A Paradigm Shift in Legal Education: Preparing Law Students for the Twenty-First Century: Teaching Foreign Law, Culture, and Legal Language of the Major U.S. American Trading Partners

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"[O]ne of the clearest lessons which can be read in the book of history is that biological and cultural cross-fertilization have preceded or accompanied epochs of rare vitality."1

I. INTRODUCTION

"[G]lobalization, [the] denationalization of markets, laws and politics in the sense of interlacing peoples and individuals for the sake of the
common good” (and expanding communications technology), has brought the world of transnational law to the door of the country lawyer. As a result, the U.S. American practitioner, now more than ever before, operates in a world society and economy constituted not only of an international society and economy but also of interdependent nations’ societies and economies. The globalization process has given rise to the development of transnational law practice.


3. See Roger J. Goebel, Professional Qualification and Educational Requirements for Law Practice in a Foreign Country: Bridging the Cultural Gap, 63 TUL. L. REV. 443 (1989). Professor Goebel notes that there are “at least seven different types of major transnational legal practice: contractual and transactional; foreign investment and local law counseling; international banking and finance; international antitrust; international arbitration and litigation; international tax planning; and trade law.” Id. at 444.

4. Michael P. Waxman, The Comparative Legal Process Throughout the Law School Curriculum: A Modest Proposal for Culture and Competence in a Pluralistic Society, 74 MARQ. L. REV. 391, 391 (1991). Professor Waxman has addressed the importance of communications technology in the practice of comparative law. This article will not expand on the nexus between globalization and communications technology as they affect the practice of law. It will discuss, instead, the importance of teaching the law of foreign countries in their domestic language, focusing at a minimum, on the foreign law of the United States’ major trading partners, and specifically, on Mexican law, culture, and Spanish legal language. Spanish legal language refers only to the legal language used in Mexico.

5. The term “American” is considered by other inhabitants of the Northern and Southern American hemispheres as being inaccurate and exclusionary. Therefore, this article uses the term “U.S. American” because it is politically and descriptively accurate.

6. Harold J. Berman, World Law, 18 FORDHAM INT’L L.J. 1617 (1995). Professor Berman calls our attention to the “interlacing of peoples” that has occurred since World War II. [F]or the first time in the history of the human race, most of the peoples of the world have been brought into more or less continual relations with each other. We speak without hesitation of a world economy, a world technology, world-wide communications, world organizations, world science, world literature, world scholarship, world travel, world sports.

Id.

7. See David M. Trubek et al., Symposium, Global Restructuring and the Law: Studies of the Internationalization of Legal Fields and the Creation of Transnational Arenas, 44 CASE W. RES. L. REV. 407 (1994); see also Richard L. Abel, Transnational Law Practice, 44 CASE W. RES. L. REV. 737 (1994). For a discussion of strong resistance to opening the international marketplace to trade in legal services by allowing lawyers to practice outside their home jurisdiction on a regular basis in a foreign jurisdiction, see Michael J. Chapman & Paul J. Tauber, Note, Liberalizing International Trade in Legal Services: A Proposal for an Annex on Legal Services under the General Agreement on Trade in Services, 16 MICH. J. INT’L L. 941 (1995). It should be noted that despite this resistance, talks continue regarding opening the international marketplace to legal services. More importantly, for the purposes of this article, there are many ways in which foreign law is being practiced domestically without ever having
Transnational law, first recognized as a separate area of law in the 1950s, is comprised of:

[T]he law applicable to the complex interrelated world community which may be described as beginning with the individual and reaching up to the so called ‘family of nations’ or ‘society of states’ . . . . [It] include[s] all law which regulates actions or events that transcend national frontiers. Both public and private international law are included, as are other rules [such as local law] which do not wholly fit into such standard categories.9

Historically, U.S. American law schools (law schools) have not trained law students for practice in the area of transnational law. The typical law school9 curriculum has required general common law courses and has offered electives in the areas of jurisprudence (e.g., legal realism and social policy), specialization (e.g., bankruptcy law), and some professional skills (e.g., negotiations). More often than not, study in the area of transnational law has been limited to survey courses in international and comparative law.10 Although comparative and international law courses have endeavored to teach students theory as well as practical skills,11 these disciplines have not prepared students for transnational practice. One consequence of not preparing students for practice in transnational law is that these disciplines are marginalized12 within the law school to leave the home jurisdiction.

8. PHILIP C. JESSUP, TRANSNATIONAL LAW 1-2 (1956); see also Goebel, supra note 3.


10. See, for example, Alejandro M. Garro, The Teaching of Latin American Legal Systems in U.S. Law Schools, 38 J. LEGAL EDUC. 271, 272, 275-76 (1988), for a history and survey of teaching courses on Latin America, indicating, generally, the comparative nature of Latin American law courses.

11. See Gunter Frankenberg, Critical Comparisons: Rethinking Comparative Law, 26 HARV. INT'L L.J. 411, 412 (1985) (noting that comparative law courses seek to ‘deprovincialize’ and ‘cross-fertilize’ ‘the minds of law students and teachers and [provide] a ‘meeting of the minds’ and easier cooperation between lawyers here and abroad’); see also Phillip R. Trimble, International Law, World Order, and Critical Legal Studies, 42 STAN. L. REV. 811 passim (1990) (reviewing international law studies including, inter alia, theoretical approaches to teaching international law [public relations of governments] and recent expanded areas of international law [private parties’ relations with governments based on international treaties]).

12. See Frankenberg, supra note 11, at 419-20 (emphasizing the limited interest that law schools have had in offering comparative law courses which have had to be “squeezed” out of the law school[;]” and, concomitantly, the limited interest of law
curriculum. Other areas of transnational law, such as the domestic law of other nations (i.e., foreign law), have largely been ignored. A few law schools have offered some courses in foreign law. Only one school has offered a course in foreign law in its domestic language.

The philosophy underlying the typical law school curriculum has been to prepare students for the practice of law by teaching them the basic substantive common law through the case law method. It is assumed that when students enter the profession, they will apply the learned methodology and general concepts of the common law to their chosen area of practice. It is further assumed that the same methodology and analytical approach will suffice for practice in the areas of transnational law. The latter assumption is erroneous. Since civil law, not common law, is practiced in the great majority of foreign legal systems, the

professors and students in the area because it has been perceived to be "quite unattractive and unrewarding . . . [professionally because it has been unprofitable]") (citing H. GUTTERIDGE, COMPARATIVE LAW 23 (2d ed. 1949)). See Trimble, supra note 11, at 811-12 (referring to the lack of interest by law schools and law professors in international law) (citing John King Gamble, Jr. & Natalie S. Shields, International Legal Scholarship: A Perspective on Teaching and Publishing, 39 J. LEGAL EDUC. 39, 40 (1989)). Like Frankenberg, Trimble claims that the marginalization of international law is due in part to deficiencies in scholarship in the area.

The exception has been the Parker School of Foreign and Comparative Law at Columbia University.

At common law, "foreign law" encompasses both the law of sister states and the domestic law of foreign countries. In this article, the term "foreign law" refers to the latter.

Boalt Hall, for example, has intermittently offered Japanese Contract Law. Telephone Conference with University of California School of Law, Boalt Hall Registrar's Office (Oct. 23, 1997). Two schools, the University of Houston, Law Center, and Southern Methodist University, have specifically offered courses on Mexico from a comparative law perspective. See Garro, supra note 10, at 272.

St. Mary's University of San Antonio, Texas, recently offered a Mexican law course in Spanish by a Mexican law professor. Telephone Interview with Professor Roberto Rosas, Visiting Professor from the Universidad Nacional Autónoma de México, Guadalajara (Oct. 20, 1995). Professor Garro's survey of 1986 showed that "no teacher [answering the survey] reported having the primary course objective of providing intensive training in one or more Latin American legal systems." See Garro, supra note 10, at 275.

For an approach emphasizing the teaching of foreign language in law school, see Vivian Curran, Developing and Teaching a Foreign-Language Course for Law Students, 43 J. LEGAL EDUC. 598 (1993), indicating that the University of Pittsburgh School of Law has offered "French for Lawyers" since 1989, "German for Lawyers" since 1993, and will expand the foreign-language curriculum to include other languages. The courses are "designed to familiarize students with the [foreign] language in a legal context." Id. at 598. See also Frank M. Lacey & José García Reyes, Training in Foreign Languages for Students of Transnational Law: Advanced Legal and Business Spanish at Vanderbilt Law School, 31 J. LEGAL EDUC. 657 (1981). As of the writing of this article, this course was no longer being offered.

See, e.g., MacCrate, Report, supra note 9, at 4.
typical law school curriculum fails to train students properly for the transnational marketplace. For practical and parochial reasons, law schools have not offered foreign law courses (either in English or in their domestic language). Unquestioningly, law schools have considered it unnecessary to offer foreign law courses because students traditionally entered only the local marketplace, and therefore, the logical focus of study was U.S. American law. Moreover, law schools have considered it impractical to include these courses in the curriculum because they would exacerbate already limited law school resources, present linguistic and cultural obstacles, and create logistic difficulties. In addition, an attitude of “parochialism, and a tradition of ‘consecrated ignorance’ of foreign laws has pervaded the law school curriculum. The foregoing factors have resulted in a lack of both scholarly interest and institutional and practitioner support. Thus, practitioners interested in the transnational marketplace have had to educate themselves about that marketplace without the benefit of substantive legal education and training.

18. See Goebel, supra note 3 (criticizing the law school curriculum model because it does not properly prepare students for the domestic marketplace). See, e.g., MacCrate, Report, supra note 9, at 330-334 (providing guidelines for solutions to the problems raised by lack of skills training in legal education in the recommendations’ section, “Enhancing Professional Development During the Law School Years”).

19. See Frankenberg, supra note 11, 419-20 (citing Pound, The Passing of Mainstreetism, in XXTH CENTURY COMPARATIVE AND CONFLICTS LAW 3 (A. von Mehren & J. Hazard eds. 1961), and Hessel E. Yntema, Comparative Legal Research, 54 MICH. L. REV. 899 (1956)). Professor Frankenberg notes the criticism leveled by comparativists against the law school curriculum model concerning academicians’ prejudice toward their discipline. This same criticism applies equally to the concept of offering foreign law courses, and foreign law courses in their domestic language, which has resulted in their exclusion from the law school curriculum.

20. Id. at 420.

21. See Garro, supra note 10, at 276 (indicating a lack of interest on the part of full-time faculty). A poorly attended conference on Latin America and Law School Curricula held in 1986 at UCLA supports Professor Garro’s survey showing a lack of interest in the area.

22. By comparison, the Faculties of Law of some European universities have offered courses in foreign law as a regular part of the curriculum. A “fairly typical” curriculum in German Faculties of Law, such as that of the University of Saarland, has included since 1975 an elective track of study including, in addition to comparative and international law courses, Fundamentals of French Law I and II. See Rudolf B. Schlesinger et al., COMPARATIVE LAW 167-68 (5th ed. 1988), citing W. K. Geck, The Reform of Legal Education in the Federal Republic of Germany, 25 AM. J. COMP. L. 86, 111-115 (1977). In addition, some European universities offer foreign law courses in their domestic language. For example, since 1969, an entire law school, The Center for
The paradigm shift that is occurring in the legal profession due to globalization should be the impetus for a concomitant paradigm shift in legal education.23 Because of globalization, practitioners (beyond the elite law firms) are beginning to offer more services in individual foreign countries’ laws in addition to their typical common law practice. Yet, the majority of these firms do not have lawyers on staff trained in the area of foreign law in which they offer services. For example, a brief survey24 of firms that identified themselves as dedicating a portion of their practice to areas of Mexican law showed that less than thirty percent indicated they had Mexican-law trained attorneys on staff in the United States. If the remaining firms are not using Mexican law consultants or experts, and they are not acting only as conduits for finding Mexican counsel, then they must be practicing Mexican law in the United States based on experience gained solely on their U.S. American practice. At a minimum, these firms are practicing Mexican law based on the assumption that they have the ability to gain such expertise.

