Simplification also adds to efficiency. Clarity is a virtue that permits students to concentrate on substantive requirements of programs rather than on the minutiae of program requirements.

78. For example, the Center for Dispute Resolution and the Agricultural Law Center at the Law School have recently joined to present a conference, entitled, *First Annual Dispute Resolution Symposium C Resolving Public Policy Disputes Arising From Agriculture: Challenges Presented By Law, Science and Public Perceptions or "Is That a Farm?"*, The Dickinson School of Law, Carlisle, PA, January 18-19, 2002. Such joint efforts, of course, are to be encouraged. And indeed, one of the criteria of the value of a program should be the extent to which cross fertilization and joint efforts of this type are possible.

79. Macro-uniformity thus permits faculty, when developing certificate programs, to concentrate on tailoring programs to the peculiarities of the area of speciality covered by the certificate, rather than having to spend time inventing a "form" of certificate program that accords with the mission and institutional structure of their law school.

from administrators, and the resentments caused within a faculty when one person or group appears more favored than others.

Basic organizational uniformity can make it easier to publicize such programs among the various outside constituencies of an institution. For example, undergraduate recruiters may find it easier to “sell” programs where similarities make the variety of programs offered easier to explain. Likewise, organizational similarity may provide a more efficient means of publicizing such programs to alumnae and the local judiciary and bar. Where programs are open to participation by non-law students,<sup>80</sup> organizational similarity makes participation easier.

2. *Design programs for the future, not the past.*—It is easy to build programs based on an understanding on where things stand at the present. Indeed, there is sometimes an urge to fix a program based on current views and understandings to ensure that the program will run in the future the way it was set up. This sort of approach to program design can be fatal to the long term utility of any legislation or program, including law school programs, and particularly certificate programs.<sup>81</sup> Programs designed for flex-

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80. In several institutions, certificate programs are open to enrollment by alumnae, members of the local bar and the judiciary. Completion of the program requirements can lead to the award of the certificate in the appropriate field. For lawyers and others interested in the program but not interested in completing all of the requirements for the certificate itself, the programs sometimes permit such interested persons to sit in on any number of courses leading to the certificate. Sometimes, programs, which open in this way, provide a source of additional revenue for the institution. They also provide a means of continuing and strengthening relations between the institution and members of its alumnae, the local bar and the judiciary.

81. The problem of institutional or structural obsolescence is an important one. See Richard Neely, *Obsolete Statutes, Structural Due Process, and the Power of Courts to Demand a Second Legislative Look*, 131 U. PA. L. REV. 271 (1982): Institutions that fail to adapt to the changing normative understandings of its constituent members risk becoming irrelevant and thus abandoned. On the problems, generally, of standing still, see for example Larry Catá Backer, *Chroniclers in the Field of Cultural Production: Interpretive Conversations Between Courts and Culture*, 20 B.C. THIRD WORLD L.J. 291, 305-08 (2000) (development of the “margin of appreciation” by the European Court of Human Rights to provide a flexible approach to permit the ECHR “the ability to reinterpret the bare words of the rights inscribed in otherwise immutable statutes in light of emerging social mores.”). There are any number of examples from American statutory law that illustrate the problem of legislating for current conditions without any flexibility. My favorite examples include the Seventh Amendment (the twenty-dollar limit meant significantly more in 1790 than in 2001 and so the effect of the legislation is strikingly different in breadth in modern than in earlier times). See U.S. CONST. amend. VII. Another is the dollar floor for asserting diversity actions in federal court. That amount has required re-legislation at regular intervals because of changes in the value of money and the resulting

ibility, and with an eye toward the possibilities the future may bring can become more powerful vehicles for student and faculty satisfaction. Such programs permit change as faculty change. It makes response to changes in the market, in the fields of law, in faculty, and student interest much easier to make. It makes expansion, as well as contraction, of programs less of an administrative nightmare. It makes experimentation possible.<sup>82</sup>

Drafting a future-centered certificate program requires an abhorrence of specificity. It demands a willingness to forego definitions that constrain to the point that alternative approaches, or discretion, is impossible. This approach should permit the administrators to experiment within the broad outlines and goals of the certificate program itself and to quickly take advantage of opportunities as they arise.<sup>83</sup> For faculties habituated to discussion and approval of even the most minute change in any program, this approach is hard to adopt. Such close supervision has the benefit of

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substantive effect of that change on the availability of federal jurisdiction to litigants. For a discussion, see for example Jack H. Friendenthal, *New Limitations on Federal Jurisdiction*, 11 STAN. L. REV. 213 (1959). Indeed, devices such as automatic cost of living increases in programs such as social security are meant to make legislation more responsive to changing conditions. For a discussion, for example CAROLYN L. MERCK, CONGRESSIONAL RESEARCH SERVICE, *BENEFIT AND PAY INCREASES IN SELECTED FEDERAL PROGRAMS, 1969-1995* 3 (1994); ADVISORY COUNCIL ON SOCIAL SECURITY, 2 REPORT OF THE 1994-1996 ADVISORY COUNCIL ON SOCIAL SECURITY 75 (1997).

82. An example from the Proposal in this regard is the provision that permits the administrators of the certificate program to count courses from overseas institutions toward the awarding of the certificate where the administrators determine that the course offered is the equivalent of a law school level course. In effect, program administrators may count for certificate purposes courses that may not be counted for graduation credit for the J.D. under the rules of American accrediting bodies. The applicable rule is as follows:

**Standard 306. PARTICIPATION IN STUDIES OR ACTIVITIES IN A FOREIGN COUNTRY.**

A law school may grant credit for student participation in studies or activities in a foreign country only if the studies or activities are approved in accordance with the Rules of Procedure and Criteria as adopted by the Council.

American Bar Association, *Standard 306 Participate in Studies or Activities in a Foreign Country*, available at <http://www.abanet.org/legaled/standards/chapter3.html> (last visited Nov. 10, 2001).

83. With respect to the Proposal, this forward looking approach is most conspicuous with respect to the foreign law certification. A balance was struck between identifying those areas in which the faculty has current foreign law expertise—the law of the European Union and the United Kingdom—and permitting administrators to add other areas of expertise as it became possible, without having to return to the faculty for approval of an essentially duplicative or additive program.

requiring full consensus at every turn in the life of a program. But at the same time, such close scrutiny makes change difficult, and sometimes impossible. Conceptualization of the problems in the construction of discretionary elements in a program thus mirror those faced by a corporation, or government.<sup>84</sup> The appropriate balance will always depend on the peculiar context of the institution in which the balance must be struck. In striking that balance, however, giving greater weight to the future, rather than the present, to administrative choice rather than tight control, can lead to substantially positive results in the long run.

Yet, such a future-centered approach can require quite a bit of trust on the part of a faculty. The ideal of future focused program construction gives rise to issues of rules versus discretion that has plagued significant areas of law in the twentieth century.<sup>85</sup> Where fairness is an issue, where core values and outlooks are not shared among those responsible for governance, discretion itself becomes problematic. Yet monitoring can serve as an effective substitute for limiting discretion in the context of the implementation and

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84. There is a tremendous amount of academic literature studying the nature of the choices a corporation makes in putting provisions in its articles of incorporation rather than in its bylaws, see for example John C. Coffee, Jr., *The Bylaw Battlefield: Can Institutions Change the Outcome of Corporate Control Contests?*, 51 U. MIAMI L. REV. 605 (1997); and Gregory Crespi, *The Enforceability of Fixed-Term Employment Contracts that Conflict with Corporate Bylaws*, 26 TULSA L. REV. 583 (2001). Similarly, there is a substantial amount of study of the politics and law relating to governance through constitutional changes and governance through statutes. While this area has not been significantly controversial at the federal level since 1865 when modern American federalism was imposed, it has become important at the state constitutional level. This has featured prominently in the use of voter referenda to impose popular change in the states. For discussion, see for example Lynn Baker, *Governing By Initiative: Constitutional Change and Direct Democracy*, 66 U. COLO. L. REV. 143. For the use of the referendum model in connection with international issues, for example K.K. DuVivier, *Think Globally, Act Locally: the Role of State and Local Ballot Initiatives in International Environmental Law*, 2000 COLO. J. INT'L ENVTL. L. & POL'Y 25 (arguing that the "ballot initiative can serve as an additional tool for international environmental activism").

85. For a classic study, and one that weighs heavily against discretion, see KENNETH C. DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* (1969); Joel F. Handler, *Discretion in Social Welfare: The Uneasy Position in the Rule of Law*, 92 YALE L.J. 1270 (1983); but see BERNARD H. BAUM, *DECENTRALIZATION OF AUTHORITY IN A BUREAUCRACY* (1961) ("Delegation of authority, to be effective and proper, proceeds on two premises. First, guides must be issued to the agent receiving the delegation so that he has a clear concept of the limits of his authority and the standards by which he is to be judged in the exercise of that authority. Second, there must be a system of review . . ." *Id.* at 84). The Proposal is structured to provide administrative discretion within a program in which the limits of authority are clearly described and a system of review in place. See discussion at Part IV, *infra*.



administration of certificate programs.<sup>86</sup> Fairness to students in the administration of the certificate program, for example, can be monitored by instituting a protest or appeals process that leads to review by the Academic Dean. Discretion can be monitored by decanal or faculty oversight in the form of periodic reports from the administrators of the program. In addition, where empire building is a concern, multi-person administrative boards reduces the remote possibility of misusing certificate programs.<sup>87</sup>

3. *Program objectives should be clearly related to the mission of the Law School.*—Certificate programs should be built on the basis of the assumption that the academic institution has committed sufficient faculty and other institutional resources to implement the certificate program in good faith.<sup>88</sup> Law Schools generally play to their strengths, as well as to the interests of students who tend to matriculate at each institution. This is a matter of economics and feasibility. This tendency to play to strengths, geography and limited mission is already well advanced in legal academia.<sup>89</sup>

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86. There is a growing body of academic literature on monitoring, especially in the field of corporate law. For a basic introduction, for example KLEIN & COFFEE, *BUSINESS ORGANIZATION AND FINANCE* (7th ed. 2000).

87. For a discussion of program administration, see text at Part III.7 (Program administration should be used as a vehicle for the integration of all faculty working in the field within the common enterprise).

88. Absent this commitment, a certificate program is an empty sell B good only for the web page and recruiting. Ultimately, unrealistically implemented certificate programs tend to produce the ill will that flows from the belief among students that they have not received the benefit of their bargain with the Law School.

89. A number of schools already advertise themselves as particularly strong in specific fields of law. This specialization within law is recognized by the popular press that provides specific rankings for the “best” programs in particular fields of law in addition to the general rankings of law schools. Thus, for example, in advertising its programs to other American academics, Tulane University Law School states that it

offers one of the largest concentrations of international and comparative law courses available in the United States, including a complete array of civil law courses. More than a third of Tulane’s faculty teach and research in the field [sic] of international and comparative law. Tulane’s admiralty law program is the world’s largest and gains form its tremendous advantage from its presence in a global port city. Tulane’s summer school abroad programs offer yet another opportunity for international exposure. . . . Tulane students can also spend a semester abroad studying at one of the eleven prestigious universities with which Tulane maintains an exchange relationship.

Brochure Tulane Law School, postmarked October 2, 2001.

Washington University in St. Louis provides another example. It has established an Institute for Global Legal Studies “to expand out knowledge and understanding of real world issues.” Washington University in St. Louis, *Institute of Global Legal Studies*, at <http://laws.wustl.edu/igls/index.html> (last visited Nov.

It follows, of course, that law schools need not choose between their strengths. As some law schools with multiple certificate programs have demonstrated, law schools can successfully operate in a multi-certificate environment.<sup>90</sup> Moreover, certificates are not necessarily limited to those areas of law deemed “peculiar” or

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10, 2001). The Institute is meant to “help make the school a first-choice institution for more of the talented students and distinguished faculty whom we want to attract. Beyond our own workplace, the Institute promises to build the reputation of the law school within the United States and abroad. We intend to become one of the world’s premier international centers.” *Id.* For these purposes, the Institute will rely on that law school’s

strong international and comparative law faculty [who] will form the nucleus of an internal advisory board, which will participate actively in the planning and operation of the Institute. An external board of respected statesmen, international judges, distinguished international law scholars, international industrialists, and other prominent people will also advise the Director and will additionally assist with visibility, contacts, and fundraising.

*Id.*

Playing to strengths is not limited to the fields of international, comparative and foreign law. Pace University Law School, for example, has drawn on its strengths in environmental law for the development of programs of specialized study in those fields. That Law School’s dean, David S. Cohen, has written

Since 1978, Pace University School of Law has provided internationally acclaimed education in environmental law. Our hallmark is a dedicated faculty who have been pioneers in establishing environmental law and who continue to serve as national and world-wide leaders. Our faculty have created such a rich curriculum and such acclaimed co-curriculum activities that our Program is consistently ranked among the top in the nation. No other law school today offers such a depth and breadth of environmental legal education.

Message From Dean David S. Cohen, *Pace’s Unparalleled Advantages*, available at <http://www.pace.edu> (last visited Nov. 5, 2001).

