

# THE TRANSFORMATIVE POTENTIAL OF ATTORNEY BILINGUALISM

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*In contemporary U.S. law practice, attorney bilingualism is increasingly valued, primarily because it allows lawyers to work more efficiently and to pursue a broader range of professional opportunities. This purely functionalist conceptualization of attorney bilingualism, however, ignores the surprising ways in which multilingualism can enhance a lawyer's professional work and can strengthen and reshape relationships among actors in the U.S. legal milieu. Drawing upon research from psychology, linguistics, and other disciplines, this Article advances a theory of the transformative potential of attorney bilingualism. Looking first to the development of lawyers themselves, the Article posits that attorneys who operate bilingually may, over time, enjoy cognitive advantages such as enhanced creative thinking and problem-solving abilities, a more analytical orientation to language, and greater communicative sensitivity. Moreover, the existence of lawyers who are fully immersed in the bilingual practice of law will transform and invigorate interactions between attorneys and limited English proficient (LEP) clients and, more broadly, among attorneys, the parties to a proceeding, and legal decision makers.*

*Although many U.S. lawyers possess non-English language ability, few are equipped with the complement of knowledge, skills, and values needed to utilize that language ability effectively in a professional setting. Therefore, the Article also calls upon the legal profession to adopt a more rigorous approach to bilingual training and instruction and outlines a set of competencies that underlie effective bilingual lawyering. These competencies relate broadly to cross-cultural interactions, knowledge of foreign legal systems, specialized and versatile language ability, and verbal and nonverbal communication skills.*

INTRODUCTION .....	865
I. ATTORNEY BILINGUALISM: A CONCEPTUAL FRAMEWORK .	868
A. <i>Benefits for Individual Lawyers</i> .....	869
1. Bilingualism and Cognitive Function.....	871

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a.	<i>A brief history of research on bilingualism and intelligence</i> .....	872
b.	<i>Recent research and its application to law practice</i> .....	874
i.	Convergent v. divergent thinking ....	874
ii.	Executive control and problem solving .....	876
iii.	Analytical orientation to language ...	878
iv.	Communicative sensitivity .....	879
c.	<i>Putting the research on bilingualism in context</i> .....	880
i.	Limiting principles .....	880
ii.	Cognitive disadvantages for bilinguals .....	882
B.	<i>Attorney Bilingualism and the Lawyer-Client Relationship</i> .....	883
1.	Attorney Bilingualism and Client Dignity ....	884
2.	Attorney Bilingualism and the Fulfillment of Ethical Obligations .....	886
C.	<i>Reinventing Relationships Among Courts, Clients, and Attorneys</i> .....	890
1.	Historical Perspectives on Language Minorities in the United States .....	890
2.	Language Minorities in the U.S. Legal System .....	893
II.	<b>BILINGUAL PEDAGOGY IN THE LAW SCHOOL CLASSROOM:</b>	
A.	<b>BLUEPRINT FOR INSTRUCTION</b> .....	899
A.	<i>Cross-Cultural Lawyering: A Theoretical Foundation</i> ..	900
B.	<i>Interpreter Role and Function: A Second Foundation</i> ..	903
C.	<i>Knowledge of Legal Systems</i> .....	905
D.	<i>Language Proficiency</i> .....	907
1.	Recognizing the Multiple Dimensions of Language Proficiency .....	908
2.	Recognizing the Fluidity and Variability of a Given Language .....	909
3.	Enhancing Language Proficiency Related to Substantive and Procedural Legal Matters....	911
E.	<i>Verbal Communication Skills</i> .....	912
1.	Using Communication Strategies to Relay Legal Concepts .....	912
2.	Strategic Use of Code Switching .....	914
F.	<i>Paralinguistic and Extralinguistic Behavior</i> .....	917
CONCLUSION	.....	919

## INTRODUCTION

In contemporary U.S. law practice, attorney bilingualism has emerged as a valued and, at times, indispensable attribute. Given the diversification of the domestic client base and the growing transnationalism within many practice areas, non-English language ability is now considered a distinct advantage that allows lawyers to bridge communicative divides, work more efficiently, and pursue a broader range of professional opportunities. This functionalist conceptualization of attorney bilingualism, however, ignores the surprising ways in which multilingualism can enhance a lawyer's professional functioning and can strengthen and reshape relationships among actors in the U.S. legal milieu. Drawing upon research from multiple disciplines, this Article advances a theory of the transformative potential of attorney bilingualism. Looking first to the development of lawyers themselves, the Article posits that attorneys who operate bilingually may, over time, enjoy cognitive advantages that enhance their ability to perform core lawyering functions. Moreover, the existence of lawyers who are fully immersed in the bilingual practice of law will transform and invigorate interactions between attorneys and clients and, more broadly, among attorneys, the parties to a proceeding, and legal decision makers.

Although many U.S. lawyers possess non-English language ability, few are equipped with the bundle of knowledge, skills, and values needed to effectively deploy that language ability in the context of their professional work. Therefore, with this Article, I also call upon the legal profession and law schools to adopt a more rigorous pedagogy geared toward bilingual law practice. Although considerable scholarly attention has been directed to bilingual education in elementary schools, there has been little inquiry into the role that U.S. professional schools can play in harnessing the language abilities of their students and preparing those students to carry out their chosen careers in multiple languages and contexts.<sup>1</sup> Indeed, law

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1. Medical schools in the United States have begun to pursue such initiatives. For example, the University of North Carolina School of Medicine has launched CAMPOS (Comprehensive Enhanced Medical Program of Spanish), an enrichment program designed to train "linguistically and culturally competent physicians." *About CAMPOS*, U.N.C. SCH. OF MED., <http://www.med.unc.edu/campos> (last visited Aug. 11, 2011). The program includes a medical Spanish elective course, community service and medical rotations with Spanish-speaking clients, and overseas immersion opportunities. *CAMPOS Curriculum*, U.N.C. SCH. OF MED., <http://www.med.unc.edu/campos/curriculum> (last visited Aug. 11, 2011). Theresa Gonzalez-Lee & Harold J. Simon have written about a similar multifaceted initiative at the University of California, San Diego. See Theresa Gonzalez-Lee & Harold J. Simon, *Teaching Spanish and Cross-Cultural Sensitivity to Medical Students*, 146 WEST. J. MED. 502, 502-04 (1987).

schools in the United States have been largely inattentive to the unique and important pedagogical opportunities presented by bilingual students.<sup>2</sup> This Article fills that void by presenting a blueprint of the specific competencies to be taught to prepare both law students and graduates for bilingual practice. The proposed reforms are particularly salient in light of calls by scholars and commentators for transformative changes to U.S. legal education,<sup>3</sup> and given the challenges presented by the economic downturn.<sup>4</sup>

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2. Certainly, some scholars have signaled the importance of language learning among law students, and of more subtle bilingual instruction. *See, e.g.*, Adele Blackett, *Globalization and Its Ambiguities: Implications for Law School Curricular Reform*, 37 COLUM. J. TRANSNAT'L L. 57, 74–78 (1998) (promoting foreign language learning among lawyers and providing thoughtful instruction on how to convey legal concepts across languages); Vivian Curran, *Developing and Teaching Foreign Language Courses for Law Students*, 43 J. LEGAL EDUC. 598 (1993) (offering a template for a foreign-language course in a law-school setting); Gloria Sanchez, *A Paradigm Shift in Legal Education: Preparing Law Students for the Twenty-First Century: Teaching Foreign Law, Culture, and Legal Language of the Major U.S. Trading Partners*, 34 SAN DIEGO L. REV. 635, 672 (1997) (encouraging U.S. law schools to offer courses in foreign law, taught in the languages of those countries, with a focus on key trading partners of the United States). Additionally, a handful of schools have initiated more comprehensive programs relating to bilingual instruction. *See infra* note 138 and accompanying text. Despite these prior calls to action and the existence of some bilingual education models, relatively few law schools have embraced bilingual instruction in a systematic way. By presenting a more robust set of justifications, and by spelling out the specific content of bilingual pedagogy, I hope, with this Article, to reinvigorate debates about bilingualism in law schools.

Additionally, when using the term “bilingual” in this Article, I refer to both bilingualism and multilingualism, since the former is a “cover term” for the latter. CAROL MYERS-SCOTTON, *MULTIPLE VOICES: AN INTRODUCTION TO BILINGUALISM* 2 (2006). “Bilingualism” itself can take many forms, depending on the relative language ability of the individual in the languages, and the age, context, and timing of the acquisition. *Id.* at 294.

3. Among these voices, some have placed central importance on cultivating critical thinking ability and developing concrete lawyering skills during law school. WILLIAM W. SULLIVAN ET AL., *EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW* 13–14 (2007) (signaling the importance of developing analytical thinking abilities and practical skills in future lawyers). Others in the legal academy have signaled the increasingly globalized nature of law practice and the corresponding need to prepare future lawyers who can work in diverse settings, in national and international fora, and in collaboration with a range of individual and organizational actors. *See, e.g.*, Alex Aleinikoff, *The Globalization of the American Law School*, 101 AM. SOC'Y INT'L L. PROC. 184, 184–86 (2007) (noting that law graduates are often “involved in matters in [sic] that cross borders and require knowledge, appreciation, and understanding of different legal systems” and that law schools should prepare students accordingly); Margaret M. Barry et al., *Clinical Education for this Millennium: The Third Wave*, 7 CLINICAL L. REV. 1, 59 (2000) (“Whether focused on private law and international economic relationships, public law and transnational problems, or public interest or poverty law implications, the inevitable move towards globalization will require that lawyers acquire skills needed for these new practice settings.”).

4. The recent economic downturn has increased the importance of attorney bilingualism. As law firms and other legal employers streamline their operations, law schools shoulder an even greater burden to produce law students who are poised for practice and who can compete in a global marketplace for jobs. *See* Daniel Thies, *Rethinking Legal Education in Hard Times: The Recession, Practical Legal Education, and the New Job Market*, 59 J. LEGAL EDUC. 598, 599 (2010) (observing that “the recession is causing legal employers to put a premium on job

Part I of the Article draws upon psychology and linguistics research to advance a unique hypothesis: that the bilingual practice of law may produce specific cognitive benefits for lawyers, including enhanced creative thinking and problem-solving abilities, a more analytical orientation to language, and greater communicative sensitivity (awareness of the listener's needs and subtle cues). The Article then situates the bilingual lawyer within a tripartite relationship among lawyers, clients, and decision makers and suggests that attorney bilingualism can have a transformative effect on each of these bilateral relationships. In the attorney-client relationship, bilingual lawyering furthers key imperatives of ethics and human dignity. Additionally, by embracing a culture of bilingualism, lawyers can begin to dismantle the structural impediments that language minorities encounter in their interactions with courts and other decision makers. Despite the emergence of interpreter and translator protocols, non-English speakers remain isolated in the context of most formal legal proceedings. A cadre of bilingual lawyers will themselves be able to relate differently to decision makers and can interpose into and soften structural rigidities between the decision maker and the non-English-speaking party. In so doing, attorney bilingualism can redefine—and enhance—the role of non-English speakers in U.S. legal practice.

As the case for attorney bilingualism is made, a series of questions naturally follows: How can we encourage bilingualism among U.S. lawyers? What role does the legal profession—and U.S. law schools specifically—play in this endeavor? How would bilingual instruction be implemented in a legal education classroom, and what, exactly, would it consist of? Although this Article opens with a theory of how attorney bilingualism can transform lawyers and legal relationships, it also outlines the content of bilingual instruction for institutions that might seek to adopt it. Specifically, in Part II of this Article, I draw upon scholarship related to bilingualism, sociolinguistics, cross-cultural lawyering, and interpretation and outline a set of core competencies that underlie effective multilingual lawyering. These competencies are grouped into five broad categories: (1) general approaches to cross-cultural and cross-language communication, (2) knowledge of foreign legal systems, (3) specialized and versatile language ability, (4) a range of verbal communication

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candidates with practical skills” and suggesting that “[l]aw schools that want to produce graduates competitive in such a market will . . . have to adjust their priorities”).

skills and strategies,<sup>5</sup> and (5) strategic use of paralinguistic and extralinguistic behavior (e.g., speech patterns and body language), and awareness of this behavior in clients. As described below, these competencies can be taught in law schools as part of skills-based courses or can be positioned as a practice-oriented, bilingual add-on to a doctrinal course.<sup>6</sup> In naming these various competencies, I challenge the assumption that multilingual law practice is simply a function of acquiring advanced vocabulary in another language. Throughout this latter part of the Article, I also draw upon lessons learned from my own efforts at bilingual instruction.

## I. ATTORNEY BILINGUALISM: A CONCEPTUAL FRAMEWORK

Attorney bilingualism is often positioned as a strategy to overcome language differences between lawyers and clients. Beyond this basic communicative function, however, attorney bilingualism has the power to enhance a lawyer's cognitive functioning and also redefine a broader matrix of relationships. As illustrated in Figure 1, attorneys routinely interact with decision makers as well as limited English proficient (LEP) or non-English proficient (NEP) clients and other parties. Bilingual attorneys can not only deepen and strengthen their client relationships but also can beneficially interpose into the relationship *between* LEP/NEP clients and decision makers.

In this process, attorney bilingualism recasts the dynamic between legal decision makers and the attorneys themselves. And given the intimate links between language, culture, and social mores, these relational transformations are bound to have a spillover effect over time on how bilingualism is perceived, and how it operates in the legal system more broadly and in society as a whole.

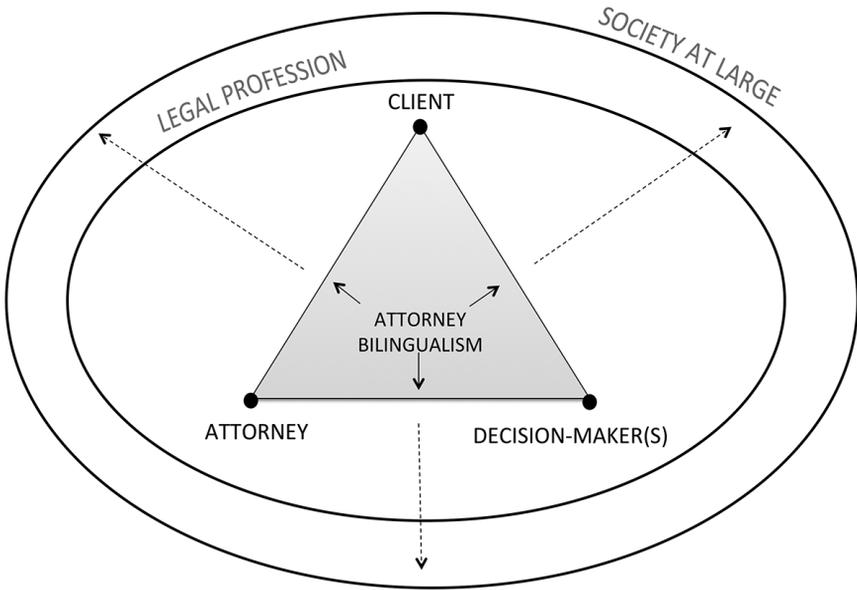
In the paragraphs that follow, I describe the transformative potential of bilingualism, beginning first with a set of hypotheses on how bilingualism shapes lawyers themselves. From there, I conceptualize the multiple ways in which attorney bilingualism can transform and invigorate relationships between lawyers, LEP/NEP clients, and legal decision makers.

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5. See ELLEN BIALYSTOK, COMMUNICATION STRATEGIES: A PSYCHOSOCIAL ANALYSIS OF SECOND-LANGUAGE USE 25-36 (1990) (describing and categorizing different communication strategies in language use).

6. In this Article, I will not exhaust all of the possible applications of bilingual pedagogy, nor will I delve into the minutiae of how it should be invoked in doctrinal, clinical, or hybrid courses. A more specific description of how bilingual pedagogy can be implemented will be reserved for future articles.

FIGURE 1: CONCEPTUAL FRAMEWORK FOR ATTORNEY BILINGUALISM



*A. Benefits for Individual Lawyers*

Discussions about attorney bilingualism often gravitate toward the marketability of language skills. Indeed, fully functional bilingual attorneys are often better positioned to take advantage of professional opportunities created by the forces of globalization.<sup>7</sup> Attorney bilingualism is a valuable commodity in the context of growing language diversity within the United States, which has created a broad client base of LEP and NEP individuals.<sup>8</sup> Attorney

7. See Laurel S. Terry, *The Legal World Is Flat: Globalization and its Effect on Lawyers Practicing in Non-Global Law Firms*, 28 NW. J. INT'L L. & BUS. 527, 548–51 (2008). Communications and technology have certainly brought individuals from different language groups into contact. See COLIN BAKER & SYLVIA PRYS JONES, *ENCYCLOPEDIA OF BILINGUALISM AND BILINGUAL EDUCATION* 133 (1998) (describing factors that have increased contact among languages). There is concern, however, that the dominance of English and anglophone culture in the information age might undermine bilingualism and language diversity. See *id.* at 228–29.

8. According to data compiled by the U.S. Census Bureau in 2011, an estimated 8.7 percent of the total U.S. population speaks English less than “very well.” *Language Spoke at Home*, U.S. CENSUS BUREAU (2011).

These LEP and NEP persons have complex legal needs, spanning a range of practice areas. The needs of the LEP population have expanded to include a broad range of civil legal services, including unique legal issues that members of certain immigrant communities commonly encounter. See, e.g., Joann H. Lee, *A Case Study: Lawyering to Meet the Needs of Monolingual Asian and Pacific American Islander Communities in Los Angeles*, 36 CLEARINGHOUSE REV. 172, 172–79 (2002) (outlining the broad legal needs of LEP Asian Pacific Islander immigrants in Los Angeles relating to family law, employment law, and small business ownership).

bilingualism is also coveted in the practice of public international law and in practice areas that are becoming internationalized.<sup>9</sup> In these discussions, language ability is positioned as an asset for job seekers. The utility of that language for the lawyer's professional work is unquestioned but is assumed simply to be the ability to speak (and, in some cases, read or write) in a non-English language so as to facilitate communication and understanding.

