



NEW MEXICO LAW REVIEW

Volume 49
Issue 1 *Winter*

Winter 2019

Contrastive Analysis and Contrastive Rhetoric in the Legal Writing Classroom

Diane B. Kraft
University of Kentucky College of Law

Recommended Citation

Diane B. Kraft, *Contrastive Analysis and Contrastive Rhetoric in the Legal Writing Classroom*, 49 N.M. L. Rev. 35 (2019).

Available at: <https://digitalrepository.unm.edu/nmlr/vol49/iss1/10>

This Article is brought to you for free and open access by The University of New Mexico School of Law. For more information, please visit the *New Mexico Law Review* website: www.lawschool.unm.edu/nmlr

CONTRASTIVE ANALYSIS AND CONTRASTIVE RHETORIC IN THE LEGAL WRITING CLASSROOM

Diane B. Kraft*

INTRODUCTION

In the past several decades, the number of English-as-a-second-language (ESL) speakers attending law schools as part of J.D. and LL.M. programs has increased dramatically.¹ While some of these students are fluent in English, many are not yet able to read, write, and speak English, or understand spoken English, at the advanced level required for successful graduate work in law. The language problems are sometimes grammatical, sometimes cultural, and often both.² For those students who are required to complete a writing course as part of their graduate program, deficiencies in writing ability can be a difficult obstacle to overcome.³ For the legal writing professionals teaching those courses, the challenges of teaching

* Wyatt, Tarrant & Combs Associate Professor of Legal Research and Writing, University of Kentucky College of Law; B.A. University of Wisconsin; M.A. Indiana University; J.D. University of Wisconsin Law School. Special thanks to Alissa J. Hartig for her insightful comments on a draft of this paper.

1. The number of schools offering LL.M. degree programs for international students increased by more than 50% between 1998 and 2004, from 67 to 96, and has increased since then to more than 100; the number of foreign students enrolled in these programs more than doubled between 1998 and 2004, from over 2000 to 4469. See Carole Silver, *Internationalizing U.S. Legal Education: A Report on the Education of Transnational Lawyers*, 14 *CARDOZO J. INT'L & COMP. L.* 143, 146–49; *LLM International Law Programs*, A.B.A. (Mar. 15, 2017), https://www.americanbar.org/groups/international_law/students/llm/; see also Mindie Lazarus-Black & Julie Globokar, *Foreign Attorneys in U.S. LL.M. Programs: Who's in, Who's out, and Who They Are*, 22 *IND. J. GLOBAL LEGAL STUD.* 3, 4–5 (2015); Carole Silver, *The Case of the Foreign Lawyer: Internationalizing the U.S. Legal Profession*, 25 *FORDHAM INT'L L.J.* 1039, 1046 (2002).

2. See, e.g., Julie M. Spanbauer, *Lost in Translation in the Law School Classroom: Assessing Required Coursework in LL.M. Programs for International Students*, 35 *INT'L J. LEGAL INFO.* 396, 412–13 (2007).

3. This problem is not limited to law students. As one applied linguistics scholar notes of ESL students studying in the United States:

[W]hen our students are asked to write to inform or persuade, many of them have serious difficulties. Persuasive writing at the university level includes a variety of genres and formats that require students to develop an assertive thesis, one that makes a claim, and to support that thesis logically with substantive evidence. When multilingual and multicultural students are faced with such writing assignments, they may face logical and structural problems because they may not know how to connect their ideas and their evidence in the expected rhetorical structure. . . . In many cases, these students rely on their native cultural and linguist patterns of explanation, and, as a result, to their instructors, their writing seems disorganized and neither informative nor persuasive.

Anne Bliss, *Rhetorical Structures for Multilingual and Multicultural Students*, in *CONTRASTIVE RHETORIC REVISITED AND REDEFINED* 15, 16–17 (Clayann Gilliam Panetta ed., 2001).

ESL students to write are often very different from the challenges of teaching traditional J.D. students, who are overwhelmingly native English speakers. Many professors of ESL legal writing students do not have backgrounds in teaching English as a second or foreign language,⁴ so may be unfamiliar with the second language acquisition and writing research and pedagogy particular to that group of learners. Research on teaching legal writing to ESL students could be of tremendous benefit to these professors.

While scholarship on second language writing is abundant in the applied linguistics community, and significant applied linguistics research is being done on second language writing in the context of legal writing, scholarship by and geared to legal writing specialists that focuses on teaching legal writing to ESL law students is less common, despite the increased number of ESL students studying law.⁵ While this is unfortunate, it is understandable: few legal writing scholars have studied second language writing. Moreover, the scholarship that does exist often focuses on

4. The difference between English as a second language (ESL) and English as a foreign language (EFL) is where the learner is studying English. If in a country where English is the native language, the learner is studying ESL; if in the learner's native country where English is a foreign language, the learner is studying EFL.

