

# In re Culture: The Cross-Cultural Negotiations Course in the Law School Curriculum

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When I hear the word “culture” . . . I reach for my pistol.<sup>1</sup>

The subject of cross-cultural negotiations refers to negotiations that occur between parties of different cultures who do not necessarily share “the same ways of thinking, feeling, and behaving.”<sup>2</sup> Since cultural differences are often most pronounced among national societies, most international negotiations are cross-cultural.<sup>3</sup> Some negotiation situations in the domestic setting are also cross-cultural,<sup>4</sup> since culture can be characterized along the lines of race, ethnicity, religion, or gender, among others.<sup>5</sup> Given the

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<sup>1</sup> BARTLETT’S FAMILIAR QUOTATIONS 679 (Justin Kaplan ed., 16th ed. 1992) (quoting HANNS JOHST, SCHLAGETER, SCHAUSPIEL act I, sc. 1 (1933) (“Wenn ich Kultur höre . . . entsichere ich meinen Browning.”)). The line is often attributed to Hermann Goering. *Id.*

<sup>2</sup> NANCY J. ADLER, INTERNATIONAL DIMENSIONS OF ORGANIZATIONAL BEHAVIOR 181–82 (2d ed. 1991).

<sup>3</sup> *Id.* at 182. Some observers have used the term culture interchangeably with nationality. See Jeffrey Z. Rubin & Frank E.A. Sander, *Culture, Negotiation, and the Eye of the Beholder*, 7 NEGOT. J. 249, 253 nn.1, 2 (1991) (“Throughout this paper, the terms ‘culture’ and ‘nationality’ are used together, and are typically designated as culture/nationality.” “We define culture/nationality very simply as the set of attitudes and behaviors that are broadly generalizable across a national or cultural grouping, and which tend to persist over time.”).

<sup>4</sup> ADLER, *supra* note 2, at 182.

<sup>5</sup> See Pat K. Chew, *The Pervasiveness of Culture in Conflict*, 54 J. LEGAL EDUC. 60, 60–61 (2004) (“I suggest that individuals of different races, ethnic groups, religions, genders, and socioeconomic classes, for instance, have distinct cultures and cultural profiles.”); see also Guy Olivier Faure & Gunnar Sjöstedt, *Culture and Negotiation: An Introduction*, in CULTURE AND NEGOTIATION: THE RESOLUTION OF WATER DISPUTES 1, 8 (Guy Olivier Faure & Jeffrey Z. Rubin eds., 1993) (defining culture as “a set of shared and enduring meanings, values, and beliefs that characterize national, ethnic, or other groups and orient their behavior.”).

increasingly international character of modern law practice<sup>6</sup> and the multicultural, pluralist society that is the United States,<sup>7</sup> the culture question should receive attention in contemporary legal education. A course in cross-cultural negotiations and dispute resolution<sup>8</sup> would examine how culture in its various forms may contribute to the development of a dispute and the approach to its resolution. In the process, the course could address the general question of how culture (and cultural differences) may shape legal relations between and among parties.

Yet despite the importance of culture in dispute resolution, the reality is that the subject receives scant mention in the law curriculum. As of this writing, out of over 180 ABA-accredited law schools in the country, only three offer a course for credit devoted to cross-cultural negotiations during the academic year: Pepperdine, Missouri-Columbia, and Northwestern.<sup>9</sup> A

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<sup>6</sup> See *infra* text accompanying note 17.

<sup>7</sup> The Supreme Court has referred to America's pluralistic society in a number of case decisions, often relating to First Amendment liberties. *E.g.*, *Bowen v. Roy*, 476 U.S. 693, 700 (1986); *Erznoznick v. City of Jacksonville*, 422 U.S. 205, 210 (1975); see also *County of Allegheny v. ACLU*, 492 U.S. 573, 635–36 (1989) (O'Connor, J., concurring); *Goldman v. Weinberger*, 475 U.S. 503, 512–13 (1986) (Stevens, J., concurring); *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 712 (1985) (O'Connor, J., concurring); *Sch. Dist. of Abington Township v. Schempp*, 374 U.S. 203, 319–20 (1963) (Stewart, J., dissenting). The U.S. Court of Appeals for the Ninth Circuit especially has endorsed the multicultural character of U.S. society. See, e.g., *Yniguez v. Arizonans for Official English*, 69 F.3d 920, 948 (9th Cir. 1995) (“[T]he diverse and multicultural character of our society is widely recognized as being among our greatest strengths.”); *Gutierrez v. Mun. Court of Southeast Judicials*, 838 F.2d 1031, 1038–39 (9th Cir. 1988) (“The multicultural character of American society has a long and venerable history and is widely recognized as one of the United States’ greatest strengths.”).

<sup>8</sup> For ease of reference herein, the course will be referred to as “cross-cultural negotiations,” which will address not only party-to-party negotiations, but also the broader dispute resolution process.

<sup>9</sup> A search was conducted on the Internet version of the *2003 American Bar Association Directory of Law School Dispute Resolution Courses and Programs*, operated by the University of Oregon School of Law. SCHOOL OF LAW, UNIVERSITY OF OREGON, AMERICAN BAR ASSOCIATION DISPUTE RESOLUTION SEARCH, at <http://www.law.uoregon.edu/aba/search.php> (last visited Jan. 22, 2005).

The site lists alternative dispute resolution courses offered in the 184 law schools listed in the *2003 Directory*. SCHOOL OF LAW, UNIVERSITY OF OREGON, ABOUT THIS DIRECTORY: INTRODUCTION, available at <http://www.law.uoregon.edu/aba/about.php> (last visited Jan. 19, 2005). The cross-cultural negotiations course was included in the list of courses offered at Missouri-Columbia, Northwestern, and Pepperdine. See UNIVERSITY OF OREGON SCHOOL OF LAW, DIRECTORY OF LAW SCHOOL DISPUTE RESOLUTION COURSES AND PROGRAMS: UNIVERSITY OF MISSOURI-COLUMBIA SCHOOL OF LAW, available at [http://www.law.uoregon.edu/aba/view.php?law\\_id=81](http://www.law.uoregon.edu/aba/view.php?law_id=81) (last visited Jan. 19,

few other schools offer a course related to the subject as part of their summer programs abroad.<sup>10</sup> Beyond these schools, if the subject of culture in dispute resolution is covered at all, it is discussed briefly, typically in one or two class sessions out of a semester-long course in alternative dispute resolution (ADR) or negotiation, or in a course relating to international law or international business transactions.<sup>11</sup> This limited coverage is inadequate.

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2005); UNIVERSITY OF OREGON SCHOOL OF LAW, DIRECTORY OF LAW SCHOOL DISPUTE RESOLUTION COURSES AND PROGRAMS: NORTHWESTERN UNIVERSITY SCHOOL OF LAW, *available at* [http://www.law.uoregon.edu/aba/view.php?law\\_id=94](http://www.law.uoregon.edu/aba/view.php?law_id=94) (last visited Jan. 19, 2005); UNIVERSITY OF OREGON SCHOOL OF LAW, DIRECTORY OF LAW SCHOOL DISPUTE RESOLUTION COURSES AND PROGRAMS: PEPPERDINE UNIVERSITY SCHOOL OF LAW, *available at* [http://www.law.uoregon.edu/aba/view.php?law\\_id=104](http://www.law.uoregon.edu/aba/view.php?law_id=104) (last visited Jan. 19, 2005).

Pepperdine began offering the course in 1989. Professor Grant Ackerman, then Acting Associate Director of Pepperdine's Straus Institute for Dispute Resolution, developed the course. The course at Missouri-Columbia is based largely on the Ackerman model. Professor Jeanne M. Brett, Director of the Dispute Resolution Research Center, at the J.L. Kellogg School of Management, teaches the course at Northwestern; class enrollment is comprised of half law students and half management students. E-mail from Jeanne M. Brett, DeWitt W. Buchanan, Jr., Distinguished Professor of Dispute Resolution and Organizations & Director of Dispute Resolution Research Center, J.L. Kellogg School of Management, Northwestern University, to author (Nov. 11, 2004, 17:00 CST) (copy on file with author).

Franklin Pierce offers "Cross-Cultural Negotiations for IP Disputes," but focuses mainly on the substance of intellectual property disputes in an international setting. FRANKLIN PIERCE LAW CENTER, ACADEMIC YEAR 04-05, COURSE LISTING (ALPHABETICAL) 15, *available at* <http://www.students.piercelaw.edu/descriptionbooks/04-05descbook/04-05desc.pdf> (updated July 29, 2004).

<sup>10</sup> Tulane offers "Intercultural Negotiation and Mediation" as part of its summer program in Germany. SCHOOL OF LAW, TULANE UNIVERSITY, COURSES, *available at* <http://www.law.tulane.edu/abroad/abroad.cfm?d=germany&main=courses.htm> (last visited Jan. 19, 2005). The subject is regularly offered in Pittsburgh's Law at Sea program. E-mail from Pat K. Chew, Professor, University of Pittsburgh School of Law, to author (Nov. 10, 2004, 19:12 CST) (copy on file with author); *see* UNIVERSITY OF PITTSBURGH SCHOOL OF LAW, COURSES BY TOPICAL ARRANGEMENT 2, *available at* [http://www.law.pitt.edu/student/registrar/Topical\\_Arrangment.pdf](http://www.law.pitt.edu/student/registrar/Topical_Arrangment.pdf) (last visited Jan. 19, 2005).

<sup>11</sup> This is a synopsis of responses from various alternative dispute resolution (ADR) law faculty nationwide in response to an informal survey transmitted by e-mail. Several faculty responded that culture deserves more mention, but that course resources do not allow for significant treatment.

The limited coverage of the subject in the law curriculum apparently mirrors the amount of attention culture has traditionally received in the literature. Professor Kevin Avruch has expressed disappointment and frustration, even resorting to the heretical—

One might think that the events of September 11, 2001, would have sparked keen interest in the cross-cultural negotiations subject. A full understanding of 9/11 must include a discussion of how profound cultural differences could explain the nature and depth of the conflict between the United States and followers of Osama bin Laden, two sides that do not share “the same ways of thinking, feeling, and behaving.”<sup>12</sup> The wide impact of

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chastising *Getting to YES*, the widely-read and highly-regarded text on negotiation, for its inadequate treatment of the cultural question:

In its first edition . . . , the best-selling *Getting to YES*, the epitome of negotiation practice for many folks today, mentioned culture not at all. A second edition . . . added a section addressing ten questions people asked about the first edition, rather like a rabbinical responsa, and here culture is lumped, in a single question along with personality and gender. Readers . . . are warned to look out for culture but not to stereotype (good advice!).

Kevin Avruch, *Culture and Negotiation Pedagogy*, 16 NEGOT. J. 339, 339–40 (2000). Professor Avruch has been one of the most passionate supporters of the study of culture in conflict resolution. In addition to his works cited herein, his considerable bibliography includes KEVIN AVRUCH, *CULTURE AND CONFLICT RESOLUTION* (1998) and Kevin Avruch, *Introduction: Culture and Conflict Resolution*, in *CONFLICT RESOLUTION: CROSS-CULTURAL PERSPECTIVES* (Kevin Avruch et al. eds., 1998).

Over the years, law coursebooks have devoted more attention to the impact of culture on dispute resolution methods, but the discussion is usually limited to a small section. The coursebook with the most discussion of cultural issues appears to be ALAN SCOTT RAU ET AL., *PROCESSES OF DISPUTE RESOLUTION: THE ROLE OF LAWYERS* 189–202, 906–27 (3d ed. 2002).

<sup>12</sup> ADLER, *supra* note 2, at 181–82. The conflict also has a notable religious dimension, which provides an opportunity to discuss the relationship between culture and religion, *e.g.*, whether one is a subset of the other, or whether they overlap. Note the references to the deity in the rhetoric from both sides:

This great victory that has been accomplished can only be attributed to God alone . . . . It is not because of our skill . . . but thanks to God it was possible . . . . Allah looks in the heart of his worshippers and chooses those who are qualified for his mercy, grace and blessing. Those 19 brothers who went out and gave their souls to Allah almighty, God almighty has granted them this victory we are enjoying now.

CNN.com/WORLD, *New bin Laden Tape Surfaces* (Apr. 16, 2002), available at <http://archives.cnn.com/2002/WORLD/meast/04/15/terror.tape/> (last visited Jan. 22, 2005) (quoting Ayman Al-Zawahiri, bin Laden’s top deputy, who claimed credit for the September 11 attacks).

This battle is not between al Qaeda and the U.S. This is a battle of Muslims against the global crusaders . . . . We believe that the defeat of America is possible, with the help of God, and is even easier for us, God permitting, than the defeat of the Soviet Union was before.

CNN.com/WORLD, *Transcript of Bin Laden’s October Interview* (Feb. 5, 2002), available at

9/11 on American life and society has had repercussions in academia, including the legal academy, which saw an increase in the number of schools offering courses in Islamic or Muslim law.<sup>13</sup> Yet coverage in law schools of the subject of culture, conflict, and resolution has remained unchanged since September 11.

This Article addresses the proper inclusion of the cross-cultural negotiations course in the law school curriculum. It begins with a discussion of some of the reasons why the course has received such little attention to date, and a critique of these reasons. This portion concludes with a reiteration and reaffirmation of the view (not universally held) that the study of culture's impact on law and dispute resolution is vitally important. With this premise in hand, and toward consideration of the formal inclusion of the subject matter in the law curriculum, a description of the suggested course content follows. Some practical suggestions in the presentation of the course are also offered. Finally, the Article explains that more attention to the subject might begin new, fruitful scholarship within the law and dispute resolution field.

### I. THREE OUT OF 184

Preliminarily, what does "culture" or "cultural" mean in the context of cross-cultural negotiations? As described in some detail herein, culture is complex, and, over the past century, defining the term has been a difficult, elusive task for commentators in a number of fields, especially those in anthropology.<sup>14</sup> Nevertheless, a frame of reference is needed, and *Webster's* offers a starting point. At this juncture, culture may be understood as "the total pattern of human behavior and its products embodied in thought,

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<http://archives.cnn.com/2002/WORLD/asiapcf/south/02/05/binladen.transcript/> (last visited Jan. 22, 2005).

On the evening of the September 11 attacks, President Bush addressed the nation, stating: "I ask for your prayers . . . . And I pray they will be comforted by a power greater than any of us spoken through the ages in Psalm 23: 'Even though I walk through the valley of the shadow of death, I fear no evil, for You are with me.' . . . God bless America." President George W. Bush, Statement by the President in His Address to the Nation (Sept. 11, 2001), *available at* <http://www.whitehouse.gov/news/releases/2001/09/20010911-16.html> (last visited Jan. 19, 2005).

<sup>13</sup> Professor Adrien K. Wing, of Iowa, created a new course, "Law in the Muslim World," as a direct result of the events of September 11. *See* Adrien Katherine Wing, <http://www.uiowa.edu/~lawakw/main.html> (last visited July 29, 2004) (copy on file with author); *see also* UNIVERSITY OF IOWA COLLEGE OF LAW, GUIDE TO COURSES 18, <http://www.law.uiowa.edu/downloads/courses.pdf> (last visited Jan. 19, 2005).

<sup>14</sup> *See infra* text accompanying notes 83–119.

speech, action, and artifacts and dependent upon man's capacity for learning and transmitting knowledge to succeeding generations through the use of tools, language, and systems of abstract thought."<sup>15</sup> The subject of cross-cultural negotiations, then, would examine the intricacies of the "pattern of human behavior" and explore how differences in the pattern from group to group may affect negotiation and dispute resolution.

In law schools, the cross-cultural negotiations course could be a logical component of curricular offerings in international law (yering) or alternative dispute resolution, two areas that have seen substantial curricular coverage in recent years. The University of Michigan Law School, for example, has declared that, "Today virtually every area of the law is being internationalized; every lawyer should understand the structure and meaning of this dramatic transformation of the global legal order."<sup>16</sup> Indeed, Michigan includes in its core curriculum a course entitled "Transnational Law."<sup>17</sup> Moreover, in 2003, all 184 ABA-accredited law schools offered at least one course in ADR, with nearly half of the schools offering a separate course in negotiation.<sup>18</sup> Yet even with these curricular developments, the cross-cultural negotiations subject is seen in less than two percent of law schools nationwide.<sup>19</sup> The following section discusses likely reasons for the small number and a critique thereof.

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<sup>15</sup> WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 552 (1993).