Lawyers who do not command both a conscious and an intuitive understanding of concepts embodied in the terms they and their colleagues use are, at a minimum, ineffectual, if not in competent, in

23. There is no universal acceptance of this position. For a contrary opinion, see Chapman & Tauber, supra note 7.

24. This cursory survey was conducted on WestLaw electronic service file WLD. The author notes that only twenty-five law firms were included in the WLD directory. However, she believes that the number of firms reporting that they dedicate a portion of their practice to Mexican law is extremely low. She personally knows of ten firms providing such legal services who are neither included in the WLD directory nor in Martindale-Hubell and who do not have Mexican-law trained attorneys on staff. She believes that there is a high incidence of lawyers, particularly in the southwestern states, who are not trained in Mexican law, yet they provide such services. See also Michael W. Gordon, Symposium: The United States and Mexican Competition and Trade Law, Part One: Establishing an Agency or Distributorship in Mexico, 4 U.S.-MEX. L.J. 71, 72 (1996) (noting that an area which has long been overlooked since the ratification of the North American Free Trade Agreement (NAFTA) is the increase of “a great deal more common trade” and litigation concerning individuals and entities within the NAFTA region. “We need to look more at the problems of the people in the trenches, the problems of blockage at the border, bills of lading and similar subjects . . . . With more trade comes more commercial litigation . . . . We have two very different systems in which that litigation may take place.”).

the Study of English and American Law, University of Clermont, France, has been dedicated to offering a degree in English and American law [the courses being taught in English], simultaneously with a degree in French law. See Allen Sultan, Teaching American Law to French Law Students—In English, 29 J. LEGAL EDUC. 577 (1978). At the University of Paris 1 Pantheon-Sorbonne, a course on English law has been taught in English since at least 1989. See PATRICIA KINDER-GEST, MANUEL, DROIT ANGLAIS (Librairie Generale de Droit et de Jurisprudence 2d ed., 1993).
their lawyering.\textsuperscript{25} Therefore, lawyers who do not command the law, language, and culture in which they are counselling their clients, whether for transactional or litigation purposes, are not performing their duties competently and ethically,\textsuperscript{26} are courting malpractice\textsuperscript{27} on a personal level, and, on a broader level, are undermining the legitimacy of the profession.\textsuperscript{28}

This article is a call to law schools to broaden their academic horizons to include elective courses in transnational practice by providing

\textsuperscript{25} Although this article does not deal with local issues regarding the importance of culture and language in the legal arena within the United States, these issues should not be overlooked. We live in a culturally and linguistically diverse society and our laws at various instances throughout history have either protected "diversity" as legally valid or refused to recognize it. See, \textit{e.g.}, Hill, infra note 113 \textit{passim}. Nonetheless, we are a multicultural society and there is a reasonable likelihood that practitioners are going to have clients culturally and linguistically different from themselves and, consequently, it behooves law schools to train future lawyers to function in this multicultural market. See also Burnele V. Powell, \textit{Somewhere Farther Down the Line: MacCrate on Multiculturalism and the Information Age}, 69 WASH. L. REV. 637, 648-49 (1994).

\textsuperscript{26} See \textsc{Model Rules of Professional Conduct} Rule 1.1 & Rule 1.1 cmt. (1983) ("A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."). See also \textsc{Model Code of Professional Responsibility} EC 6-4 (1983) ("Having undertaken representation, a lawyer should use proper care to safeguard the interests of his client. If a lawyer has accepted employment in a matter beyond his competence but in which he expected to become competent, he should diligently undertake the work and study necessary to qualify himself.").

\textsuperscript{27} See Waxman, supra note 4, at 392-94. Waxman notes that "the rise in professional liability insurance claims [is] based on 'failure to understand international and foreign substantive law.'" Id. at 393 (quoting Telephone Interview with Alice Hughey, Risk Management Coordinator, American Bar Association [Aug. 12, 1991]). See also Chapman & Tauber, supra note 7, at 943 (noting that "globalization has made domestic regulation [of lawyers] more difficult because it increases the complexity of the interactions between lawyers, the legal system, and the authorities responsible for regulating the legal profession" [citing Trubek, supra note 7, at 418]).

\textsuperscript{28} See \textsc{Fed. R. Civ. P.} 44.1. See also Waxman, supra note 4, at 393-94. Professor Waxman voices a strong opinion as to the potential for undermining the profession where the profession relies primarily on the judiciary to raise issues of foreign law because the profession is inadequately trained to do so. He states: Although elective judicial intervention may assure the appropriate result in some instances, the nature of our adversarial system requires that attorney competence be vigorously enforced. Thus, while lawyer incompetence may affect individual cases, an overall lack of familiarity with foreign legal systems by virtually the entire bar not only invites malpractice, but also undermines the validity of our legal system itself.

\textit{Id.}
specialized courses in foreign law, taught in their domestic languages, so that students are trained in the basic legal structures, laws, legal terminology, and culture of other nations. The purpose is to train future practitioners to be competitive in the expanding legal marketplace by furnishing courses that will provide a minimum level of competence in areas of practice regarding foreign law, culture, and legal language.

This article argues that Mexican law, culture, and Spanish legal language is of particular interest to U.S. American legal education.

29. See, e.g., Lacey & Reyes, supra note 16, at 657. It is recognized that some, maybe many, students will be unable to take such a course because it will require a minimum working knowledge of the foreign language being used. However, there has been an increased interest in studying foreign languages in college at both the undergraduate and graduate levels. See, e.g., Russell Gold, Accent Now is on Spanish - College Enrollment in Language Soars, SAN ANTONIO EXPRESS-NEWS, Oct. 10, 1996, at 1B (reporting that the Modern Language Association of America’s (MLA) survey for 1995 showed that over 1.3 million college students are studying a foreign language. The MLA survey also showed that 53% of college students studying language, study Spanish, and also showed that, for the first time since the 19th century, a single language is being studied by over 50% of college students [in the 19th century, Greek and Latin were the preferred languages]). See also Deb Riechmann, Courses in Chinese, Arabic Gain on European Tongues, THE ORANGE COUNTY REGISTER, Oct. 9, 1996, at 22 (noting that while Spanish remains the language most studied on college campuses, Chinese and Arabic are the fastest growing).

Furthermore, Professor Curran, supra note 16, at 601 n.4, indicates that a course devoted to emphasizing the linguistic aspect rather than the legal aspect of the foreign law is not problematic even to students who have never studied the language before where cognates are widely used. She has also noted that, according to student evaluations, the French legal language course is well received by the students. Over a period of four years, many students have taken the course in order to use the language skill in their practice. Id. at 605.

Also, increased immigration from other countries creates a ready pool of foreign language speakers. It should be acknowledged that Hispanics and Hispanic-Americans will constitute the largest minority population in the United States. Their interests will be linked on a practical level to the interests of individuals remaining in their country of origin, principally Mexico. See Greg Johnson, Fast-Food Firms Learn Lessons of El Mercado, L.A. TIMES, ORANGE COUNTY EDITION, Oct. 8, 1996, at A1 (stating that there is a population of approximately 29 million Spanish speakers in the United States and their current purchasing power is over $220 billion per year, both of which are growing at approximately 30% per year, with the greatest concentration of population and dollars spent in the areas of Los Angeles and Orange County, California).

30. See Goebel, supra note 3 passim. See also Chapman & Tauber, supra note 7.

31. See In re Roel, 3 N.Y.2d 224, 144 N.E.2d 24, 28, 165 N.Y.S.2d 31 (1957) (holding that counsel retained in a matter concerning foreign law, “are responsible to the client for the proper conduct of the matter, and may not claim that they are not required to know the law of the foreign State (citation omitted”). See also In re Disciplinary Action David L. Curl, 803 F.2d 1004 (9th Cir. 1986) (holding counsel violated professional responsibility standards, including his duty to the court and to his client, when he unintentionally mischaracterized a Mexican judgment. Attorney Curl relied on the meaning and legal effect of the judgment based on his client’s representation and an opinion of Mexican counsel obtained in conversation, where both counsel barely spoke each other’s language.). See also Waxman, supra note 4, at 393.
because knowledge in these areas will provide the greatest access to the transnational markets of the Northern and Southern American hemispheres. Mexico's border with the United States (and the United States' border with Canada) has resulted in the creation of the largest regional trade partnership in the world: the North American Free Trade Agreement (NAFTA). NAFTA is comprised of 350 million persons. After Canada and Japan, Mexico is the United States' largest trade partner. NAFTA not only has opened the door to formal trade and investment but also has recognized shared environmental concerns. All of these factors contribute to an increase of informal contacts and transactions among citizens of Canada, the United States, and Mexico, leading to an increased economic and cultural integration of the region. Furthermore, Mexico is acknowledged as being the gateway to Latin America. Law schools should recognize both the impact of NAFTA on

32. Zamora, supra note 2, at 401. It is agreed that it is larger than the European Community (EC). "The population of the North American market [will] be 30 million larger than the EC (360 million vs. 326 million) and [is estimated to] produce more than $6 trillion a year in goods and services (compared with the EC's approximately $4.5 trillion)." CANDACE BANCROFT MCKINNIS & ARTHUR NATELLA, JR., BUSINESS IN MEXICO 48 (1994).

33. The teaching of Japanese law is also of great interest because of Japan's trade partnership status with the United States and should not be overlooked. See Kenneth L. Port, The Case for Teaching Japanese Law at American Law Schools, 43 DEPAUL L. REV. 643 (1994). Professor Port advocates that law schools teach a comparative course of Japanese law in English, because Japanese law "is extremely culture-based; . . . [it is] closely allied with cultural values, values which are [very different from ours and] as much as two thousand years old . . . . [And, although] Japan has confronted problems very similar to those of the West, with very similar Western statutes, [it] has come to completely distinct results." Id. at 648-49.

34. Zamora, supra note 2, at 401. See also Gordon, supra note 24 passim.

35. See Mario L. Baeza, Investment and Trade in Argentina, Brazil, Chile, Mexico and Venezuela, 259, 263 (PLI Commercial Law and Practice Course Handbook Series No. A4-4397, Dec. 7-8, 1992), stating:
Mexico is . . . perceived as a gateway to other countries in Latin America. Mexico, Venezuela and Colombia, for example, recently announced their intention to establish a free trade zone, and Chile is considering joining them. A strategic acquisition or joint venture with a major Mexican company may soon permit a U.S. firm not only to take advantage of increased sales in Mexico, but also to be accorded barrier-free entry into other Latin American countries.

Id. See also John Jennings, National Underwriter Property & Casualty-Risk & Benefits Management, Investors Slowly Gaining Confidence in Mexican Market (Sept. 25, 1995); Stephanie B. Goldberg, South of the Border, 80 A.B.A. J. 74 (1994); and Bronwen Davis, Comment, Mexico's Commercial Banking Industry: Can Mexico's Recently Privatized Banks Compete with the United States Banking Industry After Enactment of
formal and informal transactions among citizens of the NAFTA partners and Mexico's prominent role amid its Latin American neighbors, and adjust the law school curriculum accordingly.36

This article discusses why foreign law should be taught in its cultural context and in its domestic language. It also explores the multiple relationships among law, language, and culture, and suggests the need to teach foreign law courses in their domestic language due to globalization. It proposes that: (1) U.S. American law schools should be offering courses in the law of other countries; (2) the courses should be in the domestic language of those countries in order to provide an understanding and appreciation of the legal system, culture, and language of those countries; (3) the countries likely to have the most significant relationship with the United States in the twenty-first century are its foremost trading partners, Canada, Mexico, and Japan, and at a minimum, law schools should offer a year-long course in one of these countries' legal systems, culture, and language; and, (4) Mexico is a logical place to start because of NAFTA and Mexico's prominent role in Latin America.37

This article concludes that: (1) practice in areas of transnational law will require the soundest training possible;38 (2) the soundest training possible includes teaching foreign law in the domestic language of the particular legal system; and (3) understanding law in the context of the culture and language of which it is a part is essential in the study of the law of another country.

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36. In Latin America, Spanish is spoken by approximately half a billion persons and represents an enormous future market of goods and services. See Gearing Up For Mexico and Beyond, THE FINANCIAL POST, Sept. 1, 1992, at 8.

37. The Canadian legal system, its culture and language, insofar as it differs from the U.S. American legal system, including, but not limited to the Québécois legal system, should also be considered as part of legal education. See Arthur T. von Mehren, The Significance of Cultural and Legal Diversity for International Transactions, 1-2 IUS PRIVATUM GENTIUM 247 (Ernst von Caemmerer, et al. eds., 1969) passim.

38. A word should be said concerning the choice of not proposing that foreign law be taught in English. Although teaching a foreign law course in English is the manner in which such courses have been taught traditionally (and, at a minimum, this is better than offering no such course at all), it is well recognized that the best grasp of the legal culture and use of applicable law takes place via the language of the legal system being studied. This approach provides the soundest basis for competent practice. See Lacey & Reyes, supra note 16.
II. THE IMPORTANCE OF UNDERSTANDING CULTURE AND LANGUAGE IN THE STUDY OF LAW

Generally, legal education has ignored both the role of culture and language and the relationship of culture and language to the study of law in the classroom. When included in legal education, culture and language have been addressed in limited ways, primarily as part of survey courses such as comparative and international law. Culture and language are difficult to study because they are meta-systems comprised of objective and subjective qualities that permeate individual experience and cognition. Consequently, the nature and properties of culture and language, and their important role within the context of the study of law, are difficult to conceptualize.