5. Articles and books that discuss or reference second language writing and acquisition in the context of legal writing include the following: ALISSA J. HARTIG, *CONNECTING LANGUAGE AND DISCIPLINARY KNOWLEDGE IN ENGLISH FOR SPECIFIC PURPOSES: CASE STUDIES IN LAW* (New Perspectives on Language and Education: 55, 2017); Elizabeth R. Baldwin, *Beyond Contrastive Rhetoric: Helping International Lawyers Use Cohesive Devices in U.S. Legal Writing*, 26 FLA. J. INT'L L. 399 (2014); V. K. Bhatia, *Simplification v. Easification—The Case of Legal Texts*, 4 APPLIED LINGUISTICS 42 (1983); Teresa Kissane Brostoff, *Using Culture in the Classroom: Enhancing Learning for International Law Students*, 15 MICH. ST. J. INT'L L. 557 (2007); Nigel Bruce, *Dovetailing Language and Content: Teaching Balanced Argument in Legal Problem Answer Writing*, 21 ENG. FOR SPECIFIC PURPOSES 321 (2002); Yocheved Deutch, *Needs Analysis for Academic Legal English Courses in Israel: A Model of Setting Priorities*, 2 J. ENG. FOR ACAD. PURPOSES 125 (2003); Matthew A. Edwards, *Teaching Foreign LL.M. Students About U.S. Legal Scholarship*, 51 J. LEGAL EDUC. 520 (2001); Christoph A. Hafner & Christopher N. Candlin, *Corpus Tools as an Affordance to Learning in Professional Legal Education*, 6 J. ENG. FOR ACAD. PURPOSES 303 (2007); C.B. Feak et al., *A Preliminary Analysis of Law Review Notes*, 19 ENG. FOR SPECIFIC PURPOSES 197 (2000); Alissa J. Hartig, *Conceptual Blending in Legal Writing: Linking Definitions to Facts*, 42 ENG. FOR SPECIFIC PURPOSES 66 (2016) [hereinafter Hartig, *Conceptual Blending in Legal Writing*]; Alissa J. Hartig, *Intersections Between Law and Language: Disciplinary Concepts in Second Language Legal Literacy*, 45 STUD. IN LOGIC, GRAMMAR & RHETORIC 69 (2016); Alissa J. Hartig and Xiaofei Lu, *Plain English and Legal Writing: Comparing Expert and Novice Writers*, 33 ENG. FOR SPECIFIC PURPOSES 87 (2014); P.M. Howe, *The Problem of the Problem Question in English for Academic Legal Purposes*, 9 ENG. FOR SPECIFIC PURPOSES 215 (1990); Diane B. Kraft, *Helping International Students Avoid the Plagiarism Minefield: Suggestions from a Second Language Teacher and Writer*, 23 PERSP.: TEACHING LEGAL RES. & WRITING 37 (2014); Lazarus-Black & Globokar, *supra* note 1; Robin Nilon, *The Calculus of Plagiarism: Toward a Contrastive Approach to Teaching Chinese Lawyers*, 2 S.C. J. INT'L L. & BUS. 1 (2006); Jill Northcott, *Language Education for Law Professionals, in DIMENSIONS OF FORENSIC LINGUISTICS 27* (John Gibbons & M. Teresa Turell, eds., 2008); Jill J. Ramsfield, *Is "Logic" Culturally Based? A Contrastive, International Approach to the U.S. Law Classroom*, 47 J. LEGAL EDUC. 157 (1997); Spanbauer, *supra* note 2; John Swales, *Notes and Discussion, The Case of Cases in English for Academic Legal Purposes*, 20 INT'L REV. APPLIED LINGUISTICS LANGUAGE TEACHING 139 (1982); Helena Whalen-Bridge, *The Reluctant Comparativist: Teaching Common Law Reasoning to Civil Law Students and the Future of Comparative Legal Skills*, 58 J. LEGAL EDUC. 364 (2008); Mark E. Wojcik & Diane Penneys Edelman, *Overcoming Challenges in the Global Classroom: Teaching Legal Research and Writing to International Law Students and Law Graduates*, 3 LEGAL WRITING: J. LEGAL WRITING INST. 127 (1997).

one area of second language writing: contrastive rhetoric.⁶ This is potentially problematic because contrastive rhetoric has long been questioned and even ridiculed in the applied linguistics community.⁷