<sup>16</sup> THE UNIVERSITY OF MICHIGAN LAW SCHOOL: INTERNATIONALISM, *available at* <http://www.law.umich.edu/prospectivestudents/Admissions/internationalism.htm> (last updated Aug. 11, 2004). Or, as Professors Rubin and Sander state:

The world is obviously a smaller place than it once was: Multinational corporations do business around the world and around the clock . . . . The transactions are increasingly complex and multicultural. Hence attempts to resolve disagreements through negotiation increasingly require sensitivity to the possible contributing role of cultural differences.

Rubin & Sander, *supra* note 3, at 249.

<sup>17</sup> THE UNIVERSITY OF MICHIGAN LAW SCHOOL: INTERNATIONALISM, *supra* note 16.

<sup>18</sup> SCHOOL OF LAW, UNIVERSITY OF OREGON, ABOUT THIS DIRECTORY: INTRODUCTION, *supra* note 9.

<sup>19</sup> A course in cross-cultural negotiations would appear to be a logical part of the curriculum at the school whose mission is to achieve "world peace through international law" and whose "legal-education program . . . [is] devoted to a comprehensive vision that includes . . . increased understanding among the world's culturally diverse nations and regions." CORNELL LAW SCHOOL, CORNELL LAW SCHOOL'S COMMITMENT: WORLD PEACE THROUGH LAW, <http://www.lawschool.cornell.edu/international/> (last visited Jan. 22, 2005) (emphasis added).

### A. *Dispute Resolution/Negotiation Law?*

Many see cross-cultural negotiations as part of ADR, now an established field in law practice, scholarship, and curriculum. In essence, ADR advances the idea of resolving legal disputes by methods other than the traditional means of court adjudication. As Professor Jean Sternlight has recently observed, in just three decades, "ADR has clearly arrived in a big way. Many, if not most, federal and state jurisdictions include ADR methods in their court rules. Federal and state administrative agencies are increasingly relying on non-litigious methods to resolve disputes."<sup>20</sup> All law schools offer at least one course in the subject,<sup>21</sup> and there are now full-time professional mediators and arbitrators.

Yet the ADR movement as a whole is still seen as "counter-cultural," that is, counter to the traditional view in legal circles (and perhaps in the rest of society) that if a dispute of a legal dimension arises, one retains a lawyer to prosecute or defend a claim in a court of law.<sup>22</sup> ADR may well provide an alternative to the "lawyer's standard philosophical map"<sup>23</sup> and its "traditional, narrow, adversarial"<sup>24</sup> method of dispute resolution by court adjudication. But, apparently, some still prefer to navigate the resolution of

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<sup>20</sup> Jean R. Sternlight, *ADR Is Here: Preliminary Reflections on Where It Fits in a System of Justice*, 3 NEV. L.J. 289, 290 (2002/2003) (footnotes and citations omitted).

<sup>21</sup> SCHOOL OF LAW, UNIVERSITY OF OREGON, ABOUT THIS DIRECTORY: INTRODUCTION, *supra* note 9. The now-notorious, widely-read, and annual *U.S. News & World Report* law school rankings provide a separate list of rankings for schools with a dispute resolution specialization. See Special Report, *America's Best Graduate Schools 2004*, Law Schools, Specialty Rankings, Dispute Resolution, U.S. NEWS & WORLD REP., Apr. 12, 2004.

<sup>22</sup> Professor Sally Engle Merry put it another way:

ADR challenges traditional understandings of the centrality of adjudication to the maintenance of social order in modern society. It expresses an anti-law ideology, claiming that nonadversarial ways of resolving conflict can create a better world. ADR urges the legal profession to move away from its exclusive focus on the use of courts to resolve conflicts and to consider a broader spectrum of problemsolving approaches.

Sally Engle Merry, *Disputing Without Culture*, 100 HARV. L. REV. 2057, 2058 (1987) (reviewing STEPHEN B. GOLDBERG ET AL., *DISPUTE RESOLUTION* (1985)).

<sup>23</sup> Leonard L. Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29, 43 (1982). This "map" is premised on the assumption that disputes involving adversaries result in a loser and a winner after the application of the general rule of law. *Id.* at 44.

<sup>24</sup> Leonard L. Riskin, *Mindfulness: Foundational Training for Dispute Resolution*, 54 J. LEGAL EDUC. 79, 81 (2004).

disputes by taking paths outlined in the traditional map over “the one less traveled by.”<sup>25</sup> In short, law practitioners are still skeptical of ADR.<sup>26</sup>

Those who find ADR unsatisfying suggest that parties to a dispute do not normally resort to ADR if the dispute is “really” worth something. Or, as Professor Monroe H. Freedman writes, even “those who most strongly favor ADR do not, themselves, rely on it when they have something important at stake.”<sup>27</sup> He intimates that for all of the virtues of ADR, the reality is that parties are more likely to agree to negotiate a settlement when they realize that they have a weak case, or when they are figuratively pushed up against a wall and are convinced that they could be held there until they decide to settle.<sup>28</sup>

Thus, there is a lingering sense that ADR as a field in law is overrated, and that it is already overrepresented in the law school curriculum, often at the expense of substantive law courses. The subject of negotiation bears the brunt of this charge. A colleague reports the sentiment occasionally heard from law practitioners and faculty that negotiation cannot really be taught or learned in a class.<sup>29</sup> Perhaps another criticism is that negotiation is a subject that lacks a law or legal connection.<sup>30</sup> (At least with mediation and

<sup>25</sup> ROBERT FROST, *THE ROAD NOT TAKEN* (1916), *quoted in BARTLETT'S FAMILIAR QUOTATIONS*, *supra* note 1, at 623.

<sup>26</sup> The comments of Professor Frank E.A. Sander, the leading figure of the ADR movement, indicates the “double life” of ADR:

When people ask me about the state of ADR, I say—not entirely facetiously—on Monday, Wednesday, and Friday, I think it's amazing what's happened . . . . But on Tuesday, Thursday, and Saturday, I think it's all like a grain of sand on the beach; that is, *many lawyers still have a lot of resistance.*

Frank E.A. Sander, *Some Concluding Thoughts*, 54 J. LEGAL EDUC. 115; 115 (2004) (emphasis added).

<sup>27</sup> See Monroe H. Freedman, *The Trouble with Postmodern Zeal*, 38 WM. & MARY L. REV. 63, 68 (1996). Professor Freedman continues: “[A]fter a serious dispute has risen it is always better to negotiate from a position of strength.” *Id.* at 69. Similarly, in the words attributed to Al Capone, “You can go a long way with a smile. You can go a lot farther with a smile and a gun.” The Quotations Page, *Quotations by Author*, Al Capone (1899–1947), at [http://www.quotationspage.com/quotes/Al\\_Capone](http://www.quotationspage.com/quotes/Al_Capone) (last visited Jan. 20, 2005).

<sup>28</sup> Freedman, *supra* note 27, at 69.

<sup>29</sup> E-mail from Leonard Riskin, C.A. Leedy Professor of Law & Director, Center for the Study of Dispute Resolution, University of Missouri-Columbia School of Law, to author (Nov. 11, 2004, 18:24 CST) (copy on file with author). For the record, my colleague strongly disagrees with this sentiment. *Id.*

<sup>30</sup> An acquaintance of mine, confounded by the notion of law professors specializing in the subject of negotiation, referred to the work of a faculty member at his law school alma mater (and who is a co-author of the totemic *Getting to YES*), as “such bull----.”



arbitration, law is present in the form of statutes, model acts, case law, or treaties.<sup>31</sup>) With this backdrop, the subject of cross-cultural negotiation is seen as a subset of negotiation; if negotiation does not receive much respect, cross-cultural negotiation receives less, is more suspect, and even more lacking in a law connection. Even those who are sympathetic to a course on negotiation would have trouble mustering the support of a course devoted to culture *and*, or *in*, negotiation.

The lingering skepticism of ADR<sup>32</sup> and of the inclusion of negotiation in the law curriculum is problematic for supporters of cross-cultural negotiation. Although it is true that negotiation is not directly governed by the “positive” law—constitutions, statutes, case law, and the like—it does have a basic legal foundation. The Model Rules of Professional Conduct provide that, “As a representative of clients, a lawyer performs various functions,” including not only that of an advocate, but also, explicitly, of a “negotiator.”<sup>33</sup> Moreover, no less an authority than Professor Kingsfield declared that the purpose of the law school experience is to develop in students “the ability to analyze the vast complex of facts that constitute *the relationships of members within a given society*.”<sup>34</sup> If the subject society is that of the United States, and if the society is indeed pluralist and multicultural, culture is inevitably a part of the “vast complex of facts” that counsel must be able to analyze in the representation of the client’s interests. If the given society is the global world, culture’s impact on the representation

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<sup>31</sup> For a discussion of the Uniform Mediation Act, see Monica Rausch, *The Uniform Mediation Act*, 18 OHIO ST. J. ON DISP. RESOL. 603 (2003). The Federal Arbitration Act is the federal statute governing arbitration in the United States. Arbitration Act of 1925, 9 U.S.C. § 1 (2000). Regarding international arbitration, member countries of the New York Convention agree to enforce valid arbitration awards. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, art. 3, 21 U.S.T. 2517, 2519; 330 U.N.T.S. 3, 38.

<sup>32</sup> Perhaps ADR will yet see the day when its place in the law school curriculum will be as unquestioned as that of intellectual property, bearing in mind that, until the 1970s, the legal academy “generally regarded intellectual property law as a subject of modest intellectual merit[.]” William P. Alford, *How Theory Does—and Does Not—Matter: American Approaches to Intellectual Property Law in East Asia*, 13 UCLA PAC. BASIN L.J. 8, 9 (1994).

<sup>33</sup> MODEL RULES OF PROF’L CONDUCT R. 1 (2003). “As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealing with others.” *Id.* The Rules also contemplate that a lawyer performs functions as “advisor,” “advocate,” “intermediary between clients,” and “evaluator.” *Id.*

<sup>34</sup> THE PAPER CHASE (Twentieth Century Fox 1973) (emphasis added). Professor Kingsfield is a fictional character, of course, but also an icon in the traditional legal education culture.

of interests and rights may be more obvious, making the study of culture more important.

There is also the view that the subject of cross-cultural negotiations is simply too thin and simple, such that it could be addressed in an hour's session (or two) in a negotiation or survey ADR course, perhaps by a guest lecturer with experience in negotiating with a party from a far away land or a "radically different culture."<sup>35</sup> Indeed, this is not far from the typical offering in most law schools today.<sup>36</sup> This view suggests a great misperception about what culture and cross-cultural negotiations mean, and about the course content as a whole. A related view is that the cross-cultural component is such a narrow, specialized, rarefied aspect of negotiations that a separate course is not necessary, especially at a time when law schools face limited and sometimes declining resources. Budgetary and staffing considerations present challenging realities in all schools.<sup>37</sup> Yet, one wonders if the subject of cross-cultural negotiations is any more specialized than any one of non-traditional subjects included in the law curriculum, especially at the elite law schools.<sup>38</sup> That Islamic law, for example, is offered at a small number of

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<sup>35</sup> LEONARD L. RISKIN & JAMES E. WESTBROOK, *DISPUTE RESOLUTION AND LAWYERS* 270 (2d ed. 1997).

<sup>36</sup> Or some may prefer more substantial discussion, and find adequate a one-day conference or symposium, with panel sessions and speakers. On February 28, 2003, the *Harvard Negotiation Law Review*, Harvard Law School's Program on Negotiation, and Harvard Business School's Consortium on Global Leadership sponsored a conference entitled *Overcoming Cultural Barriers in International Negotiations: A Conference On Success in Diplomacy & International Transactions*. PROGRAM ON NEGOTIATIONS AT HARVARD LAW SCHOOL, *OVERCOMING CULTURAL BARRIERS IN INTERNATIONAL NEGOTIATIONS*, available at [http://www.pon.harvard.edu/news/2003/hnlr\\_overcoming.php3](http://www.pon.harvard.edu/news/2003/hnlr_overcoming.php3) (modified June 9, 2003) [hereinafter *Overcoming Cultural Barriers Conference*]. The conference consisted of two consecutive panels, "Diplomacy" and "Transactional," and featured a number of informative speakers from government, law practice, and various academic disciplines. The panel sessions are available on an Internet webcast. *Id.* at Part I, Part II. Ideally, such a conference could serve as a revealing complement to, but not a substitute for, the cross-cultural negotiations course.

<sup>37</sup> See Paul Brest, *Skeptical Thoughts: Integrating Problem Solving into Legal Curriculum Faces Uphill Climb*, *DISP. RESOL. MAG.*, Summer 2000, at 20, 22 (noting former law dean's view that courses that teach problem-solving skills are especially susceptible to elimination in times of limited resources). For a response to Brest, see Frank E.A. Sander & Robert H. Mnookin, *A Worthy Challenge: The Teaching of Problem Solving in Law Schools*, *DISP. RESOL. MAG.*, Summer 2000, at 21.

<sup>38</sup> For example: Columbia Law School, Courseweb, *Biblical Jurisprudence*, at [https://coursewebs-3.law.columbia.edu/coursewebs/cw\\_03F\\_L9453\\_001.nsf/PublicDiscFrameset?OpenFrameset](https://coursewebs-3.law.columbia.edu/coursewebs/cw_03F_L9453_001.nsf/PublicDiscFrameset?OpenFrameset) ("focus[ing] on jurisprudential issues as they arise in Hebrew and

schools is encouraging given the world state of affairs, but that same state should also call for more attention to the study of culture's impact on negotiation and dispute resolution.<sup>39</sup>

### B. *Culture Kaput*

Perhaps another reason for the limited attention to cross-cultural negotiations in the law curriculum is that culture is not held to be significant or relevant to the subject of dispute resolution.<sup>40</sup> Indeed, some argue whether

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Christian Bibles”) (last visited Jan. 20, 2005); Columbia Law School, Courseweb, Prosecuting Violent Gangs, at [https://coursewebs-3.law.columbia.edu/coursewebs/cw\\_04S\\_L9167\\_001.nsf/PublicDiscFrameset?OpenFrameSet](https://coursewebs-3.law.columbia.edu/coursewebs/cw_04S_L9167_001.nsf/PublicDiscFrameset?OpenFrameSet) (“examin[ing] the investigation and prosecution of violent gangs,” and including examination and discussion of “definitions of ‘gangs’ and ‘gang activity’”) (last visited Jan. 20, 2005); University of Michigan Law School, Law School Course Descriptions, Animal Law, at [http://cgi2.www.law.umich.edu/\\_ClassSchedule/aboutCourse.asp?crse\\_id=038599](http://cgi2.www.law.umich.edu/_ClassSchedule/aboutCourse.asp?crse_id=038599) (“[A]n introduction to the expanding law that regulates human treatment of animals.”) (last visited Jan. 20, 2005); University of Michigan Law School, Law School Course Descriptions, Bloodfeuds, at [http://cgi2.www.law.umich.edu/\\_ClassSchedule/aboutCourse.asp?crse\\_id=030026](http://cgi2.www.law.umich.edu/_ClassSchedule/aboutCourse.asp?crse_id=030026) (“An investigation of disputing and dispute processing in Iceland of the saga age with side glances at pre-Conquest England and some contemporary pre-industrial, kin-based cultures.”) (last visited Jan. 20, 2005); University of Michigan Law School, Law School Course Descriptions, Legal Imagination, at [http://cgi2.www.law.umich.edu/\\_ClassSchedule/aboutCourse.asp?crse\\_id=030110](http://cgi2.www.law.umich.edu/_ClassSchedule/aboutCourse.asp?crse_id=030110) (“A study of the ways in which lawyers think and speak.”) (last visited Jan. 20, 2005).

<sup>39</sup> Currently, more law schools offer a course in Islamic or Muslim law than in cross-cultural negotiations.