This section first explores culture and law beginning with a brief historical review of analytical approaches applied in the area. Next, it discusses the intersection between culture and law from the perspective


40. Culture is a conundrum. Is there a single “human or meta-culture” or are there many “group cultures” or “subcultures?” If there are many cultures, are they defined by nationality, by geography, by status (e.g., age, marital status, profession, class, religion, political interests, and power relationships), by history or by any combination of the above? How does the creation of culture take place? What is the relationship between individuals and cultures? Can individuals from one culture fully understand another culture and become proficient in the latter? What is the relationship between law and culture? How does culture shape law and how does law shape culture?

The questions regarding language are not any easier, but on one level they are not as subtle as the questions pertinent to culture. On the one hand, language does not present such subtle issues because language is objectified through repetitive and consistent use of symbols, grammatical structures, meanings, sounds, intonation, and accent. On the other hand, language raises more subtle issues when one asks, what is the relationship between individuals and language? How do individuals relate to each other through language? Why do misunderstandings occur even when individuals speak the same language? Can individuals truly understand the meaning of a language which is not the language of their culture of origin? How does language affect law, and therefore, the lives of those creating laws, implementing them, and those subject to them? Are there linguistic differences across cultures that are impenetrable? Does language form worldview to the extent that it determines how we interpret our surroundings, including legal constructs?

These questions indicate the complexity involved in analyzing culture and language, and their relationship to law. They will form the background of the analyses provided in this section.
of current interdisciplinary approaches to legal theory. This section then addresses the relationship of language and culture to the study of law and how language and culture shape and influence each other. A subsection describes the role of “soft law”\(^4\) as part of the legal culture of developing societies, and emphasizes the importance of knowledge of “soft law” for practitioners of foreign law. This section then scrutinizes linguistic and cultural competency and the law, specifically in the area of foreign law. It ends with a brief discussion of the role of comparative and international law in legal education. This section underscores the important relationship between culture, language, and law because legal educators can no longer ignore the need to educate law students in specialized areas of foreign law.

A. Culture and Law

1. An Historical Note

Traditionally, culture was defined as the study of “primitive” people’s customs, artifacts, and oral traditions.\(^42\) Early anthropologists and other social scientists characterized culture as consisting of a fixed set of categories and simple human interactions.\(^43\) Thus, social scientists viewed culture as static, unicausal, and determinist.\(^44\) These notions

\(^41\) “Soft law,” here, refers to developing societies’ declared aspirations which are written and found in international organizations’ pronouncements and those countries’ operational codes which may or may not be written. See Michael W. Gordon, Of Aspirations and Operations: The Governance of Multinational Enterprises by Third World Nations, 16 INTER-AM. L. REV. 301 (1984) [hereinafter Gordon, Of Aspirations and Operations].


\(^43\) James Clifford, The Predicament of Culture 344 (Harv. Univ. Press, 1988) (questioning the assumptions that culture consists of a fixed set of categories and simple interactions derived from a positivist approach to the study of culture in referring to cultural identity and the problems raised by cultural contact).

Stories of cultural contact and change have been structured by a pervasive dichotomy: absorption by the other or resistance to the other. . . . Yet what if identity is conceived not as a boundary to be maintained but as a nexus of relations and transactions actively engaging a subject? The story or stories of interaction must then be more complex, less linear and teleological.

Id.

\(^44\) Joann Kovacich, The Legal and Social Construction of ‘Culture’, 19 LEGAL STUD. F. 287, 290 (1995) (noting that a static view of culture, i.e., one that is unicausal and determinist, has been criticized by many scholars recently who emphasize “fluidity of cultural identities, ethnic boundaries and the negotiation of ethnicity among other variables of identification such as age, gender, martial [sic] status, occupation, and nationality in particular contexts”). I would add as variables: language, food, dress, common history and place of origin, and values (including religious, philosophical, and
were based on a positivist approach to the analysis of culture.\textsuperscript{45} Rationalism and scientism formed the basis of positivist theory which reached its apogee during the late nineteenth and early twentieth centuries.\textsuperscript{46} Under the rubrics of "scientism" and "rationalism," anthropologists and sociologists sought to classify cultural traits and behavior of "primitive peoples."\textsuperscript{47} The rise of relativism, twice during this century, changed the face of the study of culture. In the twenties, anthropologist Ruth Benedict, an exponent of ethnographic relativism, postulated there was no absolute standard for human behavior, and consequently, for social institutions, due to the great and infinite variety of social orders.\textsuperscript{48} Later, structuralism departed from the premise that the relationship between cultural elements formed meaning and reasoned that this relationship existed as a "deep structure" underlying all human understanding.\textsuperscript{49} Subsequently, anthropologists posited that there were no objective accounts of behavioral facts (i.e., facts determined from cultural context) and anthropologists merely interpreted these facts through their own cultural construct.\textsuperscript{50}

In the field of law, rationalism and scientism contemporaneously formed the basis of the positivist theory which still has some currency today.\textsuperscript{51} The ideological premise of this school of thought was the assumption that universal rules existed external to individuals and societies.\textsuperscript{52} It sought to establish "pure," "logical," or "analytical" approaches to law which would allow for consistency, predictability, and political values) within particular contexts.

\textsuperscript{45} See Richard J. Bernstein, Beyond Objectivism and Relativism 52-58 (1983).
\textsuperscript{46} Id.
\textsuperscript{47} Id. at 28-29.
\textsuperscript{48} Ruth Benedict, Patterns of Culture 71 (2d ed. 1960).
\textsuperscript{49} See Edmund Leach, Claude Levi-Strauss—Anthropologist and Philosopher, 34 New Left Rev. 12 (1965).
\textsuperscript{50} Clifford Geertz, The Interpretation of Cultures passim (1973).
\textsuperscript{51} See H.L.A. Hart, The Concept of Law passim (1961) and Peter Goodrich, Legal Discourse 32-62 passim (1987). See also Katherine Sobota, Don't Mention the Norm!, 4 Int'l J. for the Semiotics of Law 45, 45 (1991) (emphasizing that modern democratic legal systems, such as that of the United States, are "convinced that law is a system constituted [solely] by explicit norms").
\textsuperscript{52} Sobota, supra note 51, at 45 ("The underlying idea of this movement was to discover (or rediscover) a reasonable system which could regulate human behaviour by means of a univocal, complete and comprehensive legal system . . . .").
stability in legal decision making.\textsuperscript{53} Legal realism, rooted in relativism, rejected the doctrinal formalism approach of the positivist school. It evolved into an empirical approach\textsuperscript{54} that attempted to establish that facts were subject to objective legal analysis.\textsuperscript{55} The theoretical Achilles’ heel of these schools of thought, highlighted by social scientists, was that concepts of law and fact and the relationship between law and fact vary cross-culturally.\textsuperscript{56}

Both the study of culture and law have suffered from the analytical constraints of scientism and rationalism and their theoretical progeny.\textsuperscript{57} The rise of both the theory of cultural relativism, and later, the theory of subjectivism\textsuperscript{58} have given impetus to more varied, open-ended and holistic, complex studies of the relationship between culture and law and the study of legal discourse. This interdisciplinary approach has flourished and is increasingly applied to a variety of legal studies.\textsuperscript{59}

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\textsuperscript{53} Id. at 46.

\textsuperscript{54} According to this approach, law is what “courts do . . . . [That is,] lawyers [from the Anglo-American legal realism tradition] conveniently remove themselves from the debate over the axioms of their discipline by assuming the attributes of a science, thus focusing specifically on the predictive implications of a legal science.” Michael Saltman, \textit{Legal Realism in Cross-Cultural Context}, \textit{2 INT’L J. FOR THE SEMIOTICS OF LAW} 113, 113 (1989).


\textsuperscript{56} CLIFFORD GEERTZ, \textit{Local Knowledge: Fact and Law in Comparative Perspective, in Local Knowledge: Further Essays in Interpretive Anthropology} 167 (1983).

\textsuperscript{57} See Sobota, supra note 52; see also Saltman, supra note 54, at 114-15.

Professor Saltman contends that anthropology and sociology suffer from a similar problem. “The mistake, that many sociologists and anthropologists make in inferring the existence of norms, is the assumption of the sufficiency of their method of establishing [the norms’] existence by means of the external observation of recurrent patterns of behavior.” Id.

\textsuperscript{58} See Frankenburg, supra note 11, at 414-16 (discussing the school of Critical Legal Studies’ perspective on the role of subjectivism in relation to comparative law).

\textsuperscript{59} See, e.g., Sobota, supra note 51, at 47-48, for a discussion of the concept of “regularities” as a basis for analyzing legal norms within the School of Analytical Rhetoric. These regularities:

[A]re dynamic cybernetic formations like the living network of a cell or like seasons, fashions, rituals or behavior patterns. . . . [T]hey do not direct or control nature and they give no universal description of nature. They are part of all living action; they organize these actions and they are produced by these actions. . . . [S]uch changeable, self-organized patterns, . . . are often articulated as rules, but really are only ‘regularities’. [F]rom this perspective, a legal text [is] a concre\textit{te technique} used by a particular person in a specific legal situation. The \textit{situation} is regarded as an open system, which is constituted by various influences, whether social, economic, cultural or biological. The \textit{inner form} of speech is regarded as a flexible regularity, rather than as a permanent structure.
2. The Current Intersection Between Culture and Law

Social scientists, for the most part, have developed three major perspectives as to the nature of culture: culture as "shared knowledge," culture as "conceptual structures," and culture as something that falls between these two views. This article departs from the premise that culture is constituted of all three views. This article asserts that culture consists of an accumulation of knowledge, including clusters of norms, and that culture is a dynamic process that is intersubjectively shared.

"Shared knowledge" is that knowledge which people must know in order to behave in the manner they do, to produce the objects they do, and to "interpret their experience in the distinctive way they do." Cultural knowledge is neither inert nor passive. It is an open and hermeneutic process comprised of conceptual structures. These structures consist of the adaptation of cultural knowledge to daily experiences, allowing individuals to understand their experiences contextually, while simultaneously promoting cultural stability through normative systems. Written and oral language is an interpretive experience and is one of several methods of cultural communication which contributes to the flexibility and creativity of culture.

Id. For an example in the area of Bankruptcy law, see Kenneth D. Ferguson, Discourse and Discharge: Linguistic Analysis and Abuse of the "Exemption by Declaration" Process in Bankruptcy, 70 AM. BANK. L.J. 55 (1996), where the author performs a legal and linguistic analysis of the false claim, false statement, and perjury issues within the context of the bad faith claims exemption.

60. See Naomi Quinn & Dorothy Holland, Culture and Cognition, in CULTURAL MODELS IN LANGUAGE AND THOUGHT 3, 4 (Naomi Quinn & Dorothy Holland eds., 1989).

61. Quinn & Holland, supra note 60, at 3-4.

62. D'Andrade, Types of Culture Theory, supra note 61, at 115.

63. Id. at 115-16.

64. Quinn & Holland, supra note 60, at 4.

65. Id. (stating that one of culture's properties is the "generative capacity" of culture within the myriad of daily simple or complex experiences).

66. Paul E. Geller, Policy Consideration, Legal Transplants in International Copyright: Some Problems of Method, 13 UCLA PAC. BASIN L.J. 199, 207 (1994) (noting that beginning with "the linguistic dimension of relativism," one soon becomes aware of the cultural dimensions of language in the area of copyright law. Terms such as "permanent cultural values" or "property" or "the most sacred of properties" are culturally bound.).
Law engenders a complex, hermeneutic process which includes its own specialized language and its own shared knowledge, i.e., "legal culture." The field of law (or legal culture) has a recognizable internal organization based on "protocols and assumptions, characteristic behaviors and self-sustaining values" forming an incomplete but autonomous social field.67 Law is also fundamentally constitutive. "[L]aw is intimately involved in the constitution of social relations and the law itself is constituted through social relations."68 Law could be said to operate inseparably from society, and therefore, from culture.69

69. Id. at 209-211. Anthropologist Sally Engle Merry states:
    "Daily talk about the law by ordinary people contributes to defining what the law is and what it is not. Ordinary people share understandings of law and the way it affects their lives and defines their relationships. These understandings, which can be called legal consciousness, include people’s expectations of the law, their sense of legal entitlement, and their sense of rights. Popular legal understanding is not necessarily the same as the professional understanding of law . . . . Legal consciousness is fundamental in influencing who goes to court with what problems because it shapes which problems are defined as worthy of legal intervention and which are not. The legal system sets up expectations for providing remedies; people use it, and as they do, they provide the social problems on which the law works."

Id. at 209-10.