There is a relative dearth of scholarship geared to legal writing professors on teaching legal writing to ESL students in both J.D. and LL.M. programs. This article will focus on contrastive rhetoric and its precursor, contrastive analysis, in an attempt to consider these important areas of applied linguistics scholarship in a more current as well as practical context. This is important because views of contrastive rhetoric have changed over the past several decades among applied linguistics scholars, and legal writing professionals who teach ESL students should be aware of this. Contrastive rhetoric is one of the most well-known areas of study in applied linguistics research in general, and certainly among legal writing professionals. It was introduced to legal writing professionals in Jill Ramsfield's seminal 1997 article, *Is Logic "Culturally Based"?* Indeed, contrastive rhetoric has been seen as one of the areas of study in applied linguistics research most applicable to legal writing in part because applied linguistics scholars who study contrastive rhetoric have focused a great deal on rhetoric in persuasive and argumentative writing,⁸ including deductive versus inductive logic, and English for Specific Purposes.⁹ Thus, the focus on contrastive rhetoric among legal writing scholars makes sense. Nonetheless, contrastive rhetoric has its critics, and for good reason.

As will be discussed below, the original focus of contrastive rhetoric on the differences in rhetorical conventions from one culture to the next proved problematic for both cultural and methodological reasons. Moreover, globalization and the increased use of English as a world language has at least partially negated the idea of a culture-specific rhetoric. That said, the idea that differences in the way people think about and use language in their first language (L1) can affect how they use language in a second language (L2) is not wrong. In fact, the use of "contrast" can be an effective pedagogical tool when the focus shifts from generalized, culture-based rhetorical differences to individual, experience-based differences. Thus, this article is intended to encourage legal writing professors of international students to think about and use contrastive rhetoric in a new way.

In Part I of the article I will give a brief overview of the history of contrastive analysis and contrastive rhetoric. Part II will focus on the myriad criticisms of contrastive rhetoric. Part III will offer suggestions on how contrastive

6. See, e.g., Baldwin, *supra* note 5; Nilon, *supra* note 5; Ramsfield, *supra* note 5; Whalen-Bridge, *supra* note 5.

7. See, e.g., Ryuko Kubota & Al Lehner, *Toward Critical Contrastive Rhetoric*, 13 J. SECOND LANGUAGE WRITING 7, 9 (2004); Xiaoming Li, *Are "Cultural Differences a Mere Fiction"?: Reflections and Arguments on Contrastive Rhetoric*, 25 J. SECOND LANGUAGE WRITING 104, 104–05 (2014).

8. See, e.g., Ryuko Kubota, *Critical Approaches to Theory in Second Language Writing: A Case of Critical Contrastive Rhetoric*, in PRACTICING THEORY IN SECOND LANGUAGE WRITING 191, 195 (Tony Silva & Paul Kei Matsuda eds., Second Language Writing 3, 2010).

9. See Dwight Atkinson, *Contrasting Rhetorics/Contrasting Cultures: Why Contrastive Rhetoric Needs a Better Conceptualization of Culture*, 3 J. ENG. FOR ACAD. PURPOSES 277, 278 (2004); Ulla Connor, *Mapping Multidimensional Aspects of Research: Reaching to Intercultural Rhetoric*, in CONTRASTIVE RHETORIC: REACHING TO INTERCULTURAL RHETORIC 299, 303–04 (Ulla Connor et al. eds., Pragmatics & Beyond New Series Vol. 169, 2008). Legal writing for ESL falls under the rubric of English for Specific Purposes.

analysis and contrastive rhetoric can be used most effectively in teaching legal writing to ESL students. While the focus of the article will be on teaching ESL students, it is also intended to aid those teaching native-English-speaking (NES) J.D. students, as many have likened learning to write legal memos and briefs to learning to write in a new language, with different rules and expectations.¹⁰ Therefore, the suggestions offered in Part III are applicable to teaching both ESL and NES students.