<sup>40</sup> Regarding culture in the social sciences generally, one is reminded of the views of political science Professor Chalmers Johnson, purportedly “[o]ne of the most dedicated of the anti-culturalists.” Robert J. Smith, *Culture as Explanation: Neither All Nor Nothing*, 22 CORNELL INT’L L.J. 425, 429 (1989). Professor Johnson decried the practice of social scientists explaining particular practices, traits, or features of societies with “fundamental cultural differences” or “unique cultures.” Chalmers Johnson, Book Review, 41 MONUMENTA NIPPONICA 245, 245 (1986) (reviewing ANDREW GORDON, *THE EVOLUTION OF LABOR RELATIONS IN JAPAN, 1853–1955* (1985)). He added that social scientists who offer the cultural explanation do so “even when they doubt whether that is true or are wholly ignorant of the matter.” *Id.* Thus, Professor Johnson counseled that those interested in learning about, for example, industrial development in Japan “would be well advised to study more Japanese history and institutions, and pay less attention to the purveyors of Japan’s unique culture.” *Id.* at 247. A professor of anthropology responded that the concept of culture is “totally misrepresented” in Johnson’s review, just as are history and the institutions misunderstood. Smith, *supra*, at 429. Culture is not a chimera, warned Professor Smith. *Id.*

culture should be studied in the dynamic of disputes and dispute resolution at all.<sup>41</sup> This approach posits that negotiation is negotiation, dispute resolution is dispute resolution, and culture is not a factor of much relevance. As Professors Rubin and Sander write, those espousing such a view may argue that even if there are cultural differences, “there really are no differences of any consequences; the underlying process of negotiation is thus assumed to be generalizable across boundaries of setting and culture/nationality.”<sup>42</sup> Professors John W. Burton and Dennis J. D. Sandole, emphasizing “universal patterns of behavior”<sup>43</sup> and the “generic nature of conflict,”<sup>44</sup> conclude that “the theory of Conflict Resolution must be treated as a generic theory.”<sup>45</sup> Thus, they say, “Generic theory implies explanation that transcends observable differences in human behavior—racial, *cultural* and institutional.”<sup>46</sup>

With respect to the impact of culture on the negotiation process, few commentators have expressed more blunt skepticism than Professor I. William Zartman. He begins promisingly enough with the statement that, “Culture is indeed relevant to the understanding of the negotiation process,” then finishes with the near dyspeptic, “every bit as relevant as breakfast and to much the same extent.”<sup>47</sup> To Professor Zartman, “Culture is to negotiation what birds flying into engines are to flying airplanes or, at most, what weather is to aerodynamics—practical impediments that need to be taken into account (and *avoided*) . . . .”<sup>48</sup> Culture, he concludes, is

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<sup>41</sup> Chew, *supra* note 5, at 60.

<sup>42</sup> Rubin & Sander, *supra* note 3, at 253. See also Faure & Sjöstedt, *supra* note 5, at 1 (“Often negotiations are described or modeled as a process entailing rational choice, with little explanatory room for such factors as culture.”).

<sup>43</sup> John W. Burton & Dennis J.D. Sandole, *Generic Theory: The Basis of Conflict Resolution*, 2 NEGOT. J. 333, 334 (1986).

<sup>44</sup> *Id.* at 333.

<sup>45</sup> *Id.* at 341.

<sup>46</sup> *Id.* at 334 (emphasis added). Such views, of course, are not unanimously held. For example, sharply critical of a generic theory of dispute resolution, Professors Kevin Avruch and Peter W. Black announced an agenda to show how “the concept of culture can contribute to a theory of conflict and conflict resolution.” Kevin Avruch & Peter W. Black, *A Generic Theory of Conflict Resolution: A Critique*, 3 NEGOT. J. 87, 95 (1987). Burton and Sandole replied. John W. Burton & Dennis J. D. Sandole, *Expanding the Debate on Generic Theory of Conflict Resolution: A Response to a Critique*, 3 NEGOT. J. 97 (1987).

<sup>47</sup> I. William Zartman, *A Skeptic’s View*, in CULTURE AND NEGOTIATION, *supra* note 5, at 17.

<sup>48</sup> *Id.* at 19 (emphasis added). With respect to the colorful analogy, Professor Avruch responds, “[O]ne . . . shudders at the consequences of birds in turbines or sudden

“epiphenomenal.”<sup>49</sup> Zartman’s views appear to be based on what is likely the single most widespread misperception of culture, namely, that understanding culture is merely having a list of dos and don’ts when negotiating with persons from foreign countries.<sup>50</sup> Zartman all but endorses this view of culture, stating, “Most cultural analyses focus on the way certain people do other things than negotiation (Do not show the soles of your feet, Do not backslap, Do develop a relationship) and the effects these things have on negotiations.”<sup>51</sup> To Zartman, “An understanding of national idiosyncrasies that can make negotiations smoother and avoid misunderstandings is knowledge that is helpful,” just as helpful, one presumes, as eating a good breakfast on the day of negotiation, “but scarcely profound or basic to an understanding of the negotiation process itself.”<sup>52</sup>

In contrast to those who reject altogether the importance of the study of culture on negotiation and dispute resolution, as well as those who urge such study, others, like Professor Russell Korobkin, offer a qualified endorsement. Initially, he posits that “even if those differences between cultures do lead to systematic differences in negotiating behavior, individual variation will often be far more important for understanding the conduct of any particular

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wind shear: crashes and catastrophe and death. What are the consequences of international negotiations that ‘crash’ along analogous lines? In some cases, they are also catastrophe and death.” AVRUCH, *CULTURE AND CONFLICT RESOLUTION*, *supra* note 11, at 43.

<sup>49</sup> Zartman, *supra* note 47, at 19.

<sup>50</sup> To culturalists, this misperception is also one of the most annoying, resulting in a somewhat defensive tone in some of their responses.

<sup>51</sup> Zartman, *supra* note 47, at 19. Other items could be added to this list. For example: “‘don’t offer your left hand to an Arab’; ‘don’t pat a Buddhist on the head’; ‘don’t expect the Latin Americans to be on time for the meeting.’” Kevin Avruch, *Culture as Context, Culture as Communication: Considerations for Humanitarian Negotiators*, 9 HARV. NEGOT. L. REV. 391, 393 (2004). Others include “learn how to deeply bow to a Japanese negotiator [and] understand the protocols for offering refreshment to a Turkish counterpart.” Jayne Seminare Docherty, *Culture and Negotiation: Symmetrical Anthropology for Negotiators*, 87 MARQ. L. REV. 711, 713 (2004).

<sup>52</sup> Zartman, *supra* note 47, at 19. To be clear, the study of culture’s impact on negotiations and the dispute resolution process is not merely about “idiosyncrasies,” protocol, etiquette, or do’s and don’t’s. At Missouri-Columbia, when these points are discussed, often in asides, they are but a small part of the course. As Professor Avruch has cautioned, approaching cultures “as collections of static traits and customs” leaves out much of the dynamism that characterize cultures. Avruch, *supra* note 51, at 393. “To try to learn about another culture from lists of traits and custom is akin to trying to learn English by memorizing the Oxford English Dictionary—all vocabulary, no grammar.” *Id.* The substance of the course, as discussed herein, offers quite a bit more.

negotiation than cultural variation.”<sup>53</sup> Indeed, individual variation within a group cannot be ignored.<sup>54</sup> But, understanding culture also means an attempt to ascertain the modal tendencies of groups<sup>55</sup> whenever possible. Whether individual variation or cultural variation has more impact in a given negotiation depends, of course, on the specific individuals, cultures, and negotiation involved. Ultimately, however, Professor Korobkin’s conclusion that “studying the role of culture in negotiation is *arguably* still a useful endeavor”<sup>56</sup> can be read as encouraging, rather than chilling, discussion of the culture question.

### C. *The Culturalists’ Cause*

Commentators from a range of disciplines—business, management, conflict resolution, diplomacy, and law—urge that culture is vitally important in negotiation and must be studied. A beginning point is that, “People everywhere in the world experience conflict, make and reject claims, and try to resolve disputes.”<sup>57</sup> In the resolution of disputes then, culture is a common characteristic, and its presence inevitable.<sup>58</sup> “[C]ulture shapes the way we approach conflict and conflict resolution—including our values, norms, and conduct. It even influences how we define conflict itself and what we consider acceptable or desirable goals of problem solving.”<sup>59</sup> Culture is not present only during in-person negotiations. As Professors Rubin and Sander note, “Some of the most important effects of culture are felt even before the negotiators sit down across from one another and begin to exchange offers.”<sup>60</sup> Culture affects much in the process, including “negotiators’ assumptions about when and how to negotiate . . . negotiators’ interests and

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<sup>53</sup> RUSSELL KOROBKIN, *NEGOTIATION THEORY AND STRATEGY* 271 (2002).

<sup>54</sup> See *infra* text accompanying note 102.

<sup>55</sup> See CARLEY H. DODD, *DYNAMICS OF INTERCULTURAL COMMUNICATION* 40 (2d ed. 1987).

<sup>56</sup> KOROBKIN, *supra* note 53, at 271 (emphasis added).

<sup>57</sup> JEANNE M. BRETT, *NEGOTIATING GLOBALLY: HOW TO NEGOTIATE DEALS, RESOLVE DISPUTES, AND MAKE DECISIONS ACROSS CULTURAL BOUNDARIES* 78 (2001).

<sup>58</sup> Faure & Sjöstedt, *supra* note 5, at 1. Put another way, “All cultures have conflict, but not all cultures see the same problems as conflicts, nor do they make the same assumptions about how human beings should respond to conflict. All cultures have processes we can identify as negotiation, but they do not all negotiate the same way.” Docherty, *supra* note 51, at 714.

<sup>59</sup> Chew, *supra* note 5, at 61.

<sup>60</sup> Rubin & Sander, *supra* note 3, at 249.

priorities and their strategies, the way they go about negotiating”<sup>61</sup>; “how negotiators reach deals, resolve disputes, . . . make decisions, . . . their agreements”<sup>62</sup>; and “why claims are made and rejected, how claims are made and rejected, how disputes are resolved, and what procedures people use to resolve them.”<sup>63</sup>

Cultural differences, which exist in “negotiators’ goals . . . [,] their conception of power . . . [,] their use of influence . . . , and the way they share information,”<sup>64</sup> can be a barrier,<sup>65</sup> and if not properly addressed, can hamper or obstruct negotiations.<sup>66</sup> Culture can shift “confrontation, motivation, influence, and information strategies.”<sup>67</sup> Culture “is a profoundly powerful organizing prism.”<sup>68</sup> Professor Avruch provides a convenient summary of how culture provides context for conflicts:

Culture determines what manners of things are subjects for competition or objects of dispute, often by postulating their value and relative (or absolute) scarcity: for example, notions of honor or purity, or accumulation of capital and profits. Culture also stipulates rules, sometimes precise, usually less so, for how contests should be pursued, including when they begin and how to end them . . . . [C]ulture provides individuals with cognitive and affective frameworks for interpreting the behavior and motives of self and others.<sup>69</sup>

While culture has an impact, this discussion does not suggest that culture is always or even usually the most critical factor in dispute resolution.<sup>70</sup> Anthropology professor Robert Smith summarizes the presence of culture in

<sup>61</sup> BRETT, *supra* note 57, at xviii.

<sup>62</sup> *Id.* at 3.

<sup>63</sup> *Id.* at 78; *see also* JESWALD W. SALACUSE, *MAKING GLOBAL DEALS: NEGOTIATING IN THE INTERNATIONAL MARKETPLACE* 58–70 (1991) (discussing ten ways culture affects negotiations).

<sup>64</sup> BRETT, *supra* note 57, at 203

<sup>65</sup> STEPHEN B. GOLDBERG ET AL., *DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES* 520 (4th ed. 2003).

<sup>66</sup> RAU ET AL., *supra* note 11, at 906.

<sup>67</sup> BRETT, *supra* note 57, at xviii.

<sup>68</sup> Rubin & Sander, *supra* note 3, at 249.

<sup>69</sup> Avruch, *supra* note 51, at 395–96 (footnote and citation omitted).

<sup>70</sup> SALACUSE, *supra* note 63, at 3 (“Culture is certainly an important factor in making global deals, but it is not the only factor.”); Avruch, *supra* note 51, at 396 (“culture *per se* . . . [is] rarely if ever the main ‘cause’ of conflict . . .”). *But see* Samuel P. Huntington, *The Clash of Civilizations?*, *FOREIGN AFFAIRS*, Summer 1993, at 22 (“The great divisions among humankind and the dominating source of conflict will be cultural.”).

practice: "Cultural factors may loom large in some contexts but play a minor role in others. They cannot serve as the entire explanation for any given development, but they are certain to be of some moment in every case."<sup>71</sup> The issue for planners of the cross-cultural negotiations course in the law curriculum then, is "not whether culture is at play, but the degree to which it affects negotiation."<sup>72</sup> Put another way, culture is rarely if ever *everything*, but may be *in* everything, and the task is to determine how much and its effect.<sup>73</sup>

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<sup>71</sup> Smith, *supra* note 40, at 434.

<sup>72</sup> Faure & Sjöstedt, *supra* note 5, at 2.

<sup>73</sup> To be sure there, there will be detractors, even from those experienced in international law practice. At the *Overcoming Cultural Barriers Conference*, *supra* note 36, one of the speakers on the "Transactional" panel was a senior partner at a major U.S. law firm, with thirty years of experience in international business negotiations. He commented that the impact of culture in international negotiations has diminished over time. "Negotiation *styles* are different," he said, but "[i]t really doesn't make much difference whether I'm negotiating a [contract] with IBM or with [a Taiwanese company]. The issues are largely the same. Yes, the negotiating styles may be somewhat different, but the substance of the negotiation is effectively the same." *Id.* The attorney pointed to four factors that explain the decreasing impact of culture: (1) the world is becoming more global; (2) CNN and the Internet have exposed everyone to foreign countries, "so many things are not so strange to us; the use and influence of e-mail has helped to break down formalistic barriers"; (3) international expansion has led to creation of global marketing consulting firms; and (4) in the event of dispute, international legal resources are addressed by international conventions, thus international law, and not national standards, are applied. *Id.*

One must certainly yield to experience; indeed, on the subject of culture and negotiations, experience is a good educator. Yet, the speaker's comments raise questions and invite more discussion. What about the view that different cultures have different views on what a contract is? Some see a contract as a memorialization of agreed terms and conditions, while others see it as the beginning of a relationship between business partners. Indeed, one of the panel speakers referred to the practice of some negotiators seeking to re-work the contract after it has been signed. Regarding the four supporting factors, even if CNN and the Internet expose practices of foreign cultures, they have not done away with the need for global marketing consulting firms. Moreover, even if there are international conventions and treaties that more and more countries have agreed to, this is not necessarily of significance unless there is relatively uniform international interpretation and application. Do all countries read and interpret the legal structures and requirements with the same understanding, or might they be affected by culturally constructed notions of "notice," "materiality," "fairness," "reasonableness," and even "law"? See generally Grant Ackerman et al., *Culture, Law and Justice* (forthcoming article).



### D. *Thoughts Toward a Course*

Culture matters.<sup>74</sup> The subject of culture and dispute resolution has been mostly neglected in the law curriculum.<sup>75</sup> Before addressing the specifics of the course content, two preliminary thoughts are addressed. First, notwithstanding questions and skepticism of a law course that examines culture's relationship to dispute resolution, the notion of culture (or to be more specific, local legal culture) is familiar to many in the legal community. Second, even with the common appreciation of the relevance of culture, there is still the question of how a full course in the law curriculum is justified. These two points are elaborated on in turn.

Litigation lawyers especially know of the notion of a "local culture" that varies from district to district, state to state, and region to region. What many have suspected was confirmed in an illuminating work by Professor Thomas Church, *Examining Local Legal Culture*, which examined the practices of four court systems in disposing of criminal cases.<sup>76</sup> Sharply questioning the general notion that law is law and is applied neutrally by a neutral forum, Professor Church found the presence of shared norms and attitudes by local practitioners, judges, court staff, and law enforcement, resulting in cases being handled differently from court to court. A sense of ethnocentrism was also seen in the four courts, in that there was "not simply a general contentment with the existing pace of litigation in their courts—no matter how fast or slow—but a firm belief that this *pace was really the only proper one*, that any significant slowing down *or* speeding up would almost

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<sup>74</sup> BRETT, *supra* note 57, at 203 (chapter heading).

<sup>75</sup> Perhaps it is the lack of attention to culture in the curriculum, along with the increasing interest in the subject that explains the frequent mention of the subject in the law commentary in recent years. See Avruch, *supra* note 51; Chew, *supra* note 5; Docherty, *supra* note 51; Diana Eades, "I Don't Think the Lawyers Were Communicating With Me": *Misunderstanding Cultural Differences in Communicative Style*, 52 EMORY L.J. 1109, 1134 (2003) (stating that legal training should include sociolinguistic training); Daniel Q. Posin, *Mediating International Business Disputes*, 9 FORDHAM J. CORP. & FIN. L. 449, 465–74 (2004) (discussing cross-cultural issues in mediation); see also Amanda Stallard, Note, *Joining the Culture Club: Examining Cultural Context When Implementing International Dispute Resolution*, 17 OHIO ST. J. ON DISP. RESOL. 463, 467 (2002) (noting that as globalization continues, lawyers must be increasingly aware of culture).