An additional set of benefits, which has received no scholarly attention, is the possibility that bilingual lawyers may enjoy certain cognitive and communicative advantages that enhance core lawyering functions. Although limited empirical data exist, research from the fields of psychology and linguistics suggests intriguing theories relating to benefits such as enhanced creative thinking and problem-solving ability, greater communicative sensitivity, and a more analytical orientation to language. As illustrated in Figure 2, and described below, these cognitive enhancements translate into concrete benefits for day-to-day lawyering activities.

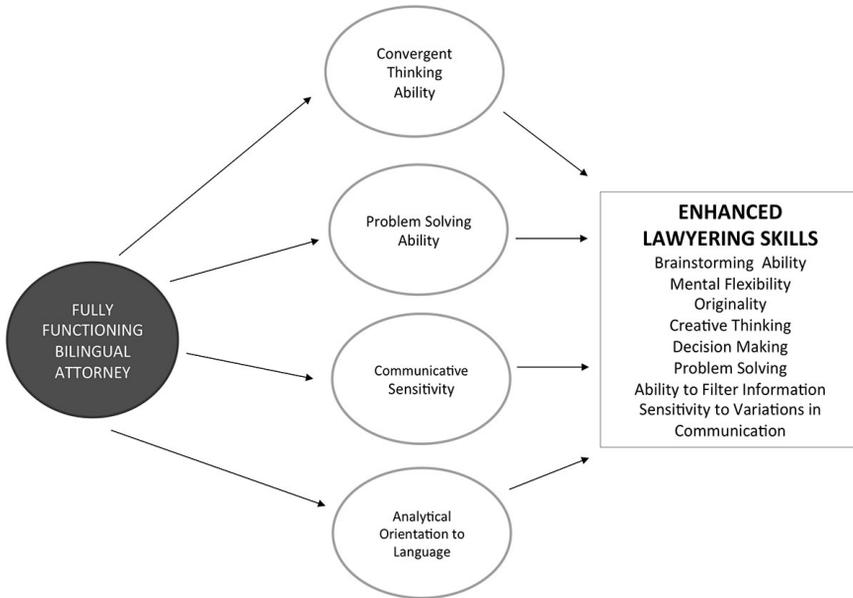
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LEP persons also interface with law enforcement and the criminal justice system as defendants, witnesses, and victims. *See, e.g.*, Flo Messier, *Alien Defendants in Criminal Proceedings: Justice Shrugs*, 36 AM. CRIM. L. REV. 1395, 1403–04 (1999) (describing the linguistic and cultural challenges that foreign-born defendants face in the criminal justice system); Bharathi A. Venkatraman, *Lost in Translation: Limited English Proficient Populations and the Police*, 73 POLICE CHIEF MAG. (April 2006) (citing examples to show that “language barriers can interfere with crime control and undermine the core purpose of police work”).

9. Indeed, in certain practice areas, globalization has rendered multilingualism the norm; the ability to read, write, *e.g.*/or speak certain non-English languages, and to strategically navigate between languages, is critical to effective representation and advocacy. For example, in the context of corporate transactional work, U.S. lawyers must be equipped to review documents in multiple languages as part of their due diligence for cross-border mergers and acquisitions and for bond issuances. Interview with David Lucking, Partner, Allen & Overy (June 19, 2011). Moreover, commercial disputes may lead to arbitrations or litigation before foreign judicial bodies. In these situations, knowledge of the language(s) used for arbitrations or in the local tribunals is critical for written filings and court appearances. *Id.*

Patent law is another practice area where internationalization and language difference have transformed the nature of legal work. U.S. attorneys are increasingly engaged in patent prosecution on behalf of corporate clients from Asia and other parts of the world. *See* Douglas C. Doskocil, *Strategies for Successful Global Patent Prosecution*, in GLOBAL PATENT PROSECUTION: LEADING LAWYERS ON DEVELOPING A STRATEGY FOR FOREIGN PATENTS, MAKING FILING DECISIONS, AND UNDERSTANDING THE CHALLENGES OF OVERSEAS PROTECTION 89, 95–96 (2009) (noting that because of globalization, U.S. lawyers are increasingly expected to coordinate patent prosecution across multiple foreign jurisdictions, which requires overcoming language differences with foreign counsel).

FIGURE 2: COGNITIVE BENEFITS THAT FLOW FROM ATTORNEY BILINGUALISM AND THEIR IMPACT ON LAWYERING SKILLS



### 1. Bilingualism and Cognitive Function

In support of the hypothesis that bilingualism may produce longer-term cognitive and communicative advantages for lawyers, I draw upon research from the fields of cognitive psychology and psycholinguistics. Existing studies suggest that individuals with advanced knowledge of more than one language who operate in bilingual environments may benefit from greater mental flexibility as compared with monolingual individuals. While none of these studies specifically address attorney bilingualism, the research does point toward a net positive effect for lawyers who practice law bilingually. Future research by social scientists will allow for more rigorous testing of the theories advanced below. In the paragraphs that follow, I briefly examine the historical trajectory of research relating to bilingualism and cognitive function and then explore aspects of contemporary research applicable to law practice.

a. *A brief history of research on bilingualism and intelligence*

The literature regarding the relationship between bilingualism and cognitive development (or intelligence) is undoubtedly controversial. As noted above, and described more fully below, there exists today a body of literature relating to bilingualism and enhanced cognitive function. Much of this literature has evolved, over the years, from virulent debates about the value of bilingual education and about the effects of second-language learning on the developing minds of young children. Despite the strong views on all sides, it is impossible to draw simple correlations between bilingualism and intelligence.<sup>10</sup> Cognitive abilities are clearly shaped by multiple factors, including biological and sociological forces that scholars still endeavor to understand. Moreover, the existing studies on this issue, while numerous, cannot necessarily be used to support broader conclusions due to the age, socioeconomic background, or other attributes of the study subjects. Another threshold issue that makes such comparisons difficult is the very definition of bilingualism. Language is used in multiple forms—written and spoken—in countless contexts, and with a wide range of proficiency. This broad spectrum of language ability makes categorical conclusions about “bilingual” vs. “monolingual” almost impossible.<sup>11</sup> Even when scholars have identified a group of “balanced bilinguals”—individuals who have roughly equal abilities in both languages—the question of how to measure the *intelligence* of those individuals has generated controversy.<sup>12</sup>

Research analyzing the relationship between bilingualism and intelligence has evolved considerably since the early 19th century. Colin Baker, a Welsh education scholar, has categorized the trajectory of past research as (1) the period of detrimental effects, (2) the period of neutral effects, and (3) the period of additive effects.<sup>13</sup> As its name suggests, during the first period (which lasted until the 1960s), scholarship on this topic concluded that bilingualism had a negative effect upon intelligence. Present-day scholars who have examined some of these studies have found multiple methodological

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10. Jesus Jose Salazar, *A Longitudinal Model for Interpreting Thirty Years of Bilingual Education*, 22 BILINGUAL RES. J. 19, 28–29 (1998) (positing that, as a whole, bilingual education studies are inconclusive due to their short timeframes and invalid assessment mechanisms).

11. COLIN BAKER, *KEY ISSUES IN BILINGUALISM AND BILINGUAL EDUCATION* 2 (1988). As Myers-Scotton notes “speakers are rarely equally fluent in two languages.” MYERS-SCOTTON, *supra* note 2, at 3.

12. BAKER, *supra* note 11, at 4–9 (describing the controversy around the use of IQ tests to measure the intelligence of bilingual study subjects and positing that “[d]efining intelligence is subjective, value laden, and culturally relative”).

13. BAKER, *supra* note 11, at 9.

flaws and suggest that the conclusions might have been driven by anti-immigrant or xenophobic sentiments.<sup>14</sup> The late 1950s marked the beginning of a brief second wave of scholarship, which found no significant IQ differentials between monolingual and bilingual groups.<sup>15</sup> In the early 1960s, scholarship emerged which highlighted positive consequences of bilingualism, including superior cognitive functioning.<sup>16</sup> Research on the “additive effects” of bilingualism continues to this day.

Despite the aforementioned barriers to identifying the cognitive advantages of bilingualism and the mixed history of scholarship, research since the 1960s has yielded intriguing conclusions, some of which are applicable to law practice. One of the seminal studies of the “additive effects” era was conducted by a pair of Canadian linguists, Elizabeth Peal and Wallace Lambert, who sought to understand the impact of bilingualism among Quebecois youth.<sup>17</sup> Peal and Lambert studied ten-year-old middle-school students from six schools in Montreal and tested them on a range of cognitive functions.<sup>18</sup> Although subsequent scholars have criticized aspects of their methodology,<sup>19</sup> Peal and Lambert heralded a positive correlation between bilingualism and cognitive ability and argued that bilingualism may produce a range of benefits, including greater “mental flexibility, a superiority in concept formation, and a more diversified set of mental abilities.”<sup>20</sup> These benefits, according to Peal and Lambert, may be linked to an ability to think more abstractly and more independently of words.<sup>21</sup> The pair also hypothesized that exposure to a bicultural environment—and the

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14. See, e.g., SUZANNE ROMAINE, *BILINGUALISM* 108–10 (1995) (summarizing the work of more recent scholars who examined intelligence testing in the early 20th century and discerned a tendency to use the testing to label certain racial and ethnic groups as having lesser intelligence).

15. BAKER, *supra* note 11, at 15–16.

16. See *id.* at 16–17.

17. Elizabeth Peal & Wallace E. Lambert, *The Relation of Bilingualism to Intelligence*, 76 *PSYCHOL. MONOGRAPHS* NO. 546 (1962). This study was historically significant in Canada as it helped shape attitudes toward bilingualism and thereby supported efforts to establish official bilingualism in that country. Allan G. Reynolds, *The Cognitive Consequences of Bilingualism, in BILINGUALISM, MULTICULTURALISM, AND SECOND LANGUAGE LEARNING: THE MCGILL CONFERENCE IN HONOR OF WALLACE E. LAMBERT* 145–46 (Allan G. Reynolds ed., 1991).

18. Peal and Lambert, *supra* note 17, at 7–10.

19. These objections include the argument that the sample size was not representative of other populations (beyond Quebecois youth) and that the bilingual students were “balanced bilinguals” and hence cannot represent all individuals with multiple language proficiency. BAKER, *supra* note 11, at 18. Others have argued that Peal and Lambert were insufficiently rigorous in accounting for the socioeconomic and family background of the study subjects. *Id.* at 19.

20. Peal and Lambert, *supra* note 17, at 20.

21. See *id.* at 14.

resulting “positive transfer” between two languages—were factors that enhanced the performance of the bilingual youth on different tests.<sup>22</sup>

In the decades since Peal and Lambert’s study, others scholars have sought to test the validity of their conclusions. Through this research, scholars have developed a more nuanced understanding of how the bilingual brain operates. Nevertheless, much of the research supports the general proposition advanced by Peal and Lambert that speaking two languages enhances cognitive functions.<sup>23</sup> Research from recent decades that is particularly relevant to bilingual law practice is described below.

*b. Recent research and its application to law practice*

Over the last four decades, scholars have conducted scores of studies to compare the cognitive functions of monolingual and bilingual persons. While the studies cover many different countries and languages, certain trends have emerged that suggest that bilinguals do benefit from certain cognitive and communicative advantages. As described below, there is a striking consonance between these advantages and the core skills needed for effective law practice in the twenty-first century. The relevant advantages include a propensity toward divergent thinking, enhanced problem-solving abilities, a more critical orientation toward language, and greater communicative sensitivity. Research suggests that these advantages are most pronounced in individuals who have advanced abilities in both languages and who use both languages on a regular basis.<sup>24</sup> Thus, if lawyers can strengthen their second-language ability and make bilingual lawyering a prominent feature of their practice, the benefits of bilingualism may be even greater.

*i. Convergent vs. divergent thinking*

A key area of inquiry for researchers is the relationship between bilingualism and convergent or divergent thinking ability. Convergent thinkers are those who tend to hone in on a singular solution,

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22. See *id.* at 15–16.

23. Anatoliy V. Kharkhurin, *The Effect of Linguistic Proficiency, Age of Second Language Acquisition, and Length of Exposure to a New Cultural Environment on Bilinguals’ Divergent Thinking*, 11 BILINGUALISM: LANGUAGE AND COGNITION 225, 225 (2008).

24. See *infra* Part I.A.1.c.i.

idea, or response. Divergent thinkers, however, are open to a multiplicity of possibilities in a brainstorming or decision-making scenario.<sup>25</sup> The majority of research on divergent thinking suggests that bilinguals are superior to monolinguals in this type of cognitive processing.<sup>26</sup>

These research results can be explained when one considers the psycholinguistic processes that underlie bilingualism. Individuals who are bilingual have multiple word associations for an object, image, or concept. As a result, the link between that word and the particular object, image, or concept is looser.<sup>27</sup> For example, an individual who is an English-Spanish bilingual will see a twelve-inch plastic replica of a human infant and conjure up the terms *doll* and *muñeca*. Furthermore, since language and culture are deeply connected, the terms *doll* and *muñeca* may have different connotations in the respective languages, which further expand the individual's understanding of objects of this nature.<sup>28</sup> This ability to structure and categorize the world in multiple ways lends itself to divergent thinking. Divergent thinkers are able to conjure multiple associations and representations, even unconsciously and from seemingly unrelated categories.<sup>29</sup> In fact, researchers have found that bilingualism and divergent thinking mutually reinforce one another.<sup>30</sup>

In law practice, divergent thinking is critical to nearly all of the core lawyering skills, including interviewing, counseling, investigating facts, negotiating, and developing case theory. J.P. Guilford has identified four main characteristics of divergent thinking that map onto tasks commonly performed by lawyers. These characteristics are:

25. See Kharkhurin, *supra* note 23, at 225 (defining "divergent thinking" as "a process which involves a broad search for information and the generation of numerous novel alternative answers to problems").

26. See Gilbert A. Jarvis, *The Value of Second-Language Learning*, in *LEARNING A SECOND LANGUAGE* 37 (Frank M. Grittner & Kenneth J. Rehage eds., 1980) (describing a Canadian study by James Cummins and Metro Gulutsan which found "a significantly higher level of verbal originality or divergent thinking for second-language students"); BAKER & JONES, *supra* note 7, at 67 (noting that "ownership of two or more languages may increase fluency, flexibility, originality and elaboration in thinking").

27. See BAKER & JONES, *supra* note 7, at 8.

28. Kharkhurin, *supra* note 23, at 227 ("Cultural knowledge (in the form of schemas and frames) modifies conceptual representations and organizations in the memories of bilingual speakers. New connotations, even entirely new meanings, may develop through acculturation. In turn, newly developed conceptual representations may promote cognitive flexibility, and novel and creative ways of encoding experience.") (citation omitted).

29. See *id.* at 226.

30. S. Scott, *The Relation of Divergent Thinking to Bilingualism: Cause or Effect?*, 10 (1973) (unpublished manuscript) (on file with McGill University Department of Psychology).

Fluency (the ability to rapidly produce a large number of ideas or solutions to a problem); flexibility (the capacity to consider a variety of approaches to a problem simultaneously); elaboration (the ability to think through the details of an idea and carry it out); and originality (the tendency to produce ideas different from those of most other people).<sup>31</sup>

The ability to conjure up multiple solutions—or, more broadly, to be comfortable with a multiplicity of possible meanings of a particular act or object—is crucial for the type of thinking that lawyers must perform for their clients. Indeed, recent monographs on the future of legal education have underscored the need to train students to identify a range of solutions to a given legal issue.<sup>32</sup> Apart from identifying solutions, a key attribute for lawyers is the flexibility to adopt and implement alternative approaches when developments in a case warrant it.<sup>33</sup> Indeed, the ability to develop a solution, think through the constituent steps, and carry them out within a specified timeframe—often labeled “project management”—is another competency expected of law school graduates.<sup>34</sup> The scholarship on bilingualism suggests that operating bilingually may promote the development of these attributes.

## ii. Executive control and problem solving

Canadian linguist and scholar Ellen Bialystok has made significant contributions to the study of bilingualism among adults.<sup>35</sup> One of her principal findings relates to “executive control” processes in bilingual adults. Because the bilingual brain contains complex and detailed information about two language systems, the brain must select the correct linguistic form to convey the intended meaning in the correct language when communicating—all while inhibiting

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31. Kharkhurin, *supra* note 23, at 226.

32. See, e.g., ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP 67 (2007).

33. See, e.g., Douglas S. Lavine, *Creative Thinking*, NAT'L L.J., Mar. 16, 2009, at 13 (offering perspectives from the bench on the need for new and creative argumentation in advocacy).

34. See generally Jim Hassett, *What Every Lawyer Needs to Know About Project Management*, LEGAL PROJECT MGMT. (2010) (encouraging private attorneys to embrace principles of project management so as to keep costs under control and to ensure that work is completed in a timely manner).