I. A BRIEF HISTORY OF CONTRASTIVE ANALYSIS AND CONTRASTIVE RHETORIC

A. Contrastive Analysis

Anyone who has studied a foreign language has likely had the experience of taking a rule or word from the first language and using it in the second language, resulting in a language error. For example, a native speaker of Russian, a language without articles, may sometimes mistakenly omit or add articles when speaking or writing in English (for example, saying or writing “I bought car” instead of “I bought a car”). This phenomenon, called “transfer” or “interference,”¹¹ gave rise to contrastive analysis, which sought to predict the errors language learners would make based on the learners’ first languages and the languages they were learning.¹² Applied linguistics researchers assumed that the errors language learners made were the result of “transfer or interference” from the learners’ native language.¹³ Therefore, researchers believed that if they studied learners’ language errors and compared them to the learners’ native languages, they could identify which errors were the result of transfer.¹⁴ They could then predict the errors learners of a particular language would make, depending on the learners’ native language.¹⁵ While this may have seemed logical, these predictions were often incorrect, and “proved not to cover all the errors students actually made.”¹⁶ So linguists looked for other reasons language learners made errors. One result was contrastive rhetoric.¹⁷

10. See, e.g., Baldwin, *supra* note 5, at 399–400; Jim Chen, Related Article, *Law as a Species of Language Acquisition*, 73 WASH. U. L.Q. 1263, 1286 (1995); see also Spanbauer, *supra* note 2, at 446 (noting the “similar cultural transition” of NES and ESL students).

11. Applied linguists consider “interference” to be a stigmatizing term because it implies resulting error. In contrast, “transfer” is generally considered a neutral term because transfer of L1 features to the L2 can be both positive and negative.

12. See Nils Erik Enkvist, *Why We Need Contrastive Rhetoric*, 4 ALTERNATION, no. 1, 1997, at 188, 188–89.

13. See *id.*

14. See *id.* at 189.

15. See *id.*

16. *Id.*

17. See Li, *supra* note 7, at 111; Paul Kei Matsuda & Dwight Atkinson, *A Conversation on Contrastive Rhetoric: Dwight Atkinson & Paul Kei Matsuda Talk About Issues, Conceptualizations, and the Future of Contrastive Rhetoric*, in CONTRASTIVE RHETORIC: REACHING TO INTERCULTURAL RHETORIC at 277, 279.

B. Contrastive Rhetoric

Where contrastive analysis focuses on interference caused by the phonological, morphological, and grammatical features of the first language compared to the second language,¹⁸ contrastive rhetoric focuses on “the way we put together language to affect an audience, [when] each audience has certain expectations of rhetorical structure based on the traditional forms of rhetoric in their culture.”¹⁹ In other words, contrastive rhetoric is “the study of patterns of text and discourse in different languages that vary in structure and in cultural background.”²⁰

The father of contrastive rhetoric, Robert Kaplan, introduced the idea in his 1966 article, *Cultural Thought Patterns in Intercultural Education*. In this article, Kaplan posited that the logic of rhetoric is influenced by culture, and the writing of different countries and cultures reflects these differences.²¹ The rhetoric of English, for example, he describes as “dominantly linear.”²² In contrast, he described Arabic writing as using “a complex series of parallel constructions,” while what Kaplan called “Oriental” writing “is marked by what may be called an approach by indirection.”²³ His illustration of the different kinds of logic became known as his “doodles.”²⁴ According to Kaplan, one of the results of these differences in logic is negative transfer.²⁵ Each language, and the culture in which it is used, has its own rhetorical conventions, and those conventions can interfere with a person’s writing in a second language.²⁶ In a follow-up article, *A Further Note on Contrastive Rhetoric*, Kaplan reiterated his view “that the rhetorical patterns of a language are unique, culturally-coded phenomena which in inter-cultural communication situations can cause blockages.”²⁷

Kaplan’s novel idea of language learning took hold, in part because it seemed intuitive to teachers of second languages.²⁸ Not surprisingly, other scholars built on Kaplan’s work, often bolstering his descriptions of the rhetorical conventions of Asian languages in particular. A teacher of English in China, for

18. See generally Robert B. Kaplan, *Foreword: What in the World is Contrastive Rhetoric?* [hereinafter Kaplan, *Foreword: What in the World is Contrastive Rhetoric?*], in *CONTRASTIVE RHETORIC REVISITED AND REDEFINED*, *supra* note 3, at vii, viii.

19. Kristin R. Woolever, *Doing Global Business in the Information Age: Rhetorical Contrasts in the Business and Technical Professions*, in *CONTRASTIVE RHETORIC REVISITED AND REDEFINED*, *supra* note 3, at 47, 48.

20. Enkvist, *supra* note 12, at 188. Another way to describe the difference is top-down (contrastive rhetoric) versus bottom-up (contrastive analysis). See, e.g., Baldwin, *supra* note 5, at 404–05.

21. See Robert B. Kaplan, *Cultural Thought Patterns in Inter-Cultural Education*, 16 *LANGUAGE LEARNING I* (1966) [hereinafter Kaplan, *Cultural Thought Patterns in Inter-Cultural Education*].

22. *Id.* at 4.

23. *Id.* at 6, 10.