<sup>76</sup> Thomas W. Church, Jr., *Examining Local Legal Culture*, 1985 AM. B. FOUND. RES. J. 449, 449 (1985). The four courts examined were the Allegheny County Court of Common Pleas, Pittsburgh, Pennsylvania; the Bronx County Supreme Court, New York, New York; the Dade County Circuit Court, Miami, Florida; and the Detroit Recorder's Court, Detroit, Michigan. *Id.* at 454.

certainly produce injustice.”<sup>77</sup> Some may respond that a local culture that varies from locality to locality, potentially affecting the client’s interests and rights, can be addressed simply enough by wise selection of capable local counsel.<sup>78</sup> If cross-cultural negotiation means dealing in a foreign *forum*, whether beyond the home locale, state, or country, advisors familiar with the local culture may be retained to assist in the preparations and negotiations. Moreover, the matter of negotiation with a foreign *party* is not a novel concept, since learning as much as possible about “the other side” and being prepared is a general lesson for any lawyer. Thus, some may question why a full course is necessary to impress upon students the importance of obtaining local counsel and being prepared.<sup>79</sup> In short, what would the cross-cultural negotiations course contain? This question is addressed in the following section, which provides a framework for the course.

## II. THE COURSE

The cross-cultural negotiations course in the law curriculum would reflect legal education’s acknowledgment of the role of culture in the dispute resolution process, and introduce to students the cultural dimension in legal

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<sup>77</sup> *Id.* at 450 (first emphasis added).

<sup>78</sup> See 2 LAWRENCE G. CETRULO, *TOXIC TORTS LITIGATION GUIDE* § 12:18 (2002) (“Local counsel’s greatest challenge may be harmonizing the company’s national strategy with the interests of the local co-defendants and the local legal culture, ethics, custom, and practice.”); Karen Cordry, *Government Entities in Your Bankruptcy Case: Why Are They There and What Do They Want? What Do States Want?*, American Bankruptcy Institute, Eleventh Annual Southwest Bankruptcy Conference (Sept. 18–21, 2003), available at 091803 ABI-CLE 59 (“To be sure, if there is going to be major litigation, a party would likely be well advised to hire local counsel for the dual purposes of explaining the local culture, as well as for ease in filing papers and perhaps occasionally to make emergency appearances.”); Andrea M. Seielstad, *Unwritten Laws and Customs, Local Legal Cultures, and Clinical Legal Education*, 6 *CLINICAL L. REV.* 127, 184 n.147 (1999) (“[M]any ‘unwritten rules’ of local legal culture may be invoked by local counsel, judges, and magistrates . . .”).

<sup>79</sup> See ADLER, *supra* note 2, at 216 (“In preparing for an international negotiation, team members should learn as much as possible about the foreign culture, its negotiating patterns, and especially its style of negotiating with outsiders, and then approach the actual bargaining sessions with as wide a range of options and alternatives—in behavior and substance—as possible.”); Rubin & Sander, *supra* note 3, at 253 (“[P]robably the wisest thing any of us can do to prepare for such negotiation [with others with cultural differences] is to: be aware of our biases and predispositions; acquire as much information as possible about our counterpart as an individual; and learn as much as we can about the norms and customs (of all kinds) that are to be found in our counterpart’s home country.”).

relations between parties.<sup>80</sup> This section does not attempt a comprehensive description of a proper course. Rather, major themes to be included in the course are addressed: (a) the meaning of culture; (b) some of the specific cultural differences between groups; (c) ways in which differences can impact dispute resolution efforts; and (d) the possible role of legal counsel.<sup>81</sup> These themes collectively are designed to introduce students to an important aspect of dispute resolution methods and practices.

### A. *The Meaning of Culture*

In a course that purports to examine the impact of culture on negotiations and the dispute resolution process, a beginning task is understanding what culture means, and also appreciating the difficulty of the task. Commentators in anthropology, the principal departmental home of culture for many years, agonize over defining the term.<sup>82</sup> In contrast, there has been much less concern about the need for a definition in legal circles, where the term is used frequently in discourse, with apparent abandon. For example, those in law commonly refer to the “law firm culture” or a specific “firm culture”; law schools might describe candidates for a deanship as particularly compatible with a particular “school culture.” In more formal discourse, in actions alleging employment discrimination, it is not uncommon for the parties or the courts to comment on the “corporate culture” of the defendant organization.<sup>83</sup> All of these phrases are used with little effort to define the main term. Perhaps there is in law a sense that “culture” is widely understood, and that the academic exercise of providing a definition is not

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<sup>80</sup> Professor Docherty observes that although there has been “an increasing awareness of the importance of culture in negotiation . . . [w]e have not yet integrated the richest understanding of culture into our curricula or our practice.” Docherty, *supra* note 51, at 722. This Article makes the attempt on the curriculum front.

<sup>81</sup> The suggested course content herein borrows from the Ackerman model of the course, first taught at Pepperdine. *See supra* note 9. The content also parallels the method of studying culture in the management field, as urged by Schneider and Barsoux. SUSAN C. SCHNEIDER & JEAN-LOUIS BARSOUX, *MANAGING ACROSS CULTURES* 1–2 (2d ed. 2003).

<sup>82</sup> *See* sources cited *infra* note 87.

<sup>83</sup> *Dunkin’ Donuts Mid-Atlantic Distrib. Ctr., Inc. v. NLRB*, 363 F.3d 437, 442 (D.C. Cir. 2004) (quoting NLRB’s finding of “a corporate culture of lawlessness”); *Townsend Indus., Inc. v. United States*, 342 F.3d 890, 894 n.3 (8th Cir. 2003) (noting corporate culture that “love[s] surprises”); *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1307 (2d Cir. 1995) (referring to plaintiff’s testimony that defendant’s “corporate culture . . . encouraged drinking”). A suggested definition of “corporate culture” appears *infra* note 111.

worth the time.<sup>84</sup> Indeed, when Chief Justice Rehnquist wrote for the Court that “*Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture,”<sup>85</sup> the statement was pithy, convenient, and, one presumes, self-explanatory.<sup>86</sup>

<sup>84</sup> There is the statement that efforts to define certain “intuitive concepts . . . are often both futile and unnecessary. We use with perfect clarity many words that we can’t define, such as ‘time,’ ‘number,’ ‘beauty,’ and ‘law.’” *Publ’ns Int’l, Ltd. v. Landoll, Inc.*, 164 F.3d 337, 339 (7th Cir. 1998) (Posner, C.J.).

<sup>85</sup> *Dickerson v. United States*, 530 U.S. 428, 443 (2000) (Rehnquist, C.J.) (citing *Mitchell v. United States*, 526 U.S. 314, 331–32 (1999) (Scalia, J., dissenting)). Justice Stevens had previously written that “the *Miranda* rule [is] now so deeply embedded in our culture that most schoolchildren know not only the warnings, but also when they are required.” *Oregon v. Elstad*, 470 U.S. 298, 370 n.13 (1985) (Stevens, J., dissenting) (citations omitted) (emphasis added).

<sup>86</sup> The term “culture” has appeared in a number of Court opinions, often with the first person plural possessive form preceding it. Although an exhaustive analysis is not attempted here, the Court’s references to “culture” fall in a few common categories:

Religious freedom. *E.g.*, *Elk Grove Unified Sch. Dist. v. Newdow*, 124 S. Ct. 2301, 2319 (2004) (Rehnquist, C.J., concurring) (“[O]ur national culture allows public recognition of our Nation’s religious history and character.”); *Lynch v. Donnelly*, 465 U.S. 668, 709 (1984) (Brennan, J., dissenting) (“[T]he Christmas holiday in our national culture contains both secular and sectarian elements.”); *McGowan v. Maryland*, 366 U.S. 420, 460 (1961) (Frankfurter, J., concurring) (“[F]undamental to our American culture [is] the principle that the enforcement of religious belief as such is no legitimate concern of civil government . . . .”); *Illinois ex rel. McCollum v. Bd. of Ed.*, 333 U.S. 203, 236 (1948) (Jackson, J., concurring) (“The fact is that, for good or for ill, nearly everything in our culture worth transmitting, everything which gives meaning to life, is saturated with religious influences . . . .”).

American “legal culture” and “constitutional culture”. *E.g.*, *Lewis v. United States*, 523 U.S. 155, 179 (1998) (Scalia, J., concurring); *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 599 (1996) (Scalia, J., dissenting); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1028 (1992) (Scalia, J.); *Planned Parenthood v. Casey*, 505 U.S. 833, 957 (1992) (Rehnquist, C.J., concurring in part, dissenting in part); *Patterson v. Shumate*, 504 U.S. 753, 766 (1992) (Scalia, J., concurring); *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18, 38 (1981) (Blackmun, J., dissenting).

American popular culture. *E.g.*, *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 495 (1996) (splintered opinion) (“Advertising has been a part of our culture throughout our history.”); *United States v. Nat’l Treasury Employees Union*, 513 U.S. 454, 465 (1995) (Stevens, J.) (“Respondents have yet to make . . . contributions to American culture [comparable to those of Nathaniel Hawthorne, Herman Melville, Walt Whitman, and Bret Harte] . . . .”); *Ginzburg v. United States*, 383 U.S. 463, 486–87 (1966) (Douglas, J., dissenting) (“The appeal is to the ribald sense of humor which is—for better or worse—a part of our culture.”).

Then, there is Professor Fried’s statement: “[I]n our culture the excretory functions are shielded by more or less absolute privacy . . . .” Charles Fried, *Privacy*, 77 YALE L.J. 475, 487 (1968), which the Court has quoted occasionally, *e.g.*, *Vernonia Sch. Dist.* 47J

The considerable bibliography on the meaning of culture indicates a discussion on the search for the definition over time, numerous proposed definitions (perhaps nearly as many as the number of authors), and occasionally, the sheer angst of the pursuit.<sup>87</sup> Oft-quoted characterizations about culture include the statements that it is “one of the two or three most complicated words in the English language”<sup>88</sup> and that over 100 definitions have been catalogued.<sup>89</sup> Part of understanding culture is appreciating that the

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v. Acton, 515 U.S. 646, 672 (1995) (O'Connor, J., dissenting); Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 646 (1989) (Marshall, J., dissenting).

<sup>87</sup> See, e.g., IRWIN ALTMAN & MARTIN CHEMERS, *CULTURE AND ENVIRONMENT* 3 (1980); JAMES CLIFFORD, *THE PREDICAMENT OF CULTURE* 13 (1988); Clifford Geertz, *Thick Description: Toward an Interpretive Theory of Culture*, in *THE INTERPRETATION OF CULTURES* 3, 25 (1973) (admitting that characteristics of cultural interpretation make it “more than usually difficult”); ROGER M. KEESING, *CULTURAL ANTHROPOLOGY* 11 (2d ed. CBS College Publishing 1981) (1976); CLYDE KLUCKHOHN, *CULTURE AND BEHAVIOR* 22–25 (Richard Kluckhohn ed., 1962); A. L. KROEBER, *ANTHROPOLOGY: CULTURE PATTERNS AND PROCESSES* 60–64 (Harbinger Books 1963) (1948) (attempting to define culture); A. L. KROEBER & CLYDE KLUCKHOHN, *CULTURE: A CRITICAL REVIEW OF CONCEPTS AND DEFINITIONS* 77 (Vintage Books 1952) (stating that it is impossible to group definitions of culture with complete consistency); *WRITING CULTURE* vii (James Clifford & George E. Marcus eds., 1986); Rosemary J. Coombe, *Objects of Property and Subjects of Politics: Intellectual Property Laws and Democratic Dialogue*, 69 *TEX. L. REV.* 1853, 1859 (1991); John Frohnmayer, *Should the United States Have a Cultural Policy?*, 38 *VILL. L. REV.* 195, 195–96 (1993); Ramón Valle, *Ethics, Ethnicity, and Dementia: A “Culture-Fair” Approach to Bioethical Advocacy in Dementing Illness*, 35 *GA. L. REV.* 465, 482–83 (2001); see also Marshall Durbin, *Cognitive Anthropology*, in *HANDBOOK OF SOCIAL AND CULTURAL ANTHROPOLOGY* 447 (John J. Honigsmann ed., 1973); DICK HEBDIGE, *SUBCULTURE: THE MEANING OF STYLE* 3 (1979); FRANK ROBERT VIVELLO, *CULTURAL ANTHROPOLOGY HANDBOOK* 16 (1978); Linz Audain, *Critical Cultural Law and Economics, the Culture of Deindividualization, the Paradox of Blackness*, 70 *IND. L.J.* 709, 715–17 (1995).

<sup>88</sup> RAYMOND WILLIAMS, *KEYWORDS: A VOCABULARY OF CULTURE AND SOCIETY* 76 (1976); see John David Donaldson, “*Television Without Frontiers*”: *The Continuing Tension Between Liberal Free Trade and European Cultural Integrity*, 20 *FORDHAM INT'L L.J.* 90, 147 (1996) (“Without doubt, culture is one of the most difficult and problematic English terms to define due to its amorphous and inherently subjective nature.”).

<sup>89</sup> See ALTMAN & CHEMERS, *supra* note 87, at 3 (citing KROEBER & KLUCKHOHN, *supra* note 87, at 181). Over two decades later, the “numerous definitions of culture . . . continue to proliferate.” Avruch, *supra* note 51, at 393.

definition of the term is still elusive and contested.<sup>90</sup> Simply, "There is no generally accepted definition of culture."<sup>91</sup>

Exposure to the multiple definitions is nevertheless necessary for building the basic foundation of the course. In 1874, British anthropologist Sir Edward Burnett Tylor proposed one of the earlier formal definitions that is still cited today: "Culture . . . is that complex whole which includes knowledge, belief, art, morals, law, custom, and any other capabilities acquired by man as a member of society."<sup>92</sup> Decades later, the anthropology team of Kroeber and Kluckhohn offered a more expansive description:

Culture consists of patterns, explicit and implicit, of and for behavior acquired and transmitted by symbols, constituting the distinctive achievements of a human group, including their embodiments in artifacts; the essential core of culture consists of traditional (*i.e.*, historically derived and selected) ideas and especially their attached values; culture systems may, on one hand, be considered as products of action, on the other as conditioning elements of further action.<sup>93</sup>

Culturalist-in-chief Kevin Avruch states more concisely that "culture refers to the socially transmitted values, beliefs and symbols that are more or less shared by members of a social group."<sup>94</sup> Professor Pat Chew's evolving definition "is that culture is a common system of knowledge and experiences that result in a set of rules or standards; these rules and standards in turn result in behavior and beliefs that the group considers acceptable."<sup>95</sup> There are other definitions,<sup>96</sup> including a description of what culture is not.<sup>97</sup>

<sup>90</sup> See Robert H. Winthrop, *Introduction: Culture and the Anthropological Tradition*, in *CULTURE AND THE ANTHROPOLOGICAL TRADITION: ESSAYS IN HONOR OF ROBERT F. SPENCER 1* (Robert H. Winthrop ed., 1990).

<sup>91</sup> RAU ET AL., *supra* note 11, at 907.

<sup>92</sup> EDWARD B. TYLOR, *PRIMITIVE CULTURE 1* (1871), *quoted in* *United States v. Guzman*, 236 F.3d 830, 837 (7th Cir. 2001) (Ripple, J., concurring in part, dissenting in part).

<sup>93</sup> KROEBER & KLUCKHOHN, *supra* note 87, at 181, *quoted in* Alan Watson, *Legal Change: Sources of Law and Legal Culture*, 131 U. PA. L. REV. 1121, 1152-53 (1983). The same definition appears in KLUCKHOHN, *supra* note 87, at 73.

<sup>94</sup> Avruch, *supra* note 51, at 393.

<sup>95</sup> Chew, *supra* note 5, at 60.

<sup>96</sup> For example: "Culture is the unique character of a social group . . . . Cultures consist of psychological elements, the values and norms shared by members of a group, as well as social structural elements: the economic, social, political, and religious institutions that are the context for social interaction." BRETT, *supra* note 57, at 6-7 (footnotes and citations omitted).