See, e.g., U.S. News & World Report, *Specialty Rankings*, available at <http://www.usnews.com/usnews/edu/beyond/bclaw.htm> (last visited Nov. 10, 2001). The U.S. News & World Report breaks down its specialty rankings into eight specific areas of law: clinical training, dispute resolution, environmental law, health law, intellectual property, international law, trial advocacy, and tax law. In each of these areas of specialty, U.S. News ranks from thirteen to twenty-seven of the top schools.

90. Thus, for example, the University of Hawaii operates certificate programs in environmental and natural resources Law as well as a certificate program in Pacific-Asian Legal Studies. See University of Hawaii, *Certificate in Pacific-Asian Legal Studies*, available at <http://www.hawaii.edu/law/spec.html> (last visited Nov. 8, 2001). Santa Clara University offers certificate programs in high tech law, international law, and public interest and social justice law. See Santa Clara University, *Academic Programs at Santa Clara University Law*, at <http://www.scu.edu/law/academic/academic.html> (last visited Nov. 14, 2001). UCLA offers concentrations and other programs in critical race studies, corporate law, entertainment law, international law and environmental law. See University of California at Los Angeles, *Programs Available at the UCLA School of Law*, at <http://www.law.ucla.edu/students/academicprograms> (last visited Nov. 10, 2001).

“narrow” specialties. There is no reason to prevent a law school whose strengths lie in providing a general education from offering certificates that play on that strength.<sup>91</sup> In the context of certificate programs, however, a number of fields of study have emerged as suitable bases for certificate or other programs of concentration.

According to U.S. News & World Report’s “2001 Annual Guide to America’s Best Graduate Schools,” in the April 10, 2000 issue, the most popular concentrations include, dispute resolution, clinical training, environmental law, health law, intellectual property, international law, trial advocacy, and tax law. Some schools have more than one specialty, but even a well-endowed law school cannot present a sufficient number of courses to support every possible specialty. Law schools must choose how to spend their resources.<sup>92</sup>

Thus, it is conceivable that a law school with multiple strengths could support more than one certificate program. It is also likely, under those circumstances, that the aggregate number of certificate programs will not affect the ability of the law school to offer its students a well-rounded curriculum. As long as the faculty is satisfied that its mix of mandatory and optional courses is fair and realistic, and that certificate programs do not completely monopolize student time, it is unreasonable to presume that certificate programs, even certificate programs in the aggregate, will substantially adversely affect the well rounded curriculum of any law school.

4. *Limits—not every law school can support formal certificate programs in every field.*—To be successful, certificate programs must be credible. One lesson of the last section must be that credibility requires playing to strengths. However, there are limits to the ability of law schools to create environments in which certificate programs, and especially multiple certificate programs, can operate. While there may be no quantitative limitation to the number of certificate programs that can be maintained by a law school, there ought to be *qualitative* limitations on the creation of these programs. A realistic qualitative assessment of the strengths of an institution in a particular field ought to be undertaken prior to any decision to move forward with a certificate program.

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91. Small practice or general practice specialization is both a valid area of general study and one that plays naturally to the strengths of many law schools.

92. Patricia Mell, *Law Schools and Their Disciples*, 9 MICH. B.J. 1392, 1394 (2000).

Any such qualitative assessment can be most fairly accomplished only when based on the application of a uniform standard of assessment. Such a standard is necessarily contextual—its application will depend on the unique circumstances of each proposed certificate program within a law school. However, such unique circumstances can be consistently assessed against a uniform set of factors derived from the principles of certificate program construction developed in this section. Factors that must be weighed in any determination of certificate program feasibility should include at a minimum the following:

- (i) the number of full and part time academic faculty devoted to that area of law at the law school,
- (ii) the number of courses offered at the law school in that field,
- (iii) the reputation of that law school among the community of scholars in that field,
- (iv) the number of students who have historically and might in the future participate in the program,
- (v) the synergistic value of a formal certificate program in that field,
- (vi) the realistic potential for sustaining a focused scholarly and curricular enterprise in that field of law.

There are doubtless other factors that may play an important part in the consideration within the peculiar context of an individual law school.<sup>93</sup> Thus, for example, it may be inadvisable to create a certificate program where there is only one faculty member involved full time in teaching and writing in the field, the number of courses that can be offered are limited, course offerings will be dependent on outside non-academic adjuncts, and there is little likelihood at the time the certificate is considered that either faculty or student interest in the field will be sustained or will grow.<sup>94</sup> In

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93. These factors might include the availability of the program to other law school constituencies (local lawyers, judges, etc.), and the effect of the program on the overall curricular goals of a law school (thus for example, law schools with a strong mission to produce generalists able to serve the local community might shy away from certificate programs that do not contribute to that mission).

94. In evaluating the viability of certificate programs, it usually makes sense to distinguish between local practitioners hired as adjuncts for part time teaching, and

those circumstances, there is no reason informal concentration programs cannot be created and run by interested faculty. These would serve primarily as a means of helping interested students choose more focused course packages in those fields where the law school does not exhibit the strength sufficient to create a formal program leading to a certificate.

5. *Certificate requirements should be fair and realistic.*—Parents who attempt to live through their children, who use their children as a means to correct the “mistakes” they made in their own youth, are rightly scorned in this society.<sup>95</sup> Faculties, like parents, find it easy to get carried away by desires to “do what is best” for their students. Faculties must constantly fight the urge to do with their students what neurotically dysfunctional parents have been attempting in soccer fields and academic competitions throughout the United States in the last generation—live their fantasies through them.<sup>96</sup>

In law school such fantastic transference can translate into issues of “rigor.” It is easy enough to “think” one’s way into an orgy of requirements that satisfy the ego or desires of the faculty and do little to make a program realistically attainable by students. It is even easier to justify.<sup>97</sup> The object is always to provide a

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full time academics at other institutions hired to teach one or two courses as ‘adjuncts’ or ‘part-time faculty.’ This distinction is particularly important where a law school operated programs at overseas locations, hired full time faculty from local law schools to teach courses, and designates them ‘adjunct’ faculty. See, e.g., University of Tulsa College of Law, International and Comparative Law Center, Autumn Semester in London, England, Faculty, *available at* <http://www.utulsa.edu/law/cilc/london1.html#faculty> (last visited Nov. 10, 2001) (listing among others, local faculty identified as full time academics at King’s College, University of London).

95. See, e.g., *Activity Avalanche: If the Extracurricular Activities are Piling Up and the Pressure to Participate is Rising, a Parenting Expert has Some Advice: ‘Take Back Your Kids.’* TIMES-PICAYUNE, Mar. 19, 2001, at D.01.

96. Descriptions of the corrosive effect of this parental drive on children have been reported in the popular press. See *id.*

97. This sort of rigor can serve as a proxy, or substitute, for quality. Certainly, talking about rigor has traditionally been a sign of the status of an institution’s students and faculty. For institutions not generally recognized as at the top of their profession, imposition of rigor requirements can serve as a sign of quality equivalence with the higher reputation schools. Rigor, in this sense, serves as a complex signifier. It, like the institutions from which a faculty obtained their law degrees, serves as a means of communicating a complicated message of status, outlook, intent, and world view. Signs, of course, are at the heart of semiotics. For some of the proponents of the Proposal, a sensitivity toward signifiers helped shaped the approach to the dissemination of the Proposal among the faculty. For a basic discussion of semiotics, see for example UMBERTO ECO, *A THEORY OF SEMIOTICS* (1976).

substantial basic grounding in the field of law the study of which is represented by a certificate without the need to produce an expert the equal of the academics who trained the certificate recipients. A certificate is neither an advanced degree in law,<sup>98</sup> nor does it represent anything but the systematic basic study of a field in which the beginner has commenced concentrated study. To invest the certificate with greater "results" than that is an exercise in delusion. As a consequence, certificate program requirements ought to be developed with an eye toward realistic expectations in the context of programs designed to provide a basic, significant *advanced introduction* to the field of law studied. All designers of certificate programs must communicate to their colleagues the difference between a certificate earned in conjunction with a J.D. and an advanced degree in a concentrated study of a field of law.

The basic nature of study represented by certificate programs does not mean that there is only one way to construct course requirements leading to the award of the certificate. The Proposal represents one approach. This approach is based on a division between required basic core courses,<sup>99</sup> a limited choice of additional courses in one or more categories,<sup>100</sup> and a research and writing requirement.<sup>101</sup> But a different approach might make sense for certificate programs in international or comparative or foreign law. In that case, a more specific and narrow study might lead to the adoption of a greater number of mandatory courses, or a re-mixing

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98. Here again we confront the basic cost-benefit equation of advanced degree versus certificate. The certificate provides a student with less "bang-for-the-buck" than an advanced degree. But the advanced degree represents a degree of advanced study and knowledge that the certificate cannot. For students the value of a certificate will be equal to the difference between the effect of the award of a certificate or an advanced degree to enhance employability as a function of the difference in the cost of each (in terms of time and money). In addition, the student might consider the "value-added" of a certificate to enhance or chances of getting into the most prestigious law school offering advanced degrees in her chosen field of law. But all of this is based on the postulate, commonly understood by law schools and employers alike, that the certificate represents a bundle of skills significantly different than that represented by an advanced degree. *But see* University of Pittsburgh School of Law, *Certificate Programs*, available at <http://www.law.pit.edu/programs/certificate/index.html> (last visited Jan. 2, 2002) ("In fact, certificate students often can compete right out of law school for positions that typically require three years of experience.").

99. In the Proposal these include the basic courses in International and Comparative Law.

100. The Proposal divides additional courses into categories based on the fields of law to be studied and then requires students to successfully complete one or more courses from each field from among the several offered in each.

101. The Proposal requires successful completion of a seminar requirement, along with a substantial paper.

of the mandatory versus optional course mix. Of course, the appropriate mix will always depend on the courses that a Law School can offer. Thus, for example, Law Schools with greater expertise in Mexican, rather than European Law, might construct a program significantly different, in detail, from that illustrated in the Proposal.<sup>102</sup>

6. *Certificate Programs should not be a refuge of the marginally performing student.*—For a certificate program to provide the greatest benefit to students, the students themselves must be ready and able to profit from a concentration in any specialized area of law. To attain this aim, it is necessary that students be well prepared in the basics. Students who do not exhibit a minimum facility in core areas of law may find the program less valuable than alternatives. Moreover, a faculty may determine that students who do not seem to be able to demonstrate an adequate level of mastery of basic subjects ought to concentrate on that mastery before attempting specialized study.<sup>103</sup>

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102. Thus, for example, contrast the programs at the University of Houston. See University of Houston, *Mexican Legal Studies Program*, at <http://www.law.uh.edu/mlsp> (last visited Nov. 10, 2001). This study abroad program, emphasizing Mexican law, compliments course offerings in Mexican and Latin American law as well as an International Law Institute. See University of Houston, *Mexican Legal Studies Program*, at <http://www.law.uh.edu/llm> (last visited Nov. 10, 2001). At larger or more well-funded institutions, it may be possible to be more things to more people. For instance, at the University of Texas, the law school has benefitted from an endowed lecture fund. This fund permits the school to host various distinguished lecturers in the areas of international, comparative, and foreign law. See University of Texas, *International & Comparative Law Program*, at <http://www.utexas.edu/law/academics/curriculum/iclp/extra.html> (last visited Nov. 10, 2001). Cornell's Law School, another well-funded institution, hosts a large contingent of visiting scholars from abroad. Throughout the year, Cornell "sponsors a series of luncheon talks, formal lecturers, seminars and panel discussions on current issues in international and comparative law." Cornell University, *Foreign Faculty, Scholars, and Graduate Students*, at <http://www.lawschool.cornell.edu/international/berger.html>; and Cornell University, *Speaker and Conference Series*, at <http://www.lawschool.cornell.edu/international/berger.html> (last visited Nov. 10, 2001).

103. Some schools have begun to recognize that specialization is most valuable to students who have mastered the basics.

Research has demonstrated that the SMU graduates who are most at risk of not passing the bar on the first attempt are those students who graduate with a law school grade point average below 2.5. Within that higher risk group, the most significant difference between those who passed the bar on their first attempt and those who did not is the number of upper-class bar courses taken. Those who passed on their first attempt took an average of more than 8 upper class bar courses, while those who failed on their first attempt took only an average of 5.

Southern Methodist University, Dedman School of Law, *The Bar Examination: SMU Course Coverage and Recommendations*, available at <http://www.law.smu>.

Having determined that some minimum demonstration of mastery of basic subjects is desirable, it is necessary to determine which of the basic subjects are most relevant to the specialized study of a particular certificate program. This determination is highly contextual. To determine which courses were important as a general foundation for the certificate in international, comparative and foreign law, a number of factors were taken into account. These factors included the extent to which the substance of basic courses be important for success in the fields of law covered by the certificate.<sup>104</sup> Another factor was the extent to which the basic course provided needed vocabulary or introduction to general principles with application to courses in the fields covered by the certificate.<sup>105</sup> Yet another factor was the extent to which the course provided basic grounding in the lawyer's craft and legal ethics.<sup>106</sup> All of these factors, of course, have something in common. They all developed basic patterns of approach to legal problems, or a basic understanding of the structuring of basic institutions and process at the core of the lawyer's function.