"[Lawyers’ ideologies] come from [legal] training as well as general cultural assumptions about conflict and relationships. More generally, as . . . lawyers, and courts handle problems, popular and professional conceptions of the law structure local practices, including the way that problems are labeled and solutions determined.” Merry, supra note 68, at 211 (citing Lynn Mather & Barbara Yngvesson, Language, Audience, and the Transformation of Disputes, 15 LAW & SOC’Y REV. 775, 777-79 (1980-1981)).

"The ability to determine the way that cases are talked about and the relevant discourse within which an issue is framed is an important facet of the law’s power . . . .” Merry, supra note 68, at 211 citing as examples: JOHN BRIGHAM, PROPERTY AND THE POLITICS OF ENTITLEMENT (1990); JOHN M. CONLEY & WILLIAM M. O’BARR, RULES VERSUS RELATIONSHIPS: THE ETHNOGRAPHY OF LEGAL DISCOURSE (1990); Sally E. Merry, Everyday Understanding of the Law in Working-Class America, 13 AM. ETHNOLOGIST 253 (1986); Messick, supra; William M. O’Barr & John M. Conley, Lay Expectations of the Civil Justice System, 22 LAW & SOC’Y REV. 137 (1988); William M. O’Barr & John M. Conley, Litigant Satisfaction Versus Legal Adequacy in Small Claims Court Narratives, 19 LAW & SOC’Y REV. 661 (1985); Austin Sarat & William L. F. Felstiner, Law and Social Relations: Vocabularies of Motive in Lawyer/Client Interaction, 22 LAW & SOC’Y REV. 737 (1988)).
Law is local knowledge, a cultural institution comprising complex processes which vary from place to place and period to period.\textsuperscript{70} Law, therefore, may be characterized as a component of culture and the relationship between law and culture is dynamic and creative. The study of law has shallow meaning when abstracted from its cultural context.\textsuperscript{71}

A contextualist approach\textsuperscript{72} in the study of law suggests that human beings always operate within social contexts and make decisions contextually.\textsuperscript{73} This approach\textsuperscript{74} assumes that the study and practice

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See also John Comaroff & Simon Roberts, Rules and Processes 6 (1986). Anthropologists Comaroff and Roberts have developed an analytic model that helps to understand how conflict talk creates meaning. They describe the process of constructing an interpretation in disputing situations as the development of a paradigm of argument, which they define as "a coherent picture of relevant events and actions in terms of one or more implicit or explicit normative referents." Id. (emphasis in the original).

70. Clifford Geertz, Local Knowledge: Fact and Law in Comparative Perspective, in Local Knowledge: Further Essays in Interpretive Anthropology 167, 175-219 passim (1983)).

71. See Clifford, supra note 43, at 344. The complexity of cultural inquiry, in the area of copyright law, is aptly illustrated by Geller, supra note 66, at 213-14. He suggests applying a new paradigm, consisting of three questions, to "troublesome cases" of interpretation in complex cross-cultural settings where different norms might apply: "First, who, in the community of legal practitioners, has power to interpret a rule?" Id. at 213. [Is authority centralized in legislators, or is it decentralized in judges having discretion to adjudicate on a case-by case basis?]; [s]econd, what values and theory direct the interpretation of rules?" Id. at 214. [Which values are universal in nature, such as "equity and reliability" (which may be interpreted differently from culture to culture) and which are limited to particular substantive fields; and, how are theories guiding interpretation of legal terminology?]; and [t]hird, what premises are assumed about the facts to which rules are to apply in practice?" Id. [Different norms might apply, depending on the factual assumptions being made which will be subject to the rules to be applied]. The purpose is to understand the underlying normative values of the particular society in order to arrive at an interpretation and application of law consistent with the society's norms.

72. A "systemic normativist" approach propounded by Hans Kelsen, Pure Theory of Law 4-6 (Max Knight trans., Univ. of Cal. Press 2d ed. 1967) (1934), is consistent with the contextualist approach. The systemic normativist approach is premised on the theory that only rules which may be structured consonantly with the particular society's norms in which they are going to be applied should be adopted because these will engender values of the particular society.

73. Coombe, supra note 39, at 266-67.

74. The contextualist approach has been criticized as being relativistic, undermining moral judgments and the generation of abstract principles of law which guide a society. Coombe posits that considering the specific cultural circumstances with which individuals are concerned "neither incapacitates us from making moral judgments nor undermines the possibility of criticism across contexts." Id. at 266. Moreover, critics of the contextualist approach fail to recognize that they themselves (like everybody else) contribute to and operate in a cultural milieu.
of law is contextually based, forming part of the greater field of shared cultural knowledge and the conceptual constructs that form culture. For example, when ideas are abstracted to general principles of law, decision-makers and practitioners (as well as law professors and students) employ a choice of relevant cultural contexts that give meaning to and determine the effect of general principles of law. "Abstract theories . . . are 'rooted in particular contexts and operate within a context with real and particular effects that often benefit some people more than others.'"

The cultural context in which the parties in a legal matter, practitioners, and decision-makers, operate must be recognized and analyzed to understand the context for legal choices and decision-making. Furthermore, unless practitioners and decision-makers are aware that they operate in a cultural context and are aware that their perception is culturally predisposed and delimits their comprehension, their understanding of others' cultural knowledge, including foreign legal systems, will be severely limited.

In the area of foreign law and legal systems, knowledge of one's cultural assumptions is crucial because choices are drawn from cultural contexts with which the individual may or may not be familiar. The individual may unwittingly superimpose her cultural interpretation on the foreign legal system which will create problems because she failed to examine her cultural assumptions. Culture and law, as cultural institutions, are objective (social) and subjective

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75. Id. at 266-267. See also Michael W. Gordon, Hamburgers Abroad: Cultural Variations Affecting Franchising Abroad, 9 CONN. J. INT'L L. 165 (1994) [hereinafter Gordon, Hamburgers Abroad].

76. Coombe, supra note 39, at 266-67.

77. Id. at 267 (citing Martha Minow & Elizabeth V. Spelman, In Context, in PRAGMATISM IN LAW AND SOCIETY 247 (Michael Brint and William Weaver eds., 1991)).

78. Id.

79. Id.

80. See von Mehren, supra note 37, at 249 (noting that "individuals with significantly different cultural or traditional backgrounds," find it very difficult "even upon mature reflection, to assess the risk of misunderstanding that may inhere in a situation" when dealing with legal matters involving transnational issues).

81. See Frankenberg, supra note 11, at 414-16.

82. See, e.g., von Mehren, supra note 37, at 249. Professor von Mehren notes that often there is greater danger of misunderstanding where apparent similarities exist in the legal devices being used, because a practitioner may draw a conclusion that is a "comfortable—but potentially dangerous—assumption that other elements (for example, legal traditions and practices) are equally comparable." Id.

83. Id.
(interpretive) experiences which require reflection and awareness by the practitioner.84

B. "Clash of Cultural Contexts": A Jewish-Iranian Legal Device in the Hands of a U.S. American Court

A California appellate family law case, In re Matter of Noghrey,85 serves to illustrate the significant legal and cultural ramifications of a judicial decision involving parties from another culture and the court's cultural assumptions. The case underscores: (1) the contextualist nature of legal devices and of abstract theory in judicial decision making; and (2) the constitutive theory of law.

In Noghrey, husband and wife had entered into a prenuptial agreement, a kethuba (defined infra), pursuant to the customs of the Jewish-Iranian culture.86 The agreement provided for a "house . . . and $500,000.00, or one-half of [husband's] assets, whichever is greater" to go to the wife in the event of a divorce.87 In exchange for the kethuba, as prescribed by Jewish-Iranian cultural norms, the wife affirmed that she was a virgin and provided the requisite medical proof.88

The appellate court acknowledged the cultural basis of the kethuba and summarily dismissed the kethuba device, holding it unenforceable on public policy grounds because it promoted divorce.89 In its opinion, the

84. Id.
86. Id. at 328, 215 Cal. Rptr. at 154.
87. Id. at 328-29, 215 Cal. Rptr. at 154-55.
88. Id. at 328, 215 Cal. Rptr. at 155. See Rachel B. Wischnitzer, Kethubah, in 6 THE UNIVERSAL JEWISH ENCYCLOPEDIA 367, 372 (Isaac Landman et al. eds., 1942), which provides a sample text of an Eastern European Kethuba which does not need to be signed by the bride nor groom, although the groom often executes it. She states:

On the . . . . .th day of the week, on the . . . . .th of the month . . . . . in the year . . . . . after the creation of the world, the era according to which we are accustomed to reckon in the city of X., N., son of M., spoke to the virgin A., daughter of B., as follows: "Be my wife according to the law of Moses and Israel, and I will work for you, honor you, and maintain you, according to the manner of Jewish men, who work for their wives, honor them, nourish them, and provide for them in truth. I will also give you the morning-gift of your virginity, 200 denarii in silver coins, which belong to you according to the Torah, as well as your food, your clothing, and all your needs, and will live with you in conjugal relations."

Id.

court referred to the long-standing public policy against enforcing premarital agreements that provide for a spouse only in the event of a divorce. The court reasoned that, if it were to hold otherwise, the kethuba would discourage husbands from divorcing their spouses but would encourage wives to do so. According to the court, the husband would find it fiscally imprudent to divorce. The wife, however, not only would be encouraged to divorce, she would be likely to do so “lest the husband suffer an untimely demise, nullifying the contract, and the wife's right to the money and property.”

Abstracted from the Jewish-Iranian cultural context, the kethuba appears to be promoting divorce. The court interpreted the kethuba agreement based on the court's own cultural assumption that all women are likely to divorce in order to receive an economic windfall. The public policy appears "logical" and "equitable," since, without the kethuba, both parties would be free to divorce without either the burden of an economic penalty or the expectation of an economic windfall. However, this result is not logical nor equitable if analyzed from the perspective of the culture in which the kethuba device arose, in which divorced women lack economic security because of cultural constraints.

The kethuba is premised on Jewish-Iranian cultural and religious norms and values. The kethuba is a contractual device designed both to provide financial security for the wife and to discourage divorce by significantly limiting the husband financially. Several reasons justified burdening the husband financially. In Jewish-Iranian culture, the husband has a right to divorce and remarry at will. The wife has a limited right to divorce and suffers a "loss of reduction of her rights should she divorce her husband on certain grounds." In addition, virginity is highly valued in this culture, and the wife in this case offered proof of her virginity before marriage. Thus, the wife's loss of virginity, because of her marriage, severely limits remarriage. With very limited opportunities to remarry within the culture, it could reasonably be inferred that the wife would become a financial burden on

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90. Id.
91. Id. at 331, 215 Cal. Rptr. at 156.
92. Id.
93. The court specifically refused to address the kethuba's religious premises, claiming that such an analysis would raise anti-establishment clause issues. Id. at 329, 215 Cal. Rptr. at 155 n.2. The kethuba's religious connotations need not be discussed here. For this analysis, secular cultural norms underlying the kethuba suffice.
95. Id.
96. Id.
97. Id. at 328, 215 Cal. Rptr. at 154.
98. Id. at 328, 215 Cal. Rptr. at 154-55.
her family if she did not have a *kethuba* agreement (providing for her economic security in the event of divorce) with the husband prior to marriage. The *kethuba* equalizes the "playing field" by providing for the wife's economic security by intentionally burdening the husband financially in the event of divorce. Therefore, the *kethuba* is a cultural device promotive of marriage, rather than promotive of divorce, as reasoned by the appellate court.

In this case, the court's failure to recognize both that the *kethuba* promoted marriage rather than divorce and the cultural impact on the wife caused by its refusal to enforce the *kethuba*, in fact, shifted the balance in favor of the husband under U.S. American norms. Additionally, the court's gratuitous comments regarding the reasons as to why husband and wife are likely to stay married in the Jewish-Iranian culture pursuant to the *kethuba* are based on U.S. American stereotypes of men being "commonsensical" and "fiscally prudent" and women being "goldiggers." Culturally, in this case, the wife's hardship was exacerbated because, if she expected to remarry, she probably would have to do so outside of her culture because of her loss of virginity.

In the interests of fairness, the court could have considered the cultural context of the *kethuba* and remanded the matter to determine whether or not the wife was sufficiently acculturated to U.S. American society to ensure that her loss of virginity would not create an undue hardship. If the wife was sufficiently acculturated to U.S. American society, then the lack of enforcement of the *kethuba* would not create a significant hardship; if she were not, then the enforcement of the *kethuba* might well be required to prevent undue hardship because it would be unacceptable for her to marry outside of the Jewish-Iranian culture. In the latter instance, the court would have had the power to hold that the *kethuba* did not violate public policy because it was not promotive of divorce, and, instead, enforce the *kethuba* in the interests of the stated public policy and fairness.