For purposes of discussion and a reference point with which other definitions can be compared, Professor Grant Ackerman offers a shorthand description of culture—taken from a composite of definitions—that highlights three essential components: (1) an identifiable *group's* (2) *patterned* way of *thought* or *behavior* (3) that is based on certain *values*.<sup>98</sup> This description allows culture to have some limiting boundaries, so that not everything under the sun is categorized as culture.<sup>99</sup> Yet, because “[a] neat, one-sentence definition of culture can only mislead,”<sup>100</sup> one must hasten to add the necessary qualifiers. Significantly, the proposed definition does not imply that culture is monolithic or permanent.<sup>101</sup> Culture is “rarely, if ever,

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<sup>97</sup> Culture is not a “homogenous, essentialized, uniformly distributed, customary, timeless, and stable thing.” Avruch, *supra* note 11, at 343; *see also* GEERT H. HOFSTEDE, *CULTURES AND ORGANIZATIONS: SOFTWARE OF THE MIND 5* (rev. ed. 1997) [hereinafter HOFSTEDE 1997] (“Culture should be distinguished from human nature on one side, and from an individual’s personality on the other . . . , although exactly where the borders lie between human nature and culture, and between culture and personality, is a matter of discussion among social scientists.”). Human nature is universal and inherited; personality is specific to the individual and not shared is both learned and inherited. *Id.* at 5, 6.

<sup>98</sup> The first formal definition of culture that encompasses these components appears to be by Kroeber and Kluckhohn. KROEBER & KLUCKHOHN, *supra* note 87, at 181; KLUCKHOHN, *CULTURE AND BEHAVIOR*, *supra* note 87, at 73. Hofstede’s definition also captures the essential components. GEERT H. HOFSTEDE, *CULTURE’S CONSEQUENCES: INTERNATIONAL DIFFERENCES IN WORK-RELATED VALUES 21* (abr. ed. 1984) [hereinafter HOFSTEDE 1984] (Culture is “the collective programming of the mind which distinguishes the members of one human group from another . . . . Culture, in this sense, includes systems of values; and values are among the building blocks of culture”). *See also* DAVID M. FETTERMAN, *ETHNOGRAPHY: STEP BY STEP 27* (1989) (Culture includes “a social group’s observable patterns of behavior, customs, . . . way of life,” “ideas,” values or beliefs, definition of reality, “attitudes,” and “habits.”); ROBERT F. MURPHY, *CULTURAL AND SOCIAL ANTHROPOLOGY: AN OVERTURE 26* (3d ed. 1989) (“Culture is an integrated system of meanings, values, and standards of conduct by which the people of a society live . . .”).

<sup>99</sup> Merely because two groups are in conflict does not necessarily imply that culture is at work (though one may make a case for a cultural examination, relying on one or more of the multiple definitions). For example, in the conflict between Shakespeare’s Montagues and Capulets, there were indeed identifiable groups, with an arguable presence of patterned behavior or thinking, but whether it was inspired by *values* is submitted for discussion.

<sup>100</sup> RAYMOND COHEN, *NEGOTIATING ACROSS CULTURES: INTERNATIONAL COMMUNICATION IN AN INTERDEPENDENT WORLD 11* (rev. ed. 1997).

<sup>101</sup> *See* Kevin Avruch & Peter W. Black, *Conflict Resolution in Intercultural Settings: Problems and Prospects*, in *THE CONFLICT AND CULTURE READER 7, 7* (Pat K. Chew ed., 2001).

perfectly shared by all members of a group or community. Intra-cultural variation is likely to be present, perhaps considerable, and this should caution us against ascribing value, belief, or behavioral uniformity to members of a group—against stereotyping.”<sup>102</sup> Professor Avruch has noted another important consideration in the understanding of culture:

[It] is a quality of social groups and perhaps communities, and . . . members may belong to multiple such groups. Therefore, an individual may “carry” several cultures, for example, ethnic or national, religious, and occupational affiliations. Thus, for any given individual, culture always comes “in the plural,” and therefore every interaction (including negotiation) between individuals is likely to be multicultural on several levels.<sup>103</sup>

Thus, although culture is often discussed on national grounds, the multiple “spheres of culture”<sup>104</sup> allow for cultural differences to exist in a domestic setting<sup>105</sup> in both multi-racial and mono-racial societies.<sup>106</sup> Other

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<sup>102</sup> Avruch, *supra* note 51, at 393. Acknowledging individual variation within a cultural group cannot be overemphasized. But importantly, as Professor Dodd advises, “to avoid this problem of stereotyping, we cannot then swing to an opposite extreme and argue for no commonalities. On the contrary, there is a middle ground where we can respectably speak of central tendencies among groups of people, a modality tendency.” DODD, *supra* note 55, at 40. For visual diagrams that illustrate both the individual variation *within* groups and the difference in modal tendencies *between* groups, see BRETT, *supra* note 57, at 10, exh. 1.2 and SCHNEIDER & BARSOUX, *supra* note 81, at 15, fig. 1.6.

<sup>103</sup> Avruch, *supra* note 51, at 393; *see* Avruch, *Culture and Negotiation Pedagogy*, *supra* note 11, at 344 (“Because ‘culture’ now consists of numerous schemas derived from diverse experience and distributed across complex social and psychological landscapes, . . . for a given individual, culture always comes in the plural.”).

<sup>104</sup> SCHNEIDER & BARSOUX, *supra* note 81, at 51.

<sup>105</sup> *See* RAU ET AL., *supra* note 11, at 909–10 (referring to “ethnic cultural experience . . . [being] further shaped by complementary and competing values of another clearly identifiable cultural experience . . . [including] religious culture, corporate culture, international culture, and/or a professional culture . . .”).

<sup>106</sup> With regard to the U.S., Hofstede describes the society as “the world’s most prominent example of a people composed of immigrants, [which] shows examples of both assimilation (the ‘melting pot’) and retention of group identities over generations (an example are the Pennsylvania Dutch).” HOFSTEDE 1997, *supra* note 97, at 16. In contrast, South Korean (as well as North Korean) society is comprised of 99.9% ethnic Koreans. Alex Y. Seita, *The Intractable State of United States-Japan Relations*, 32 COLUM. J. TRANSNAT’L L. 467, 492 n.72 (1995). Yet, cultural differences can be seen based on regional origin within the country. Of interest in this regard is a photograph of a husband and wife, both employees of the same company, which appeared in the English edition of a leading Korean newspaper. The caption reads: “A couple went against all odds



cultural groups cross or transcend national boundaries.<sup>107</sup> The literature also refers to “professional culture,” which could explain differences in “role expectations,”<sup>108</sup> “what is considered ‘proper behavior,’”<sup>109</sup> and assumptions about “how truth is established.”<sup>110</sup> Another frequently mentioned subculture or sphere of culture, seen in both law and management, is “corporate culture.”<sup>111</sup> In short, culture can be seen in many places; different cultures interact, and are sometimes in tension with each other.<sup>112</sup>

In addition to the formal definitions of culture, there are a number of “sound-bite” descriptions of the term, which lack the academic presentation,

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Thursday, daring to marry ‘within the company’ and *across the cultures of the Jeolla and Gyeongsang regions . . .*” *Culture—November 1, 2002*, DIGITAL CHOSUN: THE CHOSUN ILBO, Oct. 31, 2002, available at <http://english.chosun.com/w21data/html/news/200210/200210310032.html> (last visited Oct. 25, 2004) (emphasis added).

<sup>107</sup> See HOFSTEDE 1997, *supra* note 97, at 15–16 (“Regional, ethnic, and religious cultures account for differences within countries; ethnic and religious groups often transcend political country borders.”); SCHNEIDER & BARSOUX, *supra* note 81, at 51, 53 (“[C]ulture can be discovered in many places: regional cultures within nations (urban versus rural, north versus south), and among groups of nations (Nordic versus Latin American) . . .”; “Regional cultures refer to differences *within* countries (such as the various Länder in Germany) and similarities *between* countries (such as Scandinavia).”).

<sup>108</sup> JOHN S. MURRAY ET AL., PROCESSES OF DISPUTE RESOLUTION: THE ROLE OF LAWYERS 181 (2d ed. 1996).

<sup>109</sup> SCHNEIDER & BARSOUX, *supra* note 81, at 63. Schneider and Barsoux’s comments about the legal profession are of interest: “[F]or lawyers[,] aggressiveness, at least in court, may be encouraged. Law assumes adversarial relationships between conflicting parties . . . For a lawyer, being convincing (establishing truth) may be more related to displaying and evoking emotions rather than remaining cool, calm, and collected.” *Id.*

<sup>110</sup> *Id.* Thus, sometimes, persons from the same professional culture but different nations “can communicate more easily with one another . . . than they can with those on their own team, who may share national but not the negotiation-relevant professional ‘images and encodements.’” Avruch, *Culture and Negotiation Pedagogy*, *supra* note 11, at 344; see Avruch, *supra* note 51, at 398 (referring to ease of communication of those in “military culture” despite different nationalities).

<sup>111</sup> Schneider and Barsoux point out that, “Many managers more quickly recognize the differences between companies than between countries.” SCHNEIDER & BARSOUX, *supra* note 81, at 68. Hofstede describes corporate culture as both “a soft, holistic concept with . . . presumed hard consequences” and “the psychological assets of an organization, which can be used to predict what will happen to its financial assets in five years’ time.” HOFSTEDE 1997, *supra* note 97, at 18. See Faure & Sjöstedt, *supra* note 5, at 5 (“A corporate culture also may retain a transnational quality, shared by people in different countries.”).

<sup>112</sup> Faure & Sjöstedt, *supra* note 5, at 5.

but could be helpful in understanding what culture is. For example, culture has been described as: “software of the mind”<sup>113</sup>; “a substitute for instinct”<sup>114</sup>; “a fundamental feature of human consciousness, the sine qua non of being human”<sup>115</sup>; “a grammar for organizing reality, for imparting meaning to the world”<sup>116</sup>; “a lens through which we perceive the other”<sup>117</sup>; and the way we act and think.<sup>118</sup> Perhaps culture is to human beings what water is to fish.<sup>119</sup> These short-hand descriptions for culture are pedagogically useful, because they capture, though briefly and informally, the essence of culture, and more importantly, invite further probing into its meaning. For example, if culture is “software of the mind,” how does the programming differ from one culture to the next? Or, how does the “lens” of perceiving others or the “grammar for organizing reality” differ from one group to another? Thus, in contrast to asking what *is* culture, the question shifts to asking *what* culture and *what* cultural differences?

### B. Cultural Differences: Dimensions, Orientations, and Others

The available literature includes ample resources that provide the particulars of how various cultures differ. Before discussing some of the illustrative and best known sources, two points must be raised. First, many of the sources focus on cultural differences between and among national societies.<sup>120</sup> Even though culture is not exclusively a matter of nationality,

<sup>113</sup> “Software of the mind” is the subtitle of Hofstede’s texts: HOFSTEDE 1997, *supra* note 97; GEERT H. HOFSTEDE, CULTURES AND ORGANIZATIONS: SOFTWARE OF THE MIND (1991) [hereinafter HOFSTEDE 1991].

<sup>114</sup> Faure & Sjöstedt, *supra* note 5, at 4. Faure and Sjöstedt also note that, “This is the role of culture: to answer questions even before they are raised.” *Id.* (quoting ANDRÉ AKOUN, L’ILLUSION SOCIALE 31 (1989)).

<sup>115</sup> Avruch & Black, *supra* note 101, at 7.

<sup>116</sup> COHEN, *supra* note 100, at 12. Similarly, culture is “a grammar for the production and structuring of meaningful action.” Avruch & Black, *supra* note 101, at 12.

<sup>117</sup> SCHNEIDER & BARSOUX, *supra* note 81, at 11.

<sup>118</sup> See SALACUSE, *supra* note 63, at 5 (“Culture . . . shap[es] how people think, communicate, and behave.”). In conversations, I have offered my own brief description: Culture is a governing set of written *and* unwritten rules, more the latter.

<sup>119</sup> “Describing one’s own culture is . . . a bit like asking a fish in water what it is like to swim in the water. Washed up on the beach, the fish quickly recognizes the difference, but may not be able (nor inclined) to describe it. Its immediate objective is to get back into the water.” SCHNEIDER & BARSOUX, *supra* note 81, at 11.

<sup>120</sup> HOFSTEDE 1997, *supra* note 97, at xv (“A guide through this book”); SCHNEIDER & BARSOUX, *supra* note 81, at 77.

cultural differences at the national level are often most keen,<sup>121</sup> and most of the research is directed to the national angle. Moreover, variations in cultural traits between national societies provide a good introduction of the subject matter and encourage consideration of their application in the domestic setting. Second, in discussing various cultural indicators, researchers often set a dichotomous framework.<sup>122</sup> One must note that this is not a one-or-the-other, mutually exclusive dichotomy, but more of a continuum on a spectrum.<sup>123</sup> The sources allow students to appreciate the central tendencies of multiple national societies, relative to each other, bearing in mind the caveats of individual variation within each society.

### 1. Hofstede

Perhaps the single most widely discussed study of national cultures is the work of Geert H. Hofstede, “the ‘father’ of cross-cultural data bases.”<sup>124</sup> Hofstede’s *Culture’s Consequences*, originally published in 1980,<sup>125</sup> is based on worldwide survey data taken of employees of local subsidiaries of the multinational corporation IBM,<sup>126</sup> and reports on the major cultural differences among national societies. Though Hofstede’s research and

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<sup>121</sup> Or, as Schneider and Barsoux observe: “Despite . . . other spheres of influence, differences in national culture seem to persist. They are most deeply anchored in taken-for-granted assumptions which means we cannot ignore them.” SCHNEIDER & BARSOUX, *supra* note 81, at 77; see also HOFSTEDE 1997, *supra* note 97, at 13–15.

<sup>122</sup> See HOFSTEDE 1984, *supra* note 98; CHARLES M. HAMPDEN-TURNER & FONS TROMPENAARS, *BUILDING CROSS-CULTURAL COMPETENCE: HOW TO CREATE WEALTH FROM CONFLICTING VALUES* (2000).

<sup>123</sup> As Professor Docherty has written: “[T]hese dichotomies are actually continua; within cultures, changes in context (e.g., family versus business setting) will lead people to locate in different places along the continua; there are subcultural variations within any culture; and not all individuals carry their culture in exactly the same way.” Docherty, *supra* note 51, at 714. Importantly, there is no suggestion that one part of the dichotomy is better or worse than the other. See HOFSTEDE 1997, *supra* note 97, at xiii (Preface to the revised edition).

<sup>124</sup> HAMPDEN-TURNER & TROMPENAARS, *supra* note 122, at x.

<sup>125</sup> GEERT H. HOFSTEDE, *CULTURE’S CONSEQUENCES: INTERNATIONAL DIFFERENCES IN WORK-RELATED VALUES* (1980) [hereinafter HOFSTEDE 1980]. There is an abridged edition of the original work, HOFSTEDE 1984, *supra* note 98, and also a subsequent edition, GEERT H. HOFSTEDE, *CULTURE’S CONSEQUENCES: COMPARING VALUES, BEHAVIORS, INSTITUTIONS, AND ORGANIZATIONS ACROSS NATIONS* (2d ed. 2001) [hereinafter HOFSTEDE 2001].

<sup>126</sup> HOFSTEDE 1997, *supra* note 97, at 13–14.

conclusions have not been free from criticism,<sup>127</sup> much of his work relating to cultural norms (including updated research and texts<sup>128</sup>) continues to be influential, in a number of disciplines.<sup>129</sup>

Hofstede introduces four major cultural dimensions: power distance, individualism/collectivism, masculinity, and uncertainty avoidance.<sup>130</sup> In brief, power distance refers to a society's perceptions on "social inequality, including the relationship with authority"<sup>131</sup>; individualism/collectivism addresses the "relationship between the individual and the group"<sup>132</sup>; masculinity relates to perceptions of the two genders, "the social implications of having been born as a boy or a girl"<sup>133</sup>; and uncertainty avoidance addresses "[w]ays of dealing with uncertainty."<sup>134</sup> For each dimension, the study assigns a numerical score to each of fifty countries and three regions, so that they can be ranked relative to each other.<sup>135</sup> The rankings should encourage some discussion on the social, historical, political, or legal examples indicative of the country's relative placement on the continuum. The discussion should also remind students of the variations within a culture and the interaction of other spheres of culture. This could be followed by

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<sup>127</sup> The most critical is Brendan McSweeney, *Hofstede's Model of National Cultural Differences and Their Consequences: A Triumph of Faith—A Failure of Analysis*, 55 HUM. REL. 89 (2002).

<sup>128</sup> Mindful that the original text was written for a scholarly audience, Hofstede published a revised text, intended for a wider audience. See HOFSTEDÉ 1991, *supra* note 113; HOFSTEDÉ 1997, *supra* note 97.