It is also important to determine the means for demonstrating minimum mastery of those subject areas. At the Law School, grades are the means chosen for demonstrating proficiency. Minimum proficiency was set at the lowest grade that indicated satisfactory completion of a course.<sup>107</sup> The standard could be set

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edu/saffairs/reccoursesforbar.htm (last visited Nov. 11, 2001). For a discussion of the academic literature, see for example, William R. Trail & William D. Underwood, *The Decline of Professional Legal Training and a Proposal for its Revitalization in Professional Law Schools*, 48 BAYLOR L. REV. 201, 232-33 (1996).

As the excerpt above suggests, the relationship between bar passage rates, course selection and specialization programs is great. Yet, the relationship need not be negative. A well crafted specialization program can succeed best when participating students have mastered the basics. Students demonstrating proficiency in the basics appear to do well on the bar exam, even if specializing in their upper class years. For a discussion of the impact that bar examination passage concerns should have on the construction of certificate programs, see Part III. 10, *infra*.

104. For example, a firm understanding of American Constitutional Law was thought important as a foundation for the study of any foreign law system, and civil procedure was thought an essential foundation for comparative law.

105. For example, satisfactory performance in the basic contracts course was thought important for certificate courses in comparative law and international business transactions.

106. Such a grounding was thought necessary to classes in cross border practice, for example.

107. The Law School's grading system is a bit different from that of many other law schools. Grading is based on a numerical scale from 1-100. Generally scores over 90 indicate superlative work, grades under 70 are not satisfactory. Median scores for the typical first year classes are supposed to range from 79 to 81. See



higher or lower. That sort of change would affect primarily the size of the student population potentially eligible for participation in the certificate program. Thus, setting a higher standard reduces the pool of eligible students within the Law School, and vice versa. In the case of the Law School Proposal, and I suspect generally among law schools considering this issue, satisfactory performance should be deemed an adequate minimum standard that assures that a student derive benefit from the certificate program. Any higher standard might call into question the value of an otherwise passing grade and might require a general reassessment of the meaning and effect of grades within a law school.<sup>108</sup> Some law schools reward exceptional performance within a concentration with an 'honors' certification.<sup>109</sup>

7. *Program administration should be used as a vehicle for the integration of all faculty working in the field within the common enterprise.*—Development of program administration can be as important for optimizing the value of a certificate program for an institution as program design. There are two general models of governance generally followed, though the variation within each category is large. The first is the single administrator model. The second is the governance-by-committee model. The former, at its worst, can be a vehicle for personal aggrandizement within an institution, and the springboard to personal advancement—perhaps to a deanship.<sup>110</sup> At its best, the single administrator model can be

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Penn State-Dickinson, *Academic Rules and Regulations: Grades*, available at <http://www.dsl.psu.edu/academics.html#g> (last visited Nov. 10, 2001).

108. It is possible, for example, to argue that where a faculty sets a particular grade, for example, a "C" as the minimum satisfactory grade for attainment of the J.D., but determines that a certificate requires performance in basic or preparatory courses at a level above that grade, then the "C" might have an effect 'de facto' substantially less 'satisfactory' than its effect 'de jure.' On the other hand, a certificate program, as an additional or supplementary program within the J.D. might be reasonably considered by a faculty to be limited to those students who perform at a level above that otherwise deemed 'satisfactory.'

109. See Albany Law School, *Areas of Concentration, Grade Point Averages*, available at <http://www.als.edu/study/concent> (last visited Nov. 14, 2001) ("Students who earn a 3.50 grade point average within the concentration courses earn the concentration with honors." *Id.*); Boston University School of Law, *International Law Concentration*, available at <http://www.bu.edu/law/jd/concentrations/international/requirement.html> (last visited Nov. 12, 2001) ("Students who receive at least a 3.5 grade point average in School of Law courses taken to satisfy the requirements of concentration will be certified as earning Honors in the Concentration in International Law." *Id.*).

110. Faculty interested in deanships generally have to acquire a substantial amount of credible administrative experience. The traditional vehicle of choice for the experience has been an associate deanship. But the administration of a substantial certificate program can make an associate deanship easier to obtain, or

the basis for dynamic and flexible efficient administration. Variations on this form of administration include administrator plus advisory committee, or the executive director plus board of directors model.<sup>111</sup> Governance by committee can range from a dual director model, to a model based on governance through committee or committees. The basic difference between the two models is that a single person is ultimately responsible for decisions under the single director model and more than one person, collectively, is responsible for decisions under the other model. In many institutions, the model chosen is based on historical accident. Usually little attention is paid to the form of governance as a matter of theory, apart from personal benefit to the actors directly affected at the time the model of governance decision is made.<sup>112</sup>

Whatever model is chosen, a certificate program profits from the meaningful inclusion of all faculty working in the field represented by the certificate. At a minimum, such inclusion makes it more likely that important views and ideas are taken into account in the administration of the program. Indeed, the history of the development of the Proposal is one marked by significant improvements in the quality of the Proposal as a result of the input of faculty with a significant stake in the areas of international, comparative and foreign law.<sup>113</sup> Moreover, meaningful participation

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might even stand on its own as the sort of experience seemed sufficient for some deanships. On the traditional road to deanship generally, see for example Timothy J. Heinsz, *Deaning Today: A Worthwhile Endeavor-If You Have the Time*, 31 U. TOL. L. REV. 615 (2000); and Nancy B. Rapoport, *Going from "Us" to "Them" in Sixty Seconds*, 31 U. TOL. L. REV. 703 (2000).

111. The University of Tulsa's programs in international and comparative law are administered on the basis of this model. See University of Tulsa, College of Law, *About the Comparative and International Law Center*, at [http://www.utulsa.edu/law/cilc/about\\_cilc.html](http://www.utulsa.edu/law/cilc/about_cilc.html) (last visited Nov. 10, 2001).

112. Application of any one of the many expressions of management theory to the problem of law school governance would itself be a fascinating exercise. Lamentably, it is an exercise I must leave to others or for another day. For those in the law profession who have begun looking at related issues, see for example Thomas Earl Geu, *Chaos, Complexity, and Coevolution: the Web of Law, Management Theory, and Law Related Services at the Millennium*, 66 TENN. L. REV. 137 (1998); Victor M. Goode, *There Is Method(ology) to this Madness: A Review and Analysis of Feedback in the Clinical Process*, 53 OKLA. L. REV. 223 (2000); Stephen R. Latham, *System and Responsibility: Three Readings of the IOM Report on Medical Error*, 27 AM. J.L. & MED. 163 (2001); Manik Roy, *Pollution Prevention, Organizational Culture, and Social Learning* 22 ENVTL. L. 189 (1992). For an introduction to approaches based on cognitive or systems theory, see for example JOHN D. STEINBRUNER, *THE CYBERNETIC THEORY OF DECISION: NEW DIMENSIONS OF POLITICAL ANALYSIS* (1974); NIKOLAS LUHMANN, *A SOCIOLOGICAL THEORY OF LAW* (E. King & M. Albrow trans. 2d ed. 1985).

113. The Proposal had gone through a number of versions prior to formal

by the faculty involved makes it more likely that such actors will develop a stake in the program. Most important, perhaps, inclusion of faculty makes it easier to effect the coherence and systemization of curriculum in the fields of law covered by the certificate. Penn State chose a variant of the single administrator model. While the administration of the International and Comparative Law Center is vested in a single administrator, the certificate program itself will be administered by a newly created Internal Advisory Board of the International and Comparative Law Center composed of members of the faculty with a significant stake in international, comparative and foreign law curriculum.<sup>114</sup>

8. *Certificate Programs should serve as a focal point for generalized guidance for students on curricular choices.*—One of the hardest tasks for most law students is choosing the appropriate mix of courses that may maximize the value of their law school education. While maximizing the utility of curricular choices is to some extent highly subjective, such decisions are more difficult to make in the absence of information.<sup>115</sup> A certificate program

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presentation to Committee. Changes reflected the thoughtful input of faculty informal review. See discussion, *supra* text at notes 22-30.

114. See Proposal at Section F, *infra* at Annex A. The genesis of this model at the Law School was largely historical. For many years there had been a single administrator for the study-abroad programs and the LL.M. program for foreign law graduates. As the involvement of first the Dickinson Law School and thereafter the Pennsylvania State University expanded into semester programs, conferences and the like, the single administrator's duties grew to include these new activities. In an effort to acknowledge the broader scope of responsibility, a Center for International and Comparative Law was created by the Dean at the time of the approval by the faculty of the London Semester Abroad Program. See Penn State-Dickinson, *Center for International and Comparative Law*, at <http://www.dsl.psu.edu/london/cover.html> (last visited Nov. 11, 2001). The form of administration chosen for the certificate program represented effort to conform the Center's governance activities to the traditional model while simultaneously providing for a meaningful participation by other faculty members with a significant commitment to the fields of international, comparative and foreign law.

115. The federal government has long recognized this problem in the regulation of markets, especially in the context of sales of securities. A level playing field in which market participants have access to equal amounts of information sufficient to make informed decisions about the nature and extent of market participation is seen as essential elements of modern securities regulation. For a discussion of the theory of markets and information generally, see Julia K. Cronin, Amanda R. Evansburg & Sylvia Rae Garfinkle-Huff, *Securities Fraud*, 38 AM. CRIM. L. REV. 1277 (2001).

The same policy ought to underlie a law school's curricular relation with its students. Investing in a course, and developing a package of courses, is in some respects, analogous to the problems of choosing investments and constructing a portfolio. But the student creating a curricular portfolio faces greater risk than an investor—the student has only one chance to “get it right”—that is to maximize the utility of the course investment portfolio. Information plays a key role in that

provides a useful vehicle for a law school to meet its information and guidance roles, at least with respect to the fields of law covered by the certificate.

Academic centers administering certificate programs, or individuals otherwise involved in the field can make excellent use of the systemization achieved through a certificate program by developing one or more suggested programs of study leading to the fulfillment of the requirements for the certificate. Such suggested programs of study would have, as their object, the offering of examples of two-year systematic semester course combinations leading to qualification for the certificate. For example, certificate programs in international, comparative and foreign law could develop model two year programs of study emphasizing each of the three fields encompassed by the certificate.<sup>116</sup> These programs can serve the important function of providing guidance to students. For faculty, certificate programs can serve as an efficient gateway for the counseling of students. Faculty, even those not involved in the fields covered by the certificate program, can make use of the curricular requirements of the certificate, in general, and the illustrative courses of study, in particular, to help students develop a personal program of study that maximizes the utility of their years in law school. Moreover, well constructed illustrative programs of study leading to the award of a certificate can be developed consistent with the general mission of the Law School to produce well-rounded lawyers.<sup>117</sup>

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exercise for students. Law Schools have traditionally been less helpful in that regard than they can be. Marquette University is one among a few others that have developed course streams as a means of providing concrete curricular choice guidance for students seeking a focus in a particular field of law. For an example, see Marquette University, *The Intellectual Property Course Stream*, at <http://www.marquette.edu/law/ipwebpage/ipcstream.html> (last visited Nov. 11, 2001) (intellectual property law course stream). To some extent these streams play a role similar to that which certificate program course requirements can play. Indeed, in addition to course streams, Marquette Law School offers certificates in specialized areas of law, for example, sports law. See Marquette University, *Sports Law Program*, at [http://www.marquette.edu/law/sports/sl\\_cert.html](http://www.marquette.edu/law/sports/sl_cert.html) (last visited Nov. 11, 2001).

116. Each of these suggested programs of study would be different, emphasizing the particular field of interest to the student.

117. Indeed, one of the great benefits of the general curricular framework provided by a certificate program is to provide a concrete means for developing particular courses of study that focus not only on the field of study covered by the certificate, but also on other courses that may be deemed essential to producing the well-rounded law graduate. Boston College Law School's principles of course selection suggests ways in which specialization within a J.D. program is compatible with the commonly expressed law school mission of producing students with a well rounded introduction to law. These principles have been reduced to six themes to

9. *Certificate Programs should be made available to alumni and other members of the bar.*—Law schools have increasingly understood their mission as neither limited to the three years of study leading to a J.D. degree, or to the education of their matriculating students. Increasingly, law schools have understood the importance of providing their alumni with opportunities for continuing education as well as for other lawyers. A certificate program provides a sound vehicle for an integrated, long term program of continuing education for lawyers wishing to expand their areas of expertise. It may thus be possible to permit lawyers to audit or otherwise enroll in courses leading to the granting of a certificate, and to make a certificate available to lawyers who finish the program. Alternatively, the courses comprising the certificate can be made available for enrollment by lawyers seeking continuing legal education credit.<sup>118</sup>

Though, on first blush, one might be tempted to object to any program that permits lawyers to sit in on classes designed to meet the requirements of the J.D. curriculum, a more careful consideration suggests that the benefits of this mixing far outweigh any theoretical negatives. One of the strongest objections to mixing might be that programs of this kind offer lawyers the opportunity to retake courses already taken in law school. Yet this is unlikely to occur in fact. First, lawyers are busy, J.D. courses, even on audit, would tend to require the expenditure of some money.<sup>119</sup> Lawyers

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aid law students in course selection:

[1] Create a base of substantive knowledge by taking introductory courses in a number of substantive areas . . . . [2] Develop specialized knowledge by taking a reasonable concentration of courses in specialized areas of particular interest. . . . [3] Diversify the perspectives from which one studies the law by taking courses specifically designed to encourage broad thinking about law. . . . [4] Continue strengthening research and writing skills. . . . [5] Sharpen practical skills by taking clinical courses, trial practice, mediation, negotiation, and alternative dispute resolution. . . . [and 6] fulfill course requirements for graduation and admission of the bar. . . .