35. Claudia Dreifus, *The Bilingual Advantage*, N.Y. TIMES, May 30, 2011, at D2, *available at* <http://www.nytimes.com/2011/05/31/science/31conversation.html> (offering an overview of Bialystok's scholarly contributions in the form of an interview).

the competing language system.<sup>36</sup> Likewise, the brain must be able to switch between languages. These different processes relating to control of language are “executive processes” and form part of what has been termed “executive function” by psychologists.<sup>37</sup> Executive function operates not simply for language use; rather, it is a core part of cognitive activity relating to attention, planning, categorizing, and inhibiting inappropriate responses.<sup>38</sup>

Bialystok and her colleagues have found that as a result of this executive function, bilinguals “benefit from control processes including selective attention to relevant aspects of a problem, inhibition of attention to misleading information, and switching between competing alternatives.”<sup>39</sup> The experience of suppressing the irrelevant language generally “boosts those control processes, making them more efficient for other uses, even nonlinguistic ones.”<sup>40</sup> This enhances problem-solving ability, which likewise requires the ability to focus on relevant information and ignore irrelevant or misleading information. Indeed, Bialystok has found that bilinguals are “better able than monolinguals to control attention when misleading information provided a compelling but incorrect alternative.”<sup>41</sup> Research has demonstrated that the advantages bilinguals enjoy relating to executive control continue throughout adulthood and decline less severely with age.<sup>42</sup>

The research on executive function and problem solving invites interesting hypotheses about problem-solving abilities among bilingual lawyers. Bialystok’s suggestion that bilinguals are better at honing in on relevant information is directly applicable to the fact-gathering process for lawyers: when faced with a complex factual

36. See Ellen Bialystok, *Bilingualism: The Good, the Bad, and the Indifferent*, 12 BILINGUALISM: LANGUAGE AND COGNITION 3, 3–4 (2008) [hereinafter Bialystok, *The Good, the Bad*]; Ellen Bialystok, *Cognitive Effects of Bilingualism: How Linguistic Experience Leads to Cognitive Change*, 10 INT’L J. BILINGUAL EDUC. & BILINGUALISM 210, 210 (2007) [hereinafter Bialystok, *Cognitive Effects of Bilingualism*].

37. Bialystok, *Cognitive Effects of Bilingualism*, *supra* note 36, at 212.

38. *Id.* at 219; see also Zofia Wodniecka et al., *Does Bilingualism Help Memory? Competing Effects of Verbal Ability and Executive Control*, 13 INT’L J. BILINGUAL EDUC. & BILINGUALISM 575, 575 (2010) (“Executive control is required for all forms of higher thought, including the memory procedures used in everyday cognition—attending to ongoing streams of information, processing materials appropriately, ignoring interference, and deploying effective retrieval processes.”).

39. Kharkhurin, *supra* note 23, at 225.

40. Bialystok, *Cognitive Effects of Bilingualism*, *supra* note 36, at 212.

41. Bialystok et al., *Bilingualism Across the Lifespan: The Rise and Fall of Inhibitory Control*, 9 INT’L J. BILINGUALISM 103, 117 (2005).

42. See Bialystok et al., *Bilingualism, Aging, and Cognitive Control: Evidence from the Simon Task*, 19 PSYCHOL. AND AGING 290, 301 (2004). Note, however, that the research subjects in this study were all “balanced bilinguals” who had used the two languages daily. *Id.* at 302; see also Bialystok, *The Good, the Bad*, *supra* note 36, at 7.

scenario, or a tower of corporate documents, a lawyer's role is often to focus on only the relevant facts and filter out the many distractors. This filtering process, which is aided by the executive-control processes, is complementary to the divergent thinking ability described above. As facts are sorted by relevance, lawyers must quickly generate or discard solutions, or both, as dictated by the evolving set of facts. While the research thus far has not tested bilingual lawyers' problem-solving abilities, the proposition that bilingual lawyers may enjoy an advantage in some types of problem solving is nevertheless an intriguing one and worthy of further inquiry.

### iii. Analytical orientation to language

As described above, in the bilingual brain, a looser connection exists between a specific word and its meaning. This looser connection can produce a more critical and analytical orientation to language that enhances communication with clients. A monolingual attorney listening to a client is likely to attach known meanings to words that she hears, without considering other possibilities. For example, a client describing an assault may use the term "stick" to describe the instrument used. Bilingual listeners may not be wedded to the immediate, commonly understood meaning of "stick" and might envision other items. This is facilitated by the metalinguistic awareness among bilinguals—that is, their ability to seek broader meanings based on the content of the communication and its context, rather than be tied to specified structures or definitions.<sup>43</sup>

Because of this familiarity with two languages—and hence two sets of rules relating to grammar and syntax—bilinguals utilize different strategies when interpreting sentences. They may import processing strategies from one language into their understanding of another or may develop amalgamated strategies.<sup>44</sup> By way of example, English speakers, when interpreting sentences, rely heavily on subject-verb-object order; word order varies more in Spanish, so Spanish speakers also rely on subject-verb and noun-adjective agreement.<sup>45</sup> Bilingual speakers, however, tend to use a combination of

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43. MYERS-SCOTTON, *supra* note 2, at 339. Metalinguistic skills also include the ability to reflect upon, and analyze, the form of language, and to separate word form from meaning. ROMAINE, *supra* note 14, at 114.

44. See Iliana Reyes & Arturo E. Hernández, *Sentence Interpretation Strategies in Emergent Bilingual Children and Adults*, 9 BILINGUALISM: LANGUAGE & COGNITION 51, 53 (2006).

45. See *id.*

processing strategies when interpreting sentences. Such combined interpretation strategies may be useful for a lawyer communicating with a client. Imagine, for example, that a client who is somewhat proficient in English communicates in English with her bilingual attorney. That attorney's prior exposure to the speaker's first language will aid her in filtering out the imperfections of sentence structure and grammar, and in understanding the communication.<sup>46</sup>

#### iv. Communicative sensitivity

Researchers have also suggested that bilingual individuals benefit from greater communicative sensitivity, which includes heightened sensitivity to verbal and non-verbal cues and to particularized needs of listeners.<sup>47</sup> Communicative sensitivity manifests in specific ways: because of their superior auditory language skills, bilingual persons are able to detect variations in diction and tone<sup>48</sup> and can capture other aspects of communication, including subtleties in emotion.<sup>49</sup> Upon detecting these subtle cues, bilingual individuals are able to switch into another language or can otherwise respond to perceived communication difficulties on the part of their interlocutor.<sup>50</sup>

This communicative sensitivity provides added value when interacting with clients, witnesses, and other parties to a legal proceeding. Successful lawyering hinges upon effective comprehension and communication, which greater sensitivity to nuance can only improve. In particular, the ability to discern whether a client

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46. Cf. Tracey M. Derwing, Marian J. Rossiter & Murtagh J. Munro, *Teaching Native Speakers to Listen to Foreign-Accented Speech*, 23 J. MULTILINGUAL & MULTICULTURAL DEV. 245, 256 (2002) (finding that cross-cultural lessons and accent instructions empowered listeners to communicate more effectively with LEP individuals).

47. See Wally Lazaruk, *Linguistic, Academic, and Cognitive Benefits of French Immersion*, 63 CAN. MOD. L. REV. 605, 619 (2007).

48. MARTIN L. ALBERT & LORAIN K. OBLER, *THE BILINGUAL BRAIN: NEUROPSYCHOLOGICAL AND NEUROLINGUISTIC ASPECTS OF BILINGUALISM* 248 (1978).

49. W. Quin Yow & Ellen M. Markman, *Bilingualism and Children's Use of Paralinguistic Cues to Interpret Emotion in Speech*, 14 BILINGUALISM: LANGUAGE & COGNITION 562, 563 (2011) ("[B]ilingual children may be better able to use paralinguistic cues to interpret a speaker's emotion than monolingual children in contexts where children typically tend to rely on content over paralanguage to evaluate emotion. . . . [T]he bilingual advantage should be expected only when intonation and content conflict.")

50. COLIN BAKER, *FOUNDATIONS OF BILINGUALISM AND BILINGUAL EDUCATION* 157 (2011); see also F. Genese, G.R. Tucker, & W.E. Lambert, *Communication Skills of Bilingual Children*, 46 CHILD DEV. 1010, 1013 (1975) (finding that "children educated in a nonnative language would be more sensitive to the communication needs of listeners than children educated in their native language").

(or another interlocutor) is experiencing a communication difficulty is especially valuable. Because of power differentials, cultural difference, and/or language ability, LEP clients often may be reluctant to admit such a difficulty. Bilingual attorneys may be uniquely positioned to flag and respond to such circumstances. More broadly, communicative sensitivity undoubtedly contributes to the social intelligence needed to navigate the varied and complex relationships that lawyers form.

*c. Putting the research on bilingualism in context*

In assessing these studies on the cognitive advantages of bilinguals, it is worth noting that none of the research suggests that bilinguals are inherently more intelligent than monolinguals.<sup>51</sup> The research is not centered on questions of intellectual superiority but rather on a desire to understand how specific cognitive processes operate when one retains two or more language systems. Additionally, to appropriately frame the significance of this research, one should apply two lenses of analysis: (1) a set of general limiting principles that have emerged from the research, and (2) studies relating to cognitive *disadvantages* for bilingual adults.

*i. Limiting principles*

A handful of limiting principles can be distilled from the recent research on bilingualism and cognitive function. First, in assessing the value-added features of bilingualism, the degree of language proficiency is likely a relevant factor.<sup>52</sup> Scholars in the field of psycholinguistics have advanced the theory that bilinguals must “achieve high levels of linguistic proficiency in both of their languages before bilingualism can promote cognitive development.”<sup>53</sup> This principle is known as “threshold theory.”<sup>54</sup> Consistent with this theory, individuals who are balanced bilinguals (with roughly equal competence in both languages) are more likely to enjoy cognitive benefits as compared with dominant bilinguals (those who speak

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51. Bialystok, *Cognitive Effects of Bilingualism*, *supra* note 36, at 220.

52. See Ellen Bialystok, *Levels of Bilingualism and Levels of Linguistic Awareness*, 24 DEVELOPMENTAL PSYCHOL. 560, 560 (1988).

53. Lina A. Ricciardelli, *Bilingualism and Cognitive Development in Relation to Threshold Theory*, 21 J. PSYCHOLINGUISTIC RES. 301, 302 (1992).

54. *Id.*

one language better).<sup>55</sup> Studies in different contexts have similarly concluded that the spillover benefits of bilingualism may depend upon the degree and nature of the individual's second-language ability.<sup>56</sup>

In a related vein, psycholinguist Francois Grosjean has criticized some of the studies for being insufficiently attentive to the exact type of bilinguals being studied.<sup>57</sup> Grosjean analyzes a number of aspects of bilingualism that ought to be considered, including the history and current status of language acquisition, the speaker's current uses of the respective languages, the degree of proficiency, and relevant biographical information, such as sex, socioeconomic status, and educational background.<sup>58</sup> Of the factors raised by Grosjean, age of language acquisition is among those that other researchers have flagged. Anatoliy Kharkhurin, for example, has hypothesized that "acquisition of both languages at an early age may lead to a greater sensitivity to underlying concepts and more refined connections between linguistic and conceptual representations [which, in turn] may result in establishing more elaborate associations and therefore greater divergent thinking."<sup>59</sup>

Another limiting principle is the degree to which a bilingual individual has been exposed to a different cultural environment. Kharkhurin and others have found a correlation between the length of exposure to a culture and divergent-thinking ability. For example, someone learning English may learn the term "turkey" as a way to describe a type of bird. The additional exposure to U.S. culture—specifically, Thanksgiving—imbues that term with additional, culturally specific meaning and enhances the conceptual representation of "turkey" to include a plentiful dinner table or other aspects of a celebration.<sup>60</sup> An individual may possess advanced, lifelong proficiency in two languages; still, absent some

55. See Kharkhurin, *supra* note 23, at 226.

56. See Ellen Bialystok & Shilpi Majumder, *The Relationship Between Bilingualism and the Development of Cognitive Processes in Problem Solving*, 19 *APPLIED PSYCHOLINGUISTICS* 69, 83 (1998) ("It seems that, in extending the effects of bilingualism beyond language, the degree and perhaps the nature of bilingualism are determining factors in non-linguistic problem solving."); Ricciardelli, *supra* note 53, at 313–14 (finding that highly proficient bilinguals enjoyed advantages in the areas of divergent thinking, imagination, grammatical awareness, perceptual organization, and reading achievement).

57. See Francois Grosjean, *Studying Bilinguals: Methodological and Conceptual Issues*, 1 *BILINGUALISM: LANGUAGE & COGNITION* 131, 132–33 (1998).

58. *Id.* at 133.

59. Kharkhurin, *supra* note 23, at 227; *see id.* at 232 (finding that earlier second-language learners "tended to have greater abilities to rapidly produce a large number of ideas or solutions to a problem . . . and to consider a variety of approaches to a problem simultaneously").

60. *Id.* at 237–38.

form of cultural immersion, the value-added cognitive benefits may be limited.

These principles certainly complicate the general proposition that bilingualism may enhance the cognitive functioning of lawyers. Lawyers with only moderate second-language ability may not enjoy the same cognitive advantages as those who are fully bilingual. Moreover, if age of acquisition is a determinative factor for cognitive enhancement, there may be little that monolingual adult lawyers can do to reap these cognitive benefits. Spanish language courses taken as an adult will certainly enhance a lawyer's professional work but may not yield the more subtle advantages described above. Likewise, the importance of cultural immersion for certain cognitive advantages underscores the need for exposure to different environments, whether as part of a law school course or through other channels. Nevertheless, I contend that law schools and the legal profession should nurture students and lawyers with non-English language ability, so as to activate any untapped cognitive potential.

## ii. Cognitive disadvantages for bilinguals

In addition to these limiting principles, some of the literature on bilingualism does suggest possible cognitive disadvantages for bilingual adults. Notably, several studies have concluded that bilinguals have less verbal or semantic fluency than monolinguals.<sup>61</sup> In the field of neuropsychology, "verbal fluency" refers to the ability to generate words in a limited period of time—for example, naming animals, fruits, vegetables, or words that begin with a certain letter.<sup>62</sup> In one study of healthy, older Spanish-English bilinguals, researchers found that bilingual participants scored lower on semantic fluency tests when compared with Spanish and English monolinguals.<sup>63</sup> Similar results were found in a study of thirty Spanish-English bilinguals in California.<sup>64</sup> The delayed retrieval time in these studies is likely attributable to interference from the second language; although bilinguals benefit from multiple associations

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61. See Sarah Ellen Ransdell & Ira Fischler, *Memory in a Monolingual Mode: When are Bilinguals at a Disadvantage?*, 26 J. MEMORY & LANGUAGE 392, 393 (1987).

62. See Tamar H. Gollan et al., *Semantic and Letter Fluency in Spanish-English Bilinguals*, 16 NEUROPSYCHOL. 562, 562 (2002).

63. Mónica Rosselli et al., *Verbal Fluency and Repetition Skills in Healthy Older Spanish-English Bilinguals*, 7 APPLIED NEUROPSYCHOL. 17, 23 (2000). The authors for this study did note, however, that participants who had learned the second language earlier in life performed significantly better. *Id.* at 23.

64. See Gollan et al., *supra* note 62, at 570, 573.

with a given object or concept, these multiple associations can compete in the retrieval process, thereby delaying response time.<sup>65</sup>

Bilinguals also tend to experience more “tip-of-the-tongue experiences,” which may be related, in part, to interference from a competing language system.<sup>66</sup> A few studies have also concluded that bilingual adults have a smaller vocabulary size than monolinguals, but this proposition is not universally accepted.<sup>67</sup> Finally, although most lawyers relish their distaste for math, one study found that strong bilingual speakers took longer to perform certain, complex arithmetic functions.<sup>68</sup>

In describing these possible cognitive-professional advantages for bilingual attorneys, I do not intend to overstate the existing research in this area. At a minimum, additional studies are warranted to better understand the cognitive benefits that accrue to adult bilinguals who regularly use both languages in a professional setting. Nevertheless, the research suggests, at worst, a net neutral effect of bilingualism. When one considers the basic psycholinguistic processes that underlie bilingualism, the inference of a moderate positive effect seems justified.

### *B. Attorney Bilingualism and the Lawyer-Client Relationship*

Attorney bilingualism can reshape the relationship between lawyers and their clients in ways that are at once subtle and deeply transformative. Naturally, attorney bilingualism facilitates communication with LEP and NEP clients and allows lawyers to work more expeditiously. Beyond these pragmatic benefits, however, the ability to speak in a shared language allows the lawyer to convey certain values about the relationship and also permits a potentially deeper connection to be forged. Moreover, as a corollary to these dignity-related client concerns, thoughtful bilingualism also enables attorneys to more fully realize the ethical standards that guide the profession.

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65. See *id.* at 563.

66. Bialystok, *The Good, the Bad*, *supra* note 36, at 4.

67. Gollan et al., *supra* note 62, at 564 n.1 (describing the diverse views on vocabulary size); see Ellen Bialystok & Xiaojia Feng, *Language Proficiency and Executive Control in Proactive Interference: Evidence from Monolingual and Bilingual Children and Adults*, 109 *BRAIN & LANGUAGE* 93, 93–94 (2009).

68. See David C. Geary et al., *Mental Arithmetic: A Componential Analysis of Speed-of-Processing Across Monolingual, Weak Bilingual, and Strong Bilingual Adults*, 28 *INT’L J. PSYCHOL.* 185, 198 (1993).

## 1. Attorney Bilingualism and Client Dignity

The ubiquity of *se habla español* in lawyer advertisements suggests that a shared language is an important attribute for LEP and NEP clients who are seeking legal representation. The desire to use a shared language, however, extends far beyond functional communication needs. The act of communicating with a client in a shared language allows a lawyer to telegraph certain values—namely, her willingness to treat the client as an equal and to encourage the client to be an active participant in the representation. The lawyer’s ability to communicate in the client’s preferred language can thereby help to strengthen a relationship of mutual respect and trust between that lawyer and the client.<sup>69</sup> And, as described below, use of a shared language can enhance client dignity by ensuring that the client’s voice is understood and relayed in its purest form, and by avoiding the subtle forms of paternalism that sometimes accompany cross-language interactions.