<sup>129</sup> See BRETT, *supra* note 57, at 15–17; CARLEY H. DODD, DYNAMICS OF INTERCULTURAL COMMUNICATION 90–92 (5th ed. 1998); RAU ET AL., *supra* note 11, at 911; SCHNEIDER & BARSOUX, *supra* note 81, at 87–91; Oscar G. Chase, *Legal Processes and National Culture*, 5 CARDOZO J. INT'L & COMP. L. 1, 10–14 (1997); Amir N. Licht, *The Mother of All Path Dependencies Toward a Cross-Cultural Theory of Corporate Governance Systems*, 26 DEL. J. CORP. L. 147, 170–71 (2001); Posin, *supra* note 75, at 465–66; Joseph Sanders et al., *The Institutionalization of Sanctions for Wrongdoing Inside Organizations: Public Judgments in Japan, Russia, and the United States*, 32 LAW & SOC'Y REV. 871, 875–77, 888, 918 (1998); Daniel Visser, *Cultural Forces in the Making of Mixed Legal Systems*, 78 TUL. L. REV. 41, 71 (2003).

<sup>130</sup> HOFSTEDÉ 1997, *supra* note 97, at 14. Hofstede's later texts add a fifth dimension, long-term/short-term orientation. HOFSTEDÉ 2001, *supra* note 125, at 351–70.

<sup>131</sup> HOFSTEDÉ 1997, *supra* note 97, at 13.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at 14.

<sup>134</sup> *Id.*

<sup>135</sup> Students generally find such rankings of great interest, which often spark comment and discussion, agreement and disagreement, based on their experiences and other research.

attention to the common characteristics of a society for a given cultural dimension that might be relevant in a dispute resolution setting.

A brief elaboration of one of Hofstede's cultural dimensions will illustrate the points of suggested discussion. The individualism/collectivism dimension, "[o]ne of the most widely researched,"<sup>136</sup> is defined as follows:

Individualism pertains to societies in which the ties between individuals are loose: everyone is expected to look after himself or herself and his or her immediate family. Collectivism as its opposite pertains to societies in which people from birth onwards are integrated into strong, cohesive ingroups, which throughout people's lifetime continue to protect them in exchange for unquestioning loyalty.<sup>137</sup>

According to Hofstede's rankings, the United States emerges as the most individualist out of 53 countries and regions.<sup>138</sup> By comparison, Japan, a frequent partner in bilateral business negotiations with the U.S.,<sup>139</sup> is far more collective (located near the median ranking).<sup>140</sup> Discussion could elicit examples for each country that might support its relative placement on the continuum, encouraging an ethnographic approach. Very briefly, the emphasis on individual rights present in the Bill of Rights<sup>141</sup> can be seen as an example of the long-held individualist orientation in the United States, whereas the desire for consensus and harmony often attributed to Japanese society<sup>142</sup> might shape a more collectivist orientation there. Within this discussion, examples of a collectivist orientation in the United States and an individualist one in Japan, or changing trends in both societies, should be encouraged to emphasize that individual variation within a society does occur and that culture is not fixed or permanent.

Hofstede's recitation of the key differences between individualist and collectivist orientations relevant to the organizational setting should be of

<sup>136</sup> Chew, *supra* note 5, at 61.

<sup>137</sup> HOFSTEDE 1997, *supra* note 97, at 51 (emphasis omitted).

<sup>138</sup> *Id.* at 53, tbl. 3.1.

<sup>139</sup> Japan's orientation for the various cultural dimensions will be described herein to offer a point of reference and contrast to that of the U.S.

<sup>140</sup> HOFSTEDE 1997, *supra* note 97, at 53, tbl. 3.1.

<sup>141</sup> U.S. CONST. amends. I-X; *see also* Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 227 (1995) ("[T]he Fifth and Fourteenth Amendments to the Constitution protect persons, not groups.").

<sup>142</sup> Martha Jean Baker, *The Different Voice: Japanese Norms of Consensus and "Cultural" Feminism*, 16 UCLA PAC. BASIN L.J. 133, 147 (1997) ("It would appear that the community takes over the individual in Japan, that the harmony and consensus that is so valued contains unequal community values and assumptions.").

great interest, especially to legal counsel. Hofstede reports that, in collectivist cultures, there is a sense that hiring and promotion decisions should take into account the “employees’ ingroup,” whereas in individualist cultures, such decisions should be “based on skills and rules only.”<sup>143</sup> Those with an individualist mindset recognize that “everyone has a right to privacy,” whereas collectivist counterparts appreciate that “[p]rivate life is invaded by group(s).”<sup>144</sup> In addition, “[i]deologies of individual freedom prevail over ideologies of equality” in the individualist orientation, whereas the collectivist orientation would reverse the priority.<sup>145</sup> Where these contrasting orientations come into contact in one setting, there is likely to be tension, possibly leading to a dispute involving legal rights and liabilities. Indeed, differences in characteristics between individualist and collectivist cultures suggest a high potential for discrimination and privacy claims. This mode of discussion could be repeated for each of the cultural dimensions included in Hofstede’s work.<sup>146</sup>

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<sup>143</sup> HOFSTEDE 1997, *supra* note 97, at 67, tbl. 3.3.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* at 73, tbl. 3.4.

<sup>146</sup> Hofstede’s other cultural dimensions are elaborated on briefly herein:

**Power distance.** Power distance is “the extent to which the less powerful members of institutions and organizations within a country expect and accept that power is distributed unequally.” *Id.* at 28 (emphasis omitted). In those countries with lower power distances there is a view that “[i]nequalities among people should be minimized,” *id.* at 37, tbl. 2.3, and “[a]ll should have equal rights,” *id.* at 43, tbl. 2.4. Contrarily, in higher power distance societies, “[i]nequalities among people are both expected and desired,” *id.* at 37, tbl. 2.3, and “[t]he powerful have privileges,” *id.* at 43, tbl. 2.4.

Out of 53 countries, the U.S. is ranked within the lowest one-third in power distance (38); Japan sees a slightly higher power distance (33). *Id.* at 26, tbl. 2.1.

**Masculinity.** “[M]asculinity pertains to societies in which social gender roles are clearly distinct (*i.e.*, men are supposed to be assertive, tough, and focused on material success whereas women are supposed to be more modest, tender, and concerned with the quality of life); femininity pertains to societies in which social gender roles overlap (*i.e.*, both men and women are supposed to be modest, tender, and concerned with the quality of life). *Id.* at 82–83 (emphasis omitted). Feminine norms emphasize “equality, solidarity, and quality of work life” whereas masculine norms emphasize “equity, competition among colleagues, and performance.” *Id.* at 96, tbl. 4.2. Japan is far and away the country with highest “masculinity index score,” with the next country a distant second; the U.S. is easily within the top third of masculine countries. *Id.* at 84, tbl. 4.1.

**Uncertainty avoidance.** Uncertainty avoidance is “the extent to which the members of culture feel threatened by uncertain or unknown situations. This feeling is, among other things, expressed through nervous stress and in a need for predictability: a need for written and unwritten rules.” *Id.* at 113 (emphasis deleted). The difference between low versus high certainty avoidance society can be summarized by the phrases “few and

## 2. Hampden-Turner and Trompenaars and Others

A number of additional sources identify and explain particular cultural differences, and complement the Hofstede discussion.<sup>147</sup> Some of the sources identify cultural dimensions distinct from those of Hofstede; in others, there is some overlap.<sup>148</sup> One recommended work is Charles M. Hampden-Turner and Fons Trompenaars' *Building Cross-Cultural Competence*.<sup>149</sup> Their text reflects survey data taken of 46,000 managers from more than forty countries, and yields a discussion of six dichotomous cultural dimensions, again categorized on national lines<sup>150</sup>: universalism/particularism,

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general laws and rules" versus "many and precise laws and rules," respectively. *Id.* at 134, tbl. 5.3.

Japan is a relatively high uncertainty avoidance country (7 out of 53); the U.S. is a far more less uncertainty avoidance society (43 out of 53). *Id.* at 113, tbl. 5.1.

<sup>147</sup> Schneider and Barsoux posit that many of the studies that examine culture and offer various cultural indicators (including those of Hofstede, Hampden-Turner and Trompenaars, and Adler, among others) are derived from the work of Kluckhohn and Strodtbeck. SCHNEIDER & BARSOUX, *supra* note 81, at 34 & fig. 2.32. The anthropology team of Kluckhohn and Strodtbeck introduced the following five "orientations," followed by the focusing question asked for each, and the available options:

1. Human nature orientation: What is the character of innate human nature?  
Good, evil, or mixture of good and evil.
2. Man-nature orientation: What is the relation of man to nature (and supernature)?  
Subjugation to nature, harmony with nature, mastery of nature.
3. Time orientation: What is the temporal focus of human life?  
Past, present, future.
4. Activity orientation: What is the modality of human activity?  
Being, being in coming, doing.
5. Relational orientation. What is the modality of man's relationship to other men?  
Lineality, collaterality, individualism.

FLORENCE ROCKWOOD KLUCKHOHN & FRED L. STRODTBECK, VARIATIONS IN VALUE ORIENTATIONS (1961), *discussed in* SCHNEIDER & BARSOUX, *supra* note 81, at 34–35. Kluckhohn and Strodtbeck discussed a sixth orientation, concerning "man's conception of space and his place in it," but indicated that it lacked sufficient data at the time for elaboration. *Id.* at 10 n.16 This orientation is addressed in HENRY W. LANE & JOSPEH J. DISTEFANO, INTERNATIONAL MANAGEMENT BEHAVIOR: FROM POLICY TO PRACTICE 38–41 (4th ed. 2000).

<sup>148</sup> See SCHNEIDER & BARSOUX, *supra* note 81, at 34 & fig. 2.32.

<sup>149</sup> HAMPDEN-TURNER & TROMPENAARS, *supra* note 122. The authors provide another short-hand description of culture: "[W]hat we see so clearly, some foreigners miss. What they see so clearly, most of us miss." *Id.* at 3.

<sup>150</sup> *Id.* at 11.

individualism/communitarianism (corresponding with Hofstede's individualism/collectivism), specificity/diffusion, achieved status/ascribed status, inner direction/outer direction, and sequential time/synchronous time.<sup>151</sup> Briefly:

Universalism emphasizes rules that apply to a universe of people, while Particularism emphasizes exceptions and particular cases[;] Individualism emphasizes the individual, while Communitarianism stresses the family, organization, community, or nation in which that individual has membership[;] Specificity emphasizes precision, analysis, and "getting to the point," while Diffuseness looks to wholes and to the larger context.<sup>152</sup>

Continuing, the "status" dimension asks whether "cultures regard status as *achieved* by one's record of success or is status *ascribed* to persons for other reasons?"<sup>153</sup> The "direction" dimension asks, "Are cultures inner directed—that is, motivated or driven from within—or outer directed—that is, adjusting themselves to the flow of external events?"<sup>154</sup> The "time" dimension asks whether societies "regard time as *sequential* or *seriatim*, a passing line of increments, or is time *synchronous*, key conjunctions of events, expertly timed?"<sup>155</sup> Hampden-Turner and Trompenaars elaborate on

<sup>151</sup> Hampden-Turner and Trompenaars state that the six cultural dimensions present "*mirror images* of one another's values, reversals of the order and sequence of looking and learning." *Id.* at 1. For example, universalism can be seen as the mirror image of particularism and vice versa. Yet Hampden-Turner and Trompenaars do not state that countries are one or the other. Indeed, their survey data allow for a country's relative placement on the universal-particularism and other continua.

<sup>152</sup> *Id.* at 2.

<sup>153</sup> *Id.* at 4.

<sup>154</sup> *Id.*

<sup>155</sup> *Id.* The authors' research yielded the following relative "rankings" for the U.S. and Japan:

Universalism/Particularism. The U.S. is one of the most universalist of societies (7 out of 46); Japan is one of the most particularist (40 out of 46). *Id.* at 16, fig. 1.2.

Individualism/Communitarianism. The U.S. is one of the most individualist countries (36 out of 39), whereas Japan is one of the most communitarian (5 out of 39). *Id.* at 72, fig. 3.2.

Specificity/Diffusion. The U.S. is singularly the most specific country in the group (1 of 46); Japan is one of the most diffused (43 of 46). *Id.* at 126, fig. 5.2.

Achieved status/Ascribed status. From a more limited sample, the U.S. is the most achieved (1 of 20); Japan is more ascriptive (16 of 20). *Id.* at 192, fig. 7.2.

Inner direction/Outer direction. The U.S. is the most inner-directed (1 of 20); Japan is relatively more outer directed (11 of 20). *Id.* at 238, fig. 9.1A, 239, fig. 9.1B.



each dimension in some detail, including a definition, the national relative rankings, the U.S. orientation, the virtues and pitfalls of each end of the dichotomy, and identification and discussion of potential clashes and conflicts.<sup>156</sup>

In addition to the various cultural dimensions and orientations discussed above, the literature often refers to two commonly discussed cultural variations relating to the time orientation and the communication process, which should be included in an understanding of culture in dispute resolution.<sup>157</sup> Commentators generally credit Edward T. Hall<sup>158</sup> with introducing the indicators of monochronic/polychronic time orientation and high/low context communication.<sup>159</sup> Hall explains that the monochronic/polychronic orientation relates to the use of time (and space) as frames of organization.<sup>160</sup> The monochronic approach emphasizes “schedules, segmentation, and promptness,”<sup>161</sup> while the polychronic approach is “characterized by several things happening at once.”<sup>162</sup> Monochronic persons tend to do things one at a time, have a high need for closure for one task before moving to the next, and think in “terms of linear sequential, time-ordered patterns.”<sup>163</sup> In contrast, those with a polychronic orientation “attempt to do a number of things simultaneously,” and think in holistic pattern, in terms of pictures or configurations.<sup>164</sup> They stress “involvement of people and completion of transactions rather than adherence

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Sequential time/Synchronous time. The U.S. is relatively sequential (3 of 23; 4 of 19); Japan is more synchronous (13 of 23; 12 of 19). *Id.* at 298, fig. 11.3, 299, fig. 11.4, 300, fig. 11.5.

<sup>156</sup> *Id.* at 11–12.

<sup>157</sup> DODD, *supra* note 129, at 87; Avruch, *supra* note 51, at 405; *see* Chew, *supra* note 5, at 62 (high/low context).

<sup>158</sup> EDWARD T. HALL, *BEYOND CULTURE* (1976) [hereinafter HALL 1976]. This is the original work to which most commentators cite. A more recent edition is also available. EDWARD T. HALL, *BEYOND CULTURE* (1989) [hereinafter HALL 1989]. Hall collaborated on another work that includes many related themes, EDWARD T. HALL & MILDRED REED HALL, *UNDERSTANDING CULTURAL DIFFERENCES* (1990).

<sup>159</sup> DODD, *supra* note 129, at 87; Avruch, *supra* note 51, at 405; *see* Chew, *supra* note 5, at 62 (high/low context).

<sup>160</sup> HALL 1976, *supra* note 158, at 14; HALL 1989, *supra* note 158, at 17.

<sup>161</sup> HALL 1976, *supra* note 158, at 14; HALL 1989, *supra* note 158, at 17; *see also* HALL & HALL, *supra* note 158, at 13.

<sup>162</sup> HALL 1976, *supra* note 158, at 14; HALL 1989, *supra* note 158, at 17.

<sup>163</sup> DODD, *supra* note 129, at 88.

<sup>164</sup> *Id.*

to preset schedules."<sup>165</sup> The American, British, German, Swiss, and Scandinavian cultures are relatively monochronic, while Latin American, African, Middle Eastern, and Southern European societies are polychronic.<sup>166</sup>

The high/low context communication dichotomy addresses the amount of information contained in the context (or setting) rather than in the transmitted message itself.<sup>167</sup> According to Hall, high-context communications

feature preprogrammed information that is in the receiver and in the setting, with only minimal information in the transmitted message. [Low-context communications] are the reverse. Most of the information must be in the transmitted message in order to make up for what is missing in the context (both internal and external).<sup>168</sup>

In high-context cultures, there is an expectation of shared knowledge, the information is implicit, and the communication is less direct.<sup>169</sup> In contrast, "in a low-context culture... information is *explicit*; procedures are explained, and expectations are discussed," and a literal, direct style of communication is seen.<sup>170</sup> Hall draws an interesting reference to two sub-cultures to illustrate the contrast in the dichotomy: "Twins who have grown up together can and do communicate more economically [high-context] than *two lawyers in a courtroom* during a trial [low-context] . . ."<sup>171</sup> With respect

<sup>165</sup> HALL 1976, *supra* note 158, at 14; HALL 1989, *supra* note 158, at 17; *see also* HALL & HALL, *supra* note 158, at 14 ("Polychronic time is characterized by the simultaneous occurrence of many things and by a great involvement with people. There is more emphasis on completing human transactions than on holding to schedules.") (emphasis omitted).