Boston College Law School, Academic Services, *General Principles of Course Selection, Guidelines for Course Selection*, available at [http://www.bc.edu/bc\\_org/avp/law/acadserv/genprincourse.html](http://www.bc.edu/bc_org/avp/law/acadserv/genprincourse.html) (last visited Jan. 2, 2002). (These principles are then followed by a broad listing of courses categorized by area of specialization, including, among others, Family Law, Intellectual Property, International and Comparative Law, and Business Law).

118. In many states continuing legal education (CLE) requirements have been made mandatory. Most law schools offer programs of some sort to meet the continuing educational needs of the local bar. See, e.g., Penn-State Dickinson, *Schedule of Continuing Education and Outreach Programs, 2001-2002*, at <http://www.dsl.psu.edu/continuinged/clesched1.html> (last visited Nov. 11, 2001).

119. Most law schools charge fees for attendance at CLE courses. The longer

would tend not to want to waste their time or their money on silly enterprises. Lawyers most likely to take advantage of these opportunities would be those who never had a chance to take the courses offered when they went to law school and find themselves confronting problems in new areas of law.<sup>120</sup>

Moreover, the educational benefit to current law students of the presence of practicing lawyers in a class may be significant. Just like non-traditional J.D. students bring a wealth of insights and approaches to the class that would not otherwise be available in a class of recent university graduates,<sup>121</sup> so practicing lawyers bring a range of experiences and approaches that may help younger and less experienced students more easily understand the connection between the classroom and the work world. Lawyers would certainly enrich class discussion. Their presence would provide a stronger connection between the academy and the practicing bar.<sup>122</sup>

10. *Certificate programs can be crafted to avoid adversely affecting bar passage rates.*—Evaluation of the suitability of any certificate program will invariably lead to a discussion of the effects of the certificate program, or of legal specialization in general, on bar passage rates. Someone will suggest that certificate programs contribute, directly or indirectly, to a downward pressure on bar passage rates. Yet careful consideration of the issues statements

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or more involved the course, the more likely it is that the fee for that course might rise.

120. There are any number of reasons why this might have occurred. As law school curricular offerings become richer, it becomes less and less likely that a law student can enroll in all courses of possible interest to her prior to graduation. Moreover, some lawyers may be interested in courses, avoided in law school, because having focused their career in one area of law, they now find their careers moving in new directions. This is certainly likely to happen with respect to the fields of international, comparative and foreign law, practice areas once thought exotic, and now becoming more common at virtually every level of practice. For the growth of practice touching on these fields, see for example John A. Barrett, Jr., *Recent Development: International Legal Education in the United States: Being Educated for Domestic Practice While Living in a Global Society*, 12 AM. U.L. INT'L L. & POL'Y 975 (1997).

121. On the value of non-traditional students in law schools, see for example Lorraine K. Bannai & Marie Eaton, *Fostering Diversity in the Legal Profession: A Model for Preparing Minority and Other Non-Traditional Students for Law School*, 31 U.S.F. L. REV. 821 (1997).

122. Commentators have recently decried the division between academic and practicing lawyers. Legal scholarship in particular has been criticized as less relevant to the needs of the bar. See, e.g., Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992); Larry Catá Backer, *Measuring the Penetration of Outsider Scholarship in the Courts: Indifference, Hostility, Engagement*, 33 U.C. DAVIS L. REV. 1173, 1173-78 (2000).

like that raise indicate that certificate programs, when carefully constructed, do not have this negative effect on bar passage rates. The argument confuses the effect of specialization with that of poor grades on bar performance. More significantly, it hints at dissatisfaction, not with certificate programs, but with the curricular choices made by the faculty between mandatory and optional courses.

Faculties and other law school constituencies are concerned about bar passage rates, and law schools informally compete on the basis of these rates, even though the utility of bar passage rates as a measure of the effectiveness of legal education has been disputed.<sup>123</sup> However, like institutional rating by the popular press, bar passage rates do affect an outsider's perception of institutional reputation and educational quality.<sup>124</sup> In considering the parade of horrors attendant on any change within an institution, it has sometimes been suggested that certificate programs may somehow be linked negatively to an institution's bar passage rate. Certificate programs, it might be argued, offer marginally performing students a way of rehabilitating their relatively poor performance (at least vis-a-vis the other students in their class). These students may be disproportionately attracted to certificate programs in hopes that a certificate may deflect a closer or more meaningful inspection of their aggregate academic performance. And indeed, where poorly performing students do better on their certificate courses than on other courses, they might even take advantage of this to advertise a higher grade average in an area of interest than in their aggregate performance. As a result, so the argument may conclude, such students devote a disproportionate amount of their class time on "marginal" courses, that is courses necessary to complete the certificate, and less time on "important" courses, that is courses that might help them better prepare for practice. As a result, these

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123. See, e.g., Daniel R. Hansen, *Do We Need the Bar Examination? A Critical Evaluation of the Justifications for the Bar Examination and Proposed Alternatives*, 45 CASE W. RES. L. REV. 1191 (1995); Joan Howarth, *Teaching in the Shadow of the Bar*, 31 U.S.F. L. REV. 927 (1997); Cecil J. Hunt, II, *Guests in Another's House: an Analysis of Racially Disparate Bar Performance*, 23 FLA. ST. U. L. REV. 721 (1996); but see Katherine L. Vaughns, *Towards Parity in Bar Passage Rates and Law School Performance: Exploring the Sources of Disparities Between Racial and Ethnic Groups*, 16 T. MARSHALL L. REV. 425, 434-44 (1991) (lower bar passage rates for people of color result from lower quality of education).

124. Bar passage rates thus serve as an important sign within the code we have come to understand as the cultural matrix of legal academia. It is a sign with great communicative effect. See ECO, *supra* note 97, at 48-150.

students may be more likely to fail the bar and thus negatively affect the bar passage rate of the institution.

Careful analysis of this argument suggests some of its weaknesses. For one, the problem is isolated, and may have little effect in many law schools. This problem occurs only in law schools with bar passage rates that a faculty might believe are worth improving. In many schools, where bar passage rates are consistently satisfactory, there should be little cause for concern. But even in institutions where there is a greater concern about bar passage rates, the link between bar passage rate improvement and certificate programs might be less clear cut than suggested by the argument described above. First, it is not clear that marginally performing students are attracted in disproportionate numbers to certificate programs.<sup>125</sup> I might be inclined, on the basis of anecdotal experience with certificate program administration, to suggest that the opposite is as likely true. Marginally performing students are more likely to be worried about performance on a bar exam, and therefore more likely to shy away from rigorous programs of specialization that may not be directly bar related. As a result, only students more confident of bar passage, usually higher ranked students, are likely to be attracted to the certificate program.<sup>126</sup> "Research has shown that bar examination performance correlates more with law school grades than with LSAT scores."<sup>127</sup> Second it is not clear that marginally performing students will perform better in courses that count for the award of a certificate than in other courses. Indeed, assuming that all courses are taught within the same range of rigor, a student's performance

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125. There are easy methods for determining the truth of this assertion. Most schools with certificate programs use the program gather information about student interest, student performance and the like. It is an easy matter to determine the relationship between rank in class and election to pursue a certificate with several years data. Conjecture alone, or conjecture based on anecdotal information is the worst way to make a determination with respect to the viability of an academic program.

126. Again, this is worth some field testing. My guess is that, over time and across institutions, the profile of the average certificate participant will mirror that of the average law student, with the usual statistical deviation.

127. Linda F. Wightman, *Are Other Things Essentially Equal? An Empirical Investigation of the Consequences of Including Race as a Factor in Law School Admission*, 28 SW. U. L. REV. 1, 24 (1998) (citing Stephen P. Klein, Ph.D. & Roger Bolus, Ph.D., *The Size and Source of Differences in Bar Exam Passing Rates Among Racial and Ethnic Groups*, BAR EXAMINER, Nov. 1997, at 8, 12). But see Deborah L. Rhode, *Institutionalizing Ethics*, 44 CASE W. RES. L. REV. 665, 690 (1994) ("No showing has ever been made that performance either on bar exams or in law school correlates with performance in practice.").



should, on the average, be similar in certificate and non-certificate courses.

Most importantly, the connection between participation in certificate program courses and other course work which, if properly undertaken might have bettered the student's chances of bar passage, rests on slim logic and little hard evidence. It suggests that but for the time spent on a course of certificate study, the student with a low grade point average would have either performed better in courses otherwise deemed more appropriate to bar preparation, or would have taken more courses deemed essential to bar preparation.

Yet either 'but for' alternative is insupportable. The first is hardly worth rebuttal. The willingness or ability of the poorly performing student to learn is not 'cured' by forcing her to pay more attention to 'important' courses, or by faculty manipulation of the palette of courses available to her. On the other hand, some evidence indicates that, at the margin, the student with low grades does improve her chances of passing the bar by concentrating on basic bar exam courses.<sup>128</sup> Thus, certificate programs are not distracting for students who are performing satisfactorily. It is more likely that the student with low grades evidences the sort of difficulty with a mastery of basics that indicates not only poor performance on the bar exam, but equally poor performance in any course of specialization. Yet because certificate programs may not be suitable for such students, it does not follow that certificate programs are bad for everyone. Indeed, it may well suggest the opposite.

The second confuses the symptom for the cause. The argument that students would have taken more 'bar courses' but for a certificate program implies that all students would perform better on the bar if they concentrated on those courses. But this assertion is not necessarily true; academically 'at risk' students raise their chances of passing the bar if they take more general basic courses introducing them to the fields of law covered on the bar examination. It also hints that courses other than 'bar courses' are superfluous or at least unimportant 'fluff' within legal education. Most importantly, it treats as irrelevant the policy underlying the construction of a law school's curriculum. In a sense, such arguments constitute a flank attack on the construction of the

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128. See, e.g., Southern Methodist University, Dedman School of Law, *The Bar Examination, SMU Course Coverage and Recommendation*, available at <http://www.law.smu.edu/saffairs/reccoursesforbar.htm> (last visited Nov. 11, 2001).

general law school curriculum. These are arguments that marginalize and denigrate the care and attention faculties traditionally pay to the construction of a curriculum divided between courses deemed pedagogically essential, and thus required, and those from among which the student is free to choose. The argument actually suggests that this mix of mandatory and optional courses is somehow unbalanced. But if that is the case, the answer is not to reject a certificate program—*which ordinarily merely organizes a set of courses already in the curriculum and rewards a student for taking these courses in a prescribed sequence*. The better alternatives are either to revisit the basic choices among curricular offerings made by the faculty in line with the law school's mission, or to raise the minimum grade point average necessary to participate in the certificate program.<sup>129</sup> Law schools are well equipped to deal with these issues directly, rather than surreptitiously through a certificate program. As long as students remain free to take a sequence of courses within a legal specialty, the 'problem' of certificate programs, thus framed, remains—whether or not a certificate program is approved. For faculty with an abhorrence of specialization for fear of lowering bar passage rates, opposition to certificate programs amounts to tilting at windmills—and should be treated as such. Certificate programs do not invariably and adversely affect a law school's bar passage rates.

11. *Certificate Programs can contribute to the development of a well-rounded graduate.*—Most law schools profess a mission to produce a law graduate with a well rounded legal education.<sup>130</sup>

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129. Some law schools have indeed begun to increase the number of required courses. The new Ave Maria Law School "will require core courses to be two-thirds of the curriculum, when the trend at law schools is to increase electives." Francine Cullari, *Innovating Through Tradition: the Ave Maria School of Law*, 79 MICH. B.J. 1578, 1579 (2000) (citing an interview with Ave Maria's dean, Dean Bernard Dobranski). For a discussion of program quality and student 'quality' in constructing a certificate program, see Part III.6, *supra*.

130. See, e.g., Gordon T. Butler, *The Law School Mission Statement: A Survival Guide for the Twenty-First Century*, 50 J. LEGAL EDUC. 240 (2000); Frank S. Ravitch, *Struggling with Text and Context: a Hermeneutic Approach to Interpreting and Realizing Law School Missions*, 74 ST. JOHN'S L. REV. 731 (2000) (applying theory to the development of law school mission statements). Thus, for example, the mission of the University of Baltimore Law School is to provide "its graduates with 'the latest skills and techniques for productive careers in the public and private sector.'" Eric C. Schneider, *Dean's Forum*, 30 U. BALT. L. FORUM 2 (2001). Some law schools favor a social justice mission. See, e.g., Joyce E. McConnell, *A Feminist's Perspective on Liberal Reform of Legal Education*, 14 HARV. WOMEN'S L.J. 77, 88-94 (1991) (CCNY).