Alternatively, in *Noghrey*, the court could have reasoned more soundly by recognizing both the constitutive nature of the law and the contextualist basis of judicial decision-making, and acknowledging that, because of the multicultural nature of U.S. American society, the "standardization" of legal norms is a highly valued principle in U.S.
American legal culture. Thus, the court could have concluded that the need to maintain a standardized public policy regarding non-enforcement of premarital agreements (that settle property on one of the two spouses only in the event of a divorce) outweighed upholding the kethuba. The court could have strengthened its decision by noting that the kethuba could be used to promote divorce in U.S. American culture, in which other Jewish-Iranian cultural constraints, such as the limitation on a divorced woman’s remarrying, might not be operating.

This case is an example of the failure by a court to analyze the meaning of a legal device within its cultural context. The court, instead, substituted its own cultural predispositions without question. The court in Noghrey, by recognizing the limitations of its own worldview, might have considered different and better reasoned bases for its decision. The court could have considered the normative value of standardization in this society’s multicultural context, or, alternatively, remanded the matter to determine whether or not the kethuba, in this instance, was or was not promotive of divorce. If the kethuba was not promotive of divorce, the court could have considered whether fairness required that the court be more protective of the wife’s rights. The court would also have avoided perpetuation of U.S. American cultural stereotypes that stigmatize based on gender in its decision making.

1. Legal Culture and “Soft Law”

“Soft law” is an important aspect of legal culture in develop-

100. See Gunther F. Handl, A Hard Look at Soft Law, 82 AM. SOC’Y OF INT’L LAW PROC. 371-73 (1988) (opening remarks discussing that while “soft law” is at the vortex of intense debate among internationalists, there is no consensus as to its meaning). “Soft law,” according to noted internationalist, Michael W. Gordon, encompasses the aspirational declarations of international organizations (written but not law) adopted by developing nations, and unwritten law (i.e., unwritten law or written, but unpublished laws) of international organizations and of developing societies. See Gordon, Of Aspirations and Operations, supra note 41, at 302-13, 332-33. Professor Gordon defines “aspirational declarations” as written statements that reflect the aspirations of developing nations. Id. at 323. They emphasize goals or views of developing nations through international organizations, such as the United Nations, and should not be overlooked. These views represent an important element in the framework of governance . . . by host nations. Emanating from a multi-nation organization, they nevertheless illustrate an aggregate response by developing . . . nations. While the policies of host nations often are not expressed in writing . . . they are written and disclosed in the pronouncements of the multi-nation organizations. Id. at 320. See also Gordon, Hamburgers Abroad, supra note 75, at 166-68.

101. Because of its aspirational and unwritten nature, “soft law” has been criticized as not being law at all. See Michael Reisman’s remarks in Handl, supra note 100, at 373-377, for a brief discussion of how soft law fails to meet lawmaking criteria. The debate as to whether “soft law” is law or not law is inapposite to this discussion.
ing nations, \textsuperscript{102} pertinent to the training of future practitioners of transnational law. \textsuperscript{103} "Soft law" serves four functions in legal culture. First, declared aspirations and unwritten law are often precursors to hard law, i.e., written law. \textsuperscript{104} Second, unwritten laws constitute the "operational code" or the "way things really work" in the legal culture, \textsuperscript{105} and often determine legal matters. \textsuperscript{106} For example, unwritten laws often are "interpretations of laws," and therefore, attorneys must know about unwritten laws in order to understand the meaning of a law in a foreign country. \textsuperscript{107} Third, "soft law" serves as an instrument of flexibility in an era of change allowing for compromise and negotiation. \textsuperscript{108} And, fourth, "soft law" promotes stability during times of rapid change.

\textsuperscript{103} See Handl, \textit{supra} note 100, at 372. Professor Handl notes the important role of "soft law":

[An abundance of examples exist concerning] formal international law such as treaties, whose ineffectiveness relegates them to the ranks of nonlegal norms, or, if you will, \textit{soft norms}, notwithstanding their formal status. And vice versa, there is an abundance of, formally speaking, nonnormative documents such as resolutions and declarations of international organizations or conferences, which have proved to be highly effective internationally and must be deemed part and parcel of international normative order. \textit{Id.} (Emphasis added). See also Gordon, \textit{Of Aspirations and Operations}, supra note 41, and Gordon, \textit{Hamburgers Abroad}, \textit{supra} note 75 \textit{passim}, which examine some problems that practitioners encounter in the international area due to lack of cultural knowledge or misunderstanding.

\textsuperscript{104} Aspirational declarations of nations usually precede enactment of domestic law and aspirational declarations of international organizations often transmute into customary law. See Gordon, \textit{Hamburgers Abroad}, \textit{supra} note 75, at 166-67.
\textsuperscript{105} See Gordon, \textit{Of Aspirations and Operations}, \textit{supra} note 41, at 302-13, 332-33; see also, Gordon, \textit{Hamburgers Abroad}, \textit{supra} note 75, at 166.
\textsuperscript{106} Gordon, \textit{Hamburgers Abroad}, \textit{supra} note 75, at 167-69. Professor Gordon provides various examples of such "laws" from around the world. For example, in Mexico, a U.S. American fast food company was denied a waiver of mandatory joint venture provisions based on, inter alia, a reluctance to permit the particular style of American cooking involved. In Brazil, government officials determine on an ad hoc basis whether or not to apply "drawer regulations" to foreign investment applications. "Drawer regulations," as they are known by Brazilian attorneys, remain unknown to the lawyer until the official decides to pull them out of the drawer, literally. And in China, certain regulations, although written, are not for dissemination to foreigners, and therefore, foreign attorneys lack any knowledge as to their existence until they are applied to a matter they are handling.
\textsuperscript{107} \textit{Id.} at 183.
\textsuperscript{108} Handl, \textit{supra} note 100, at 375-76 (discussing the importance of soft law in resolving deadlocks among states due to economic and political differences).
through "soft" legal decision making bodies, such as mediation and alternative dispute resolution panels.109

In essence, "soft law" is an important part of legal culture because it includes both the aspirations and the operational code of foreign legal systems of developing countries. Knowledge of the "soft law" of a particular nation provides information as to interpretation of written law, unstated conventions in the legal community, and trends in legislation. "Soft law" also provides information regarding cultural differences among legal cultures and leads to greater understanding of cultural values.110 Additionally, "soft law" increases during times of rapid social change. The process of globalization is a process of rapid social change affecting and being affected by increased international economic relations, advanced communications technology, and increased environmental interdependence.111 Consequently, lawyers practicing transnational law involving a particular foreign nation must have knowledge of the "soft law" of that particular nation in order to increase their professional competency.

C. Language and Culture

Language and culture are difficult to discuss separately. Language symbols, grammatical structures, meanings, sounds, intonation, and accent are culturally defined.112 Culture and enculturation form ideas, methods of analyses, perceptions, behaviors and beliefs. The language selected to structure and convey these cultural phenomena reflects

109. See Christine Chinkin's remarks in Handl, supra note 100, at 391.
110. See Gordon, Hamburgers Abroad, supra note 75, at 183-84, which underscores the relationship between "soft law" and culture, and how important it is for lawyers to understand the role of culture:

   Culture is elusive. It is difficult for a person from one nation to fully understand what a person from another nation views as culture and what emphasis and value that nation places on culture, and therefore, its protection. . . . [W]e are remiss in acting as international counsel if we fail to understand the importance of culture in functioning abroad, and to advise our clients to consider cultural aspects of doing business abroad. That will include a broad range of activities. . . . The variations of culture make the lawyers' role more demanding and complex.

   Id.

111. See Handl, supra note 100, at 372; see also Pierre Marie Dupuy's remarks in Handl, supra note 100, at 382.
112. For example, compare Chinese characters with American English characters; compare the letter "c" in English and the letter "ch" in Spanish which does not exist in English, although the sound is denoted through the combination of the letters "c" and "h."
Language is a product of culture and, simultaneously, is formative of culture. Scholars have long recognized that language, like law, does not exist in the abstract. Language is understood because of culture.

In 1939, Professor Leslie Spier published a seminal cross-cultural study, comparing the relationship of "habitual thought" and "habitual behavior" of speakers of the Hopi Indian language and speakers of the "Standard Average European" (SAE) languages. He found that:

"[H]abitual thought" and "thought world" [mean] more than simply language, i.e., than the linguistic patterns themselves. [They include] all the analogical and suggestive values of the patterns (e.g., our "imaginary space" and its distant implications), and all the give-and-take between language and culture as a whole, wherein is a vast amount that is not linguistic but yet shows the shaping influence of language . . . . [T]his "thought world" is the microcosm that each man carries about within himself, by which he measures and understands what he can of the macrocosm.

In other words, the individual processes the situation around her based on cultural information which is obtained heuristically. Thought that precedes language is shaped by the concepts and values embodied in the language of the individual, forming the individual's cultural perception.

Language and thought process are inextricable, and both are inextricable from culture. The processual relationship between language and thought may be characterized as "linguistic thought" and "linguistic behavior." Linguistic thought is the "hermeneutic response a person has to the spoken or written language."

Professor Edward Sapir

114. This does not mean that language is not subject to separate analysis. Linguistics is a well established area of study.
115. Quinn & Holland, supra note 60, at 5 (noting that artificial intelligence researchers who attempted translation by computers "discovered that language cannot be understood, much less translated, without reference to a great deal of knowledge about the world"). In other words, one of the reasons that translation by computers has failed is that the use of language is culturally based; it is complicated and subtle.
117. Id. at 573 (citing JOHN B. CARROLL, LANGUAGE, THOUGHT AND REALITY: SELECTED WRITINGS OF BENJAMIN LEE WHORF 147 (John B. Carroll ed., 1967)).
118. Quinn & Holland, supra note 60, at 9; see also Bourdieu, supra note 67, at 809.
120. Hill, supra note 113, at 572.
explained, "[w]e see and hear and otherwise experience very largely as we do because the language habits of our community predispose certain choices of interpretation." For example, in some instances individuals will not conceptualize an idea, nor identify an event or phenomenon because the language a speaker knows does not have an equivalent term for the idea, event, or phenomenon existing in another language.

Like culture, linguistic thought is comprised of objective (social) and subjective (interpretive) levels. Objective linguistic thought deals with pragmatic reality, whereas subjective thought deals with emotional reality. Objective linguistic thought has been characterized as linguistic thought which permits individuals using the same language to participate in the general sociolinguistic or dominant cultural environment. Subjective linguistic thought is linguistic thought based on the individual’s social and historical experience.

I. Inter-cultural and Inter-linguistic Communication: Its Impact on Legal Discourse

The objective-subjective model of linguistic thought is also relevant inter-culturally, and inter-linguistically. When individuals from disparate cultures and languages interact, such as between English and Spanish speakers, variances in understanding occur. Therefore, the importance of linguistic thought is underscored. When objective

121. CARROLL, supra note 117, at 134.
122. Gary P. Ferraro, "The Need for Linguistic Proficiency in Global Business," BUSINESS HORIZONS 39, 40 (May-June 1996) (citing INSUP TAYLOR, PSYCHOLINGUISTICS: LEARNING AND USING LANGUAGE (1990), which illustrates this cognitive phenomenon: "[T]he English language lacks a word for the aroma of roasted ground sesame seeds, English speakers fail even to perceive the scent until it is pointed out to them. Yet Koreans, who have a word for that particular aroma, have no difficulty recognizing it when it fills the air.").
123. See Hill, supra note 113.
124. Id. at 580.
125. Professor Hill analyzes linguistic thought and linguistic behavior within the phenomenon of perceptual duality [double consciousness] in the context of the Black American experience. He maintains that issues arise regarding linguistic thought and linguistic behavior even when parties share a common culture and common language. He provides significant examples of linguistic thought and behavior involving perceptual duality in regards to Black Americans and the judicial system and Black American students in relation to cultural-legal terminology and pedagogy in law schools. He underscores the issues perceptual duality raises for legal education in the United States, i.e., the dissonance that exists due to the insecurity caused by the lack of correspondence between subjective and objective thought. Id. at 581-91.
126. See Geller, supra note 66, at 207 (underscoring that language translation problems require understanding "ever-larger contexts, ultimately entire cultures and historical periods" in order to provide consistent interpretation).
linguistic thought and subjective linguistic thought do not correspond, communication, especially technical communication such as legal discourse which embodies value-laden meaning, often will result in dissonance, confusion, ambiguity, and misconstruction.

The primary reason that dissonance, confusion, and ambiguity, and thus, misunderstanding and miscommunication, occur is that language primarily takes place on a subconscious level.

When a user/receiver linguistically uses a word or term, the signifier is suppose to produce a mental image in his/her mind which corresponds with that intended by its user. For the signifier to be meaningful, the word-image created must carry the same or closely approximate signification for both parties. When this does not occur, there is an obvious failure to communicate. If the signifier produces an ambiguous or contradictory meaning-effect, the result is either miscommunications, confusion, doubt, or insecurity.