As suggested above, use of a specific language in a conversation can reflect one’s views of the other participants in a conversation.<sup>70</sup> For example, use of a particular language, or specific forms within a given language, may be a conscious strategy to diminish (or even increase) power differentials and the social distance between two speakers.<sup>71</sup> More fundamentally, use of a shared language can also be an expression of connection and common membership between two human beings. James Boyd White has written of this deeper human impulse. In describing his desire to communicate in Spanish with a Spanish-speaking family, he writes:

What was the understanding that we sought? Was it simply the capacity to “express our ideas” in Spanish or English, as the case might be? . . . No: what I wanted to be able to do, and I think the others did too, was to inhabit the world of the other, to speak Spanish, or English, with the right intonation, cadence, texture, with the right position of the body and timbre of the voice, to respond and be responded to in a whole way. That sense of human reciprocity, of shared movements, is

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69. In drawing this connection, I recognize that language ability, without more, is an insufficient gauge of a lawyer’s ability to connect and build trust with clients. There are many bilingual lawyers who are ineffective practitioners of the “emotional” side of lawyering. Moreover, there are some bilingual lawyers who—intentionally or not—take advantage of the foundational connection created by a shared language to draw in clients, yet ultimately fail to provide competent representation.

70. MYERS-SCOTTON, *supra* note 2, at 143.

71. *Id.* at 151.

where the deepest meaning lies. . . . [L]anguage has its roots not in ideas but in social relations.”<sup>72</sup>

White’s reflections underscore the profound human connection that derives from shared language use. Implicit in these efforts at communicating in a shared language is respect for the individuality of the interlocutor and an acknowledgment of her basic human dignity.

Preservation of dignity is an implicit norm that guides conventional human interactions. For lawyers, however, this norm takes on additional meaning; indeed, as David Luban has written, a core duty of a lawyer is to uphold human dignity.<sup>73</sup> Clearly, the concept of “dignity” is somewhat elusive and has been the subject of philosophical inquiry for generations. In the legal context, the imperative to uphold human dignity arguably translates into the ability to tell one’s story and present one’s position to a decision maker. The role of a lawyer in absorbing that story—a story that is inherently unique and subjective—and articulating it in a persuasive fashion is critical to promoting dignity.<sup>74</sup> Using a shared language can enhance the client’s dignity simply by virtue of the connection between attorney and client. The shared language also allows for a deeper, more refined understanding of the client’s story. A bilingual attorney who can grasp nuances in language and cultural context has access to the client’s voice and her story in its purest form. An inadequate understanding of these subtleties can lead to errors in absorbing and relaying a client’s story.<sup>75</sup>

Honoring the dignity of clients also requires valuing their autonomy and avoiding paternalism. When thinking of autonomy in this context, I do not refer to the strict Kantian definition of autonomy (i.e., behavior guided by one’s own moral compass) but to respecting the expression of human will and the choices that individuals make.<sup>76</sup> This involves an appreciation and respect for human will not just as an untethered force, but rather as a complex bundle of views, emotions, experiences, and relationships.<sup>77</sup> For example, a client may insist on a particular course of action that the lawyer disagrees with. This generates a counseling dilemma fraught with

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72. JAMES BOYD WHITE, *JUSTICE AS TRANSLATION* 232–33 (1990).

73. DAVID LUBAN, *LEGAL ETHICS AND HUMAN DIGNITY* 66 (2007).

74. *See id.* at 70.

75. *See* Clark D. Cunningham, *A Tale of Two Clients: Thinking of Law as Language*, 87 MICH. L. REV. 2459, 2464–65 (1989).

76. *See* LUBAN, *supra* note 73, at 76.

77. David Luban, *Lawyers as Upholders of Human Dignity (When They Aren’t Busy Assaulting It)*, 2005 U. ILL. L. REV. 815, 826.

concern about how best to uphold client dignity. A lawyer appropriately trained on issues of language and culture who can diagnose relevant aspects of a client's life experience is more likely to successfully navigate these challenging lawyering scenarios.

Luban has also posited that a factor underlying all of the efforts that lawyers undertake to honor client dignity is the imperative to not humiliate others.<sup>78</sup> Humiliation involves an implicit assessment of the worth of another; the subject of humiliation is considered to be less worthy, less valuable, or of lesser rank. In the legal context, humiliation can occur if a lawyer "treat[s] a person's story and viewpoint as insignificant."<sup>79</sup> Communicating in a common language may ameliorate the subtle, often unconscious forms of humiliation that occur in cross-language lawyering scenarios.

These unintended acts of humiliation arise from psycholinguistic processes that are triggered when speakers of a dominant language in a society encounter speakers of other languages. The human brain has developed a set of responses when communicating with infants who are learning to speak. Adults deploy communication strategies, including slowing down, repetition, simplification, and changes in tone.<sup>80</sup> Interestingly, these same psycholinguistic processes are deployed when adults encounter other adults who do not speak the dominant language.<sup>81</sup> Therefore, the communication may result in subtle forms of infantilization or even humiliation. In both professional and social settings, one can observe these patterns in conversations between native English speakers and LEP persons. A lawyer's effort to communicate in the client's primary language mitigates this dynamic and arguably levels the balance of language and power between the two interlocutors.

## 2. Attorney Bilingualism and the Fulfillment of Ethical Obligations

Bilingualism enhances the ability of lawyers to satisfy the ethical obligations they owe to LEP and NEP clients. It is certainly possible for monolingual lawyers to competently represent such clients with

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78. See LUBAN, *supra* note 73, at 88.

79. Luban, *supra* note 77, at 822.

80. BIALYSTOK, *supra* note 5, at 99.

81. See *id.* at 85 ("[C]hildren's communication is similar to the adult second-language learner encountering a problem of a lexical gap."); *id.* at 99 ("Many of these modifications are similar to the adjustments that adults make when addressing foreigners.") (citation omitted).

the aid of a skilled interpreter.<sup>82</sup> In fact, as noted above, a rigorous set of practices has evolved to ensure accurate communication between attorneys and NEP clients. Notwithstanding those practices, attorneys commonly rely upon mediocre or underdeveloped second language ability when communicating with clients. In such scenarios, lawyers risk a range of ethical lapses.<sup>83</sup> The Association of the Bar of the City of New York flagged some of these concerns in a 1995 ethics opinion, noting that a lawyer's

attempts to communicate solely using a rudimentary personal knowledge of a foreign . . . language may not only be unwise, but may reflect bias or condescension towards the client because such a practice could tend to minimize the importance of what the client has to say to the lawyer and the client's role in decision making, and to treat the client with less care than other clients because of the language barrier between lawyer and client.<sup>84</sup>

Despite this admonition, lawyers with some degree of second-language proficiency short of fluency routinely represent clients without the aid of an interpreter. At law firms, not-for-profit organizations, and government offices—just about any entity affected by the economic downturn—bilingual lawyers are thrust into treacherous lawyering scenarios involving LEP/NEP clients, dependent upon their own language abilities throughout much of their representations. In these situations, a lawyer may overestimate his language ability, leading to communication hiccups, misunderstandings, or worse. In cases where the details of the testimony are critical, and where credibility findings are vital to a case, miscommunications stemming from language difference pose a grave concern. Indeed, notwithstanding the dignitary value of communicating in the same language, such clients are ultimately better served by the use of a properly trained interpreter.

Lawyers with moderate language ability run the risk of breaching a range of specific ethical norms. In his article on the role of legal

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82. Many ethics opinions have found that use of an interpreter with LEP clients is often vital to competent representation. See, e.g., N.Y. City Bar Ass'n Comm'n on Prof'l Ethics Formal Op. 1995-12 (1995).

83. See Paul M. Uyehara, *Legal Help for Speakers of Other Languages: Three Ethical Traps*, 29 NAT'L LEGAL AID & DEFENDER ASSN. 8 (2007) (arguing that an attorney with inadequate language ability who fails to use an interpreter risks the same ethical hazards as a monolingual attorney who forgoes an interpreter).

84. N.Y. City Bar Ass'n Comm'n on Prof'l Ethics Formal Op. 1995-12 (1995).

interpreters, Muneer Ahmad describes various ethics rules implicated when lawyers represent non-English-speaking clients with whom they lack a shared language.<sup>85</sup> Many of these concerns rise to the surface when lawyers invoke a not quite fully developed second language. Fundamentally, Rule 1.1 of the Model Rules requires a lawyer to provide competent representation—which, in turn, requires the “legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”<sup>86</sup> As the California State Bar has noted, sensitivity to communication difficulties with LEP clients “is an important aspect of attorney competence.”<sup>87</sup>

For lawyers who intend to practice bilingually, underdeveloped language ability may represent a deficiency in a “skill” needed to offer competent representation. This deficiency can be remedied through additional training and preparation. The ethical requirement for diligent representation, per Rule 1.3, can be read to impose a similar obligation on lawyers.<sup>88</sup> When assessing the sufficiency of the representation, one must consider not only the lawyer’s ability to engage in verbal communication but also her ability to read or write in the target language, absent a translator.

Lawyers practicing law in a second language may risk critical communication errors. Under Rule 1.2, a lawyer “shall abide by a client’s decisions concerning the objectives of representation, and . . . shall consult with the client as to the means by which they are to be pursued.”<sup>89</sup> Likewise, Rule 1.4 requires a lawyer to keep a client reasonably informed about case developments.<sup>90</sup> The Comments to Rule 1.4 note that “[t]he client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued.”<sup>91</sup> The ability to fulfill this set of obligations rests on clear and effective communication, which may be hindered by limited language ability. Yet Rule 1.2 also empowers attorneys to “take such action on behalf of the client as is *impliedly authorized* to carry

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85. See Muneer I. Ahmad, *Interpreting Communities: Lawyering Across Language Difference*, 54 UCLA L. REV. 999, 1019–24 (2007).

86. MODEL RULES OF PROF’L CONDUCT R. 1.1 (1983).

87. Cal. Comm. Prof’l Responsibility & Conduct, Formal Op. 1984-77 (1984). Interestingly, the opinion suggests that one way to bridge language difference is to “refer the case to or associate a bilingual attorney who can assist with the language problem, as is done in other areas when a lawyer is confronted with a matter calling for skills outside his or her personal experience or ability.” *Id.*

88. See MODEL RULES OF PROF’L CONDUCT R. 1.3 (1983).

89. MODEL RULES OF PROF’L CONDUCT R. 1.2 (1983).

90. MODEL RULES OF PROF’L CONDUCT R. 1.4 (1983).

91. MODEL RULES OF PROF’L CONDUCT R. 1.4 cmt. 5 (1983).

out the representation.”<sup>92</sup> In English-English lawyering scenarios, determining what is “impliedly authorized” may turn on a short phrase uttered by a client, tone of voice, or even facial expressions and body language. A lawyer who has not been properly trained in the use of a second language, yet who nevertheless proceeds to communicate with clients in that language, may risk missing subtle communicative cues. Missed cues may, in turn, create a distorted picture of a client’s goals or the lawyer’s scope of authority. Even more fundamentally, a lawyer with limited language ability may find it difficult to keep the client informed about the progress of the representation.<sup>93</sup>

A final ethical rule relevant to bilingual lawyers is Rule 7.2, relating to lawyer advertising. A handful of states have explicitly addressed the question of whether, and how, an attorney may refer to her language ability in the context of advertising. While most states permit lawyers to advertise language ability, state bars have generally failed to consider the question of what competencies a lawyer must possess in order to practice law bilingually. Indeed, the state bar associations are guilty of internalizing a core assumption—that lawyers can easily filter their acquired legal knowledge into another language and thus provide suitable representation to clients—which this Article seeks to challenge.

In fact, at least one ethical oversight body has arguably undervalued training that is relevant for bilingual lawyers. In a 1980 ethics opinion, the New Jersey Supreme Court Advisory Committee on Professional Ethics ruled that an attorney practicing law in New Jersey who had a doctorate in Spanish could not use the phrase “Ph.D. in Spanish” on his card or letterhead.<sup>94</sup> The Committee based its decision on a prior ABA opinion concluding that lawyer advertising should not include references to “earned degrees or titles, which do not indicate training in the law.”<sup>95</sup> While that general principle is reasonable, advanced language study might endow a lawyer with a body of knowledge and skills that enhance the execution of professional functions.

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92. MODEL RULES OF PROF'L CONDUCT R. 1.2 (1983) (emphasis added).

93. See Sanchez, *supra* note 2, at 670–71 (describing the case of an Arizona attorney who lacked fluency in Spanish, and who was sanctioned by the Ninth Circuit for erroneously relying on his client’s representation about the legal significance of a Mexican court’s judgment).

94. N.J. Sup. Ct. Advisory Comm. on Prof'l Ethics, Op. 461 (Sept. 11, 1980).

95. *Id.* (citing ABA Comm. on Prof'l Ethics, Informal Op. No. 1247 (Oct. 18, 1972)).

### C. *Reinventing Relationships Among Courts, Clients, and Attorneys*

Attorney bilingualism serves as an important counterbalance to forces that have contributed to the marginalization and devaluation of language minority status, both in U.S. society as a whole and in the U.S. legal system in particular. Promoting attorney bilingualism would help mitigate the historically entrenched isolation that LEP individuals experience as participants in this system and would redefine relationships between legal decision makers and the attorneys and LEP/NEP clients who appear before them.

#### 1. Historical Perspectives on Language Minorities in the United States

The societal posture toward bilingualism in the United States has shifted over time. In the nineteenth century, bilingualism in the United States was generally accepted, and European immigrants and other groups embraced bilingual education.<sup>96</sup> With the onset of World War I and, later, World War II, foreign language schools were shut down, given the emphasis on national unity and a particular concern about nefarious influences from parts of Europe.<sup>97</sup> In the late 1960s, by contrast, an emphasis on remaining globally competitive reinforced the importance of bilingual education. This dovetailed with the Civil Rights movement and growing concern about the status of language minorities in the United States. In 1968, Congress passed the Bilingual Education Act, which encouraged schools to offer instruction in multiple languages.<sup>98</sup>

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96. FRANCOIS GROSJEAN, *LIFE WITH TWO LANGUAGES: AN INTRODUCTION TO BILINGUALISM* 68 (1982) (“There were German schools in Ohio, Pennsylvania, Indiana and other states with strong German minorities; French schools in Louisiana, and later in New England, usually run by Catholic priests, brothers, and nuns; Spanish schools in New Mexico and other Spanish-speaking areas.”).

97. Prohibitions against teaching German emerged at the state level in Nebraska, Ohio, and Iowa. See BILL PIATT, *¿ONLY ENGLISH? LAW AND LANGUAGE POLICY IN THE UNITED STATES* 38 (1990). In Iowa and South Dakota, state governments issued decrees prohibiting the use of non-English languages in public places. See *id.* at 17; see also Stephen J. Frese, *Divided by a Common Language: The Babel Proclamation and Its Influence in Iowa History*, 39 *THE HIST. TCHR.* 59, 62 (2005) (describing a 1918 proclamation issued by Iowa Governor William L. Harding, which banned the use of non-English languages in public places). The Nebraska law was challenged through litigation, and ultimately resulted in a U.S. Supreme Court decision, holding that the restrictions against foreign-language instruction constituted a deprivation of liberty, and thus violated the 14th Amendment. *Meyer v. Nebraska*, 262 U.S. 390 (1923).

98. Bilingual Education Act of 1968, Pub. L. No. 90-247, 81 Stat. 816 (codified as amended at 20 U.S.C. §§ 3221–3262 (1982)). The Bilingual Education Act has been criticized for encouraging transitional education programs designed to cultivate English-language learning without necessarily preserving the speaker’s first language. See Gi Hyun

The 1980s witnessed a growth in the English-only movement across the country. In Congress, numerous joint resolutions were introduced to amend the Constitution and make English the official language of the nation.<sup>99</sup> At the state and local levels, English-only and “official English” resolutions and ordinances proliferated.<sup>100</sup> This trend continued into the 1990s with the passage of “official English” laws in six states.<sup>101</sup> In the current political moment, in a post-9/11 environment, views toward bilingualism are decidedly mixed. On the one hand, the September 11 attacks have ratcheted up anti-immigrant sentiment and xenophobia and have fueled even more “official English” initiatives at the federal and state levels.<sup>102</sup> On the other hand, periodic economic struggles—and even the country’s national security challenges—have underscored the need for a bilingual populace that can engage in the global marketplace and also staff the country’s intelligence and military operations.<sup>103</sup>

On a broader societal level, the United States has had a dichotomous attitude toward bilingualism in recent decades. Among

An, *The Right to Bilingual Education: Providing Equal Educational Opportunity for Limited English Proficient Children in a Pluralist, Multicultural Society*, 11 GEO. IMM. L.J. 133, 142–43 (1996) (describing the Act’s emphasis on transitional bilingual programs).

99. See, e.g., H.J. RES. 13, 100th Cong. (1987); H.J. RES. 96, 99th Cong. (1985); S.J. RES. 167, 98th Cong. (1983); S.J. RES. 72, 97th Cong. (1981).