24. In fact, the article is known as Kaplan’s doodle article. See, e.g., Baldwin, *supra* note 5, at 403 n.11.

25. See Robert B. Kaplan, *A Further Note on Contrastive Rhetoric*, *COMM. Q.*, Spring 1976, at 12, 16 [hereinafter Kaplan, *A Further Note on Contrastive Rhetoric*].

26. See Kubota & Lehner, *supra* note 7, at 8.

27. Kaplan, *A Further Note on Contrastive Rhetoric*, *supra* note 25, at 12. For a discussion of Kaplan’s doodles in the context of legal writing, see Baldwin, *supra* note 5, at 403–05; Ramsfield, *supra* note 5, at 167–70.

28. See Kubota & Lehner, *supra* note 7, at 10.

example, agreed with Kaplan's description of "Oriental" rhetoric as indirect, observing that "[t]o be indirect in both spoken and written discourse, to expect the audience to infer meanings rather than to have them spelled out is a defining characteristic of Chinese rhetoric. . . ." ²⁹ Later scholars described rhetoric in Japanese in similar terms: "indirect," "non-linear," "inductive," and "reader-responsible."³⁰

Differences in rhetorical conventions were also identified as being the result of "high-context" versus "low-context" cultures. In the United States, which has a "low-context" culture, meaning is conveyed via "explicit" communication, both oral and written.³¹ In contrast, in "high-context" cultures such as China and Japan, communication relies on "the implicit nuances" of "the way the message is delivered" as much as it does on the content of the message.³² For example, even when writing persuasive documents in Japanese, the writer does not overtly try to persuade the reader that a particular viewpoint is correct.³³ Thus, instead of making a direct, explicit argument, the persuasive writer in Japanese "might mention discrete points favoring the proposition."³⁴ The goal is that the reader then "will agree or disagree with the proposition—even though it has never been stated directly."³⁵

The implications of contrastive rhetoric for teachers of English as a second or foreign language were profound, particularly for those who taught academic writing. Proponents of contrastive rhetoric believed that instead of being stymied by a student's inability or disinclination to write an explicit and direct persuasive essay, the teacher could identify a possible reason for the student's difficulty: negative transfer, or interference, from the student's first-language culture. Contrastive rhetoric showed teachers that if an ESL student was struggling in English class, the problem was not that the student was low-performing; the problem was that the student was accustomed to writing in a different rhetorical style. Through contrastive rhetoric, "Kaplan was able to suggest that rhetorical structure is not universal, but culture-dependent. . . . In essence, instructors were called to realize that 'differences among rhetorical patterns do not represent differences in cognitive ability, but

29. Carolyn Matalene, *Contrastive Rhetoric: An American Writing Teacher in China*, 47 C. ENG. 789, 801 (1985).

30. Kubota & Lehner, *supra* note 7, at 8. "Writer responsible" means it is the job of the writer to make meaning clear, while "reader responsible" means it is up to the reader to interpret and understand meaning. *Id.*

31. See Woolever, *supra* note 19, at 50.

32. *Id.* Note, however, that Woolever recognizes this distinction may be becoming less pronounced: However correct these cultural theories were prior to the Internet and the attendant knowledge revolution, these days most locales have electronic access to cultural "levelers" that have created in the younger generation around the world a similar set of expectations and behaviors. . . . "[T]here is a high probability that an intermediate form composed of various elements taken from each of the varieties will develop."

Id. (quoting Robert B. Kaplan, *Cultural Thought Patterns* [hereinafter Kaplan, *Cultural Thought Patterns*], in *WRITING ACROSS LANGUAGES: ANALYSIS OF L2 TEXT* 9, 15 (Ulla Connor & Robert B. Kaplan eds., Second Language Prof'l Library Ser. 1987)). This "leveling" and its implications for the classroom teacher will be discussed in Part II of this article.

33. Bliss, *supra* note 3, at 17 ("[I]t is typically considered rude to point out to the listener or reader what that person should believe or do.").

34. *Id.*

35. *Id.*

differences in cognitive style.”³⁶ As intuitive as Kaplan’s observations seemed to many ESL teachers, Kaplan’s idea faced swift and strident criticisms, which are the subject of the next Part.

II. CRITICISMS OF CONTRASTIVE RHETORIC

Kaplan’s 1966 article on contrastive rhetoric is one of the most cited articles in applied linguistics scholarship, and also one of the most criticized. The criticism has been so loud and so effective that contrastive rhetoric as an area of study arguably does not even exist anymore.³⁷ It has proven to be so controversial that scholars have since shifted focus away from its more controversial aspects, and have even renamed it.³⁸ Most of the criticism of contrastive rhetoric can be divided into two general categories: (1) accusations that contrastive rhetoric is English-centric; and (2) criticism of the methodology of contrastive rhetoric studies, and its oversimplification of how language is acquired.