For a discussion of the mission of law schools from a cross border perspective, see for example Jon Mills, *The Role of Law Schools in the Development of Inter-*

Certificate programs, if well constructed, can provide an efficient means of affording direction in the third year of law study, increasing the utility of the student's third year. At their best, such programs offer "law students the opportunity to maximize their law degree."<sup>131</sup> Certificate programs, in conjunction with a well thought out program of required courses in the first and second year of study, provide an integrated course of study that can enrich all three years of legal study. Concentrated study of a field of law through certificate programs can also help an institution meet the objectives of the MacCrate Report.<sup>132</sup> Programs designed to permit students to pursue an in-depth study of a particular field of law "might itself have pedagogic value" consistent with the core values of the MacCrate Report.<sup>133</sup> Thus, though the better approach to the construction of a well-rounded curriculum should center on macro-issues, such as the number and mix of required courses, certificate

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*American Relations and the Rule of Law, A Discussion By Law School Deans From the Americas*, 13 FLA. J. INT'L L. 114 (2000). For a discussion of the difference in mission between public and private law schools, see Richard A. Matasar, *Private Publics, Public Privates: An Essay on Convergence in Higher Education*, 10 U. FLA. J.L. & PUB. POL'Y 5, 9 (1998) (differences narrowing but still important).

131. The Florida State University College of Law, Academic Programs, *Land Use and Environmental Law Certificate*, available at [http://www/law.fsu.edu/academic\\_programs/certificates/environmental/index.php](http://www/law.fsu.edu/academic_programs/certificates/environmental/index.php) (last visited Nov. 14, 2001). See Jeffrey E. Lewis, "Advanced" Legal Education in the Twenty-first Century: A Prediction Of Change, 31 U. TOL. L. REV. 655 (2000) (on the need to provide context to a law student's third year of law study).

132. AMERICAN BAR ASSOCIATION SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP (1992) (the "MacCrate Report"). For discussion of the MacCrate Report, see for example Peter A. Joy, *The MacCrate Report: Moving Toward Integrated Learning Experiences*, 1 CLINICAL L. REV. 401 (1994). One of the driving forces behind the MacCrate Report expressed his views elsewhere as well. See Robert MacCrate, *The Shared Responsibility for a Profession*, 80 MARQ. L. REV. 745 (1997); Robert MacCrate, *Lecture on Legal Education*, 30 WAKE FOREST L. REV. 261 (1995). For a sensitive criticism of the MacCrate Report, see Carrie Menkel-Meadow, *Narrowing the Gap By Narrowing the Field: What's Missing From the MacCrate Report—Of Skills, Legal Science and Being a Human Being*, 69 WASH. L. REV. 593 (1994).

133. Deborah Jones Merritt & Jennifer Cihon, *New Course Offerings in the Upper Level Curriculum: Report of an AALS Survey*, 47 J. LEGAL EDUC. 525 (1997) (interpreting the survey's findings and making certain observations about the Accurrent direction of curricular innovation in American law schools). See Darlene Ricker, *On Track*, STUDENT LAW, Mar. 1993, at 36, 40 (quoting Ronald Cass, Dean of Boston University School of Law, who said that "A major field requires you to study in a different way and on a higher level than do general survey courses. You get more out of the subject area.").

programs provide a means of thinking about general curriculum issues in a narrower context. Similar considerations should guide the structuring of the sequence of courses, required and optional, that forms that basis of a certificate program, as those that inform the creation of the general law school curriculum. Certificate programs may well thus provide a framework, or another more narrowly focused space, within which the important issues of curricular needs and “what is best for students” can be developed. Yet at the same time, the focus permits law schools to adjust to the realities of the markets they serve, both legal and otherwise, especially the move towards specialization—not hyper-specialization, but rather specialization to some extent. Certificate programs provide a point at which legal education can adjust to the practices and cultures of the industries in which it operates.

#### IV. The Penn State Proposal for a Certificate Program in International, Comparative and Foreign Law

With the foregoing background firmly in mind, it is easier to understand some of the choices made in developing the Law School’s version of a Certificate Program in International, Comparative, and Foreign Law.

On the basis of a number of overarching goals and objectives,<sup>134</sup> the Proposal provides for the awarding of either a certificate in international, comparative and foreign law,<sup>135</sup> or a certificate in international, comparative and foreign law with a concentration in foreign law.<sup>136</sup> An award of the former is earned by successfully completing eighteen credit hours from a list of courses divided into five components: core courses (two courses, six credits), international law components (no less than one course), comparative law component (no less than one course), foreign law component (no less than one course), and capstone recourse (writing requirement, no less than one course).<sup>137</sup> For an award of the certificate with a concentration in foreign law, the student must complete all of the course requirements for the certificate, but no less than three of the courses undertaken for fulfillment of the requirements must include a substantial component of the law of

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134. See Proposal at Section A (Principles and Purposes), *infra* at Annex A.

135. See Proposal at Section B, Part I, *infra* at Annex A.

136. See Proposal at Section B, Part II(a), *infra* at Annex A. This certificate will initially be offered only for the law of the United Kingdom or the European Union.

137. See Proposal at Section B, Part I(3)(a)-(e), *infra* at Annex A.

the jurisdiction to be studied.<sup>138</sup> In addition, a student must meet a number of other requirements. She must successfully complete all requirements for the award of a J.D.<sup>139</sup> She must also meet certain minimum performance requirements on all courses undertaken for the certificate as well as a number of other basic courses.<sup>140</sup> The student must also fulfill a number of administrative requirements.<sup>141</sup> Certificate candidates are given a modest priority for enrollment in courses necessary for the fulfillment of certificate course requirements.<sup>142</sup> Lastly, the Proposal provides for administration by the Law School's Center for International and Comparative Law,<sup>143</sup> an administrative unit of the Law School previously established by the dean.<sup>144</sup>

The Proposal is based on a number of assumptions derived from the discussion above. First, it is grounded on an understanding of the fields of international, comparative and foreign law as both separate and interlinked. The Proposal structures the requirements of the certificate to accord with the different focus of each of the fields, but with an understanding of the basics that connect international, comparative, and foreign law study in the United States.<sup>145</sup>

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138. See Proposal at Section B, Part II(a)(1)-(3), *infra* at Annex A. For the concentrations in the law of the United Kingdom or European Union Law, courses with a substantial component of the relevant foreign law are listed.

139. See Proposal at Section B, Part I(1), *infra* at Annex A.

140. See Proposal at Section C, *infra* at Annex A. Students must earn a minimum grade for each of the courses offered for fulfillment of certificate requirements (70), and maintain an average grade for all courses meeting the requirements of the certificate program(80). The student must also earn grades of at least 70 in a number of non-certificate courses: Civil Procedure, Contracts, Constitutional Law, Professional Responsibility, and Lawyering Skills I & II. For a description of the grading system at the Law School, see Penn State-Dickinson, *Academic Rules and Regulations: Grades*, available at <http://www.dsl.psu.edu/academics.html#g> (last visited Nov. 14, 2001) ("Course grades for J.D. students are reported on a numerical basis and signify quality of work as follows: 90 and above Distinguished; 85-89 Excellent; 80-84 Good; 75-79 Satisfactory; 70-74 Passing; 65-69 Conditional Failure; Below 65 Failure (No credit)).

141. For example, requirements as to application for the certificate, see Proposal at Section D(1)-(2), *infra* at Annex A, demonstration of language proficiency for students undertaking the certificate in the foreign law of a jurisdiction the legal language of which is not English. See Proposal at Section E, *supra* at Annex A.

142. See Proposal at Section D(3), *infra* at Annex A.

143. See Proposal at Section F, *infra* at Annex A.

144. See Penn State-Dickinson, *Center for International and Comparative Law: Law in London-Spring Semester 2002*, available at <http://www.dsl.psu.edu/london/index.html> (last visited Nov. 14, 2001).

145. See Proposal, Section B, *infra*, at Annex A.

Second, the Proposal was grounded on the assumption that foreign language proficiency was not essential, though desirable, for the award of the certificate.<sup>146</sup> The Proposal mandates foreign law proficiency only with respect to certificates with a concentration in foreign law the legal language of which is not English.

Third, the Proposal was structured to maximize flexibility. The Proposal was meant to highlight faculty strengths in each of these fields of law. It was meant to permit the student to structure a course of study generally covering all three fields, or concentrating in one of them.<sup>147</sup> Moreover, it permits students as much flexibility as the diversity of the interests and talents of the faculty permit. The premise is that student course flexibility will be a function of faculty interest and talent in these fields. The greater the range of interests, the greater the diversity of courses, the larger the range of choices available to students within the certificate program.

Fourth, the Proposal is built on the assumption that the academic institution must have faculty and other institutional resources sufficient to provide the necessary basic instruction in international and comparative law, and to expose students to at least one system of foreign law.<sup>148</sup> The Proposal is meant to maximize utility for faculty as well as students. The certificate program is meant, in some respect, to provide the focal point for systematizing the international, comparative and foreign law curriculum, as well as providing another means by which faculty working in related areas could more closely interact. Faculty and student synergy would be the ultimate benefit of the certificate program.

Fifth, the Proposal is intended to apply the principles of certificate program creation developed above.<sup>149</sup> This application is consistent with the aims of creating a special focus program that enhances the educational opportunities of students.

The section that follows illustrates the ways in which the Proposal was structured to incorporate the objectives of those principles. It is structured to demonstrate the way a principled qualitative assessment can be used not only to determine whether a certificate program is feasible, but also help craft the program to more effectively benefit the law school community<sup>150</sup>

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146. For a discussion of the rationale for this position, see discussion, *supra* text at notes 55-63.

147. See Proposal, Section B, Part I and Part II, *infra* at Annex A.

148. See discussion *supra*, at Part I.

149. See discussion, *supra*, text at notes 76-127.

150. For a discussion of the nature, need and content of a uniform standard of

A. *Macro-Uniformity Within the Law School: Comparison of the Proposed Program With Existing Certificate Programs at the School of Law*

The School of Law has recently considered and approved a program leading to a Certificate in Dispute Resolution and Advocacy. That certificate program has established a base line for the construction of other certificate programs within the Law School. The Proposal was structured to follow the form of the Certificate in Dispute Resolution and Advocacy to the extent appropriate.<sup>151</sup> The construction of the program leading to a Certificate in Dispute Resolution and Advocacy is divided into six parts. The first part consists of a short statement of purpose. The other five parts consist of organizational and certificate requirements divided into the following sections: (a) requirements for certificate, (b) grades required for the certificate, (c) granting of the certificate, and (d) creation of a certificate program committee.<sup>152</sup>

The Proposal used the form of the Certificate in Dispute Resolution and Advocacy as a template for the structuring of its program in international, comparative and foreign law. The utility of that approach with respect to ease of program structuring was borne out in the process of the creation of the Proposal. Macro-uniformity is efficient, and permitted a concentrated effort on the particulars of the Proposal. I believe it will also serve to reinforce the distinctive culture of the Law School—it puts the mark of the Law School on all of its programs.

It is common practice to include language on program purposes in developing programs of every type at any academic institution. Such articulations serve as an important exercise for those building programs to elaborate on the need for, and objectives of, the proposed program. It also can serve as a vehicle for identifying the manner in which the proposed program will serve to enhance the overall academic mission of the Law School,

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assessment of certificate programs, see discussion, *supra*, text at Part III.

151. Clearly, basic organizational similarity is not the same thing as a mindlessly slavish imitation of program form. Differences in the fields covered by certificate programs should produce differences in the substantive details of certificate programs. The point where necessary organizational similarity ends and counter productively mindless imitation begins can be difficult to determine. One should rely on the experience of those with administrative experience as well as those with experience in the fields the subject of the certificate in drawing those lines.

152. See Pennsylvania State University, Dickinson School of Law, *Certificate in Dispute Resolution and Advocacy* (on file with author).

as well as the means by which the program better utilizes the resources of the Law School.

The Certificate in Dispute Resolution and Advocacy lists four purposes and objectives: packaging current course offerings in a more systematic manner, providing a vehicle by which students can demonstrate proficiency in certain skills to prospective employers, providing a means of attracting prospective students interested in the field, and highlighting the excellence of current programs in dispute resolution. Each of these serves both to announce the goals and objectives of the program to interested students, and to remind faculty of the reasons they devote time to the program. Each also provides a declaration of intent that accords with some of the core principles of sound certificate program building.