The speaker or writer generally lacks awareness of "the values associated with the selection of signifiers, or of the values associated with the meaning-effect of the word or sound-images that are received." Therefore, rarely does a speaker or writer "consciously weigh the value of each signifier with respect to the influence which myth or culture has had upon the chosen signifier in terms of cultural signification, value, or meaning effect." The matter is resolved when "the hearer ... interpret[s] ... linguistic references from the cultural perspective of the

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128. See von Mehren, supra note 37, at 248-50.
129. See Geller, supra note 66, at 210.
130. See Hill, supra note 113, at 582, 582 n.35, citing well-known linguistic authority, F. DE SAUSSURE, COURSE IN GENERAL LINGUISTICS 9, 13 (1966), to explain the linguistic concepts of signifier and signification:

Our definition of the linguistic sign poses an important question of terminology. I call the combination of a concept and a sound-image, a sign, but in current usage the term generally designates only a sound-image, a word . . . . I propose to retain the word sign [signe] to designate the whole and to replace concept and sound-image respectively by signified [signifie] and signifier [significant]; the last two terms have the advantage of indicating the opposition that separates them from each other and from the whole of which they are parts.

Id.

131. See Hill, supra note 113, at 583. See also the discussion infra concerning the hypothetical as to the form of the legal relationship between the U.S. American and Mexican companies which is to be considered in the distribution of a U.S. American product into Mexico.
132. Id.
speaker rather than that of the hearer . . . "133 "To do otherwise . . . create[s] confusion and misunderstanding."134

D. A Simple Problem of Language and Culture with Significant Legal Ramifications: The Single Word

The following example demonstrates the difficulty of communicating the same legal concept inter-linguistically and inter-culturally via the use of a single word. The issue arises from variation in the definition of the term "investment" in Spanish and in English.135 In Spanish, the term investment translates to "inversión." The terms "investment" and "inversión" have different Latin roots. In English, "investment," from investire, means "to install, to surround, to clothe in a garment;" whereas "inversión" in Spanish, from invertire, means "to change position, to turn over or turn around."136 This variance in meaning suggests that the terms differ diametrically: in the United States "investment" seeks long-term benefits, while in Mexico "inversión" seeks short-term profit.137 Stated another way, objective and subjective linguistic

133. Id. at 583 n.37. Professor Hill, again citing to De Saussure, states: Language is a system of interdependent terms in which the value of each term results solely from the simultaneous presence of the others . . . . [A]ll values are apparently governed by the same paradoxical principle. They are always composed:
   (1) of a dissimilar thing that can be exchanged for the thing of which the value is to be determined; and
   (2) of similar things that can be compared with the thing of which the value is to be determined.
   Both factors are necessary for the existence of a value. To determine what a five-franc piece is worth one must therefore know: (1) that it can be exchanged for a fixed quantity of a different thing, e.g., bread; and (2) that it can be compared with a similar value of the same system, e.g., a one-franc piece, or with coins of another system (a dollar, etc.). In the same way a word can be exchanged for something dissimilar, an idea; besides, it can be compared with something of the same nature, another word. Its value is therefore not fixed so long as one simply states that it can be exchanged; for a given concept, i.e., that it has thus or that signification: one must also compare it with similar values, with other words that stand in opposition to it. Its content is really fixed only by the concurrence of everything that exists outside it. Being part of a system, it is endowed not only with a signification but also and especially with a value, and this is something quite different.
   Id. at 583 (citing De Saussure, supra note 130, at 114-15).

134. Hill, supra note 113, at 576 (stating that this is true even if one of the two parties speak the same language or languages).


136. Id. at 75-76.

137. Professor Ewell provides a series of hypotheticals to illustrate whether a business venture, depending on the facts, might be an investment subject to NAFTA and
thought will not correspond to the meaning of the term “investment” in English and Spanish. The thoughts being formed in the minds of speakers from the United States and Mexico are based on different cultural and linguistic backgrounds and divergent values resulting in erroneous assumptions, unless the latter are made clear at the outset of the legal discourse. Lack of familiarity with the basic difference in the meaning of the word, and therefore its intended use, in the contexts of the United States Common law and Mexican Civil Law systems, respectively, could lead to linguistic and cultural misunderstanding, thwart foreign investment in either or both countries, and lead to litigation due to miscommunication.

E. Two Languages, Two Subcultures and a Single Word Lead to Litigation: “What is ‘chicken’”?

Frigaliment Importing Co. v. B.N.S. International Sales Corp., a well known first-year contracts case, demonstrates the problems caused by misunderstanding and miscommunication because the parties did not know each other’s commercial subculture (custom), despite speaking each other’s languages. Frigaliment involves legal discourse concerning the definition of an industry term, “chicken” in English, and whether or not the U.S. American company (B.N.S.), a supplier of chicken, had a breached a warranty under its contract with a Swiss company (Frigaliment), a buyer of chickens, by delivering stewing chicken instead of broilers or fryers. B.N.S. agreed to deliver to Frigaliment fresh frozen “chicken” for consumption in Europe. Both parties’ representatives spoke English and German. During the negotiations, B.N.S.’s and Frigaliment’s representatives had exchanged telegrams concerning the type of chicken to be shipped. Although the telegrams were essentially in German, the English word “chicken” was used. B.N.S., attempting to clarify the term, specifically asked in one cable whether

subject to Mexican or U.S. law interpretation. Id.

138. See e.g., von Mehren, supra note 37, at 255-56.

139. For another analysis in support of this proposition, see the discussion infra of Frigaliment.


141. Id.

142. Id. at 118.

143. Id.
“chicken” in English meant the German word, “huhn,” which included both “brathuhn” (broilers) and “suppenhuhn” (stewing chicken) and was told, “any kind of chickens.” The dispute as to the English meaning of “chicken” arose because Frigaliment’s representatives understood the English word “chicken” to mean “young” chicken, i.e., broilers and fryers. Frigaliment’s representatives understood the German word “huhn” to mean both broilers and stewing chicken. B.N.S.’s representatives, however, understood the English word “chicken” to mean “huhn.” Consequently, B.N.S. delivered, inter alia, stewing chicken to Frigaliment in Switzerland. Upon receiving the stewing chicken, Frigaliment protested and sued B.N.S. because it had not received broiler chicken.

The federal district court did a painstaking analysis of trade usage in construing the ambiguous English word “chicken.” The court compared the meaning of the term in both English and German, as understood in the domestic and international industries. “Chicken,” in English in the United States, was broadly defined and included broilers, fryers, and stewing chicken; whereas, the English term in Switzerland was narrowly defined and meant only young chickens, i.e., broilers or fryers. The court noted that Frigaliment’s subjective intent was to buy young chicken, while B.N.S.’s subjective intent was to sell stewing chicken. Thus, although the parties’ objective linguistic thoughts corresponded, neither party’s subjective linguistic thoughts corresponded. The court looked to various trade sources from both countries to determine an objective definition of the term and then relied on an “objective” source, the dictionary, to ascertain that B.N.S.’s subjective intent coincided, at least minimally, with the dictionary meaning. The court understood B.N.S.’s subjective linguistic thought to correspond more closely to the objective linguistic thought of the court as supported by an objective source (the dictionary), and thus, held in B.N.S.’s favor.

Frigaliment demonstrates that even though the parties to the transaction speak the same language, or languages (English and German), the meaning of words, here “chicken,” will be understood differently depending on the individual speaker’s commercial subculture. Because of their lack of mutual cultural knowledge, the parties in the Frigaliment case misunderstood and miscommunicated their intent which was based on their respective cultural interpretations, affecting their rights and obligations under the contract.

144. Id.
145. The court held that in this instance the proper construction was the broadest definition of the term because of the price terms negotiated. Id. at 121.
F. A Complex Problem of Language and Culture with Significant Legal Ramifications: An Example of Selecting the Appropriate Contractual Device

The Frigaliment case, discussed above, presents a relatively simple linguistic error based on a cultural misunderstanding between parties speaking the same languages who had different cultural expectations and which had serious legal consequences. This subsection explores a more complex potential problem of misunderstanding and miscommunication due to linguistic and cultural differences arising when practitioners and parties of common and civil law systems interact. The problem was recently demonstrated at the Fourth Annual Conference of the United States-Mexico Law Institute where panelists from Mexico and the United States were asked to address a hypothetical problem concerning a U.S. American manufacturer who was distributing a product into Mexico via an existing Mexican company.\textsuperscript{146} It was assumed that an U.S. American attorney would be involved in some manner (if not entirely) in the representation of the U.S. American company during negotiations. One of the issues the panelists addressed was the form of the parties' legal relationship and the type of written contract to be used by the parties under Mexican civil law.\textsuperscript{147} Two panelists, one from each side of the border, noted the importance of the U.S. American attorney's understanding of the legal concept of "classifying" the legal relationship from a civil law perspective,\textsuperscript{148} and therefore, the type of contract to be used.

In the jurisprudence of the civil law system, it is assumed that behavior and transactions are subject to categorization.\textsuperscript{149} Consequently, "classifications have substantive value; they are capable of creating, extinguishing, or modifying rights and duties."\textsuperscript{150} Classifications in

\textsuperscript{146} See Gordon, supra note 24 passim.
\textsuperscript{147} Gordon, supra note 24, at 72-75.
\textsuperscript{148} Id. at 72, 74.
\textsuperscript{150} See Gordon, supra note 24, at 77.
Mexico have performative functions.151 For example, defining a contract in a particular manner carries a presumption that it is in fact such a contract, although it may be established otherwise. By contrast, in the United States, categorizations do not have performative functions. They only have theoretical value "useful only to the extent that they reflect transactional reality or help to explain statutory or judicial language."152 Therefore, the designation of and the definitions constituting legal classifications recognized in Mexican law are substantively different from classifications in the United States, serving to demonstrate to U.S. American practitioners the "foreignness"153 of legal reasoning under Mexican law which is based on legal and cultural assumptions.154 In the hypothetical situation provided, at least two different types of Mexican contracts were to be considered in selecting the appropriate classification of the legal relationship between the companies concerning the distribution of U.S. American goods into Mexico. The two different types of contracts were based on existing legal classifications, *contrato de mediación* (intermediary’s contract) and *contrato de comisión* (commission contract), each with its own tax and labor law considerations. The specific classification of the contract would have to

151. See Bourdieu, *supra* note 67, at 809 (regarding the performative function of law; see discussion *infra* concerning performative functions).

152. Bourdieu, *supra* note 67, at 809. In the United States, for example, designating a contract to be an "agency contract" does not create an agent-principal relationship which is then scrutinized as to whether or not it complies with the requirements of an agency contract. The designation of the contract as an agency contract may provide evidence as to the parties’ intent to enter into an agency contract, but the result may be a valid contract of another nature.

153. The author is presuming that a U.S. American attorney would be representing the U.S. American company in the transaction to some significant degree, either solely and directly, or in conjunction with Mexican counsel, such that the U.S. American attorney would be deemed to be practicing law under the circumstances. Consequently, the notion of the "foreignness" of the Mexican Civil legal system would be important.

154. See Gordon, *supra* note 24, at 73, 74, 80. One of Mexican panelists described the concept of classification as follows:

We have behind us Justinian, the Roman law and the Napoleonic Code. That means that, generally speaking, when we talk about a particular contract, it is as if we are talking about a box or a particular door. If you say "contrato de comisión" [commission contract] or if you say "contrato de compraventa" [sell-purchase agreement] that means that under the civil code you go to a building, you go up four stories to the floor called "contracts", you go down the corridor and open the door which is called "[sell-purchase]" and there are the rules. *It is simply a different way of thinking.* It’s not only important that we lawyers in the practice think that way, but the courts think that way too. This means, for example, courts are going to apply the rules that they consider applicable to the nature of that contract, regardless of the name of the contract. *Id.* at 73 (emphasis added).
be carefully scrutinized during negotiations, before agreeing to a certain type of contract.

Additionally, legal language cognates would have to be used with caution during negotiations because the different approach to legal classification in the U.S. American common law and the Mexican civil legal systems would not result in "word for word" translation. For example, the *contrato de comisión* (commission agreement) has two different legal meanings and effects. The *contrato de comisión* is either an agreement concerning a commissioned act, or an agreement concerning the payment of a commission.\(^{155}\) The former contract is almost analogous to an agency agreement at common law. Through this device, the U.S. American principal would be deemed to be doing business in Mexico, and thus, subject to taxation in Mexico.\(^{156}\) The latter type of commission agreement is analogous to a U.S. American contract for payment of commission.