A. Criticism of the English-centric and culture-centric nature of contrastive rhetoric

At the heart of contrastive rhetoric is culture and the influence culture has on rhetoric. As Kaplan wrote in the first sentence of the seminal 1966 article in which he introduced contrastive rhetoric, “[t]he teaching of reading and composition to foreign students does differ from the teaching of reading and composition to American students, and cultural differences in the nature of rhetoric supply the key to the difference in teaching approach.”³⁹ Among the most vocal critics of contrastive rhetoric are those who find in its culture-centric nature the implicit understanding that the direct, linear style of English rhetoric is preferable to the supposedly indirect, non-linear style of rhetoric in other, particularly Asian, cultures.⁴⁰ Perhaps anticipating such objections, Kaplan noted in the 1966 article that the point of contrastive rhetoric was not to suggest that other rhetorical styles were less valid, but was rather to show that the rhetoric of American English was not the only acceptable rhetoric.⁴¹ Ten years later he reiterated that he did not mean to suggest that English rhetoric was superior, stating that “[t]he concept of contrastive rhetoric does not concern itself with any attempt to establish primacy; rather it is concerned merely with describing observable differences in rhetorical operations and with trying to

36. Clayann Gilliam Panetta, *Understanding Cultural Differences in the Rhetoric and Composition Classroom: Contrastive Rhetoric as Answer to ESL Dilemmas* (citation omitted) (quoting Alan C. Purves, *Introduction*, in *WRITING ACROSS LANGUAGES AND CULTURES: ISSUES IN CONTRASTIVE RHETORIC* 9, 19 (Alan C. Purves ed., 1988)), in *CONTRASTIVE RHETORIC REVISITED AND REDEFINED*, *supra* note 3, at 3, 4.

37. See Li, *supra* note 7, at 104 (referring to contrastive rhetoric as “discarded”).

38. See Kubota, *supra* note 8, at 194 (suggesting “intercultural rhetoric” as a possible replacement for contrastive rhetoric).

39. Kaplan, *Cultural Thought Patterns in Inter-Cultural Education*, *supra* note 21, at 1.

40. See, e.g., Li, *supra* note 7, at 107, 109; Enkvist, *supra* note 12, at 190.

41. See Kaplan, *Cultural Thought Patterns in Inter-Cultural Education*, *supra* note 21, at 14 (stating that his purpose was “only to demonstrate that paragraph developments other than those normally regarded as desirable in English do exist”).

identify the grammatical causes of those differences and, where possible, with suggesting phenomenological parallels.”⁴²

Nonetheless, even for those critics who accepted that the purpose of contrastive rhetoric was not to elevate English rhetoric as preferred over the rhetoric of other cultures, contrastive rhetoric was still problematic. Because contrastive rhetoric defined rhetoric based on cultural differences, and also ignored differences within individual cultures, critics argued that it encouraged cultural stereotyping.⁴³ In addition, even if contrastive rhetoric was not intended to be “English-centric,” the result was still the replacing of the rhetoric of a learner’s native culture with the rhetoric of the target culture, which was often English.⁴⁴ Many applied linguistics scholars argued against a prescriptive teaching of second writing, where learners were compelled to write in the rhetorical style of the target language.⁴⁵ Critics cautioned against the “colonizing effects” of reproducing the rhetoric of the English language” because it could cause students to resist, even unconsciously in the form of writer’s block.⁴⁶ In other words, the “rhetorical conflict” of being asked to write according to the rhetoric of a different culture could cause the learner to fail at the writing task, regardless of the learner’s ability. “Rhetorical conflict can lead to resistance to writing whether it is encountered in a homogeneous classroom, an ESL classroom, or a multicultural classroom.”⁴⁷ The criticism of the culture-centric and English-centric nature of contrastive rhetoric resulted in many applied linguistics scholars being reluctant to conduct research in that area.⁴⁸ The lack of robust research has meant that more remains unclear than clear about contrastive rhetoric and whether it is a legitimate source for pedagogical theories of second language writing.