Similarly, the Proposal for a Certificate in International, Comparative, and Foreign Law lists nine purposes and objectives: packaging current course offerings in a more systematic manner, providing a means for students to provide evidence of concentrated study to prospective employers, providing additional training in the laws of other nations, attracting prospective students, utilizing the program of concentrated study as a means of remaining at the forefront of development in these fields of law, increasing the quality course integration, enhancing the development of programs and other opportunities through a Center for International and Comparative Law, highlighting the strength of these programs to others outside the Law School community, and to increase the opportunities for faculty working in these fields of law to express their excellence in teaching, research and service.<sup>153</sup>

This articulation represents both an affirmation of the basic goals of programs of concentrated study at the Law School, and the intention to broaden the utility of the certificate program to serve faculty and the outside community. The purposes and objectives section of the Proposal is aimed at a number of different constituencies—faculty, current students, prospective students, alumni, other academics, and the bench and bar. The Proposal objectives are crafted to offer an ‘interest hook’ for each of these groups by articulating, in a concise manner, the reasons the program should be of interest to each of them. The objectives thus serve both substantive and informational purposes. The objectives are meant to be seen, and distributed, to all of the constituencies of the Law School.

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153. See Proposal, Section A, *infra* at Annex A.



The other Parts of the Proposal mirror the structure of the Certificate in Dispute Resolution and Advocacy: (a) requirements for certificate, (b) grades required for the certificate, (c) granting of the certificate, and (d) administration by the Center for International and Comparative Law.<sup>154</sup>

Certificate requirements in both programs are grounded on principles of flexible exploration of the field of law studied. Both require a minimum number of basic courses and then. Both also divide a number of other relevant courses into "buckets" of courses corresponding to divisions within their respective fields. Students are then required to explore each area, but are given some flexibility to undertake this exploration.<sup>155</sup> Both also require a concentrated study of the field at an advanced level leading to the production of a significant paper demonstrating some proficiency within the field studied.

Both certificate programs also impose minimum grade requirements for individual courses undertaken to satisfy certificate requirements. Both require that students maintain a minimum overall performance average for all courses undertaken in satisfaction of certificate requirements. Each also imposes minimum performance requirements for basic courses deemed foundational for the study of the field represented by the certificate.<sup>156</sup> Each imposes similar administrative requirements for certificate qualification. With these requirements, especially, macro-uniformity provides significant administrative efficiencies.<sup>157</sup> Both certificates also provide for a similar administrative structure. Each is administered by a Center established to oversee a host of efforts by the Law School related to the fields of the certificates. As such, in both cases, the certificate adds to the efforts of the Law School in those fields.<sup>158</sup>

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154. See Pennsylvania State University, Dickinson School of Law, *Certificate in Dispute Resolution and Advocacy*, (on file with author).

155. Thus, the Proposal requires some study in international, comparative and foreign law. This provides the necessary breadth of study within the fields, but permits students to pick courses in each area that best suit their educational needs.

156. Of course, the list of courses deemed foundational for a certificate in advocacy and dispute resolution is different from that for a certificate in international, comparative and foreign law.

157. At the Law School, the Associate Dean for Academic Affairs is generally given responsibility for keeping track of students working towards a certificate. Uniformity of administrative requirements eases the Associate Dean's administrative burdens.

158. With respect to the other projects of the Center for Advocacy and Dispute Resolution, see for example Penn State-Dickinson, *First Annual Dispute Resolution Symposium: Resolving Disputes Arising Out of the Changing Face of*

*B. The Proposal is Designed for the Future, Not the Past*

Designing a certificate for the future—rather than using it to memorialize the present or praise the past—does little to utilize a certificate program’s power to add significant value to the efforts of a law school. The Proposal is designed to permit a flexible approach to change. It embraces flexibility in a number of significant ways. First, the Proposal permits the program administrator to count courses for the award of the certificate, courses not otherwise listed but offered in the summer or semester abroad programs of the Law school or other ABA-approved law schools.<sup>159</sup> Second, students are permitted to seek the application of other courses towards the awarding of the certificate.<sup>160</sup> More innovative, perhaps, is the ability for students to seek application of courses undertaken at universities outside the United States towards the award of the certificate.<sup>161</sup> The purpose is to permit students who have actually studied at universities abroad to apply those courses to the certificate, even if such courses do not count towards graduation under ABA standards or the Law School’s rules.<sup>162</sup> Of course, flexibility does not suggest the absence of rules with respect to course inclusion. The Proposal provides significant oversight by the certificate program administrator with respect to courses counted for the award of the certificate. In addition, the Proposal sets forth standards to guide the application of the administrator’s discretion.<sup>163</sup>

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*Agriculture: Challenges Presented by Law, Science and Public Perceptions*, available at <http://www.dsl.psu.edu/continuing/dispute.html> (last visited Nov. 11, 2001) (project undertaken in collaboration with the Agricultural Law Research and Education Center and the Penn State Journal of Environmental Law and Policy).

159. See Proposal Section B, Part I(b)(x), (c)(vi), and (d)(iv), *infra*, at Annex A.

160. See Proposal, Section B, Part I(f), *infra* at Annex A.

161. See Proposal Section B, Part I(b)(xi), (c)(vii), (d)(v) and (f), *infra*, at Annex A.

162. Here the purpose is to reward additional work, where appropriate, if it is directed toward the study of one of the fields encompassed by the certificate. While students will still have to meet their ordinary graduation requirements, there is no reason why they ought not to be rewarded for initiative and extra effort.

163. Thus, for example, with respect to the inclusion of courses undertaken at foreign universities, the administrator may count those toward fulfillment of the certificate requirements only if the course is deemed “to be equivalent in rigor to courses offered at the Law School” and otherwise covers an area of law that lends itself to inclusion in one of the component categories of the certificate program. See Proposal Section B, Part I(b)(xi), (c)(v), and (d)(v), *infra*, at Annex A.

Moreover, the program administrator is also given flexibility with respect to the certificate program with concentration in foreign law. Here the Proposal struck a balance between providing for present capability and leaving enough room for the certificate program to include emerging capabilities at an appropriate time. Thus, the Proposal recognizes that currently the Law School has sufficient expertise to support a certificate with concentration in foreign law only with respect to the law of the United Kingdom and that of the European Union. Recognizing the limits of that expertise, the Proposal sets forth course requirements with some particularity for a concentration in the laws of the United Kingdom<sup>164</sup> or the European Union.<sup>165</sup> At the same time, the Proposal permits the program administrator to develop similar program requirements with respect to the study of the law of any other foreign jurisdiction where the emerging competence of the Law School as a whole makes such inclusion appropriate.<sup>166</sup> Guidance with respect to the scope of requirements for any additions to the foreign law concentration is also provided.<sup>167</sup>

*C. The Proposal's Objectives Are Clearly Related to the Mission of the Law School.*

The Proposal plays to significant strengths of the Law School. First, there are a sufficient number of faculty teaching and researching in the fields of comparative, international and foreign law to make the certificate program viable. This is no sham designed to create a formal program around one individual, nor is the thrust of the Proposal idiosyncratic. Second, it complements a number of other activities of the Law School in the fields of international, comparative and foreign law. These include the Law

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164. See Proposal Section B, Part II(b)(2), *infra*, at Annex A.

165. See Proposal Section B, Part II(b)(1), *infra*, at Annex A.

166. This can occur in a variety of ways. For example, new faculty hires may provide significant expertise in the laws of a foreign jurisdiction. Alternatively, the focus of existing or emerging programs of study sponsored by the Law School may provide significant new opportunities for the study of the law of another jurisdiction. Currently, that possibility is strongest with respect to European law—the law of Italy, France, the Netherlands or Austria. But that may change as the involvement of the Law School abroad changes. Lastly, current or new relationships with foreign universities may lead to the opportunity for students to study the laws of additional foreign jurisdictions. Currently that may be possible within the foreseeable future with respect to Austrian and Italian law.

167. See Proposal Section B, Part II(a), *infra*, at Annex A. This section effectively provides the template for the development of requirements for the study of the law of additional foreign jurisdictions.

School's summer programs abroad,<sup>168</sup> the recently implemented London Semester Program Abroad,<sup>169</sup> and the Law School's academic relationships with foreign law schools.<sup>170</sup> Third, the Proposal complements the curricular focus of the Law School.<sup>171</sup> The Proposal organizes the study of a set of discrete fields of law into an integrated sequence, the benefit of which is to "develop analytical skills and teach the fundamental body of knowledge required by beginning lawyers, while building competence in the skills needed for professional success."<sup>172</sup> The Proposal complements the Law School's stated objective for faculty, as well.<sup>173</sup> This is particularly true with respect to the offering of a specialization in foreign law, and the creation of an advisory board of faculty to aid in the administration of the certificate program. It also complements the overall focus of legal education at the Law School.<sup>174</sup>

#### *D. The Proposal's Requirements Are Fair and Realistic*

The Proposal is based on the assumption that a certificate program is not the equivalent of a post-J.D. degree. As such, treating the certificate program like an LL.M. program for purposes of determining requirements is inappropriate. Additionally, creating a program that essentially monopolized the third year of a law student's legal education is also inappropriate at the J.D. level. Such monopolization is unfair because it may detract from the Law School's mission of providing a well-rounded education and may be unrealistic because a program constructed in that way might do a

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168. See discussion at note 27, *supra*.

169. See discussion at note 28, *supra*.

170. These relationships have produced a program through which law teachers from abroad offer short courses in international, comparative or foreign law to students at the Law School. See Penn State-Dickinson, *Index of Faculty Biographies*, available at <http://www.dsl.psu.edu/faculty/facbioin.html> (last visited Nov. 5, 2001) ("Visiting scholars and practitioners, some from foreign countries, enrich the academic and intellectual life here as well.").

171. "The curriculum at Penn State-Dickinson is organized into an integrated sequence of required and elective courses designed to develop analytical skills and teach the fundamental body of knowledge required by beginning lawyers, while building competence in the skills needed for professional success." Penn State-Dickinson, *Curriculum, J.D. Program*, available at <http://www.dsl.psu.edu/curriculum.html> (last visited Nov. 14, 2001).

172. *Id.*

173. "The faculty is committed to innovation and strives to make instruction both interesting and effective." *Id.*

174. The current dean of the Law School has stated that "Our program of study is both national and international in its focus and scope." Peter G. Glenn, *A Word From the Dean*, available at <http://www.dsl.psu.edu/deanmess.html> (last visited Nov. 11, 2001).

better job of steering students away than inviting them to participate in the program. In line with other certificate programs,<sup>175</sup> we determined that a required course of study equal to enough courses to fill a little more than one semester's study would be adequate to constitute the sort of significant advanced introduction to the study of international, comparative and foreign law,<sup>176</sup> that the certificate represented.

Fairness and realism are attempted in other ways as well. One is by providing flexibility in course choices. Students may select from among several courses in each of the fields of international, comparative and foreign law. Choice permits students the option of tailoring their program of studies to suit their individual interests within the context of basic knowledge acquired through the required courses, and demonstrated through a required advanced writing course.<sup>177</sup> Another is by providing flexibility in the study of foreign law, an approach that takes advantage of foreign law expertise within the Law School faculty but does not require the creation of a new foreign law curriculum.<sup>178</sup>

Taken together, the Proposal creates a means of acquiring a substantial introduction to the fields of international, comparative and foreign law in a degree-appropriate manner. This introduction, though thorough and rigorous, does not impede a law student's ability to acquire the sort of well-rounded education that accords with the mission of the Law School. The Program requirements are sufficiently flexible to make its completion realistic. It is rigorous enough to provide a firm grounding in the fields of law studied.

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175. For similar cumulative course requirements in international and comparative certificate programs, see for example University of Pittsburgh, *Certificate Programs: International and Comparative Law*, available at <http://www.law.pitt.edu/programs/certificate/international.html> (last visited Jan. 2, 2002) (University of Pittsburgh: 19-20 credits); University of Tulsa, *Certificate Program in Comparative and International Law*, available at <http://www.utulsa.edu/law/cilc/certificate.html> (University of Tulsa: 18 credits); Pace University, *International Law Program*, available at <http://www.pace.edu/lawschool/intlaw/> (Pace Law School; 12 credits); but see Ohio State University College of Law, Courses and Curriculum, Certificate Programs, Certificate in International Trade and Development, available at <http://www.osu.edu/units/law/law6.html> (last visited Nov. 12, 2001 (30 semester hours required, 15 at the law school)).

176. See discussion above at notes 94-100.

177. See Proposal at Section B, Part I, and Section B Part II, *infra* at Annex A.

178. Here, for instance, realism is evidenced by inclusion of courses within this program area with a substantial emphasis on the law of the foreign jurisdiction.