<sup>166</sup> DODD, *supra* note 129, at 88; HALL 1976, *supra* note 158, at 14; HALL 1989, *supra* note 158, at 17; HALL & HALL, *supra* note 158, at 14.

<sup>167</sup> HALL 1976, *supra* note 158, at 79; HALL 1989, *supra* note 158, at 101.

<sup>168</sup> HALL 1989, *supra* note 158, at 101; *see also* HALL 1976, *supra* note 158, at 79; Chew, *supra* note 5, at 62-63.

<sup>169</sup> *See* DODD, *supra* note 129, at 90.

<sup>170</sup> *Id.*

<sup>171</sup> HALL 1976, *supra* note 158, at 79 (emphasis added). With respect to the lawyer culture, Hall wonders, "How many times has the reader heard, 'Answer the question, Yes or No,'" and describes the U.S. courts "as the epitome of low-context systems." *Id.* at 93.

In this light, the following description of U.S. negotiation style by a specialist in diplomatic negotiations and intercultural communications (and professor of international relations at the Hebrew University of Jerusalem) should inspire some discussion. Professor Raymond Cohen asserts that, "The single most characteristic feature of the American negotiation style from the perspective of a high-context observer is its:

to nationalities, the United States, Germany, Switzerland, and other Northern European countries are considered to be low context, in contrast to the high context seen in cultures like those in Japan and Arabian and Mediterranean countries.<sup>172</sup> As with other cultural indicators, the interaction of high- and low-context cultures, as well as monochronic and polychronic cultures, present potential for confusion, misunderstanding, and exacerbation of dispute.

### C. Culture, Legal Disputes, and the Cross-Cultural Counsel

An understanding of culture and its particulars provides the basic foundation of the course. Traditionalists in law will note that many of the sources relied on for this task are from the fields of anthropology or management, and not law.<sup>173</sup> If nothing else, this point should underscore the reality that the subject of cross-cultural negotiation by its very nature is inter- and multi-disciplinary. Still, for the course to be considered for inclusion in

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low context *legalism*. Even if U.S. negotiators are not lawyers by training, their approach will be lawyerly: they view themselves as playing a fiduciary role, that is, conscientiously and objectively representing the interests of their client to the best of their ability without injecting their own personal bias into the equation. Within this tradition one may as easily represent the defendant as the plaintiff, since one's role and the rights of one's client are paramount, not some concept of absolute truth. Indeed, "truth" emerges from the exposition of rival versions of the facts before a jury, an approach that places a particular onus on persuasion through the convincing presentation of evidence. Emotion may conceivably be manipulated for histrionic purposes on occasion to convey an impression of conviction or annoyance, but would usually be considered out of place or even bad form. Great emphasis is placed on procedure, the due process of law, even at the expense of substance; this has a far-reaching influence on the conduct of negotiation, which is perceived as a highly structured activity governed by strict, albeit implicit rules of procedure.

As the lawyerly negotiator understands it, the objective of the entire negotiating exercise is the drawing up of a detailed, binding contract that will withstand legal scrutiny by other lawyers working in the government. It is natural to work from the outset with written texts, paying particular attention to language, appealing to precedent and past agreement, honing down phrases in a painstaking and sometimes nitpicking exercise in joint draftsmanship.

COHEN, *supra* note 100, at 135–36 (emphasis added).

If the above description of the U.S. negotiator reflects a fair modal tendency, one wonders about the degree of low context legalism for U.S. *lawyers*. An important lesson is that counsel must be aware of their *own* orientation.

<sup>172</sup> HALL & HALL, *supra* note 158, at 6–7.

<sup>173</sup> Professor Brett's text does include specific discussion of the resolution of disputes. BRETT, *supra* note 57, at 78–134.

the law curriculum, it must be related to some legal function.<sup>174</sup> The connection is simple and straightforward: Culture can affect all aspects of disputes and dispute resolution efforts, including a party's perception of a dispute, the attorney-client relationship, party-to-party negotiations or settlement efforts in mediation or arbitration, and post-settlement activities. Culture and cultural differences can contribute to competing interests and desires, tension, and dispute, all of which relate to legal rights.

Having an introductory understanding of culture and the dichotomous cultural dimensions, legal counsel must appreciate the impact of culture. Recognizing cultural differences is necessary in anticipating potential lawsuits and opportunities for dispute settlement.<sup>175</sup> As Professor Ackerman emphasizes in class lectures, attempts toward the resolution of dispute (which can pit competing interests against each other and evoke zero-sum games) is difficult even in mono-cultural or relatively mono-cultural settings. Resolution is even more difficult, and the risk of exacerbation of the dispute higher, when culture in its many forms is present. Thus, counsel must be able to identify the "cultural cues," so that the necessary adjustments can be made and the process be allowed to pursue more constructively. Culture identification is synonymous to "issue spotting" in the law school exam setting. Without cultural recognition and issue spotting, it may be impossible to proceed to a fruitful result: toward dispute resolution in the former and application of the law in the latter.

To illustrate—using the license of exaggeration and accumulation to highlight the point—take the hypothetical case of one Smith, an individual whose cultural background, referring to the work of Hofstede and Hall, can be described as individualist, low power distance, low uncertainty avoidance,

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<sup>174</sup> There is little question that the course is interdisciplinary in nature and can fit under the elective curriculum of multiple university departments. The class enrollment at Northwestern is half management students, half law students. See E-mail from Jeanne Brett, *supra* note 9. At Pepperdine, students from the business school comprise a portion of the enrollment. See E-mail from Peter Robinson, Associate Director of the Straus Institute for Dispute Resolution and Assistant Professor of Law, Pepperdine University School of Law, to author (Nov. 11, 2004 00:48 CST) (copy on file with author). The course in Missouri-Columbia sees the occasional graduate student from the social sciences.

<sup>175</sup> The original quotation is, "Recognizing cultural differences is the necessary first step to anticipating potential *threats* and opportunities for *business encounters*." SCHNEIDER & BARSOUX, *supra* note 81, at 11 (emphasis added). The text has equal application in the legal dispute resolution setting, with law equivalents substituting the underscored terms.

high masculinity index, low context, and monochronic orientation.<sup>176</sup> Initially, counsel for Smith must be cognizant of these cultural characteristics, bearing in mind her own leanings and orientation, as they may affect the representation of the client and the attorney-client relationship. Smith may be engaged in a dispute with Jones, whose background is far more collectivist, high power distance, high uncertainty avoidance, low masculinity index, high context, and polychronic. Other spheres of culture may also be involved, based on considerations of race, regional origin, ethnicity, and occupation, among others. If counsel for either or both parties see themselves as limited to the task of prosecuting or defending against legal claims, culture may be of only academic interest. If, however, counsel assume the broader role of problem solver<sup>177</sup> (and can integrate the multiple functions of “advocate,” “advisor,” and “negotiator”), and are mindful of ADR methods, they must take into consideration the clashing cultural norms in advising of options and strategies. The failure on the part of counsel for Smith or Jones to recognize the cultural dynamic may begin with unflattering characterizations and judgments, lead to risk of “fundamental attribution error,”<sup>178</sup> and ultimately, to a diminished possibility of settlement.

In addition to the party-to-party setting, culture may also play a role in the forum in which the parties decide to address the dispute, whether it be mediation, arbitration, or court adjudication. The cultural orientation of the mediator, the individual arbitrator, and the judge or jury members,

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<sup>176</sup> This is not an entirely random selection of attributes. There is some correlation, between, for example, monochronic orientation and low context communication, see HALL & HALL, *supra* note 158, at 15, and collectivist orientation and high power distance, see HOFSTEDE 1997, *supra* note 97, at 54.

<sup>177</sup> See Paul Brest & Linda Hamilton Krieger, *Lawyers As Problem Solvers*, 72 TEMP. L. REV. 811 (1999); Carrie J. Menkel-Meadow, *When Winning Isn't Everything: The Lawyer As Problem Solver*, 28 HOFSTRA L. REV. 905 (2000); Janet Reno, *Lawyers As Problem-Solvers: Keynote Address to the AALS*, 49 J. LEGAL EDUC. 5 (1999).

<sup>178</sup> Avruch, *supra* note 51, at 405. Seen in social psychology, fundamental attribution error “arises when one encounters behavior by another that is puzzling or disturbing in some way, and attributes that behavior to the personality or character of the individual, rather than to ‘external’ factors such as the larger environment or situation (including situations characterized by cultural difference).” *Id.* Attributions can be more harmful if they sound like ethnocentrism, “the certainty that the way of doing things with which one is familiar is superior to all others.” Smith, *supra* note 40, at 427. Then there is the following quotation: “I believe only in French culture, and regard everything else in Europe which calls itself ‘culture’ as a misunderstanding. I do not even take the German kind into consideration.” FRIEDRICH WILHELM NIETZSCHE, ECCE HOMO (1888), *quoted in* BARTLETT’S FAMILIAR QUOTATIONS, *supra* note 1, at 553 (translated by Anthony M. Ludovici).

respectively, must also be considered.<sup>179</sup> Moreover, in addition to the “local legal culture” seen in court systems,<sup>180</sup> there has been mention of a “mediation culture”<sup>181</sup> and an “international arbitration culture,”<sup>182</sup> presumably, a set of shared beliefs on how mediation and international arbitration, respectively, should be conducted. In short, culture in its many forms must be identified.<sup>183</sup>

Admittedly, the Smith-Jones example above is exaggerated to illustrate certain points, and tends toward the abstract. A discussion of an actual dispute with specific facts will better highlight the cultural dimension for counsel and advisors. The following case is from the Hampden-Turner and Trompenaars text,<sup>184</sup> with the parties’ names changed, for the time being.

ABC is a firm that provides consulting services to various companies and governments all over the world. It has also authored and published a book that outlines many of the strategies that it recommends, and refers to the text in consulting services. ABC has retained full copyright protection of the book. In one consulting arrangement with Tah-Pah-Hah, a large and influential corporation in another country, ABC distributed copies of its book to company representatives in attendance. Later, much to ABC’s surprise and discomfort, Tah-Pah-Hah had the book translated into the local language and

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<sup>179</sup> Perhaps jury selection consulting services, now an active business and a vital part of the U.S. litigation process, could be seen as “cultural matching” of party and jury.

<sup>180</sup> See *supra* text accompanying notes 76–77.

<sup>181</sup> John Lande, *Failing Faith in Litigation? A Survey of Business Lawyers’ and Executives’ Opinions*, 3 HARV. NEGOT. L. REV. 1, 8 n.27, 69 & nn.200 & 203, 70 & n.204 (1998) (referring to “mediation culture” generally); Peter N. Thompson, *Enforcing Rights Generated in Court-Connected Mediation—Tension Between the Aspirations of a Private Facilitative Process and the Reality of Public Adversarial Justice*, 19 OHIO ST. J. ON DISP. RESOL. 509, 563 (2004) (stating that “[t]he concept of self-determination . . . is central to the mediation culture . . .”); Ellen Waldman, *The Role of Legal Norms in Divorce Mediation: An Argument for Inclusion*, 1 VA. J. SOC. POL’Y & L. 87, 96 n.32, 141 (1993) (discussing anti-law bias in “mediation culture”).

<sup>182</sup> See generally R.S. Pathak, *When and Where Do National Courts Reflect an International Culture When Deciding Issues Relating to International Arbitration?*, in INTERNATIONAL DISPUTE RESOLUTION: TOWARDS AN INTERNATIONAL ARBITRATION CULTURE 173 (Albert Jan van den Berg ed., 1998); Tom Ginsburg, *The Culture of Arbitration*, 36 VAND. J. TRANSNAT’L L. 1335 (2003).

<sup>183</sup> See e-mail from Grant R. Ackerman, Faculty, Executive Education, Columbia University, Graduate School of Business, to author (Nov. 24, 2004 14:25 CST) (copy on file with author). As Professor Ackerman reminds, recognition of culture is the first step; appropriately adapting to it is the next. In class sessions, the “what-to-do” portion leads to lively discussion. Suggestions and options can be offered and analyzed, though ultimately “the correct answer” will be elusive.

<sup>184</sup> HAMPDEN-TURNER & TROMPENAARS, *supra* note 122, at 46–48.

distributed copies to its executives, without consent from, or compensation to, ABC. Tah-Pah-Hah even sent a copy of the translation to ABC, describing it as a gift. The distribution of the translation was a clear violation of international copyright convention, to which Tah-Pah-Hah's home jurisdiction is a signatory. ABC seeks advice and counsel.

Without a sense of the cultural forces that may be at work, legal counsel may advise one of three options: sue Tah-Pah-Hah for copyright infringement; seek a settlement with Tah-Pah-Hah, in the form of an agreement not to sue in exchange for a payment of a fee, representing an approximate amount to which ABC was entitled<sup>185</sup>; or do nothing, essentially allowing Tah-Pah-Hah to do as it wishes, without even an informal note of objection. But each option has drawbacks. In every lawsuit, there is the ever present reality of the unpredictable result in litigation, not to mention the inevitable cost and time. In this case specifically, a lawsuit would likely sever future business relations between ABC and Tah-Pah-Hah. Although an out-of-court settlement is recommended over litigation in many instances,<sup>186</sup> it may not be desirable here, since it could annoy all parties (including the publisher), ABC would lose Tah-Pah-Hah's goodwill, and, given Tah-Pah-Hah's influence in the country, ABC's reputation and standing there would suffer.<sup>187</sup> Chances of future commercial publication in the country might be dim. Finally, ABC would likely look askance at being advised to do nothing, because ABC would be giving up proprietary rights in its work entirely, for the "vague hope" of realizing some future consulting projects.<sup>188</sup>

In contrast, the more culturally adept counsel would look to see if culture could explain ABC's grievance and Tah-Pah-Hah's actions. As Hampden-Turner and Trompenaars explain, the universalism/particularism dichotomy could be in play here.<sup>189</sup> ABC may be operating from a universalist mindset,

<sup>185</sup> Both a lawsuit and settlement negotiations would likely be preceded by unambiguous correspondence from ABC to Tah-Pah-Hah, informing the latter of its infringement of ABC's copyright rights. It is not unusual in such a situation for the correspondence to include a demand for prompt termination of any current infringing activity, return of infringing products, and list of persons who received such products. In the U.S., such correspondence may be a routine part of the business culture; in other countries, the correspondence could be received with more negative consequences.

<sup>186</sup> One is reminded of Lincoln's oft-quoted advice, "Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often the *real* loser—in fees, expenses, and waste of time." Abraham Lincoln, *Fragment: Notes for a Law Lecture* (1850), in *THE COLLECTED WORKS OF ABRAHAM LINCOLN: SUPPLEMENT 1832–1865*, at 18, 19 (Roy P. Basler ed., 1974).

<sup>187</sup> HAMPDEN-TURNER & TROMPENAARS, *supra* note 122, at 47.

<sup>188</sup> *Id.*

<sup>189</sup> *Id.* at 47–48.

desiring to have enforcement of the rules of international copyright applied to all. Yet Tah-Pah-Hah's actions may be driven by an orientation that is one of the most particularist in the world, second only to Yugoslavia in the rankings.<sup>190</sup> Indeed, perhaps Tah-Pah-Hah officials thought that the translation and the "gift" were a particularly gracious gesture to ABC, reflecting a view that "a particular and warm relationship would *precede* the exercise of legal rights."<sup>191</sup>

Such recognition and analysis may allow for advising of an option alternative to suing, negotiating a settlement, or doing nothing: ABC could thank Tah-Pah-Hah for the translation, express great pleasure that Tah-Pah-Hah executives found the book helpful, and then ask their advice on how to locate a good commercial publisher in Tah-Pah-Hah's country. This precise situation occurred, involving Hampden-Turner and Trompenaars themselves (ABC) and Samsung, the Korean conglomerate (Tah-Pah-Hah).<sup>192</sup> Hampden-Turner and Trompenaars report the very satisfactory result:

Within two weeks we had three offers. Within a month we had a legal contract that protected our copyright. The fact that Samsung recommended the book and had commissioned the translation was displayed on the cover. Sales in Korea have been brisk. Royalties have been received. The value of royalties foregone when Samsung published its own version was less than the translation costs.<sup>193</sup>

This option allowed ABC to affirm its particular relationship with Tah-Pah-Hah, and then use this relationship to win its universal rights. "We have integrated Universalism with Particularism, but in reverse sequence, by putting our special relationship with Samsung first . . . [W]e have accepted that deep personal relationships of particular respect are the foundation of laws that respect human rights to property."<sup>194</sup> Granted, the ABC/Tah-Pah-

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<sup>190</sup> *Id.* at 16, fig. 1.2.