B. Criticism of the methodology of contrastive rhetoric studies, and its oversimplification of how language is acquired

Even if one is unconvinced or untroubled by criticisms leveled against contrastive rhetoric for being “English-centric,” an educator relying on the claims of contrastive rhetoric scholars in planning classroom materials and activities should be aware of the criticisms of the methodology that has been used in research on contrastive rhetoric. One applied linguistics scholar has neatly summed up the criticisms of contrastive rhetoric by observing that:

Kaplan’s (1966) study itself is now often pointed to as a template for how **not** to do [contrastive rhetoric/intercultural rhetoric] research: Don’t compare incommensurate texts, of different

42. Kaplan, *A Further Note on Contrastive Rhetoric*, *supra* note 25, at 17.

43. See Kubota, *supra* note 8, at 193 (“[Contrastive rhetoric] tend[s] to produce and reinforce cultural stereotypes . . . , creating the dichotomous us-versus-them paradigm which has increasingly been critiqued as problematic in the age of globalization.”).

44. See Jan Corbett, *Contrastive Rhetoric and Resistance to Writing*, in *CONTRASTIVE RHETORIC REVISITED AND REDEFINED* at 31, 32.

45. See, e.g., *id.* at 45; Kubota, *supra* note 8, at 197, 202; Paul Kei Matsuda, *Contrastive Rhetoric in Context: A Dynamic Model of L2 Writing*, 6 *J. SECOND LANGUAGE WRITING* 45, 51 (1997).

46. See Corbett, *supra* note 44, at 31.

47. *Id.* at 37.

48. See, e.g., Matsuda & Atkinson, *supra* note 17, at 278–81.

genres, by authors of varying expertise; don't label, overgeneralize, and oversimplify ethnolinguistic cultures and rhetorics, as, for instances, Oriental or Semitic, linear or non-linear; don't take a mainly etic perspective; and don't overlook the need for empirical data analysis.⁴⁹

The general criticism is that the methodology has not been sophisticated enough to account for factors like differing norms and expectations of different genres.⁵⁰ For example, writing samples used in applied linguistics studies have sometimes been inappropriate in that the studies have compared modern English writing with classical writing from other languages, such as Chinese.⁵¹ Indeed, several studies found that the classical Chinese eight-legged essay⁵² that early researchers such as Kaplan said would influence Chinese L1 writers in their L2 writing⁵³ is not even used by modern Chinese university students.⁵⁴

Even when comparing modern writing in English with modern writing from other cultures, different understandings of, and emphases on, various types of writing can result in a misunderstanding of the reasons for rhetorical differences in writing. For example, writing instruction in some cultures is not focused on argument and persuasion to the extent that writing instruction in English is.⁵⁵ So when comparing persuasive writing in languages such as Japanese, Chinese, and Russian with persuasive writing in English, researchers are essentially comparing the rhetoric of less experienced writers with that of more experienced writers.⁵⁶ Thus, errors may be the result of lack of practice rather than a different understanding of the rhetoric of persuasive writing.

For example, essays in Slavic languages such as Russian tend to “offer[] the writer's thoughts on an issue as a stimulus to the readers' thinking rather than trying to persuade them.”⁵⁷ Therefore, students from Slavic countries may not be as familiar with the kinds of persuasive writing done in U.S. classrooms. As one scholar notes, “it can be predicted that the students in this study may be unfamiliar with the conventions of the argumentative essay and that the deductive essay structure, with the thesis statement expressed at the beginning of the essay, may not be their

49. Diane Belcher, *What We Need and Don't Need Intercultural Rhetoric for: A Retrospective and Prospective Look at an Evolving Research Area*, 25 J. SECOND LANGUAGE WRITING 59, 60 (2014).

50. See, e.g., Ana I. Moreno, *The Importance of Comparable Corpora in Cross-Cultural Studies*, in CONTRASTIVE RHETORIC: REACHING TO INTERCULTURAL RHETORIC.

51. See Kubota & Lehner, *supra* note 7, at 11.

52. The Chinese eight-legged essay was a highly formulated responsive essay used for civil service exams in China.

53. See, e.g., Kaplan, *A Further Note on Contrastive Rhetoric*, *supra* note 25, at 16.

54. See Kubota & Lehner, *supra* note 7, at 11.

55. See Bojana Petrić, *Contrastive Rhetoric in the Writing Classroom: A Case Study*, 24 ENG. FOR SPECIFIC PURPOSES 213, 218 (2005); see also Kubota & Lehner, *supra* note 7, at 11 (noting that the Japanese four-unit style arising from classical Chinese rhetoric is not recommended for persuasive writing by many writing specialists in Japan).