100. CAL. CONST. art. III, § 6 (amended 1986); COLO. CONST. art. II, § 30a (amended 1988); FLA. CONST. art. II, § 9 (amended 1988); ALASKA STAT. § 44.12.300 (2010) (enacted in 1998 via Ballot Measure No. 6, § 1); ARK. CODE ANN. § 1-4-117 (2008) (effective 1987); IND. CODE § 1-2-10-1 (2011) (effective 1984); KY. REV. STAT. § 2.013 (LexisNexis 2008) (enacted 1984); MISS. CODE ANN. § 3-3-31 (West 1999) (enacted 1987); MO. REV. STAT. § 1.028 (West 2000) (enacted 1998, amended 2008); N.C. GEN. STAT. ANN. § 145-12 (West 2011) (enacted 1987); N.D. CENT. CODE. § 54-02-13 (2011) (enacted 1987); S.C. CODE ANN. § 1-1-696 (2010) (enacted 1987).

101. ALA. CONST. amend. 509 (amended 1990); GA. CODE ANN. § 50-3-100 (2009) (enacted 1996); 5 ILL. COMP. STAT. 460/20 (West 2005) (effective 1991); MONT. CODE ANN. § 1-1-510 (2011) (enacted 1995); S.D. CODIFIED LAWS § 1-27-20 (2003) (enacted 1995); TENN. CODE ANN. § 4-1-404 (2011) (enacted 1994); WYO. STAT. ANN. § 8-6-101 (2011) (effective 1996).

102. See, e.g., IDAHO CODE ANN. § 73-121 (2010) (declaring English to be the official language of Idaho while conceding that foreign language instruction should be encouraged in the schools); KAN. STAT. ANN. § 73-28 (2002) (designating English as the official language of the state of Kansas); English Language Unity Act of 2005, H.R. 4408, 109th Cong. (2005) (proposing a bill declaring English to be the official language of the United States and requiring, inter alia, a uniform English-language testing standard for naturalization).

103. See U.S. GEN. ACCOUNTING OFFICE, FOREIGN LANGUAGES: WORKFORCE PLANNING COULD HELP ADDRESS STAFFING AND PROFICIENCY SHORTFALLS 1 (2002) (“Foreign language skills are increasingly needed to support traditional diplomatic efforts and public diplomacy programs, military and peacekeeping missions, intelligence collection, counterterrorism efforts, and international trade.”); Eric Gorski, *More Students in College Study Foreign Languages*, BOSTON GLOBE, Dec. 9, 2010, available at [http://articles.boston.com/2010-12-09/news/29313393\\_1\\_american-sign-language-language-study-community-colleges](http://articles.boston.com/2010-12-09/news/29313393_1_american-sign-language-language-study-community-colleges) (citing experts who link the growth in foreign language study to career opportunities and globalization).

professionals, elites, and others, bilingualism is an important attribute for enhancing career options and for professional success. Yet at the same time, bilingualism is often associated with “low-income, low-status” individuals.<sup>104</sup> Language minorities who are recent arrivals to the United States are often encouraged to assimilate and to learn English as quickly as possible, with little attention to the value of maintaining their native languages. There is a vigorous scholarly and policy debate about the role of bilingual education among immigrant youth in particular; many continue to support “transitional” educational approaches that encourage aptitude in English at the expense of preserving the child’s first language.<sup>105</sup> For these reasons, the United States has been criticized for its “monolingual view of the world,” which stands in contrast to the widespread bilingualism in other parts of the world.<sup>106</sup>

These views about bilingualism and the relative status of language minorities play out in subtle, yet important, ways in everyday life. Language minorities are exhorted to learn English in order to fully integrate in society and partake in the economic and civic life of the country. The relative dearth of bilingual politicians, business executives, and professionals sends the message that success is achieved by embracing English and Anglophone culture and by downplaying other linguistic and cultural attributes. In many professional settings, the administrative or support staff are bilingual, yet the “professionals” themselves are not; this dynamic certainly plays out in law offices that are staffed with monolingual lawyers and bilingual paralegals and secretaries.<sup>107</sup> Attorney bilingualism

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104. KENJI HAKUTA, *MIRROR OF LANGUAGE: THE DEBATE ON BILINGUALISM* 7 (1986).

105. The debate on bilingual education in elementary schools continues to flourish. Increasingly, educators are embracing approaches that allow for immigrant students to learn English, while also maintaining—and valuing—the language and culture of their countries and regions of origin. This emphasis on “heritage learning” is gaining strength as a pedagogical approach. See Maria Carreira & Olga Kagan, *The Results of the National Heritage Language Survey: Implications for Teaching, Curriculum Design, and Professional Development*, 44 *FOREIGN LANGUAGE ANNALS* 40, 40–41 (2011). In the 1980s, some researchers contended that bilingual educational approaches ultimately undercut the students’ ability to master English and succeed in a formal academic setting in the United States. More recent empirical work strongly suggests that such contentions are incorrect. See Virginia P. Collier, *A Synthesis of Studies Examining Long-Term Language Minority Student Data on Academic Achievement*, 16 *BILINGUAL RES. J.* 187, 205–06 (1992) (concluding that the research supports the conclusion that balanced instructional support in both languages leads to greater academic achievement).

106. BAKER & JONES, *supra* note 7, at 10. According to one estimate, between one-half and two-thirds of the world’s population is bilingual. *Id.* at 134.

107. In making this observation, I do not mean to suggest that monolingual lawyers are inattentive to the needs of LEP/NEP clients or that they cannot be effective advocates for such clients. On the contrary, I recognize that many monolingual lawyers are deeply concerned about their ability to competently represent LEP/NEP clients and therefore rely on the assistance of support staff and/or interpreters or translators. My intent here is not to

can serve as a counterbalance to these sometimes subtle forces that contribute to the marginalization of LEP and NEP individuals.

## 2. Language Minorities in the U.S. Legal System

The inconsistent views toward bilingualism held at the societal level and reflected in U.S. history have also trickled into the legal system. In recent decades, two divergent trends have emerged. On the one hand, the state and federal judiciary have made progress in ensuring that some legal proceedings are accessible to LEP individuals—most notably, when the LEP person appears as a criminal defendant. At the same time, however, most judicial systems within the United States have effectively tried to sequester the bilingualism of jurors, attorneys, judges, and other individuals involved in legal proceedings. Although this latter trend is often justified on evidentiary grounds, it both ignores the reality of how the bilingual mind operates and exacerbates the isolation of LEP persons who find themselves in the midst of a legal process.

There have been some positive developments with respect to the right to an interpreter in a trial setting. Although the U.S. Supreme Court has not clearly articulated a right to an interpreter in either criminal or civil matters, lower federal courts have upheld the right to an interpreter in a criminal case. In *U.S. ex rel. Negron v. New York*, the Second Circuit Court of Appeals held that an indigent, Spanish-speaking criminal defendant had a right to have the proceedings interpreted for him; the absence of interpretation constituted a violation of his Sixth Amendment right to confront the witnesses testifying against him.<sup>108</sup> The holding in *Negron* has been reaffirmed by other federal courts and by the courts of multiple states.<sup>109</sup>

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characterize the intent of lawyers but rather to describe how language minorities have been treated in the United States and how such treatment affects their views toward professionals.

108. *Negron v. New York*, 434 F.2d 386, 389–90 (2d Cir. 1970).

109. See, e.g., *Ling v. State*, 702 S.E.2d 881, 882–83 (Ga. 2010) (stating that a criminal defendant must have the ability to communicate with his lawyer to a reasonable degree of understanding, and the failure to provide an interpreter implicated due process concerns); *Garcia v. State*, 149 S.W.3d 135, 145 (Tex. Crim. App. 2004) (holding that a trial court's failure to appoint interpreter for defendant violated defendant's Sixth Amendment right to confront witnesses). Although *Negron* and its progeny have affirmed the importance of interpreters for criminal defendants, courts continue to parse the nature of the interpretation that must be offered. For example, in *State v. Gonzales-Gutierrez*, an Oregon appeals court held that a trial court had not violated a defendant's constitutional rights by failing to provide contemporaneous interpretation of two English-language recordings. 171 P.3d 384, 388–89 (Or. Ct. App. 2007).

Building upon *Negron* and similar precedent, in 1978, Congress enacted the Court Interpreters Act, which requires the use of qualified interpreters in civil or criminal actions initiated by the federal government.<sup>110</sup> The interpreter requirement applies to the full continuum of federal proceedings, including pretrial matters, hearings, and trials. Moreover, the interpreters are subject to a rigorous certification process and must follow specific standards of performance relating to accuracy and completeness. In the decades that have followed the passage of the Court Interpreters Act, state judicial systems have made notable advances in accommodating the language needs of LEP and NEP individuals. Several jurisdictions have adopted comprehensive language access plans that greatly improve the accessibility of the courts. A few states have imposed a broad mandate on interpreter use, requiring interpreters in both civil and criminal matters.<sup>111</sup>

The concerns about LEP/NEP individuals in the U.S. legal system, however, extend far beyond issues of interpretation. For various reasons, courts have consistently sought to wash away traces of bilingualism from the courtroom. One consistent target for such efforts is the bilingual juror. In *Hernandez v. New York*, the Supreme Court upheld a lower court's decision to allow a prosecutor to strike jurors on the basis of their ability to speak a language other than English, on the grounds that the juror's understanding of the testimony might differ from the "official" rendition provided by the interpreter.<sup>112</sup> Specifically, the trial prosecutor noted the jurors' hesitancy to accept the official interpretation:

[W]hen I asked [the jurors in question] whether or not they could accept the interpreter's translation . . . I didn't feel that they could. They each looked away from me and said with some hesitancy that they would try, not that they could but

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110. 28 U.S.C. § 1827 (2006).

111. See, e.g., KAN. STAT. ANN. § 75-4351 (1997) (requiring the appointment of a "qualified interpreter" for an LEP person who is a defendant in a criminal proceeding; a plaintiff, defendant, or witness in a civil proceeding; a witness before a grand jury; or the "principal party in interest" before "a board, commission, agency, or licensing authority of the state or any of its political subdivisions"). Notwithstanding these advances, significant deficiencies continue to exist, especially in administrative matters. See LAURA ABEL, LANGUAGE ACCESS IN STATE COURTS 1 (N.Y.U. Brennan Center for Justice ed. 2006), available at [http://brennan.3cdn.net/684c3cdaaa2bfc8ebc\\_6pm6iywsd.pdf](http://brennan.3cdn.net/684c3cdaaa2bfc8ebc_6pm6iywsd.pdf) (finding, in a study of the language access protocols of thirty-five state courts, that 46 percent of states failed to require the use of interpreters in all civil cases; 80 percent failed to guarantee that courts would pay for interpreters they provide; and 37 percent of states fail to require the use of credentialed interpreters).

112. *Hernandez v. New York*, 500 U.S. 352, 360–62 (1991). Although some scholars have assailed the *Hernandez* opinion, the Court was careful to note that its decision "does not imply that exclusion of jurors is wise, or even that it is constitutional in all cases." *Id.* at 371.

that they would try to follow the interpreter, and I feel that in a case where the interpreter will be for the main witnesses, they would have an undue impact upon the jury.<sup>113</sup>

Consistent with *Hernandez*, the Third Circuit held in *Pemberthy v. Beyer* that peremptory challenges based on foreign language ability do not violate the Equal Protection Clause.<sup>114</sup> In that case, the parties expected translation of taped conversations in Spanish to be contested; the language ability of the jurors was therefore perceived as a possible detriment to the proceedings. Similar concerns arose in *U.S. v. Fuentes-Montijo*, in which the Ninth Circuit emphasized that bilingual jurors should be instructed that translated transcripts are controlling over foreign language recordings, not vice-versa.<sup>115</sup> In *United States v. Lopez*, a criminal defendant argued that only a Spanish-speaking jury was truly capable of understanding and evaluating the evidence, which consisted of multiple recordings of conversations in Spanish and a few pages of documents, written in Spanish.<sup>116</sup> The court rejected the argument, noting the sufficiency of the translation and suggesting that an all-Spanish-speaking jury would unlawfully exclude jurors based on national origin.

Apart from juror issues, the legal system has not carefully thought through the nuances of representation by bilingual lawyers. Certainly, courts do acknowledge the value of bilingual attorneys and, in some instances, strive to match LEP clients with bilingual counsel.<sup>117</sup> Additionally, courts have noted the presence of bilingual counsel to challenge a defendant's claim to have not understood the nature of the proceedings or received effective representation.<sup>118</sup> While courts appreciate the value of bilingual representation, the lawyer's language ability is occasionally restrained in the courtroom. To cite one example, bilingual lawyers

113. *Id.* at 356–57.

114. *Pemberthy v. Beyer*, 19 F.3d 857, 869–70 (3d Cir. 1994).

115. *U.S. v. Fuentes-Montijo*, 68 F.3d 352, 354–55 (9th Cir. 1995).

116. *U.S. v. Lopez*, No. 86 CR 513, 1987 WL 18573, at \*1 (N.D. Ill. 1987).

117. *See, e.g., U.S. v. Marin*, No. 93-1887, 1994 WL 442443, at \*1 (5th Cir. 1994) (noting that district court judge appointed bilingual counsel to a defendant for purposes of an appeal); *see also* Cristina M. Rodriguez, *Accommodating Linguistic Difference: Toward a Comprehensive Theory of Language Rights in the United States*, 36 HARV. C.R.-C.L. L. REV. 133, 199 (2001) (suggesting that courts in “communities with large linguistic-minority populations” should strive to identify bilingual attorneys for appointed counsel positions).

118. *See, e.g., U.S. v. Perez*, 115 Fed. App'x. 586, 587–88 (3d Cir. 2005) (finding that a criminal defendant's “assertion that he did not understand his plea because it was in English [was] belied by his competent representation by a bilingual attorney and the presence of a Spanish interpreter throughout the plea colloquy”); *State v. Canez*, 118 Ariz. 187, 189 (Ariz. Ct. App. 1978) (finding no merit in a defendant's claim of ineffective assistance of counsel, in part because of vigorous representation by a bilingual attorney).

are placed in a difficult situation when they wish to challenge the official interpretation of witness testimony. On the one hand, as a zealous advocate, the lawyer would be inclined to state an objection on the record. But in some circumstances, the lawyer could also be positioned as a language expert, compromising her role as attorney.<sup>119</sup>

Finally, judicial systems within the United States have not developed protocols for bilingual judges and court staff who might have proficiency in languages spoken by LEP/NEP parties. Bilingual judges have been present in the United States since the nation's early history<sup>120</sup> and continue to play an important role. In theory, bilingual judges are positioned to use their language ability in multiple ways, including monitoring the quality of interpretation, greeting parties in a non-English language, or even conducting part of the proceedings in that language.<sup>121</sup> All of these functions, however, are fraught with practical and ethical challenges.<sup>122</sup>

The current approach—one where the language ability of these various actors is artificially suppressed—is arguably driven by a desire to bring order to complex proceedings with multiple parties involved. Nevertheless, it privileges English-English communication, with other forms of discourse (e.g., Spanish-Spanish or Bilingual-Bilingual) at the periphery. The LEP/NEP client's language proficiency, or the bilingualism of others, is painted as a deficiency or aberration that must be corrected or neutralized.<sup>123</sup> It is notable that LEP/NEP status is often analogized to a physical disability, which obscures the profound connections between language, culture, individual identity, and self-expression.<sup>124</sup>

The status quo also imagines that the bilingualism of jurors, attorneys, and judges can be suppressed at will, even though the

119. See Charles M. Grabau & Llewellyn Joseph Gibbons, *Protecting the Rights of Linguistic Minorities: Challenges to Court Interpretation*, 30 NEW ENG. L. REV. 227, 303–04 (1996).

120. Daniel J. Rearick, *Reaching Out to the Most Insular Minorities: A Proposal for Improving Latino Access to the American Legal System*, 39 HARV. C.R.-C.L. L. REV. 543, 561 (2004) (noting that Thomas Jefferson appointed bilingual judges in Louisiana).

121. See Grabau & Gibbons, *supra* note 119, at 297–99.

122. *Id.*

123. THE OXFORD HANDBOOK OF LANGUAGE AND LAW 259 (Peter M. Tiersma & Lawrence M. Solan eds., 2012) (noting the transitional nature of bilingual education, with the intent to convert LEP/NEP speakers to English speakers).

124. See, e.g., Charu A. Chandrasekhar, *The Bay State Buries Bilingualism: Advocacy Lessons from Bilingual Education's Recent Defeat in Massachusetts*, 24 CHICANO-LATINO L. REV. 43, 49 (2003) (“[T]he failure to master English constitutes a permanent disability that, coupled with the absence of adequate academic opportunity, cripples an immigrant or minority student's potential for economic advancement in contemporary America.”).

complexity of the bilingual brain makes such efforts nearly impossible.<sup>125</sup> Researchers have consistently found that the bilingual brain stores information in complex ways and that the optimal, most “natural” form of communication for some bilingual individuals involves the use of *both* languages. The phenomenon of code switching, where a speaker alternates between languages (even mid-sentence), sometimes occurs subconsciously. The efforts in the courts to streamline language use are driven by functionalist concerns but are inconsistent with basic psycholinguistic processes.

An alternative approach would acknowledge that the U.S. legal system, in its formal proceedings and even in less formal interactions, is structurally rigid and does not optimize the participation of non-English-speaking and bilingual individuals. A range of possible solutions—many linked to attorney bilingualism—could alter the current conditions. At one extreme, courts could recognize some form of limited official bilingualism, and certain proceedings could be conducted in a non-English language where all parties, the attorneys, and the decision maker possess some degree of proficiency. Likewise, where bilingual lawyers are present, court-sanctioned settlement conferences or mediations could be conducted in Spanish or other languages, rather than relying upon interpreters. Other, more subtle reforms are possible, such as allowing lawyers to conduct direct examinations in the client’s preferred language; creating clearer procedures for challenging the “official” interpretation; and allowing service by bilingual jurors. And, as seen in *Diaz v. State*, the Supreme Court of Delaware expanded upon a suggestion, advanced by Justice Kennedy in *Hernandez*, that bilingual jurors can discreetly advise the trial judge via a written note about any concerns relating to the accuracy of the official interpretation.<sup>126</sup> Any of these changes would necessarily alter the way in which decision makers interact with both lawyers and clients, by positioning non-English-language ability as either a normal vehicle for communication or as an asset to be deployed strategically.