*E. Certificate Programs Should Not be a Refuge of the Marginally Performing Student*

The Proposal is designed to limit the ability of students to “launder” their law school resumes through recourse to a certificate program.<sup>179</sup> The Proposal also attempts to ensure that the certificate program does not become an academic distraction for law students.<sup>180</sup> It is also designed to make it harder for marginally performing students to successfully complete the requirements for a certificate. These limitations are accomplished imposing minimum performance requirements on students who successfully complete the requirements for the certificate. Participating students must have earned a minimally satisfactory grade on a broad range of introductory courses to qualify for the certificate.<sup>181</sup> Most of those courses would have been completed in the first year.<sup>182</sup> Students must also earn a grade no less than the minimum considered satisfactory in every course to be applied toward award of the certificate.<sup>183</sup> Lastly, the average grade of all courses taken in

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179. See *supra* notes 101-05 and accompanying text. Some faculty fear the ability of poorly performing students to distract employers from the student's overall performance when the employer may focus on the awarding of the certificate. Sometimes, these students can even point to better performance, on average in the certificate courses, than in general. Of course, employers are only capable of being distracted by certificates to the extent they are willing to be distracted. Perusal of class rank and course grade information is usually an adequate tonic against distraction. To the extent employers do not understand this, certainly the career services office might provide helpful information on the evaluation of students. On the other hand, even a brief perusal of the Law School's web page can educate a prospective employer sufficiently to avoid any possible distracting effects of a certificate in the hands of students who otherwise do not have a distinguished law school record.

180. See *id.* Some faculty worry about the possibility that certificate programs may turn marginally performing students away from “helpful” courses. To the extent that students can receive guidance from faculty and Law School administration in those circumstances, and to the extent that a Law School satisfies itself that it has prescribed all those courses deemed essential for law students, the argument makes little sense, except perhaps on an emotive level. Where more than emotion is involved, faculty concern is misdirected when it is directed to certificate programs—it is to an analysis of the value of the core required curriculum that such faculty might better turn.

181. Students must earn a minimum grade of 70 (the lowest numerical score considered satisfactory at the Law School), in order to qualify for the certificate. See Proposal, Section C(1), *infra* at Annex A.

182. Among the courses for which a grade of satisfactory or better must be earned are civil procedure, constitutional law, contracts, professional responsibility, and Lawyering Skills I and II, are all required in the first year of law school. See Penn State-Dickinson, *Curriculum*, available at <http://www.dsl.psu.edu/courses.html> (last visited Nov. 14, 2001).

183. See Proposal, Section C(2). Students may not elect the pass/fail option

satisfaction of the certificate must equal or exceed the minimum numerical grade deemed "good."<sup>184</sup> Moreover, the Proposal contemplates a significant amount of faculty involvement in guidance of students participating in the program.<sup>185</sup>

*F. Program Administration Should be Used as a Vehicle for the Integration of All Faculty in the Field of the Common Enterprise*

Program administration is a sensitive issue with most programs. The nature of the administration model chosen usually depends on the history of a Law School, the needs, interests and abilities of interested faculty members and the desires of the administration. Thus, the overall form of administration is difficult to predict with any degree of accuracy—nor is any one model particularly more successful than others.

However, certificate programs should strive to maximize their value to faculty as well as students. The Proposal seeks to accomplish this objective by giving all faculty with a strong tie to the fields of international, comparative and foreign law a voice in the administration, implementation and future of the certificate program. The administrative vehicle for this formal inclusion is the Internal Advisory Board to be established within the Law School's International and Comparative Law Center.<sup>186</sup> The Internal Advisory Board will serve as the focus of faculty activity within the International and Comparative Law Center. It will also serve as the body of faculty to which students may turn for advice.<sup>187</sup>

*G. Certificate Programs Should Serve as a Focal Point for Generalized Guidance for Students on Curricular Choices.*

The Proposal attempts student guidance by relying on two general approaches. The first is through the traditional one-on-one student faculty counseling model. This counseling effort is concentrated on the faculty members of the International and

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with respect to any course taken in satisfaction of certificate requirements. *See id.* For similar requirements, see for example Albany Law School, *Areas of Concentration, Grade Point Averages*, available at <http://www.als.edu/study/concent> (last visited Nov. 12, 2001).

184. *See* Proposal, Section C(3). That minimum grade is 80. For a description of grades and their meaning, see Penn State-Dickinson, *Academic Rules and Regulations: Grades*, available at <http://www.dsl.psu.edu/academics.html#g> (last visited Nov. 14, 2001).

185. *See, e.g.*, Proposal at Section D(2), *infra* at Annex A.

186. *See* Proposal Section F, *infra* at Annex A.

187. *See id.*

Comparative Law Center's Internal Advisory Board.<sup>188</sup> But advice without context loses much of its meaning. Thus the other approach to guidance rests on the creation of streams of concentration within the certificate program.<sup>189</sup> The task for creating these streams falls on the members of the International and Comparative Law Center.<sup>190</sup> There is thus an opportunity for the faculty most involved in the courses comprising the core of the certificate program to meet and provide guidance to students. As a necessary concomitant to this project will be a review of the entire international, comparative and foreign law curriculum for purposes of systemization. Here faculty participation should lead to significant short and long-term benefits to the curriculum.<sup>191</sup>

*H. Certificate Programs Should be Made Available to Alumni and Other Members of the Bar*

The Proposal does little to further this principle of certificate program structuring. On the other hand, there is nothing in the Proposal that prohibits the broadening of the program to permit alumni and other members of the bench and bar to participate. That, however, is for the moment left to the future.

*I. Certificate Programs Do Not Disadvantage the Less Competent Members of a Law School Class*

This principle is related to the principle of not turning the certificate program into a refuge for the marginal student. The difference here is the worry is not about student laundering of performance, but rather the power of certificate programs to reduce the ability of law students to pass a state bar examination.<sup>192</sup> The solution requires little of the Proposal. Faculties must continue to monitor their curriculum for signs that it is not responsive to student needs or fails to meet the Law School's obligation to prepare students for law practice. Law Schools have significant

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188. *See id.*

189. Streams of concentration should consist of two-year suggested programs of study that can be created from the required and optional courses available for satisfaction of certificate requirements. Thus, each stream can provide examples of focus within each of the fields of international, comparative or foreign law. *See supra* notes 112-13 and accompanying text.

190. *See* Proposal, Section F, *infra*, at Annex A ("The Center for International and Comparative Law coordinates and facilitates development of programs for the study and teaching of law in an international and comparative context.").

191. *See supra* notes 108-10 and accompanying text.

192. *See supra* notes 119-23 and accompanying text.



experience with this task. Certificate programs do not diminish the need or scope of that task, *nor do they augment it*. The Proposal is sensitive to overall curricular needs by limiting the minimum requirements for the certificate to eighteen credits. This leaves a student sufficient course time for other sources she might deem important for practice or the bar exam. Indeed, adopting a longer term perspective, solely from practice, it seems that the Proposal's mix of courses might well mimic the practice mix of lawyers in the future.

*J. Certificate Programs Can Contribute to the Development of a Well Rounded Graduate*

Discussion of the last point invariably leads to this final principle of certificate program construction—the need for certificate programs to further the basic mission of the Law School to produce well-rounded lawyers. The Proposal contributes to the development of a well-rounded lawyer and to the provision by the Law School of a well rounded legal education in two respects.<sup>193</sup> The Proposal achieves the goal first by providing a well-rounded approach to the study of a field of law in a manner that mirrors the general mission of the Law School with respect to the curriculum in general. It requires successful completion of a set of courses that will give the student a basic but well rounded advanced introduction to the fields of international, comparative and foreign law. In addition, the Proposal satisfies the Law School's mission to provide some measure of deepening knowledge of law. Opportunities to deepen knowledge in those areas of that interest the student are mostly available through the capstone course requirement.<sup>194</sup> Taken together, the Proposal presents a focused reduction of the Law School's general approach to educating its students. It thus complements, rather than competes with the rest of the curriculum, and, to that extent at least, can strongly contribute to the educational mission of the Law School as a whole.

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193. See *supra* notes 124-30 and accompanying text.

194. Capstone courses are the Law School's principle vehicle for the advanced focused study. In this sense, the Proposal merely focuses a student's general obligation to acquire deeper knowledge in some field of law by focusing that endeavor on the fields of international, comparative or foreign law. See Proposal, Section B, Part I(3)(e) and Part II(a)(3), (b)(1) (c) and (b)(2)(c), *infra*, at Annex A (capstone seminar requirement for the awarding of a certificate in international, comparative and foreign law, and the certificate with concentration in foreign law).

## V. The Proposal's Progress

The recounting of the story of the development of the Proposal deliberately ends with the submission of the Proposal to the faculty. The story of the progress of the Proposal, of course, does not end with faculty consideration. Yet to tell more would diffuse the focus of this essay—to educate the reader about the value and place of well considered certificate programs in the curriculum of American Law Schools and to develop a sound principled basis for considering adoption of particular programs in context.

I believe that such certificate programs provide benefits well beyond the piece of paper handed to law students at commencement. The benefits to faculty, students and law school administration are both direct and synergistic. They affect the curriculum, as well as faculty research and service. Certificate program benefits extend beyond the walls of the legal academy to prospective students and the legal community as well. The benefits to them, and to the law school can also be substantial.

**ANNEX A:**

**Proposed Certificate Program in International, Comparative and Foreign Law**

**CERTIFICATE IN INTERNATIONAL, COMPARATIVE, AND FOREIGN LAW**

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## CERTIFICATE IN INTERNATIONAL, COMPARATIVE, AND FOREIGN LAW

### *Statement of Principles and Program Requirements*

Beginning in the 2001/2002 academic year, the Law School will offer qualified J.D. students the opportunity to earn a Certificate in International, Comparative and Foreign Law or a Certificate in International, Comparative and Foreign Law With Concentration in Foreign Law.

#### A. Certificate in International, Comparative and Foreign Law: Principles and Purposes

The Certificate Program in International, Comparative and Foreign Law (including the Certificate With Concentration in Foreign Law) has been created to serve the following purposes:

- To offer a basic comprehensive and systematic grounding in the study of the separate but interlinked fields of International, Comparative and Foreign Law;
- To offer students a means by which they can acquire a basic proficiency in International, Comparative and Foreign Law and provide evidence to prospective employers and the public of this proficiency;
- To offer students and faculty a means by which they may acquire or hone additional training in the law of other nations and its utility for American lawyers and scholars;
- To attract to the Law School prospective students of the highest quality who are interested in the rigorous and comprehensive study of International and Comparative, or Foreign Law;
- To remain at the forefront of changes and advances in the law and legal practice, to anticipate the growth, change or emergence of new areas of legal practice, and to respond to growing student and employer interest in these new, changing or expanding fields of study and practice;
- To better integrate the high quality course offerings and study abroad opportunities offered to Law School students;
- To enhance the development and administration of programs, opportunities and potential in the fields of International, Comparative and Foreign Law through the Center for International and Comparative Law;

- To highlight the excellence of the Law School's International, Comparative and Foreign Law programs offered at the Carlisle Campus and at the Law School's correspondent campuses abroad; and
- To provide greater opportunities for the expression of excellence in teaching, scholarship and service by the Law School's faculty in the area of International, Comparative and Foreign Law.

B. Requirements for the Certificate.

Students may earn (i) a Certificate in International, Comparative and Foreign Law or (ii) a Certificate in International, Comparative and Foreign Law With Concentration in Foreign Law. The Certificate in International, Comparative and Foreign Law With Concentration in Foreign Law shall specify the name of the state whose law was the object of study.

*I. Certificate in International, Comparative and Foreign Law.*—To earn the Certificate in International, Comparative and Foreign Law, students must satisfy all of the following requirements:

1. Successfully complete all of the requirements to earn a J.D. degree from the Law School.
2. Maintain or exceed the grade requirements found in Section C, *infra*.
3. Earn a minimum of eighteen (18) credits from the listing of courses that follow. The courses of study described below are divided into five required categories: (i) core courses, (ii) an international law component, (iii) a comparative law component, (iv) a foreign law component, and (v) a capstone component (requiring production of a substantial paper).

The core courses provide the foundation for the study of non-U.S. law by American law students. They also provide an appropriate basis for the study of foreign law by American law students, by providing perspective and the tools (primarily a grounding in the comparative law method) to appropriately apply their knowledge of foreign law in a manner useful within the United States. Students will be required to complete all core courses, and at least one course from each of the international law, comparative law, foreign law, and capstone components. Students are given freedom to choose additional courses from the

elective categories to round out their studies. The last category, 'Other Courses,' will provide some flexibility to meet the particularized needs of students in appropriate circumstances.

**a. Core Courses:** A Student must successfully complete the following courses:

- i. International Law (3 credits)
- ii. Comparative Law or Comparative Law Seminar (2 or 3 credits)

**b. Elective Courses: *International Law Component:***  
A student must successfully complete at least one (1) of the following courses:

- i. Air & Space Law (2 credits)
- ii. International Trade Law (2 credits)
- iii. Maritime Law (3 credits)
- iv. Taxation of Multinational Transactions (2 credits)
- v. Ocean and Coastal Law (3 credits)
- vi. International Tax Law (2 credits) (London Program only)
- vii. Transnational Financial Crime (2 credits) (London Program only)
- viii. International Protection of Human Rights (2 credits) (London Program only)
- ix. One or more seminars **NOT** used to fulfill the capstone course requirements, if the seminar is designated as an *International Law* course by the Center for International, Comparative and Foreign Law Internal Advisory Board.
- x. One or more courses **NOT** listed elsewhere and offered by the Law School's summer or semester programs abroad or other ABA approved programs in international or comparative law, if the course is approved as an *International Law* course by the Center for International and Comparative Law Internal Advisory Board.
- xi. One or more courses **NOT** listed elsewhere and offered by law schools or universities based outside the United States, if the course is approved as an *International Law* course by the Center for International and Comparative Law Internal Advisory Board and the course

is deemed by the Advisory Board to be equivalent in rigor to courses offered at the Law School.