<sup>191</sup> *Id.* at 47.

<sup>192</sup> *Id.* at 46-48.

<sup>193</sup> *Id.* at 48-49.

<sup>194</sup> *Id.* at 49. Perhaps the universalism/particularism dimension was at work in the U.S.-Japan negotiations over the status of Charles Robert Jenkins. As a U.S. Army sergeant on patrol inside the DMZ dividing North and South Korea in 1965, Jenkins deserted to North Korea, where he later taught English and appeared in propaganda films. Jenkins married a Japanese woman who had been abducted to North Korea to teach Japanese to North Korean spies. His wife was returned to Japan 24 years after her abduction; Jenkins, in poor health, joined her 21 months later with their two daughters. American officials insisted that they would seek extradition and prosecute Jenkins for desertion, despite great popular sympathy in Japan for Jenkins and his wife. Prime



Hah situation would pose a challenging task for the novice; indeed, it seemed to perplex even the experts at the outset. It does, however, illustrate vividly the impact of culture, and the importance of cultural education for the counsel in assisting clients.

#### D. Course Summary

To summarize: The cross-cultural negotiations course would include a discussion of the meaning of culture and illustrative cultural differences—explaining how different people approach the same things differently—which lays the conceptual foundation. The course then could address how various cultural factors may lead to a dispute and affect the dispute resolution process, whether in party-to-party negotiations or other methods. This development allows students to be able to identify the “cultural cues.” Where resources are available, actual cross-cultural negotiation exercises, with participants from another “culture,” will add a practical and realistic dimension.<sup>195</sup> The course ought not purport to *complete* the discussion with

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Minister Junichiro Koizumi himself appealed to President Bush for leniency. See Todd Zaun, *Ex-G.I. Accused of Deserting Arrives in a Sympathetic Japan*, N.Y. TIMES, July 19, 2004, at A4. Jenkins ultimately turned himself in and pled guilty to charges of desertion and aiding the enemy. James Brooke, *G.I., 64, Pleads Guilty to Desertion From Duty in Korea in '65*, N.Y. TIMES, Nov. 3, 2004, at A9.

The American approach could be seen as reflecting a universalist orientation, seeking to apply evenly the rules regarding the conduct of soldiers, such that Jenkins should face a court martial, even decades after his actions. The Japanese could have been operating from a more particularist orientation, giving regard to the particular situation—a man in poor health, permitted to leave North Korea after nearly 40 years, to be reunited with his wife, who herself was able to return to Japan 24 years after being abducted to North Korea.

<sup>195</sup> For the Pepperdine course, Professor Ackerman has designed a business negotiation exercise involving a joint venture between American and Chinese companies, with students in the course playing the role of representatives for the former, and a visiting delegation from China playing the counterpart officials. Missouri-Columbia uses a settlement negotiation exercise between American employees (students) and Korean managers of a U.S. subsidiary of a Korean company (Korean graduate students and visiting faculty), in a fictional employment discrimination suit. In the spring 2004 semester, the Negotiation Seminar course at Stanford arranged for negotiation exercises between Stanford law students and business students (simulating attorney-client interaction), and Stanford law students and law students in India (involving a joint venture between a U.S. and Indian company). See Ralph Pais, *Cross-School Negotiations Enhance Learning for Students in Negotiation Classes*, NEWS FROM GOULD, Spring 2004, at 1, 4 (copy on file with author).

regards to culture and dispute resolution, but only to begin it. As with many law course offerings, it is only an introduction of a set of ideas.<sup>196</sup>

### III. THE CASE FOR CROSS-CULTURAL

Before law commentators called for more attention to the matter of culture in dispute resolution, those in the business or management department urged a similar study of culture in their field.<sup>197</sup> There, too, the idea was met with some skepticism.<sup>198</sup> "After all," the skeptics would say, "business is business, products are products, and when you come right down to it, international business is really nothing more than making deals in strange places."<sup>199</sup> But this was not the prevailing view<sup>200</sup>; the culturalists in the sister department appear to have won the battle, if the volume of literature<sup>201</sup> and inclusion in the business curriculum<sup>202</sup> are any indication.

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<sup>196</sup> A challenge for the new teacher of cross-cultural negotiations is the selection of reading materials. The main text for the courses at Pepperdine and Missouri-Columbia is a collection of articles and excerpts compiled by Professor Ackerman. *CROSS-CULTURAL NEGOTIATION AND DISPUTE RESOLUTION: READINGS AND CASES* (Grant R. Ackerman ed., 2003). Information on the Northwestern course may be obtained from the university's Kellogg School of Management, Dispute Resolution Research Center. See Kellogg School of Management, *Dispute Resolution Center*, at <http://www.kellogg.northwestern.edu/drrc/index.htm> (last visited Jan. 23, 2005).

<sup>197</sup> See, e.g., SALACUSE, *supra* note 63, at 2; SCHNEIDER & BARSOUX, *supra* note 81, at 1.

<sup>198</sup> See, e.g., SALACUSE, *supra* note 63, at 2; SCHNEIDER & BARSOUX, *supra* note 81, at 1.

<sup>199</sup> SALACUSE, *supra* note 63, at 2.

<sup>200</sup> Professor Salacuse describes such attitudes as "wrong." *Id.* See SCHNEIDER & BARSOUX, *supra* note 81, at 1 ("We . . . challenge the notion that 'business is business', that management, like science and engineering, is immune to the influence of culture, or culture-free."). If indeed there is so little to culture, one wonders why "[c]rossing cultures is by now a business," HAMPDEN-TURNER & TROMPENAARS, *supra* note 122, at x, or why there is a "booming market for cross-cultural training," HOFSTEDE 1997, *supra* note 97, at xiii.

<sup>201</sup> E.g., BRETT, *supra* note 57; SALACUSE, *supra* note 63; SCHNEIDER & BARSOUX, *supra* note 81; Adler, *supra* note 2.

<sup>202</sup> In addition to the J.L. Kellogg School of Management at Northwestern, see *supra* note 9, the following schools of business or management offer culture-related courses in their curriculum: Brigham Young University Marriott School, Master of Business Administration Course Descriptions, available at <http://www.marriottschool.byu.edu/mba/curriculum/coursedescriptions.cfm> (last visited Oct. 17, 2004) ("Managing People and Cultures"); Georgia Tech College of Management, Master of Business Administration International Business Concentration,

The law department would be wise to follow the path of the business counterpart, at a time when the marketplace suggests that law schools are beginning to become more like business schools.<sup>203</sup>

The cross-cultural negotiations course could be offered as an upper-class elective and included under ADR offerings, if the school offers such courses in significant numbers. That there is traditionalist resistance to ADR generally is problematic.<sup>204</sup> The perception that the subject matter lacks substance can hopefully be addressed by an opportunity to present the

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available at [http://mgt.gatech.edu/programs/mba/con\\_int\\_bus.html](http://mgt.gatech.edu/programs/mba/con_int_bus.html) (last visited Oct. 17, 2004) ("Cross-Cultural Management"); University of Minnesota Carlson School of Management, Full-Time MBA Course Descriptions, available at <http://www.csom.umn.edu/Assets/10451.pdf> (last visited Oct. 17, 2004) ("Complex and Cross-Cultural Negotiations"); Yale School of Management, Course Descriptions, available at <http://www.som.yale.edu/students/courses/elective/leadership-and-organizational-behavior.asp> (last visited Oct. 17, 2004) ("Managing Cultural Dynamics").

<sup>203</sup> See Anthony Lin, *Law Schools Get Down to Business*, NAT'L L.J., May 3, 2004, at 8. "Many law schools, [Northwestern Professor John P.] Heinz said, have responded to perceived changes in the marketplace and set a goal of training lawyers who understand the world of business better and can more easily put themselves in the shoes of clients." *Id.*

Culture is receiving more attention in the curriculum in other professional schools, including medicine. "[The University of Pennsylvania] School of Medicine requires all first-year students to take a 16-hour course called 'Culture Matters.'" Penn In Practice, *First-year Medical Students Learn that Culture Matters*, available at <http://www.upenn.edu/pip/?pip=docpatient> (last visited Oct. 17, 2004). Cross-cultural medical care is at the forefront of Anne Fadiman's riveting text, ANNE FADIMAN, *THE SPIRIT CATCHES YOU AND YOU FALL DOWN: A HMONG CHILD, HER AMERICAN DOCTORS, AND THE COLLISION OF TWO CULTURES* (1997). Fadiman notes that the 1992 edition of the "world's most widely used medical text includes a chapter called 'Cross-Cultural Issues in Medicine,'" but is "allotted only three pages out of 2,844, and it was not cross-referenced in any other chapter." *Id.* at 270. "Today most medical students at least brush shoulders with cross-cultural issues, and some form more than a glancing acquaintance." *Id.* at 271. She describes some of the cross-cultural training incorporated into the curriculum at the medical schools in Wisconsin and Harvard. *Id.*

The University of Missouri School of Journalism requires a "Cross-Cultural Journalism" course for its undergraduate majors. See Missouri School of Journalism, *Requirements for the Bachelor of Journalism Degree*, available at <http://www.journalism.missouri.edu/undergrad-handbook/requirements-after.html> (last visited Oct. 17, 2004). The Show Me State may well have the only university where separate cross-cultural courses are taught in multiple departments.

<sup>204</sup> Also problematic is the reality that, despite the depth of the course material, as described above, some will see cross-cultural negotiations as nothing more than a "skills" course. Former law school dean Paul Brest doubts that skills courses and those who teach them "will be treated as full-fledged members of the law school curriculum and faculty," respectively. Brest, *supra* note 37, at 22.

content of the course. An alternative to presenting the course under the ADR banner is to highlight the interdisciplinary nature of the course, capitalize on the current appeal of interdisciplinary education,<sup>205</sup> and offer the course to students across university departments. For instance, a course entitled "Culture in International Negotiations," could be adapted to satisfy multiple departments. In the legal academy, those schools with diverse student populations or that historically send graduates to practice in multicultural areas may consider a course entitled "Cross-Cultural Lawyering," incorporating much of the material suggested herein, and adapting it to the domestic setting.<sup>206</sup> If a separate course on the subject is not possible, some of the material could be folded into such courses as international negotiations, international business transactions, or the appropriate first-year lawyering course, with the drawback that some of the existing material in these courses would have to be reduced. Ultimately, the task is to shed more light on the mostly neglected matter of culture and its relation to negotiation and dispute resolution, and not necessarily to gain victory by increasing the number of schools that offer the cross-cultural negotiations course.<sup>207</sup>

Curricular inclusion of the subject of culture and dispute resolution is a significant part of the overall goal of bringing more attention to the subject. Another part of the movement is to encourage fruitful research and

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<sup>205</sup> The rhetoric espousing the virtues of interdisciplinary education is apparently common for newly appointed deans at the elite law schools. See Ulysses Torassa, *New Law Dean an Expert on Constitution*, SAN FRAN. CHRONICLE, May 13, 2004, at B4 ("[Stanford Law School dean designate Larry Kramer] said, the school could . . . become more involved in interdisciplinary ventures, working with other scholars in fields like history, science, medicine and economics."); *Michael H. Schill Appointed as Dean of the UCLA School of Law*, available at <http://www.law.ucla.edu/news/newdean.htm> (last visited July 24, 2004) (quoting new dean designate: "[UCLA Law School] is poised to become the leading innovator in interdisciplinary legal education.") (copy on file with author).

<sup>206</sup> Such a course could emphasize cultural dimensions relating to race, ethnicity, religion, and gender, as well as the multiple levels of culture seen in U.S. society.

<sup>207</sup> Readers might be interested in a sampling of student reactions to the course at Missouri-Columbia, which have included both disappointing and favorable comments at the extremes. Comments have ranged from the course being "kind of silly," to "the best course . . . in law school." One former student, a member of Missouri-Columbia's LL.M. program in dispute resolution, urged that the course be required for all LL.M. students. (The course is a core requirement in Pepperdine's Master of Dispute Resolution program. Straus Institute for Dispute Resolution, *Master's Degree Program*, available at [http://law.pepperdine.edu/straus/academics/program\\_overview/masters.jsp](http://law.pepperdine.edu/straus/academics/program_overview/masters.jsp) (last visited Oct. 17, 2004)). I received what was to me the highest compliment about any course when a student, a former state trooper, said, "The course made me think about things that I never thought about before."

commentary on the subject. As Professor Chew mentions, “legal scholars are still in the early stages of acquiring knowledge of the relationship between culture and conflict.”<sup>208</sup> The statement indicates an untapped area of research on questions relating to the relationship between culture, disputes, and the resolution of disputes. The cultural angle could be added to the commentary that addresses various methods of dispute settlement—negotiation, mediation, arbitration, or any of its many hybrids.

Two examples, both inspired from recent commentary, will highlight this point. First, Professor Leonard Riskin has encouraged consideration of new approaches to dispute resolution, such as “transformative mediation, narrative mediation, understanding-based mediation, as well as problem solving, collaborative law, preventive law, and holistic lawyering.”<sup>209</sup> New scholarship could address, for example, whether certain cultures would be more compatible with one or more of the new methods for intra-cultural disputes, or, what type of cross-cultural disputes may be especially suitable to such methods. Second, there is increasing mention in the law commentary devoted to the use of the apology in dispute settlement.<sup>210</sup> For example, Professor Jennifer Robbennolt’s recent article addresses the impact of the apology on dispute resolution, and reports empirical data on the effect certain types of apologies have on possibilities for settlement.<sup>211</sup> Her article begins, interestingly enough, with the observation that “[i]t is often said that U.S. *legal culture* discourages apologies,”<sup>212</sup> presumably, in contrast to its counterpart in Japan. The societal and cultural differences between the two countries that explain the varying approaches to the apology have already

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<sup>208</sup> Chew, *supra* note 5, at 71.

<sup>209</sup> Riskin, *supra* note 24, at 81–82 (footnotes and citations omitted). Professor Riskin acknowledges that some of these approaches are considered in Susan Daicoff’s “Vectors of the Comprehensive Law Movement,” which share a “common goal of a more comprehensive, humane and psychologically optimal way of handling legal matters.” *Id.* at 82 n.22 (quoting Susan Daicoff, *The Role of Therapeutic Jurisprudence Within the Comprehensive Law Movement*, in PRACTICING THERAPEUTIC JURISPRUDENCE 465–66 (Dennis Stolle et al. eds. 2000)).

<sup>210</sup> E.g., Jonathan R. Cohen, *Advising Clients To Apologize*, 72 S. CAL. L. REV. 1009 (1999); Erin Ann O’Hara & Douglas Yarn, *On Apology and Consilience*, 77 WASH. L. REV. 1121 (2002); Lee Taft, *Apology Subverted: The Commodification of Apology*, 109 YALE L.J. 1135 (2000).

<sup>211</sup> Jennifer K. Robbennolt, *Apologies and Legal Settlement: An Empirical Examination*, 102 MICH. L. REV. 460 (2003).

<sup>212</sup> *Id.* at 461 (emphasis added) (citing Hiroshi Wagatsuma & Arthur Rosett, *The Implications of Apology: Law and Culture in Japan and the United States*, 20 LAW & SOC’Y REV. 461 (1986)).

been the subject of some examination.<sup>213</sup> The commentary to date encourages further discussion and research on how cultural norms or cultural identification may affect parties' use of, or reaction to, an apology in dispute settlement in the domestic setting.<sup>214</sup> In short, the culture-based scholarship could complement the existing dispute resolution literature by addressing the follow-up question: Does the subject of discussion allow for further elaboration, along cultural lines, whether in the international, comparative, or domestic setting?

#### IV. CONCLUSION

Culture and cultural differences can shape disputes—and the resolution of disputes—in a host of situations. The modern counsel and neutral must be mindful of the possibility of culture's impact (slight in some situations, serious in others) on the dispute resolution process. This Article advocates more attention to the cultural dimension in the legal academy, suggests a method of inclusion in the law school curriculum, addresses misperceptions about the subject, proposes a framework for study, and encourages related research and scholarship. The goal is to realize that culture is an important part of the study of law and dispute resolution.

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<sup>213</sup> For examples of authorities, see *id.* at 466 n.20.

<sup>214</sup> The survey results analyzed in the Robbennolt article do not identify survey participants by cultural or demographic groups. Robbennolt, *supra* note 211, at 487, tbl. 1, 495, tbl. 2.