In advancing these suggestions, I do not suggest that attorneys should assume the role of both counsel and official court interpreter, as such an arrangement would arguably diminish their effectiveness in the courtroom and would raise a host of ethical concerns.<sup>127</sup> Nor is attorney bilingualism a panacea for the deep-seated inequities that many LEP and NEP individuals encounter in

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125. See Rodriguez, *supra* note 117, at 143–44.

126. *Diaz v. State*, 743 A.2d 1166, 1176 (Del. 1999).

127. See generally Bill Piatt, *Attorney as Interpreter: A Return to Babble*, 20 N.M. L. REV. 1 (1990).

the U.S. legal system. Nevertheless, the presence of a corps of attorneys, who are able to represent clients competently and empathetically in multiple languages, will begin to soften the structural isolation of language minorities in U.S. legal practice.<sup>128</sup>

Ultimately, the lawyer's ability to effectively communicate with the client, and to render the client a more equal, active participant in her case, will serve the interests of pursuing justice. Even with interpreters present, clients may not feel that they are being understood, that their stories are adequately portrayed, or that they comprehend the legal processes in which they are situated.<sup>129</sup> Again, while attorney bilingualism does not remedy a complex phenomenon, it is an important step in redefining the role of the lawyer vis-à-vis language minorities. Over time, larger structural changes may follow.

Although not specifically focused on bilingual attorneys, the State of New Mexico has modeled a type of language-related flexibility by allowing monolingual Spanish speakers to serve on juries. Per the state constitution, citizens may not be excluded from jury duty based on their ability to "speak, read or write" either English or Spanish.<sup>130</sup> The practice stems from a long history in New Mexico of making the laws and legal system accessible to speakers of both English and Spanish.<sup>131</sup> In practice, New Mexico courts have developed a juror qualification form and questionnaire in Spanish.<sup>132</sup> The New Mexico court system also provides simultaneous interpretation to jurors who are monolingual speakers of Spanish and other languages.<sup>133</sup>

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128. A handful of authors have written about the complexity of operating as a bilingual attorney in the U.S. legal system. See, e.g., Teresa B. Morales & Nathaniel D. Wong, *Attorneys who Interpret for Their Clients: Communication, Conflict, and Confusion—How Texas Courts have Placed Attorneys and Their L.E.P. Clients at the "Discretion" of the Trial Court*, 37 ST. MARY'S L.J. 1123 (2006).

129. See Helen E. Reagan, *Considerations in Litigating Civil Cases with Non-English Speaking Clients*, in 65 AM. JUR. TRIALS § 2 (2009).

130. N.M. CONST. art. VII, § 3.

131. See Andrew McGuire, *Peremptory Exclusion of Spanish-Speaking Jurors: Could Hernandez v. New York Happen Here?*, 23 N.M. L. REV. 467, 473 (1993) ("New Mexico's Constitution is unique in the amount of protection given to its Spanish-speaking citizens.").

132. See Edward L. Chávez, *New Mexico's Success with Non-English Speaking Jurors*, 1 J. CT. INNOVATION 304, 310–11 (2008) (describing the importance and use of the juror qualification form).

133. *Id.* at 312–13 (describing the use of simultaneous interpretation equipment to assist non-English-speaking jurors). During a three-year period, court interpreters in New Mexico assisted jurors in nineteen languages, plus American Sign Language. *Id.* at 308.

## II. BILINGUAL PEDAGOGY IN THE LAW SCHOOL CLASSROOM: A BLUEPRINT FOR INSTRUCTION

The transformative potential of attorney bilingualism cannot be realized without a corps of attorneys who are thoroughly prepared to engage in the multilingual practice of law. To achieve this vision, and to help promote bilingual lawyering, U.S. law schools and the legal profession as a whole must place a greater focus on bilingual instruction and equip students with the bundle of knowledge, skills, and values needed to effectively educate, represent, and communicate with LEP and NEP individuals in different lawyering contexts.<sup>134</sup> Many students and, indeed, law school instructors give little consideration to how law graduates can take the legal skills and knowledge they acquire in English and can apply that learning to future work in a foreign language with LEP or NEP individuals. A more refined approach to bilingual instruction will allow students to understand the complexity and challenge of this transition and will also uncover the potential richness of bilingual-bilingual interactions.

In this section, I offer a blueprint for bilingual instruction that is consistent with my vision for attorney bilingualism. Specifically, I catalog some of the core competencies that underlie effective bilingual lawyering—competencies that can be taught in doctrinal and clinical courses or incorporated into other law school programs. Underlying my description of these core competencies are writings from the fields of linguistics and psychology, as well as two bodies of lawyering scholarship: cross-cultural lawyering and lawyering with the assistance of interpreters and translators. Lawyers who operate bilingually must embrace some of the skills and values that have proven to be effective in cross-cultural lawyering settings and in the work of interpreters. As described below, however, while these two bodies of scholarship provide an important foundation for bilingual law students and lawyers, additional layers of complexity accompany the multilingual practice of law.

In offering this framework, I draw upon my own teaching at American University Washington College of Law. During the spring semesters of 2009 and 2010, I taught a course entitled “Immigrants in the Workplace” that was designed to provide a “comprehensive

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134. See Rearick, *supra* note 120, at 581–83 (noting that a simple way to enhance access to the American legal system would be to train bilingual lawyers; accordingly, law schools should offer courses in foreign languages).

background in labor and employment law, as it applies to immigrant workers in the United States.”<sup>135</sup> Students had the option of enrolling for an additional credit, which entailed participating in a third hour of the class conducted entirely in Spanish.<sup>136</sup> In spring 2012, I offered a similar option in a survey course on immigration and naturalization law. Furthermore, in my clinical teaching, I have conducted supervision meetings in Spanish, especially when the bulk of my students’ lawyering occurs in Spanish. I describe aspects of these experiences below in the context of specific core competencies.

Before proceeding, I would note that bilingual instruction has already begun to emerge at some law schools. Many law faculties offer foreign and comparative law courses in French, Spanish, and other languages.<sup>137</sup> Additionally, a handful of schools, including the McGeorge School of Law and the University of Denver, have established programs designed to prepare law students for a multilingual practice that traverses borders and cultures.<sup>138</sup> The theoretical justifications for attorney bilingualism (described above) and the pedagogical content that fosters it (outlined below) are designed to catalyze the creation of similar courses and programs at law schools around the country.

### A. Cross-Cultural Lawyering: A Theoretical Foundation

In preparing lawyers to operate bilingually, an appropriate starting point is the powerful literature that has emerged on cross-

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135. Jayesh Rathod, *Immigrants in the Workplace* (2009) (unpublished syllabus) (on file with author).

136. *Id.*

137. For example, at the Washington College of Law at American University, Prof. Marcarena Saez offers a course on the Introduction to the Continental Legal System taught in Spanish. See *Office of the Registrar: Elective Seminars*, AM. U. WASH. C. OF L., [http://www.wcl.american.edu/registrar/elective\\_seminars.cfm](http://www.wcl.american.edu/registrar/elective_seminars.cfm) (last visited Jul. 21, 2011). The law school occasionally offers an “Introduction to French Law” course, taught in French.

138. The Inter-American Program at the McGeorge School of Law is an example of one such pioneering initiative. The Program is described as “an innovative law school educational initiative designed to graduate bilingual and intercultural lawyers who are competent to work with Latino clients in the United States or on Latin American matters.” *Inter-American Program*, MCGEORGE SCH. OF L., [http://www.mcgeorge.edu/Future\\_Students/JD\\_Program/Global\\_Impact/Inter-American\\_Program.htm](http://www.mcgeorge.edu/Future_Students/JD_Program/Global_Impact/Inter-American_Program.htm) (last visited Jul. 3, 2011). The program allows students to choose either a domestic or transnational track; students receive legal instruction in both English and Spanish and participate in field placements both in the greater Sacramento area and in Guatemala. *Id.* Likewise, the Lawyering in Spanish program at the University of Denver Sturm College of Law offers courses and seminars taught in Spanish, along with different immersion programs. See *Lawyering in Spanish*, STURM C. OF L., <http://www.law.du.edu/index.php/lawyering-in-spanish> (last visited Jul. 3, 2011).

cultural lawyering. Being an effective bilingual advocate requires awareness of one's own view of the world and how that outlook is articulated through specific words and phrases, in one or more languages. Likewise, it requires an appreciation for the worldview of one's interlocutor and an understanding of how that person's worldview, molded by life experience and culture, takes shape in the form of a specific communication style. Bilingual lawyers must be able to diagnose gaps between the two different perspectives that can inhibit effective communication.

Several scholars have explored this fundamental challenge to effective lawyering in an increasingly interconnected world. In a seminal article, Susan Bryant describes five habits for cross-cultural lawyering that she developed jointly with Jean Koh Peters.<sup>139</sup> As Bryant explains, all lawyers—and all people—carry their own “invisible cultural [lenses],” which shape the meaning they attribute to actions or words. Culture also shapes how we deploy and perceive body language and how we make judgments. Moreover, it inhabits the legal systems in which we operate and guides the decisions of clients, attorneys, and others actors within that system.<sup>140</sup>

Bryant and others have outlined broad categories of cultural difference that routinely shape the actions and communications of attorneys and clients. For example, culture may guide whether an individual gravitates toward individualistic or collective behavior, uses more direct or indirect communication, adheres to rigid social hierarchies, and the like.<sup>141</sup> Likewise, whether an individual hails from a “high-context” or “low-context” culture will shape the form of their communications. In high-context cultures, the meaning of interpersonal communications is often dependent upon the context—that is, situational factors such as body language shape the intended meaning.<sup>142</sup> (Japanese society is often cited as an example of a high-context culture, where the spoken word must be assessed vis-à-vis body language.) By contrast, the intent of communications

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139. Susan Bryant, *The Five Habits: Building Cross-Cultural Competence in Lawyers*, 8 CLINICAL L. REV. 33 (2001). The five habits are: (1) “degrees of separation and connection,” which recommends mapping similarities and differences between a lawyer and her client, to understand and enhance attorney-client interactions, *id.* at 64; (2) “the three rings,” which involves a similar mapping exercise, with the addition of the decision maker as a third party, *id.* at 68; (3) “parallel universes,” which encourages law students to identify alternative explanations for the actions of clients, *id.* at 70; (4) “pitfalls, red flags, and remedies,” which focuses on both best practices and challenges for cross-cultural communication, *id.* at 72; and (5) “the camel's back,” which encourages awareness of the assumptions, bias, and stereotypes that we all carry and of how these can be deployed, especially in stressful circumstances, *id.* at 78.

140. *Id.* at 44–46.

141. *Id.* at 50–51

142. MYERS-SCOTTON, *supra* note 2, at 182.

in low-context societies can be gleaned largely from the words themselves.<sup>143</sup>

Each of these cultural continua is relevant to the work of bilingual lawyers. Bilingual lawyers must be sensitive to cultural forces that determine the form and content of communication, including the combination of spoken word and body language. Likewise, given that culture shapes how individuals choose to relate to others, analysis of communications must incorporate culturally determined perceptions of the attorney-client relationship.

Bryant offers a range of specific recommendations to bridge communicative chasms between clients and attorneys. As a general matter, she recommends ongoing awareness of one's own cultural frames and adopting a nonjudgmental attitude toward oneself and also toward the client.<sup>144</sup> Among the specific habits that Bryant recommends, one is a practice of naming the similarities and differences between a lawyer and client, to diagnose how those attributes might affect communication.<sup>145</sup> Another habit, "parallel universe thinking," encourages lawyers to seek multiple explanations for client behavior, particularly when the lawyer finds the behavior odd or inappropriate.<sup>146</sup> Bryant's fourth habit is especially relevant to bilingual lawyers: she "encourages conscious attention to the process of communication," including focus on the use of scripts, and the client's own understanding of the legal system and their problem.<sup>147</sup> It is easy for lawyers, particularly those not completely fluent in a second language, to default into scripts in that language. These scripts should be examined for communicative pitfalls. Moreover, as described below, it is imperative for bilingual lawyers to gauge their clients' knowledge of how legal systems operate.

This emphasis on cross-cultural communication, drawn from the lawyering literature, has a close analog in the field of linguistics. In the late 1960s and early 1970s, linguist Dell Hymes began to promote the concept of "communicative competence." This concept was meant to complement the strong emphasis at the time on grammatical systems, to include all of the other dimensions of the speech (in the second language) that are implicated in any communication. As used today, the term refers to "an ability to recognize what your community views as the unmarked (appropriate) way(s)

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143. *Id.* at 182–83.

144. Bryant, *supra* note 139, at 49.

145. *Id.* at 64–67.

146. *Id.* at 70–71.

147. *Id.* at 72–73.

of speaking in a given type of interaction.”<sup>148</sup> This includes everything from tone and level of formality to conversational gambits (ways to initiate a conversation) and timing within the conversation.<sup>149</sup> Communicative competence includes the ability to diagnose when silence is appropriate, or even preferable, in a given interaction,<sup>150</sup> as well as the challenge of how and when to express empathy in a conversation. In short, communicative competence is a framework of analysis that reminds speakers of a second language that “it is much easier to be bilingual than bicultural.”<sup>151</sup>

All that said, given their prior experience with two languages, bilingual individuals are well positioned to practice communicative competence. Linguists have found that persons who are accustomed to switching between different languages may have developed sensitivity to the appropriate communication style with a given individual and in a particular context.<sup>152</sup> Other research conducted by linguists has revealed that bilingual individuals are “more responsive to hints and clues in a social situation.”<sup>153</sup>

The project for instructors who teach bilingual law students and attorneys is to make explicit some of the behaviors that underlie communicative competence. The work of cross-cultural lawyering theorists provides an optimal point of departure, as it offers important guiding principles for bilingual law students and attorneys. The sections that follow build upon these principles and describe a set of specific competencies that can be taught to prepare law students for the bilingual practice of law.

### *B. Interpreter Role and Function: A Second Foundation*

Another set of writings that can be deployed to train bilingual lawyers is the literature on interpreters in legal settings. In a sense, the emergence of a trained corps of bilingual attorneys is a natural next step in the evolution of a profession that has grown increasingly attentive to issues of language difference. In recent decades, practitioners and scholars have dissected the role of interpreters and have developed a set of best practices. Much of the interpreter

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148. MYERS-SCOTTON, *supra* note 2, at 29.

149. *See id.* at 178; Wilga M. Rivers, *Psychology and Linguistics as Bases for Language Pedagogy*, in *LEARNING A SECOND LANGUAGE* 58 (Frank M. Gritter & Kenneth J. Rehage eds., 1980).

150. MYERS-SCOTTON, *supra* note 2, at 186.

151. HENRY T. TRUEBA & CAROL BARNETT-MIZRAHI, *BILINGUAL MULTICULTURAL EDUCATION AND THE PROFESSIONAL* 336 (1979).

152. *See* BAKER & JONES, *supra* note 7, at 7, 54–55.

153. *Id.* at 55.

literature relates to effective conveyance of meaning, considerations of language ability and role, and cross-cultural awareness. Although interpreters and attorneys have distinct roles, these themes are largely transferrable to the work of bilingual lawyers.

In recent decades, U.S. lawyers have turned increasingly to interpreters and translators when representing LEP and NEP clients. This trend has been fueled by enactments at the federal level, which require specific entities to provide language-accessible programs and services. Notably, Title VI of the Civil Rights Act of 1964 (prohibiting discrimination on the basis of national origin in programs and activities receiving federal financial assistance) has been interpreted to forbid discrimination against LEP persons.<sup>154</sup> More recently, Executive Order 13166, issued in August 2000 by President Bill Clinton, requires federal agencies to examine the services they provide to LEP persons and to develop reasonable language access plans.<sup>155</sup> Legislative measures at the federal and state levels have mandated interpreter use within the judiciary.<sup>156</sup>

As noted above, as interpreter and translator use has risen, lawyers have developed protocols for the work of such individuals in the context of legal representation.<sup>157</sup> These protocols include interpreter-selection guidelines, specific techniques when working with interpreters, and safeguards to protect confidential client information. Muneer Ahmad has enriched this area of inquiry by theorizing about the complex role of the interpreter in the attorney-client relationship and suggesting that the interpreter might productively wear multiple hats, including those of a client guardian, advocate, or cultural broker.<sup>158</sup> Paralleling these developments,

154. See 42 U.S.C. § 2000d (2006); *Lau v. Nichols*, 414 U.S. 563, 568 (1974).

155. Exec. Order No. 13166, 65 Fed. Reg. 50121 (Aug. 16, 2000); see also Memorandum from the Att’y Gen. to Heads of Fed. Agencies, Gen. Counsels, and Civil Rights Heads (Feb. 17, 2011), available at [http://www.lep.gov/13166/AG\\_021711\\_EO\\_13166\\_Memo\\_to\\_Agencies\\_with\\_Supplement.pdf](http://www.lep.gov/13166/AG_021711_EO_13166_Memo_to_Agencies_with_Supplement.pdf) (requesting that federal agencies recommit themselves to Executive Order 13166, and listing eight specific action items for agencies to follow).

156. In the federal courts, the Court Interpreters Act requires interpreter use in any civil or criminal action initiated by the federal government. Court Interpreters Act, 28 U.S.C.A. § 1827 (West 2010). At the state level, most jurisdictions have adopted language-access plans for the state courts; the plans, however, vary in the scope of their coverage, and compliance is inconsistent. For an overview of individual states’ language access plans, see ABEL, *supra* note 111, at 12, 62–66; see also *supra* Section I.C.2.