On the other hand, there is no literal translation of *contrato de mediación* (intermediary's contract). The *contrato de mediación* does not refer to mediation or arbitration as used in the U.S. American legal context.\(^{157}\) The contract generally refers to providing an intermediary service for a fee (not a commission). Through this intermediary service an entity or a person introduces the product to potential buyers (i.e., through catalogues) with the understanding that potentially interested buyers will contact the seller directly without any further services required of the "intermediary."\(^{158}\) Because this contract does not create an agency relationship, there are no tax consequences.\(^{159}\) Although it is vaguely similar to a consultant’s relationship, the *contrato de mediación* has no counterpart in the United States. The foregoing contracts would establish very distinct rights and obligations of the parties,\(^{160}\) some with analogues in the United States (such as the *contrato de comisión*), and some which vaguely resemble types of


\(^{156}\) See Gordon, *supra* note 24, at 73.

\(^{157}\) See Fernando Alejandro Vásquez Pando, *Contrato de Mediación* in A-CH DICCIONARIO JURIDICO MEXICANO, *supra* note 155, at 704-706 (for a legal definition of "contrato de mediación").

\(^{158}\) *Id.*

\(^{159}\) See Gordon *supra* note 24, at 73.

\(^{160}\) *Id.* at 73-75.
contracts in the United States but are without legal equivalents (such as the *contrato de mediación*).

The foregoing discussion demonstrates that objective and subjective linguistic thought will not correspond in the minds of individuals of different cultural and linguistic backgrounds because different methods of legal reasoning and different values underlie the different legal systems in which they operate. Unless the parties become aware of the differences in their linguistic and cultural assumptions, the likelihood of misunderstandings and miscommunications in legal discourse between parties of different legal systems, languages, and cultures is great.161

1. Professional Competency: Where Language, Culture and Law Meet on a Daily Basis

The legal profession and tradition is particularly language sensitive.162 Without language there would not be laws or lawyers. The business of lawyers is to transact or litigate through words.163 Competency in the profession, therefore, requires expertise in legal discourse. Legal discourse consists of knowledge of legal terms, semantics, grammar, and legal language’s “performativc function,” all of which are culturally defined.

Like all other languages, legal language is culturally bound. Yet, unlike other languages, legal language is “performativc.”164 Legal language has an inherent and special formative attribute in that it “makes things true simply by saying them.”165 For example, legislative enactments create norms of individual behavior; judicial orders dictate behavior of parties; juries determine fact from non-fact and relate facts to law; and parties to a contract ordain rights and obligations pursuant to written or oral agreement. Societal values and norms are expressed through the performative function of legal language, and the meaning of a legal statement is related to the social and cultural context in which it is formulated.166 Proper choice of a legal term and its appropriate use in discourse is culturally structured. “The immediate social situation and the broader social milieu wholly determine—and determine from within, so to speak—the structure of an utterance.”167 Furthermore,

161. See the Frigaliment discussion supra.
163. See Bourdieu, supra note 67, at 809; see also Geller, supra note 66, at 210-11.
164. See Bourdieu, supra note 67; Geller, supra note 66.
165. See Bourdieu, supra note 67; Geller, supra note 66.
166. See Quinn & Holland, supra note 60; see also GEERTZ, supra note 50.
whether or not and to what extent particular aspects of legal discourse have performative functions will vary cross-culturally. Professional competency, then, is dependent on how knowledgeable the practitioner is of the legal discourse of the particular culture or cultures involved.

Lack of competency in legal discourse is directly related to lack of knowledge of legal language within its cultural context, which in turn lead to misunderstanding and miscommunication. Misunderstanding and miscommunication involving legal discourse take place when speakers of the same language and culture interact, when speakers of the same language and different cultures interact, and, most importantly, when speakers of different languages and different cultures interact. The increased likelihood of misunderstanding and miscommunicating is found in the latter type of legal discourse because "the structure [and meaning] of legal discourse in different legal cultures will be, by definition, diverse." Problems regarding professional competency, professional responsibility, and malpractice are also likely to increase in the latter instance.

168. See discussion supra regarding the function of classification in civil as opposed to common law systems.
170. See, e.g., Frigaliment discussion supra.

Such errors have resulted in millions of dollars of losses and damage to U.S. American firms' reputations and credibility. Aware of the high cost of inter-linguistic and inter-cultural problems, graduate schools of business have recognized the need to educate their students to participate in the globalization era by offering specialized courses in the culture of other nations in their domestic language. For example, Columbia Graduate School of Management is currently offering such courses. The potential for misunderstanding and miscommunication in the legal setting is great with the result being just as damaging, in addition to the increased potential for malpractice liability and ethics violations. Law schools should emulate the business school model in training future practitioners of transnational law.

172. See Saltman, supra note 54, at 117.
173. See Waxman, supra note 4.
A Ninth Circuit Court of Appeals case, *In re Disciplinary Action David L. Curl*,\(^{174}\) illustrates the intersection between professional competency and professional responsibility in an inter-linguistic and inter-cultural setting. *In re Curl* concerned the disciplinary hearing of an Arizona attorney for the unintentional misrepresentation of a judgment of the Supreme Court of Sonora, Mexico (Sonoran court). Curl relied on his client's representation as to the legal interpretation and effect of the Mexican judgment of the Sonoran court.\(^{175}\) His client, who had been the defendant in the underlying matter, had represented to him that the Sonoran court had entered a judgment on the merits in his favor and that he had obtained a Mexican attorney's opinion on the issue. Curl subsequently confirmed the interpretation and legal effect of the judgment with another Mexican attorney.\(^{176}\) However, Curl did not speak fluent Spanish and the Mexican attorney with whom he consulted did not speak fluent English. Curl and the Mexican attorney discussed the legal meaning and effect of the Sonoran court's holding in "broken Spanish" and "broken English."\(^{177}\) The Sonoran court ruled for Curl's client and awarded him costs of the trial. However, the judgment was not a judgment on the merits; the Sonoran court also held that plaintiff's appeal was dismissed without prejudice and plaintiff could proceed to vindicate its rights in the appropriate manner (in Spanish, "por lo que se dejan a salvo sus derechos para que los haga valer en la via y forma correspondiente").\(^{178}\) Plaintiff had already brought suit successfully in a United States district court against Curl's client.\(^{179}\)

On appeal, Curl represented to the Ninth Circuit Court of Appeals that the Sonoran court's judgment was a decision on the merits. In both Curl's appellate brief and in his oral argument, he reiterated his representation of the Sonoran court's judgment. Curl argued that the judgment was subject to comity and plaintiff's suit was barred by the doctrines of collateral estoppel and res judicata.\(^{180}\) The Ninth Circuit

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174. 803 F.2d 1004 (9th Cir. 1986).
175. *Id.*
176. *Id.* at 1005.
177. *Id.*
178. *Id.*
179. *Id.*
180. 803 F.2d at 1006.
Court of Appeals upheld the United States district court’s judgment in favor of plaintiff.\textsuperscript{181} The Ninth Circuit sanctioned Curl by public admonition.\textsuperscript{182} The court reasoned no prudent U.S. American attorney would rely on his client’s interpretation of foreign law or rely on the interpretation or legal effect of a foreign judgment based on the opinion of an attorney of the foreign jurisdiction when neither attorney spoke the other’s language fluently.\textsuperscript{183} The court held that this behavior was “reckless” and Curl had violated the standards of professional responsibility and his duty to the court.\textsuperscript{184}

In this case, the U.S. American attorney brought the appeal because he believed there was a final judgment in his client’s favor. He did not understand the legal meaning and effect of the Mexican judgment. He was unfamiliar with Mexican civil law; he did not know the Spanish legal language and he lacked linguistic and cultural competence. Had he known Mexican legal discourse, he would not have had to rely on a Mexican attorney’s opinion as to the legal effect of the Sonoran court’s judgment. If he had knowledge of Mexican legal discourse, at a minimum, he would have been alerted to the probable misunderstanding and miscommunication with Mexican counsel and would have sought another opinion. In either case, he would have known that an appeal would not lie on the grounds of comity, collateral estoppel, and res judicata and would have thought twice about bringing a “baseless” appeal.\textsuperscript{185}

Problems such as Curl’s are likely to increase in inter-cultural and inter-linguistic situations due to a lack of linguistic and cultural knowledge. However, legal discourse issues of this type are not insurmountable. Legal discourse can be learned. Culture is comprised of both implicit and explicit characteristics and values.\textsuperscript{186} The organization of such knowledge is ascertainable to a functional degree and may

\begin{itemize}
  \item \textsuperscript{181} Id. at 1005.
  \item \textsuperscript{182} Id. at 1007.
  \item \textsuperscript{183} Id.
  \item \textsuperscript{184} Id.
  \item \textsuperscript{185} Id.
  \item \textsuperscript{186} See Bourdieu, supra note 67, at 806.
\end{itemize}
be learned together with legal language. The purpose is to learn to understand from the speaker's viewpoint.

Proficiency in a language and culture requires awareness and training. Law schools, therefore, should be preparing law students for a globalized legal market by training them in the foreign law, culture, and legal language of the country or countries in which their legal services are most likely to be in demand. Countries in which the interests of U.S. American clients are likely to arise and legal services are likely to be needed, such as the United States' major trading partners, Canada, Mexico, and Japan.

1. NAFTA: Competency and Professional Responsibility

In order to be competitive in the NAFTA marketplace, future practitioners must be competent and meet the standards of professional responsibility. For situations in which Mexican law is at issue, the attorney in the case must either become competent to deal with the matter or seek competent counsel on behalf of the client. The Model Rules of Professional Conduct and the Model Code of Professional Responsibility require that a lawyer handle competently the client's matter by being prepared to address every pertinent legal issue in the case. Failure to do so is an ethical violation and a basis for malpractice liability. Since U.S. American lawyers, with few exceptions, are not sufficiently versed in Mexican law, at a minimum they must seek

187. But see von Mehren, supra note 37, at 255 (stating that the need to "operate effectively in transactions involving more than one legal system requires a kind of insight and feel that perhaps relatively few lawyers have and that probably cannot be explicitly taught except in the sense of developing an awareness of potential difficulties"). This author is of the opinion that teaching in the domestic language of the foreign legal system will increase awareness and proficiency of the foreign law under study. The assumption is not being made that one will entirely understand and operate in the foreign legal system as if one had been born, raised and educated as a local practitioner. Instead, the goal should be to train future practitioners to achieve proficiency to the level of competency.

188. See Geller, supra note 66, at 208, 209 (noting that since languages are translatable, cultural obstacles are not impenetrable, even though certain variables, i.e., time, distance, disparities of outlook or assumptions, make the act of translation difficult) (citing GEORGE STEINER, AFTER BABEL: ASPECTS OF LANGUAGE AND TRANSLATION 48 (2d ed. 1992)).


190. See supra note 29. See also In re Roel, 3 N.Y.2d 224, 144 N.E.2d 24, 165 N.Y.S.2d 31 (1957) (holding that attorneys admitted to the New York State Bar who are retained to handle a case dealing with foreign law have a duty to the client to know the foreign law at issue and may not claim otherwise).

191. See Goebel, supra note 3; see also Waxman, supra note 4.
counsel who has adequate knowledge and preparation.\textsuperscript{192} However, transferring cases to other attorneys due to lack of competence in the legal area is less than optimal. The better solution is to educate U.S. American law students to be competent attorneys in the area, thus making them competitive.\textsuperscript{193}

Lack of cultural knowledge will also limit entry into the NAFTA market.\textsuperscript{194} For example, cultural variances in negotiation styles can impede expansion due to miscommunication and different cultural expectations of appropriate behavior. In Mexico, for instance, negotiation discourse, behavior, and goals differ from U.S. American negotiation discourse, behavior, and goals.\textsuperscript{195} Relationship and time are treated differently in this context.\textsuperscript{196} On a general level, Mexican cultural discourse includes personal introduction of the parties and personal knowledge about the parties before negotiating. Because the individual is "perceived as the essence of his or her business,"\textsuperscript{197} inquiries into areas, such as family and personal interests, are made over meals and other social events, with the goal of building both trust and an ongoing relationship.\textsuperscript{198} U.S. Americans, on the other hand, perceive contracting as a business-to-business relationship.\textsuperscript{199} Consequently, an U.S. American might "cold call" somebody to propose a meeting to discuss an idea for a business venture; when the parties meet, after a few pleasantries, they "get down to business" and follow a

\textsuperscript{192} This, however, is problematic if the U.S. American lawyer is selecting Mexican counsel with whom she is unfamiliar and she desires to continue to act in the matter as co-counsel. Communicating with Mexican counsel may prove troublesome if the North American attorney does not speak Spanish and understand sufficient legal Spanish terminology to discuss strategy and make decisions. Moreover, such circumstances would require a contractual relationship with co-counsel from Mexico requiring knowledge of Mexican law, legal, social and political culture and Spanish legal terminology.