**c. *Elective Courses: Comparative Law Component:***

A student must successfully complete at least one (1) of the following courses:

- i. Conflict of Laws (3 credits)
- ii. Comparative Corporate Law (2 credits) (London Program only)
- iii. Comparative Taxation (2 credits)
- iv. Comparative Criminal Justice Systems (2 credits) (London Program only)
- v. One or more seminars not used to fulfill the capstone course requirements, if the seminar is approved as a *Comparative Law* course by the Center for International and Comparative Law Internal Advisory Board.
- vi. One or more courses **NOT** listed elsewhere and offered by the Law School's summer or semester programs abroad or other ABA approved program in international or comparative law, if the course is approved as a *Comparative Law* course by the Center for International and Comparative Law Internal Advisory Board.
- vii. One or more courses **NOT** listed elsewhere and offered by law schools or universities based outside the United States, if the course is approved as a Comparative Law course equivalent in rigor to courses offered at the Law School by the Center for International and Comparative Law Internal Advisory Board.

**d. *Elective Courses: Foreign Law Component:*** A student must successfully complete at least one (1) of the following courses:

- i. Legal Systems of the United Kingdom (2 credits) (London Program only)
- ii. Commercial Law of the European Union (2 credits) (London Program only)
- iii. One or more seminars not used to fulfill the capstone course requirements, if the seminar is designated as a *Foreign Law* course by the

Center for International and Comparative Law Internal Advisory Board.\*

- iv. One or more courses **NOT** listed elsewhere and offered by the Law School's summer or semester programs abroad or other ABA approved programs in international or comparative law, if the course is approved as a *Foreign Law* course by the Center for International and Comparative Law Internal Advisory Board.
  - v. One or more courses **NOT** listed elsewhere and offered by law schools or universities based outside the United States, if the course is approved as a Foreign Law course by the Center for International and Comparative Law Internal Advisory Board and the course is deemed by the Advisory Board to be equivalent in rigor to courses offered at the law school.
- e. **Capstone Courses:** A student must successfully complete at least one (1) of the following courses:
- i. Anglo-American Legal History Seminar (3 credits)
  - ii. Comparative Commercial Law Seminar (2 credits)
  - iii. Cross Border Legal Practice Seminar (2 credits)
  - iv. European Union Law Seminar (3 credits)
  - v. International Environmental Law Seminar (2 credits)
  - vi. International Protection of Human Rights Seminar (3 credits)
  - vii. Any other seminar on international or comparative law (2 or 3 credits)

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\* European Union Law, a system of foreign law with respect to which our faculty has particular expertise, falls within this category. There are resident and visiting faculty on our Carlisle campus and abroad currently able to teach a broad array of European Union Law courses. Additional courses in European Union Law are contemplated and will be presented to the faculty for their consideration at the appropriate time. Courses in other foreign law fields may also be presented to the faculty for their consideration as specialists in particular areas are added to the faculty.



- viii. An independent study paper on an international or comparative law topic supervised in accordance with Law School rules on the oversight and grading of independent study papers, on a topic approved by the Center for International and Comparative Law Internal Advisory Board (2 credits).

f. **Other Courses:** Upon petition directed to and approved by the Center for International and Comparative Law Internal Advisory Board, other courses may be applied toward the above distribution requirements. Such courses shall not be approved unless the courses (i) are found to further one or more of the purposes of the Certificate Program in International, Comparative and Foreign Law, and (ii) can otherwise be classified as an international, comparative or foreign law course. Courses in this category may include, to a limited extent, courses offered at other fully accredited law schools or law schools or universities based outside the United States to the extent the courses are approved and deemed to be equivalent in rigor to courses offered at the Law School by the Center for International and Comparative Law Internal Advisory Board.

## ***II. Certificate in International, Comparative and Foreign Law With Concentration in Foreign Law.***

(a) To earn the Certificate in International, Comparative and Foreign Law With Concentration in Foreign Law, students must satisfy all of the following requirements:

1. Successfully complete all of the requirements necessary to earn a Certificate in International, Comparative and Foreign Law;
2. Complete at least three elective courses that contain a substantial component of the law of the jurisdiction to be studied. Completion of these courses can be counted towards fulfillment of the general Certificate in International, Comparative and Foreign Law requirements, as well as the Foreign Law concentration requirements. To qualify, these courses must:
  - i. relate to the foreign law study to be undertaken in the Capstone course described in part 3 of this section and
  - ii. each be approved by the Center for International and Comparative Law Internal Advisory Board; and

3. Complete an independent study paper (2 credits) on a topic of the law of the nation studied supervised in accordance with Law School rules on the oversight and grading of independent study papers. Such paper shall make appropriate use of original and secondary source material from the state being studied that demonstrates proficiency in the language of legal discourse in the state studied. The topic must be approved by the Center for International and Comparative Law Internal Advisory Board. Where the foreign law sought to be studied is that of a non-English speaking state, the candidate must demonstrate reading proficiency in the legal language of that state (see Section E below).

(b) The Certificate in International, Comparative and Foreign Law With Concentration in Foreign Law shall specify the law of the particular jurisdiction whose law has been the object of study. For Academic Years starting in 2001-2002, such Certificate may be earned through study of the law of United Kingdom or of the European Union.

1. To earn the Certificate in International, Comparative and Foreign Law With Concentration in the Law of the European Union, the candidate must meet the following requirements:
  - a. Successfully complete all of the requirements necessary to earn a Certificate in International, Comparative and Foreign Law;
  - b. Complete the course "European Union Law Seminar" (3 credits) and at least two of the following elective courses. Completion of these courses can be counted towards fulfillment of the general Certificate in International, Comparative and Foreign Law requirements, as well as the Foreign Law concentration requirements.
    - i. Commercial Law of the European Union (2 credits);
    - ii. Comparative Corporate Law (2 credits);
    - iii. Comparative Competition Law (2 credits);
    - iv. One or more courses **NOT** listed elsewhere and offered by the Law School's summer or semester programs abroad or other ABA approved programs in international or comparative law, if the course is approved for the purpose of meeting this requirement for the study of the law of the

- European Union by the Center for International and Comparative Law Internal Advisory Board;
- v. One or more courses **NOT** listed elsewhere and offered by law schools or universities based outside the United States, if the course is approved as an International Law course by the Center for International and Comparative Law and the International and Comparative Law Internal Advisory Board and the course is deemed to be equivalent in rigor to courses offered at the Law School by the Center for International and Comparative Law Internal Advisory Board; and
- c. Complete an independent study paper (2 credits) on a topic of the law of the European Union, supervised in accordance with Law School rules on the oversight and grading of independent study papers. Such paper shall make appropriate use of original and secondary source material from the European Union. The topic must be approved by the Center for International and Comparative Law Internal Advisory Board.
2. To earn the Certificate in International, Comparative and Foreign Law With Concentration in the Law of United Kingdom, the candidate must meet the following requirements:
- a. Successfully complete all of the requirements necessary to earn a Certificate in International, Comparative and Foreign Law;
  - b. Complete the course "The Legal Systems of the United Kingdom" (2 credits) and at least two of the following elective courses. Completion of these courses can be counted towards fulfillment of the general Certificate in International, Comparative and Foreign Law requirements, as well as the Foreign Law concentration requirements.
    - i. Comparative Criminal Justice Systems (2 credits);
    - ii. Comparative Taxation (2 credits) (London Program only)
    - iii. One or more courses **NOT** listed elsewhere and offered by the Law School's summer or semester programs abroad or other ABA approved programs in international or comparative law, if the course is approved for the purpose of meeting this requirement for the study of the law of United

Kingdom by the Center for International and Comparative Law Internal Advisory Board;

- iv. One or more courses **NOT** listed elsewhere and offered by law schools or universities based outside the United States, if the course is approved as a European Union Law course equivalent in rigor to courses offered at the Law School by the Center for International and Comparative Law Internal Advisory Board.
- c. Complete an independent study paper (2 credits) on a topic of the law of the United Kingdom, supervised in accordance with Law School rules on the oversight and grading of independent study papers. Such paper shall make appropriate use of original and secondary source material from the United Kingdom. The topic must be approved by the Center for International and Comparative Law Internal Advisory Board.

(c) For years after the 2001-2002 academic year, the Center for International and Comparative Law Internal Advisory Board will specify from time to time such other jurisdictions the study of the law of which may also qualify for the Certificate in International Comparative and Foreign Law with Concentration in Foreign Law. In that connection those courses completion of which will be necessary for qualifying for this Certificate will be specified.

#### C. Grades Required for the Certificate.

In order to earn a Certificate in International, Comparative and Foreign Law, a student must meet the following requirements:

1. Earn grades of at least 70 in Civil Procedure, Contracts, Constitutional Law, and Professional Responsibility;
2. Earn grades of at least 70 in each course that a student seeks to apply toward the eighteen (18) credits required for the Certificate in International, Comparative and Foreign Law, unless such courses are offered only on a credit/no-credit basis. For courses offered only on a pass/fail (credit/no-credit) basis, a student must earn credit in order to apply such courses toward the eighteen (18) credit requirement. Any course for which grades are available and which is used to fulfill the eighteen (18) credit requirement may **NOT** be taken on a pass/fail

(credit/no-credit) basis if such course is to be offered in fulfillment of the certificate requirements; and

3. Maintain a grade point average of at least 80 for courses that the student applies toward the eighteen (18) credit requirement. There is no minimum overall grade point average required to earn the certificate, beyond that which is required of all students for graduation.

D. Granting of Certificate in International, Comparative and Foreign Law

1. All students who apply for the Certificate in International, Comparative and Foreign Law, qualify for graduation and complete the above requirements shall be granted a Certificate in International, Comparative and Foreign Law.
2. Application is made by submitting one's name to the Associate Dean of Academic Affairs with an indication of intention to fulfill the requirements of the Certificate in International, Comparative and Foreign Law. All students who apply for the Certificate in International, Comparative and Foreign Law should indicate their intent to meet the requirements of the Certificate as early in their law school career as possible. Where appropriate, students should be encouraged to indicate whether they intend to concentrate in international, comparative or foreign law. That concentration will be noted for purposes of counseling and course selection where appropriate.
3. All students who have informed the Associate Dean of Academic Affairs of their interest in obtaining a Certificate and who are making progress toward fulfilling the requirements of the certificate shall have priority over their classmates (but not over members of an earlier graduating class) for admission into limited enrollment courses that may or must be applied toward fulfillment of the requirements for the certificate.
4. The Certificate in International, Comparative and Foreign Law may be earned by any student meeting the requirements for the Certificate who will qualify for graduation in 2002 or thereafter.

E. Granting of Certificate in International, Comparative and Foreign Law With Demonstrated Foreign Language Proficiency.

Where a student indicates a desire to complete the requirements for a Certificate in International, Comparative and Foreign Law With Concentration in Foreign Law, and the foreign law to be studied is that of a non-English speaking state, the student shall demonstrate reading proficiency in the language of the state or states to be studied. Such proficiency requirements may be satisfied by meeting the Pennsylvania State University undergraduate criteria for language proficiency or by otherwise providing evidence of language reading proficiency satisfactory to the Center for International and Comparative Law Internal Advisory Board. Students successfully completing these requirements who shall be awarded a Certificate in International, Comparative and Foreign Law With Concentration in Foreign Law may have added to their Certificate a notation indicating foreign language proficiency and identifying the nation(s) whose law has been studied.

F. Administration by the Center for International and Comparative Law

The program requirements for the Certificate Programs in International, Comparative and Foreign Law shall be administered by the Law School's Center for International and Comparative Law Internal Advisory Board." The Dean shall appoint an internal Advisory Board consisting of the Director of the Center and three

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" "The Center for International and Comparative Law coordinates and facilitates development of programs for the study and teaching of law in an international and comparative context. It provides counseling and facilitates acquisition by students of legal skills and production of creative scholarship by faculty and students required in the global society of the twenty-first century. Development of study, teaching, and scholarship opportunities for students and professors from other countries is also facilitated.

The Center also organizes symposia on comparative and international law subjects, such as the three-day conference recently conducted at the law school for the 10th Biennial Meeting of the International Academy of Commercial and Consumer Law. Publication in our student law journals of the proceedings of this meeting and other scholarly comparative and international law research is facilitated by the Center. Other areas of activity to which the center is committed are faculty exchanges, campus visits by foreign faculty and guest speakers; cooperation with practicing attorneys in foreign and international areas; and development of information on foreign and international opportunities including student internships in foreign law firms." <http://www.dsl/psu.edu/london/index.html>

faculty members to administer the Certificate Programs. Students are encouraged to consult with members of the Advisory Board as they plan a sequence of courses that will fulfill the Certificate requirements.