157. Angela McCaffrey, *Don’t Get Lost in Translation: Teaching Law Students to Work with Language Interpreters*, 6 CLINICAL L. REV. 347, 375–83 (2000). Additionally, there is abundant literature on the role of interpreters in the courtroom. See, e.g., Steven M. Kahaner, *The Administration of Justice in a Multilingual Society: Open to Interpretation or Lost in Translation?*, 92 JUDICATURE 224, 225–27 (2009) (offering guidance for the role of the interpreter in the courtroom).

158. See Ahmad, *supra* note 85, at 1004, 1058.

interpreters themselves have spelled out technical guidelines for their work and have generated a set of professional norms.<sup>159</sup>

Effective bilingual lawyering requires internalizing many of the norms of trained interpreters. For example, a primary norm for interpreters is to render as accurate an interpretation as possible by ensuring that the meaning conveyed includes any relevant subtleties from the source language.<sup>160</sup> This accuracy norm also requires interpreters to diagnose and convey “non-linguistic means of expression” such as “facial expressions, posture, tone of voice, and other[s].”<sup>161</sup> As described more fully below, consideration of different forms of nonlinguistic communication is critical to effective bilingual lawyering.<sup>162</sup> Another interpreter norm that is vital to bilingual lawyers is awareness of, and honesty about, the limitations in one’s own language ability.<sup>163</sup> Interpreters, over time, develop sensitivity for their own limitations in language skills; the same self-awareness is essential for bilingual attorneys, lest they risk communication errors or even ethical violations. Finally, trained interpreters appreciate the multiple roles that they can play vis-à-vis clients and are able to identify and navigate cultural differences that inhibit effective communication. These, too, are important abilities for bilingual attorneys and law students.

### C. Knowledge of Legal Systems

Lawyers who intend to work bilingually must be able to diagnose their clients’ familiarity with the U.S. legal system. Oftentimes, this requires disentangling three strands of information that shape clients’ perspectives: (1) knowledge of or familiarity with a foreign legal system; (2) direct knowledge of or experience with the U.S. legal system; and (3) narratives about the U.S. legal system that are created, shaped, and propagated over time by immigrant communities.

For many immigrants, experiences with the legal system in their countries of origin color their view of the U.S. legal system and, in

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159. See, e.g., *Model Code of Prof'l Responsibility for Interpreters in the Judiciary*, in NATIONAL CENTER FOR STATE COURTS, COURT INTERPRETATION: MODEL GUIDES FOR POLICY AND PRACTICE IN THE STATE COURTS, available at [http://www.ncsconline.org/wc/publications/Res\\_CtInte\\_ModelGuidePub.pdf](http://www.ncsconline.org/wc/publications/Res_CtInte_ModelGuidePub.pdf) (last modified Apr. 1, 2009).

160. See Franklyn P. Salimbene, *Court Interpreters: Standards of Practice and Standards for Trainings*, 6 CORNELL J. L. & PUB. POL'Y 645, 649–51 (1997).

161. *Id.* at 652 (quoting ADMINISTRATIVE OFFICE OF THE COURTS, 1996 ORIENTATION WORKSHOP FOR NEW MEXICO COURT INTERPRETERS, pt. 3 at 1–2).

162. See *infra* Section II.F.

163. See Salimbene, *supra* note 160, at 655.

turn, their interactions with attorneys in the United States. Clients who hail from civil law countries may be accustomed to a fundamentally different role for a judge and may not squarely comprehend the concept of the adversarial system. Similarly, clients or attorneys with civil law backgrounds are often unaccustomed to the common law's dual emphasis on facts and narrative.<sup>164</sup> Such clients may also be unfamiliar with the jury system, as jury trials are rare in civil law countries.<sup>165</sup> Additionally, solutions for legal problems, and/or the type of damages that might be available in a given type of case are prone to vary across legal systems and cultures.<sup>166</sup> Equipping law students with some baseline knowledge of foreign legal systems, particularly for those countries or regions heavily represented in local immigrant populations or in a given area of law practice, will offer them some guidance on the clients' starting point for the conversation. And with such knowledge, lawyers will be able to explain U.S. legal processes using explicit comparisons to overseas analogs.

Clients may also have some direct knowledge of, or experience with, the U.S. legal system. Given the distinctions between civil and criminal proceedings, variations from state to state, and the growth of specialized courts, a client's past experience may not resemble the likely trajectory of a new legal matter. For example, a client who participated in a relatively rapid misdemeanor criminal proceeding may be unprepared for the delays that often accompany a complex civil matter. Inquiry into the nature and scope of the client's prior experience is therefore helpful as a predicate matter.

Finally, clients often acquire knowledge about the U.S. legal system through their local communities and immigrant networks. At times, this knowledge reflects reality, but often it is distorted, approximating folklore. This knowledge may relate to a client's expectations for what will happen during a proceeding (e.g., "If I lose my immigration case, they will arrest me on the spot and put me in jail."); or the significance of past conduct (e.g., "Since I never filed taxes, I can't possibly win my case."). The knowledge may also take the form of advice on how to tell one's story or otherwise behave during a legal proceeding (e.g., "If I tell the judge that I was a

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164. See Philip M. Genty, *Overcoming Cultural Blindness in International Clinical Collaboration: The Divide Between Civil and Common Law Countries and its Implications for Clinical Education*, 15 CLINICAL L. REV. 131, 139 (2008).

165. See Max Rheinstein, *Comparative Law—Its Functions, Methods and Usages*, 22 ARK. L. REV. 415, 418 (1968).

166. See Carrie Menkel-Meadow, *Why and How to Study "Transnational" Law*, 1 U.C. IRVINE L. REV. 97, 107 (2011).

member of the opposition party, I will win my case"). Extracting this acquired knowledge is an important part of a lawyers' work.

In my course, *Immigrants in the Workplace*, I cultivated an awareness of these frames of reference in multiple ways. First, I provided a brief overview of how employment and labor law disputes are resolved in civil law countries in Latin America. I also developed hypothetical counseling scenarios in which students were required to grapple with tensions between civil and common law systems or with concerns generated by client misunderstandings of the U.S. legal system. For example, I asked students to explain, in Spanish, the concept of common law precedent and to explain how a court might apply U.S. Supreme Court precedent in a factually distinct case. Other scenarios that I developed related to disclosure of immigration status and client assumptions about a connection between employment law litigation and immigration removal proceedings.

#### *D. Language Proficiency*

Proficiency in a language other than English is an obvious prerequisite for any lawyer (or soon-to-be lawyer) who practices (or plans to practice) law in multiple languages. In addition to acquiring and mastering a language, students who intend to practice bilingually must understand the fundamental link between language and culture. The lexical structures and vocabulary of a given language are shaped by culture. Given that language is the principal vehicle for human communication and gives meaning and content to a shared human experience, language itself is a core constituent of culture. Culture, moreover, is ever changing. Due to these links between language and a rich and dynamic culture, language mastery involves "much more than [learning] structures and [a] lexicon [but also involves] becoming familiar with new ways of signifying, new genres, new social practices . . . new cultural schemata, and stories belonging to the language community's cultural heritage."<sup>167</sup>

One's mastery of a language can never be absolute. Rather, mastery of a language must be assessed vis-à-vis specific contexts or practices.<sup>168</sup> For lawyers and law students, the desired areas of mastery relate, inter alia, to the professional practice of law in one or

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167. Richard Kern & Jean Marie Schultz, *Beyond Orality: Investigating Literacy and the Literary in Second and Foreign Language Instruction*, 89 *THE MODERN LANGUAGE J.* 381, 382 (2005).

168. See *id.* at 383.

more substantive areas. To help achieve this mastery, law schools can provide instruction to enhance certain aspects of language proficiency. These aspects include recognizing the multiple dimensions of language proficiency, including the ability to write and read; recognizing the fluidity and variability of language; and enhancing language proficiency relating to procedural and substantive legal matters.

### 1. Recognizing the Multiple Dimensions of Language Proficiency

Lawyers who intend to operate bilingually must recognize the multiple dimensions of language proficiency and assess their abilities in each of these dimensions. Typically, proficiency in a second language includes the ability to listen, speak, read, and write in that language.<sup>169</sup> All individuals, however, vary in their mastery of these four dimensions of a language. Indeed, an individual may lack ability in one or more of these dimensions of language proficiency (typically, reading and/or writing) yet will still consider herself bilingual. This stems from the “dominant assumption . . . that speech is primary (the ‘real thing’) and that writing is secondary (a representation).”<sup>170</sup> This bias toward spoken communication “obscures from view other equally important but less easily observed dimensions of language learning and language use.”<sup>171</sup>

Lawyers must be conscious of their abilities in each of these four dimensions, so as to assess their ability to competently represent a client in different contexts. For example, a lawyer with only rudimentary writing skills in a second language would need to carefully consider her ability to single-handedly undertake legal representation that requires the analysis and preparation of formal written communications in that language. Indeed, many individuals who ably speak a second language struggle with drafting a simple letter to a client in that same language. Conversely, some are more at ease with written communication and shy away from verbal communication.

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169. See BAKER & JONES, *supra* note 7, at 90; ROMAINE, *supra* note 14, at 12–13 (suggesting that bilingualism should be measured by assessing proficiency in listening, reading, speaking, and writing).

170. Kern & Schultz, *supra* note 167, at 382. This also stems, in part, from the lack of a consistent definition for the term “bilingual.” Typically, bilingualism incorporates, at a minimum, the ability to understand and speak two languages. This definition, however, ignores the written aspects of language proficiency. See BAKER & JONES, *supra* note 7, at 2–3.

171. Kern & Schultz, *supra* note 167, at 382.

In my Immigrants in the Workplace course, I asked all students to complete a brief survey, in which they provided a self-assessment of their reading, writing, and speaking abilities in Spanish. With this information, I attempted to enhance the students' abilities in the language dimensions that were less developed. To develop students' writing skills, I required all students to draft brief reflection memos, in Spanish, in which they identified areas of the doctrinal law that would be challenging to explain to Spanish-speaking clients. These memos therefore served two purposes: they allowed me to assess and critique the students' writing ability in Spanish and served as a vehicle to reflect about specific challenges in cross-language and cross-cultural lawyering. For the immigration law course, I developed three specific writing assignments that reflect the work of bilingual lawyers: preparing a formal letter to a client in Spanish, drafting a retainer agreement in Spanish, and preparing an English translation of a birth certificate from a Latin American country.

In addition to these writing assignments, I have provided students with a range of materials written in Spanish, including news articles about employment issues, employment contracts, and official Spanish language versions of U.S. Department of Homeland Security immigration forms. With these documents, students are able to strengthen their ability to comprehend and to explain the type of written Spanish that they might encounter in their practice. Finally, in both courses, the students worked on listening skills through frequent one-on-one role-plays with classmates and with the help of video clips that I occasionally shared with the class. These exercises allowed students to grapple with variations in dialect and diction and to develop strategies to respond accordingly.

## 2. Recognizing the Fluidity and Variability of a Given Language

Bilingual lawyers must be attuned to the inherent fluidity and variability of language. Despite having a shared language, a lawyer and client (or a lawyer and co-counsel or a professional colleague) may face communication barriers due to national or regional variations in scripts, dialects,<sup>172</sup> accents, use of slang, speed of speech, and the like. Lawyers must be attuned to these differences, how

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172. Dialects are defined as "linguistic varieties whose speakers can understand one another." MYERS-SCOTTON, *supra* note 2, at 23. Dialects may be regional (identified with a specific geographic area) or social (identified with a particular social group). *Id.* at 31.

they are affecting the transmission and comprehension of information, and whether they might impede creating relationships of confidence and trust.

This is clearer theoretically if one understands that the speech of *every single individual* has a distinct accent, pronunciation, use of syntax, and vocabulary. Linguists have termed the unique language that all humans possess an “idiolect.”<sup>173</sup> When two idiolects collide, even if they are part of the same language group and the same dialect within that language, communication difficulties can nonetheless ensue.

The Spanish language is an optimal example of the fluidity and variability of language. Clearly, there are tremendous differences between peninsular Spanish and Latin American Spanish relating to grammar, vocabulary, and pronunciation.<sup>174</sup> Even within Spanish-speaking Latin America, variations in accent, speed of speech, vocabulary, and grammar are well known.<sup>175</sup> Moreover, among Spanish-speaking immigrant communities in the United States, Spanish often merges with English, creating a commonly spoken hybrid, “Spanglish.”<sup>176</sup> Similar variations exist in all of the world’s major languages: consider the well-known dialectical variations within and among English-speaking nations, and the similar variations in Francophone countries.<sup>177</sup> I have been able to explore some of these variations in the classroom, given the different dialects of Spanish spoken by students.<sup>178</sup>

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173. See Malcolm Coulthard, *Author Identification, Idiolect, and Linguistic Uniqueness*, 25 APPLIED LINGUISTICS 431, 431–32 (2004) (discussing the idea that every native speaker of a language has their own distinct and individual version of the language, known as an idiolect); Alexander George, *Whose Language Is It Anyway? Some Notes on Idiolects*, 40 PHIL. Q. 275, 277 (1990) (“[O]ur idiolects . . . so vary with the present moment, audience and speaker that no two people are likely to share an idiolect and even . . . at no two times is an individual likely to have the same idiolect.”).

174. See D. LINCOLN CANFIELD, *SPANISH PRONUNCIATION IN THE AMERICAS* 1–13 (1981) (giving a historical breakdown of the adaption and change in grammar and pronunciation of peninsular Spanish as it came to Latin America).

175. See generally RALPH PENNY, *VARIATION AND CHANGE IN SPANISH* 136–73 (2000).

176. See, e.g., Alfredo Ardila, *Spanglish: An Anglicized Spanish Dialect*, 27 HISPANIC J. OF BEHAVIORAL SCI. 60, 62–66 (2005) (defining the term “Spanglish” and explaining its use in the United States).

177. See DENNIS AGER, *SOCIOLINGUISTICS AND CONTEMPORARY FRENCH* 5 (1990) (acknowledging significant variations in how French is spoken across different language communities). Consider also the variations and dialects of Chinese, Portuguese, Russian, and other languages spoken in the context of law practice by attorneys in the United States.

178. In each of my courses, I encountered a few students who had learned Spanish in Spain and spoke with a peninsular accent. As a class, we would discuss how this might be received by clients of Latin American origin. Moreover, when discussing how to articulate a specific point of law in Spanish, I would lead group discussions on how this might be articulated in different Spanish-speaking countries. In these discussions, students offered formulations based on where they had studied Spanish, or their families’ national origin. At

### 3. Enhancing Language Proficiency Related to Substantive and Procedural Legal Matters

Most law students and junior lawyers, including those who are proficient in a language other than English, lack knowledge of the specific vocabulary needed to discuss legal matters in that foreign language. For example, the students or lawyers may not know how to properly translate the name of specific laws or statutes (e.g., “Immigration Reform and Control Act” or “Fair Labor Standards Act”). Similarly, they may not know terms specific to certain substantive areas. In the wage and hour context, for example, the terms “overtime” or “joint employer” will be unknown to many.

In acquiring this vocabulary, one must again be sensitive to regional variations and the use of slang terms. Apart from enhancing comprehension, knowledge of these variations and informal terms may be essential to communicate with individuals (particularly those who either have limited formal education or are from marginalized communities, or both) who may not know the “formal” term in the shared language. For example, among El Salvadoran immigrants, reference is often made to *permiso de trabajo*. The term, which is translated as “work permit,” is often used as shorthand for a specific immigration status known as Temporary Protected Status. Knowledge of this informal term will help to avoid pitfalls in communication.

As a corollary to enhanced proficiency in substantive terms, mastery of procedural terms (e.g., “statute of limitations” or “burden of proof”) is likewise critical. Knowledge of such terms is essential to effectively counsel clients about their options and to accurately convey the typical trajectory of a case. As noted above, many NEP or LEP clients, particularly those with limited education in their countries of origin, are unlikely to know formal procedural terms in their native language. To the extent they do know, their knowledge of legal procedure may be framed by the legal system from their country of origin. Given the vast differences in procedure between the U.S. legal system and most foreign legal systems, miscommunication and misunderstanding are prone to occur. For example, the term *hearing* is often translated into Spanish by bilingual lawyers as *audiencia*. The term *audiencia* can have a very different connotation depending on one’s country of origin. Likewise, the French term

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times, the group came to a consensus that a slang or “Spanglish” phrase would be more readily understood by Spanish-speaking clients. These conversations served to reinforce the inherent variations in language, and the pitfalls of rigid adherence to specific vocabulary and stock phrases.

*hypothèque* is easily (and understandably) translated as “mortgage,” although the words can have slightly different connotations across legal systems and cultures.<sup>179</sup> Therefore, to effectively explain legal concepts in another language, knowledge of vocabulary, built upon a foundational knowledge of foreign legal systems, is essential. These concepts and considerations can be integrated into bilingual pedagogy.<sup>180</sup>

### *E. Verbal Communication Skills*

#### 1. Using Communication Strategies to Relay Legal Concepts

One of the core skills strengthened by bilingual instruction is the ability to explain concepts from U.S. law into languages other than English. As noted above, effective communication in a non-English language, particularly in a professional setting, requires one to internalize and practice some of the core competencies of skilled interpreters. One of these competencies is the ability to explain complex issues in an understandable, yet accurate, manner. At times, there may not be a precise translation of a specific concept or term in U.S. law.