\textsuperscript{193} Currently, representatives of the NAFTA countries are discussing requirements for Foreign Legal Consultants, as permitted by NAFTA provision.

\textsuperscript{194} See, e.g., Gordon, Hamburgers Abroad, supra note 75.


\textsuperscript{196} See Mears, supra note 196, at 757, 758; Phatak and Habib, supra note 196, at 34.

\textsuperscript{197} Mears, supra note 196, at 755.

\textsuperscript{198} Id. at 757-58.

\textsuperscript{199} Id. at 756, 757.
specific set of points on an agenda.\textsuperscript{200} For U.S. Americans, "time is money," set procedures, and punctuality (as defined by U.S. American norms) are important values and functions in the business context.\textsuperscript{201} By contrast, Mexicans perceive time based on valued social norms conducive to strong family and friendship ties. Time is an "endless continuum—context[,] rather than constraint—in which we live" and in which personal relationships develop.\textsuperscript{202} Thus, the style of negotiations and the determination as to whether or not the negotiations were successful is dictated by cultural expectations and interpretations concerning the appropriate manner of conducting business.\textsuperscript{203}

\textbf{G. Comparative Law and International Law: Where Law, Culture, and Language Meet in the Law School Curriculum}

Historically, U.S. American law school curricula have virtually ignored substantive courses on the culture and legal terminology of other nations.\textsuperscript{204} Generally, there has been no recognition of the need to train students in areas dealing either with laws of foreign nations or with legal cultures and legal language of other sovereign states. Only two substantive law areas in the U.S. law school curriculum have dealt consistently with legal culture and legal terminology of other sovereign nations: comparative law and international law. This section reviews the role of these two disciplines in legal education and explores their relationship to courses teaching foreign law, culture, and legal language.

\textbf{1. Comparative Law}

Comparative law has not been considered a significant part of law school education.\textsuperscript{205} This perception arises from the assumption that it is unnecessary to train students in "esoteric" areas.\textsuperscript{206} The comparative law approach consists of comparing and contrasting the domestic

\textsuperscript{200}. Id.; see also Phatak and Habib, \textit{supra} note 196, at 34.
\textsuperscript{201}. See Mears, \textit{supra} note 196, at 756, 757; see also Phatak and Habib, \textit{supra} note 196, at 34.
\textsuperscript{202}. See Phatak and Habib, \textit{supra} note 196, at 34.
\textsuperscript{203}. See Mears, \textit{supra} note 196, at 758. Mears provides solutions to these problems. \textit{Id.} at 759.
\textsuperscript{204}. See Waxman, \textit{supra} note 4, at 391; see also Garro, \textit{supra} note 10, at 271.
\textsuperscript{205}. Professor Waxman indicates that a survey of law school curricula demonstrates that comparative law is not a graduation requirement at most law schools; it is an elective and is within a "required course grouping" only at six law schools throughout the U.S. In a few instances, it is altogether omitted from the curriculum. Waxman, \textit{supra} note 4, at 391.
\textsuperscript{206}. \textit{Id.} (emphasizing that these subjects, like jurisprudence, are perceived to be esoteric in nature and "shunted off to the academic sidelines").
substantive and procedural laws of differing legal systems. Its primary goal, "as a science, [is to obtain] better knowledge of legal rules and institutions." Comparative law, therefore, generally is considered to have theoretical not "practical value."

Due to the impetus of globalization, law schools, law students, and the practicing bar should re-examine the role of comparative law "in legal education [as] essential to meet the needs of America and its legal advisors in the 1990s and beyond . . . . In the twenty-first century, attorneys will regularly address domestic and foreign legal issues, involving diverse cultures, in differing legal contexts." Consequently, at least one comparativist has proposed that comparative law be integrated into the first-year curriculum.

The inclusion of the comparative law approach in first-year courses would be an introduction to other legal systems. Students would benefit by exposure to different legal systems; fostering an awareness of the variety in legal systems, legal culture, and legal terminology, and highlighting areas where some problems are likely to develop. However, to provide more than only a cursory overview of foreign legal systems, there would still be a need for additional specialized study in the foreign law, culture, and legal language of a particular nation, specifically, of the major U.S. American trading partners. A year-long foreign law course would not purport to train students to become fully competent practitioners in transnational law. However, such a foreign law course

207. Id. at 397. But see Frankenberg, supra note 11 passim (criticizing the lack of a common purpose and approach among comparativists as an additional reason for marginalization of the discipline).
209. Id. at 1. But see Port, supra note 33, at 643 (proposing that U.S. American law schools teach Japanese law from a comparative law perspective, in light of U.S. American economic interests in Japan).
210. See Waxman, supra note 4, at 391.
211. Id. (citing Robert A. Stein, The Future of Legal Education, 75 MINN. L. REV. 945, 958, 959 (1991), and Goebel, supra note 3, at 458-60).
212. Id. at 397 (opining that comparative law would "invariably provide a practical introduction into the legitimacy of distinct legal and cultural backgrounds").
213. Few law students graduate with sufficient knowledge and skills training to be competent attorneys from the outset. However, the role of law schools is to provide, at a minimum, an adequate introduction to substantive law areas and to teach a method of analysis which the lawyer in practice may apply to any area of law. Excluding an entire area of substantive law, such as foreign law, in which a clients' needs are likely to be greater, potentially contributes to a practitioners' incompetence.
would serve as a significant introduction to the specific areas of a particular country’s legal system creating a substantive base upon which additional professional training could be obtained. Incorporating a comparative law approach would be a significant first, but limited, step toward adequately training transnational lawyers. A comparative law course could be a prerequisite to taking a foreign law course (because it would provide a good overview upon which a foreign law course could build). However, a comparative law course alone would not serve the purpose of training students to be practitioners as effectively as training them in the law, culture, and legal language of the particular foreign jurisdiction which is likely to form part of their students’ practice.

2. *International Law*

Both academics and practitioners regard international law, like comparative law, as an esoteric discipline, peripheral to legal education.\(^{214}\) Academics have considered international law a “‘fringe’ specialty, well meaning, even noble, but naive and largely irrelevant to the real world.”\(^{215}\) International law rarely is a law school curriculum requirement and “mainstream” law journals rarely publish international law materials.\(^{216}\) Additionally, despite the increase in international treaties in the 1980s which have extended the domain of international law to include private acts and transactions (such as wills, trusts, decedents’ estates, adoption of children, abduction of children, commercial sale of goods, electronic fund transfers, bills of exchange, and promissory notes),\(^{217}\) practitioners, like academics, have been reluctant to recognize the need for training future attorneys in international law.

Problems of interpretation and application of treaty provisions, conflicts of law, and enforceability of judgments, historically, have occurred in international law.\(^{218}\) These problems have been based on

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215. *Id.* at 811 (quoting John K. Gamble, Jr. & Natalie S. Shields, *International Legal Scholarship: A Perspective on Teaching and Publishing*, 39 J. LEGAL EDUC. 39, 39 (1989)) (indicating that the lack of relationship between law and politics espoused by international law scholars forms the basis for the perception that international law “is irrelevant to the real world”). Professor Trimble argues that it is essential to connect international law with “its political base” to re-establish its credibility in academia and the profession. *Id.* at 823.
216. “[A] survey showed that less than 1 percent of the articles published between 1983 and 1985 in thirty major law reviews dealt with public international law. Even in the specialized international law journals, law faculty accounted for less than 40 percent of the total articles published.” *Id.* at 811.
217. *Id.* at 811, 812.
218. *Id.* at 837.
cultural and linguistic differences. For example, "German courts [have tended] to interpret the Geneva Conventions on bills of exchange and checks as if only domestic law were involved, without reference to other countries' interpretation." Additionally, uniform laws (which have been carefully constructed to avoid ambiguities and misunderstandings) have been differentially applied because actors from different nations are charged with their interpretation and implementation.

Problems of interpretation and application will increase because the nature of international law has changed substantially over the last two decades. International law no longer is concerned solely with the regulation of public relations of sovereign nations. The field of international law has expanded to include regulation of: (1) private parties' relations and transactions with private parties from other nations; and (2) governmental actors transacting in the private domain of international commerce. Varying national traditions, cultures, languages, values, and interests will form the bases for interpretation and application of law in the new treaty areas and will create pitfalls which can be avoided by training students in specific foreign countries' legal systems, cultures, and languages. Another reason to consider offering foreign law, culture, and language courses in the curriculum is that international law practitioners tend to limit the scope of their

219. See Trimble, supra note 11, at 836, 837.
220. Id. at 837, n.99 (citing Oral statement of Ulrich Drobnig, in INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW (UNIDROIT), INTERNATIONAL UNIFORM LAW IN PRACTICE 305, 306 (1988)). Trimble notes that this phenomenon of differential interpretation and implementation has applied in a variety of uniform law settings, e.g., the Warsaw Convention, the Hague Rules on Bills of Lading, and the United Nations Convention on the Sale of Goods. This is likely to happen in the interpretation of NAFTA provisions, since three countries' legal cultures, languages, and political systems are involved. Id. at 837, 838.
221. Id. at 812.
222. See, e.g., Handl, supra note 100 (discussing the need to understand the role of soft law in international law due to the paradigmatic shift occurring in the last two decades). The shift that has taken place has resulted in moving away from the "classic" international law which dealt with the "state-to-state relations [of a] limited number of fairly homogenous states" toward complex "deepening global interdependencies in international security, environmental and economic matters[,]" evidencing (1) communal purposes among states; and (2) the increasing role of nonstate actors. Id. at 372.
223. Id.
224. Trimble, supra note 11, at 837 (citing Zhivko Stalev, The Uniform CMEA Law and Its Uniform Application, in INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW (UNIDROIT), INTERNATIONAL UNIFORM LAW IN PRACTICE 231, 235-36 (1988)).
practice to specific nations. Transnational lawyers, therefore, need in
depth knowledge in foreign law, culture, and domestic legal languages
of the particular nations that are the focus of their practice. For
example, practice in the area of NAFTA will require knowledge of the
Mexican and Canadian (including the Québécois) legal systems, culture,
and language (in the case of Mexico and Quebec, Spanish and
Québécois, respectively). Additionally, some areas of substantive law,
such as foreign investment, are subject directly to regulation by the
foreign nation's laws. Thus, transactional lawyers will require knowl-
edge of the specific foreign legal system, including "soft law." 225 The
law school curriculum should reflect these needs.

III. CONCLUSION

The legal culture and terminology of the common law system has been
assumed to be the only legal culture and terminology appropriate for
training law students. In light of globalization, failure to train students
in laws, culture, and legal language of other nations will lead to
inadequately prepared lawyers in the expanding legal market place. The
conscious knowledge of legal culture and legal language in the operation
of a legal system is paramount in understanding and applying laws
within any society. Misunderstanding and lack of awareness occur
intraculturally, when it is assumed that the same or similar assumptions
are operating in order to interpret, among other things, law, legal
strategy, policy, and negotiations. The likelihood of misunderstanding
and lack of cultural awareness will be exacerbated and will impede
lawyering when law school graduates begin practicing in greater
numbers in inter-cultural and inter-linguistic arenas. Knowledge of
foreign laws, legal cultures, and legal languages leads to an understand-
ing and awareness which will make them more effective lawyers,
domestically and internationally. 226

U.S. American law students are more likely to practice transnational
law, requiring knowledge of the Canadian, Mexican, and Japanese legal
systems, cultures, and legal languages, during this era of increased
globalization. Canada, Mexico, and Japan are currently the United

225. See Gordon, Of Aspirations and Operations, supra note 41, at 313 (noting
specifically that practitioners should not rely unduly on international law norms because
often developing nations reject these laws since they are perceived by the developing
nations as having been imposed upon them, historically, by developed nations.
Consequently, Gordon assumes that developing nations will control foreign investment
through their respective regulatory frameworks.).

226. See Richard K. Sherwin, Lawyering Theory: An Overview, What We Talk
States's major trade partners, and are likely to remain so into the twenty-first century. Furthermore, because of NAFTA's impact, as well as Mexico's prominent role in Latin America's markets and its influential role in Latin America's legal systems, knowledge of Mexican law, culture, and the Spanish legal language, in particular, will provide the greatest access to transnational markets in the Northern and Southern American hemispheres.

Law schools have a duty to prepare students to be effective, competitive, and ethical practitioners. By not preparing students to specialize in foreign law areas during this era of globalization, law schools will be failing in the performance of this duty. Legal education, therefore, should include, at a minimum, courses on the law, culture, and language of Canada, Mexico, and Japan. Furthermore, if only one area of foreign law is to be selected, then legal educators should choose to incorporate courses in Mexican law, culture, and the Spanish legal language for the reasons discussed above.