Consequently, the lawyer, when speaking with a client or colleague in a foreign language, must utilize a specific strategy to convey the intended meaning in the target language. Linguists have coined the term “communication strategies” to describe the “mutual attempt of two interlocutors to agree on a meaning in situations where requisite meaning structures do not seem to be shared.”<sup>181</sup> Strategies may take the form of “message adjustment,” that is, “to tailor the message to come into congruence with the linguistic resources of the speaker.” Alternatively, they may involve

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179. Rheinstein, *supra* note 165, at 422.

180. In my Immigrants in the Workplace and immigration law courses, I would distribute a list of Spanish language vocabulary terms, based upon the content of the readings. The list would typically include the proper translations of the federal statutes we discussed as well as a host of terms related to the substantive law and procedure discussed in the assigned readings. Preparing this list often proved to be a difficult task, due to the unavailability of a precise translation for many terms and phrases. In some instances, I relied upon the materials provided in Spanish by federal agencies such as the Department of Labor and the Department of Homeland Security. I sometimes questioned the accuracy of these translations.

After distributing the list, we would go around the room and read out the terms. This provided me an opportunity to clarify distinctions in usage when multiple Spanish words were used for a particular English term. It also allowed students to offer regional or country-specific variations for certain terms.

181. BIALYSTOK, *supra* note 5, at 26 (citation omitted).

“resource expansion” or “manipulat[ing] the available linguistic system so that it becomes capable of realizing the intended message.”<sup>182</sup> The specific approach adopted may depend on the orientation of the speaker toward either avoidance or problem solving.<sup>183</sup>

Among these communication strategies, simplification or paraphrasing is perhaps the most common. Speakers of a second language who have not fully mastered it will routinely engage in a strategy of simplification.<sup>184</sup> Over time, the simplified usage becomes incorporated into the speaker’s language through repeated use.<sup>185</sup> Ellen Bialystok describes three specific types of simplification or paraphrase strategies. The first involves “approximation,” which is the use of a similar word or construct as a substitute—for example, using the term “worm” instead of “silkworm.”<sup>186</sup> Another strategy is to coin a phrase that does not exist in the target language but may still convey the meaning. Finally, and most commonly, speakers engage in “circumlocution”—a “process in which the learning describes the characteristics or elements of the object or action instead of using the appropriate target language structure.”<sup>187</sup>

Apart from these paraphrase strategies, speakers of a second language may consciously choose to switch between languages to effectively convey meaning. They may also use body language in tandem with the spoken word for the same purpose. These two strategies are described in depth below in the discussions of code switching and paralinguistic behavior, respectively. A final strategy, which is unquestionably problematic for bilingual lawyers, is to simply avoid certain topics.<sup>188</sup> While avoidance is rarely beneficial in the context of attorney-client communications, it is helpful to name this strategy to prevent lawyers from unconsciously slipping into this practice.

There are different views as to whether these communication strategies can be formally taught in a classroom. Some adhere to a rigid view of instruction, in which specific strategies are taught and practiced. The indeterminacy and variability of communication, however, casts doubt on the value of this rigid approach.<sup>189</sup> A more

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182. *Id.* at 30.

183. *See id.*

184. *See id.* at 16.

185. *See id.*

186. *See id.* at 40.

187. *Id.* at 41 (citation omitted).

188. *See id.* at 40.

189. *See id.* at 141.

moderate approach—one that could work among law students—is to incorporate some general instruction on communication strategies. An instructor could raise awareness about strategies that the students may already use and ask the students to name them and assess their effectiveness in different lawyering contexts.<sup>190</sup>

## 2. Strategic Use of Code Switching

Most discussions of cross-cultural lawyering and lawyering across language differences fail to contemplate scenarios in which both the lawyer and the client (or other party) are fully bilingual or at least have some knowledge of both languages. As noted above, given the reach of globalization, many individuals now have proficiency in multiple languages. Moreover, for many LEP immigrants in the United States, the lived experience in this country results in some language acquisition.

When two bilingual individuals speak with one another, they often engage in “code switching,” a term that refers to the act of switching between languages or “linguistic codes” in the midst of a conversation.<sup>191</sup> Code switching can occur between parts of a conversation, between individual phrases or sentences (termed “intersentential” code switching), or even midsentence (termed “intrasentential” code switching).<sup>192</sup> A related phenomenon, called insertional code switching or “borrowing,” involves using a single word or phrase from a second language.<sup>193</sup> Although code switching is sometimes perceived as reflecting a deficit in language ability, linguists now understand it to be a normal feature of bilingual speech.<sup>194</sup> Code switching can occur either consciously or unconsciously.<sup>195</sup>

Many linguists have studied the phenomenon of code switching and have begun to uncover some of the specific contexts that give rise to it. Grit Liebscher and Jennifer Dailey-O’Cain, in surveying the relevant literature, have noted that code switching may serve

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190. See *id.* at 145.

191. Almeida Jacqueline Toribio, *On the Emergence of Bilingual Code-Switching Competence*, 4 BILINGUALISM: LANGUAGE & COGNITION 203, 204 (2001).

192. See ROMAINE, *supra* note 14, at 122–23.

193. Toribio, *supra* note 191, at 205.

194. See Roberto R. Heredia & Jeanette Altarriba, *Bilingual Language Mixing: Why Do Bilinguals Code-Switch?*, 10 CURRENT DIRECTIONS IN PSYCHOL. SCI. 164, 165 (2001) (offering and discussing multiple hypotheses as to why bilinguals code switch); see also Grit Liebscher & Jennifer Dailey-O’Cain, *Learner Code-Switching in the Content-Based Foreign Language Classroom*, 89 THE MODERN LANGUAGE J. 234, 235 (2005).

195. See BAKER & JONES, *supra* note 7, at 58.

either a *discourse-related* function (i.e., for emphasis, clarity, or to otherwise enhance the interactional meaning of the utterance) or a *participant-related* function (i.e., to accommodate the preferences of the speaker or a coparticipant in the conversation).<sup>196</sup> Many acts of code switching, especially by persons who are not fully bilingual, may serve both functions. Consider, for example, the common case where the speaker simply does not know how to articulate a specific phrase in the second language or is using a technical term for which there is no equivalent in the second language.

In the specific context of legal work, code switching can be deployed strategically to achieve both discourse-related and participant-related functions. First, code switching is often utilized in discourse for emphasis or to reinforce a request. Switching into a different language for a particular phrase reinforces the importance of that phrase.<sup>197</sup> A study of Welsh nurses in a hospital ward revealed how the nurses typically spoke with patients in Welsh but switched to English to accent a particular point about the use of nurse call buttons:

‘Ganoch chi’r gloch DWY WAITH! Peidiwch byth a’i ganu e dwywaith—‘Emergency’ ydy hynny. Dim ond UNWAITH sydd ange. Only ring it ONCE!

Translation from Welsh: You rang the bell TWICE! Don’t ever ring it twice—that’s an emergency. ONCE is enough. [In English] Only ring it ONCE!<sup>198</sup>

Repetition of a phrase in multiple languages might also be used to ensure comprehension and clarity. Switching to a second language may also be an effective tactic to qualify what has been said in the first language.<sup>199</sup> Additionally, if a particular word or phrase in English will be repeatedly used throughout a legal proceeding (for example, in a courtroom setting), a lawyer may purposefully use the English version to familiarize the client with its use.

Participant-related code switching can also be used in the lawyering context. If an attorney is unsure of the interlocutor’s level of proficiency in each of the shared languages, repetition with code

196. See Liebscher & Dailey-O’Cain, *supra* note 194, at 235.

197. See ROMAINE, *supra* note 14, at 162.

198. BAKER & JONES, *supra* note 7, at 56 (internal quotations omitted). Underlying such a practice, of course, might be the shared understanding that English is the dominant language and that the nurse’s use of English reinforced her authority over the patient. Lawyers must therefore be careful that the use of code switching for emphasis does not reinforce the subordination of language minorities.

199. See ROMAINE, *supra* note 14, at 163.

switching can be used as a strategy.<sup>200</sup> Code switching can also be deployed strategically to alter the dynamic of the conversation between the speaker and the listener. A bilingual individual's language use will vary depending on the specific social arena in which the conversation is taking place.<sup>201</sup> For example, language use will shift as the speaker moves from the home, to the workplace, to school, to a business setting, and the like. Conscious code switching can subtly import a more familial dynamic into a professional interaction, thereby neutralizing the power dynamics that can inhibit effective communication and relationship building.

Similarly, a speaker may switch to the listener's primary language as a way to convey friendship or as an attempt to identify with the listener.<sup>202</sup> In multilingual societies, using a particular language may reflect an attempt to establish a relationship of solidarity with another individual.<sup>203</sup> And code switching can be used to change the mood of a conversation, helping to release tension or to insert humor.<sup>204</sup> Humor might be generated because the switch is incongruous, because it is a form of teasing or disparagement of others, or because it serves as a form of release for the interlocutors.<sup>205</sup> Whether a particular code switch is funny will depend, of course, on the specific subject of the conversation and the speakers involved. Nevertheless, in the context of an attorney-client interaction, one can imagine how switching from English into another language (or vice-versa) could lighten the mood. The change in language allows the speaker to signal a shift in the tone and direction of the interaction.

One way to teach code switching is for an instructor to allow English to be spoken in a class otherwise focused on foreign language proficiency. Although conventional wisdom dictates that second-language proficiency is best acquired through immersion—that is, by banning the use of English in the classroom—studies have found that allowing the use of English can yield pedagogical benefits. In

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200. See BAKER & JONES, *supra* note 7, at 60.

201. See ROMAINE, *supra* note 14, at 166.

202. See *id.* This practice is common in everyday life, particularly when the speaker has only a basic knowledge of the second language. Given the emphasis on English-language learning in the United States, however, speakers must be careful that the listener does not perceive such code switching as a tacit critique of the listener's proficiency in the primary shared language.

203. See MYERS-SCOTTON, *supra* note 2, at 161–62 (describing code-switching practices in Kenya).

204. See generally Jeff Siegel, *How to Get a Laugh in Fijian: Code-Switching and Humor*, 24 LANGUAGE IN SOC'Y 95 (1995) (examining the practice of code switching from Fijian into Hindi as a way to express humor in Fijian society); see also BAKER & JONES, *supra* note 7, at 60.

205. See Siegel, *supra* note 204, at 103–04.

one study of German language students at the University of Alberta, the instructor explicitly allowed students to speak English in the classroom but rarely herself spoke English to the students.<sup>206</sup> Although allowed to speak English and engage in code switching, the students in the study “did not merely fall back on [English] when they encountered a deficiency in their [German] learning; they also made frequent use of language alternation to indicate changes in their orientation toward the interaction and toward each other.”<sup>207</sup> In short, the classroom can serve as a laboratory where code switching occurs and where the code switching can then be dissected by the instructor to import broader lessons.

#### *F. Paralinguistic and Extralinguistic Behavior*

As noted above, language reflects a culture’s value system, and its view of how the world is structured. Culture also influences the style of speech and the nonverbal communication that both speakers and listeners use in a conversation. The two broad categories of behavior include paralinguistic behavior (or body languages or gestures that accompany the spoken word) and extralinguistic behavior (referring to the speed, tone, and other dimensions of how the speech itself is delivered).

A lawyer’s ability to interpret paralinguistic behavior is essential for comprehending client communication and for serving as an effective advocate. Nonverbal communications, such as facial expression, posture, and other body language, often reflect personality, credibility, and confidence.<sup>208</sup> These attributes are important considerations for the lawyer to weigh when crafting an overall case strategy. Lawyers, however, must assess nonverbal communications through multiple cultural-linguistic lenses to ensure that they are drawing the proper conclusions about their clients.

As noted above, there is considerable scholarship about differences in nonverbal communication across cultures and about how misinterpretations of such behaviors can lead to breakdowns in communication. Eye contact is an often-cited example: gaze patterns vary across cultures, such that subverting the eyes might be viewed as a sign of deference or respect, or, alternatively, as a reflection of doubt, dishonesty, or avoidance.<sup>209</sup> Likewise, scholars have

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206. See Liebscher & Dailey-O’Cain, *supra* note 194, at 236, 245.

207. *Id.* at 245.

208. See Reagan, *supra* note 129, at § 11.

209. See Neal P. Pfeiffer, *Credibility Findings in INS Asylum Adjudications: A Realistic Assessment*, 23 TEX. INT’L L. J. 139, 144 n.35–36 (1988) (citing Furnham & Bochner, *Social Difficulty*

noted that “[m]embers of Arab societies tend to speak fast and loudly . . . [and] tend to use a higher pitch range[,]” which might be seen as aggressive by native English speakers.<sup>210</sup> The use of silence in the context of a conversation also varies across cultures.<sup>211</sup> Understanding these culturally defined paralinguistic and extralinguistic cues are an important part of second-language comprehension.

Appropriately diagnosing paralinguistic behavior is critical before allowing clients to present testimony before a decision maker. In the U.S. legal system, the paralinguistic behavior of a party, witness, or applicant may be used to determine whether or not the person is credible. In the immigration context, for example, adjudicators are explicitly permitted to weigh the client’s demeanor in assessing credibility.<sup>212</sup> In determining truthfulness, listeners may rely upon behavioral cues such as “gazing, smiling, postural shifts . . . and adaptors (i.e., fidgeting, behavior associated with grooming, and hand-to-face gestures).”<sup>213</sup> Many of these behaviors are culturally determined and often are closely linked to a specific language. Heightened awareness about paralinguistic behavior will allow a lawyer to better understand the client and to anticipate potential pitfalls as the legal process unfolds.

In bilingual lawyering settings, where a lawyer and client are attempting to communicate using a shared language, nonverbal communication can be particularly relevant. Imagine, for example, that the lawyer and client have an unequal grasp of Portuguese; the client speaks it with native fluency, whereas the lawyer is simply proficient in the language. When such a disparity exists, and the lawyer seeks to communicate with the client in Portuguese, the client will rely more heavily on the lawyer’s nonverbal communication to fully understand what is being communicated.<sup>214</sup> The same is true, of

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in *a Foreign Culture: An Empirical Analysis of Culture Shock*, in *CULTURES IN CONTACT* 161, 165–66 (S. Bochner ed. 1982)).

210. Ellen Feghali, *Arab Cultural Communication Patterns*, 21 *INT’L J. INTERCULTURAL REL.* 345, 368 (1997).

211. See *id.* at 369 (describing cultural uses of silence in Arab societies); see also Margaret E. Montoya, *Silence and Silencing: Their Centripetal and Centrifugal Forces in Legal Communication, Pedagogy, and Discourse*, 5 *MICH. J. RACE & L.* 847, 863–67 (2000).

212. See U.S. DEP’T OF JUSTICE, EXECUTIVE OFFICE OF IMMIGRATION REVIEW, *Immigration Judge Benchbook: Credibility*, available at <http://www.justice.gov/eoir/vll/benchbook/templates/Credibility%20Standard%20Language.htm> (last visited July 20, 2011) (noting that credibility determinations in Immigration Court may be made on the basis of “demeanor, candor, and responsiveness of the applicant or witness,” among other factors).

213. Pfeiffer, *supra* note 209, at 144 n.35–36 (citing Zuckerman, DePaulo & Rosenthal, *Verbal and Nonverbal Communication of Deception*, 14 *ADVANCES IN EXPERIMENTAL SOC. PSYCHOL.* 1, 17–19 (1981)).

214. See Reagan, *supra* note 129, at § 8.

course, if the lawyer (a native English speaker) is speaking in English to a client for whom English is a second language. In this context as well, nonverbal communication is critical to the lawyer's comprehension due to the disparities in language proficiency.

Additionally, nonverbal communication (charades or mime) can be used as a conscious strategy when the lawyer lacks the refined vocabulary needed to describe a particular act or occurrence.<sup>215</sup> Imagine, for example, a French-speaking lawyer interviewing a native French speaker about a physical assault. In the moment, the lawyer may be able to recall only one relevant verb in French meaning "to hit or strike." With the limited language, the lawyer may not be able to ask precisely whether the client was beaten, slapped, punched, or something else. The lawyer can then rely on paralinguistic behavior—in the form of hand gestures—to ask the question with more precision.

Law students and lawyers can be taught about the types of paralinguistic behavior that typically accompany a language or that are practiced by persons from a certain culture or geographic area. But in teaching about such behaviors, lawyers must recognize the inherent variability of language and the risk of assuming that all speakers of a language exhibit, or can appropriately interpret, a certain type of behavior. This is particularly true for languages (including English, French, and Spanish) that transcend various cultures.<sup>216</sup>

## CONCLUSION

Given the current trajectory of client needs and the concomitant evolution of law practice, attorney bilingualism is growing in importance. Although bilingualism is appropriately understood as a means to streamline communication, few have explored the transformative potential of a broader culture of attorney bilingualism in the United States. As described above, bilingual attorneys are poised to reap various cognitive benefits while deepening and strengthening relationships with LEP and NEP clients. Moreover, their presence will necessarily reshape how courts and other decision makers interact with individuals who are language minorities.

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215. See BIALYSTOK, *supra* note 5, at 101–03.

216. Additionally, depending on the type of cross-cultural behavior that might be deployed, the speaker may experience different types of psychological or emotional tolls, particularly if the behavior to be used generates some kind of embarrassment, anxiety, or other form of distress. See Andrew Molinsky, *Cross-Cultural Code-Switching: The Psychological Challenges of Adapting Behavior in Foreign Cultural Interactions*, 32 *ACADEMY OF MANAGEMENT REV.* 622, 624–31 (2007).

The realization of this transformative potential depends on the presence of lawyers who are not only bilingual but are fully prepared for the practice of law in non-English languages. To this end, law schools and the legal profession should adopt a rigorous approach to bilingual legal practice, paying particular attention to the multiple competencies demanded by this kind of work.