56. See Petrić, *supra* note 55.

57. *Id.*

preferred way of writing.”⁵⁸ In such cases, rhetorical differences are the result of exposure and practice as much as cultural understandings of logic.⁵⁹

Contrastive rhetoric has also been criticized for “reductionism,” in other words, for “trying to reduce the whole of linguistics to this single issue” of culture’s influence on rhetoric,⁶⁰ instead of acknowledging and controlling for the many factors that can influence writing. These factors are myriad, and can be both linguistic and non-linguistic. What some researchers attribute to cross-cultural interference, for example, could also be attributed to developmental sequences.⁶¹ Some scholars have argued that second language learners go through a “cognitive sequence of stages . . . between the first and second languages,” and this process is as likely a source of errors as is cross-cultural transfer.⁶²

An important factor in a person’s second language proficiency is that person’s proficiency in the first language. This “interdependence hypothesis” predicts that a motivated language learner with “sufficient exposure to the L2” will experience positive transfer from L1 to L2, and that those learners who are most proficient in their first language will achieve higher proficiency in the second language.⁶³ Indeed, multiple studies have provided evidence of positive L1 to L2 transfer in “phonology, communicative strategies, morphosyntax, metalinguistic awareness, and pragmatics.”⁶⁴ One group of scholars has found that “the best predictors of L2 proficiency and achievement are variables related to language skills (e.g., performance on measures of L1 reading and L2 aptitude . . .).”⁶⁵

In addition to linguistic factors, non-linguistic factors that may affect a learner’s level of proficiency in a second language include the learner’s educational training, the type of communication task or genre, the audience, the learner’s emotional state, the learner’s previous knowledge and experience of the world or the text’s subject matter, the era the learner lives in, economic conditions, the learner’s religion, and the learner’s gender.⁶⁶ For example, a Japanese student writing a letter

58. *Id.* This study is of particular interest to legal writing faculty because the participants are legal studies students.

59. *See id.*

60. Panetta, *supra* note 36, at 5 (quoting Kaplan, *Cultural Thought Patterns*, *supra* note 32, at 9).

61. *See* Atkinson, *supra* note 9, at 278.

62. David Cahill, *The Myth of the “Turn” in Contrastive Rhetoric*, 20 WRITTEN COMM. 170, 172 (2003). Some scholars argue that “cognition theory” can better explain differences and errors in second language writing.

L1 and L2 learning may depend on basic language learning mechanisms that are similar to both languages, as predicted by the LCDH. The findings of this study suggest that theories of cognition that propose connections between basic L1-L2 language learning skills (e.g., syntax, morphology, phonology) may be beneficial in explaining individual differences in L2 learning and how students acquire L2 skills. L2 educators should consider theories of cognition that propose crosslinguistic interactions between L1 and L2 when seeking explanations for more and less successful L2 learning.

Richard Sparks et al., *Long-Term Crosslinguistic Transfer of Skills from L1 to L2*, 59 LANGUAGE LEARNING 203, 227 (2009).

63. Sparks et al., *supra* note 62, at 204–05.

64. *Id.* at 210 (citations omitted).

65. *Id.* at 206.

66. *See, e.g.*, Ulla Connor, *New Directions in Contrastive Rhetoric*, 36 TESOL Q. 493, 504 (2002); Kubota & Lehner, *supra* note 7, at 12; Matsuda & Atkinson, *supra* note 17, at 284; Matsuda, *supra* note

to the editor of a campus newspaper about that paper's coverage of campus issues will be influenced by more than just the facts that she is Japanese, speaks Japanese, and was educated in Japanese schools.⁶⁷ Her writing of the letter could also be influenced by any previous experience she had in editing a newspaper, whether she knows the editor she is writing to or even lives in the same dorm as the editor, and whether she has had letters published in the past.⁶⁸ A writer's background is "complex and flexible—varying from person to person and from time to time."⁶⁹ That background affects how the writer communicates in both the first and second language.

One of the most important factors that has affected how people learn English as a second language over the past several decades is globalization, in particular the rise of English as a dominant world language and the internet's spread of English to every corner of the world.⁷⁰ The rising importance of English in business as well as in the sciences and the humanities has resulted in English being taught at universities world-wide.⁷¹ This, in turn, means that the "idealized rhetorical

45, at 47–48, 53; Jim McKinley, *Displaying Critical Thinking in EFL Academic Writing: A Discussion of Japanese to English Contrastive Rhetoric*, 44 RELC J. 195, 204 (2013); Moreno, *supra* note 50, at 29–33; Sparks et al., *supra* note 62, at 206–07. One 2008 study of Chinese writing found that the theme of the writing often determined the type and structure of the writing. See Xiaoye You, *From Confucianism to Marxism*, in CONTRASTIVE RHETORIC: REACHING TO INTERCULTURAL RHETORIC at 241, 242–43. Matsuda identified three explanations—part of what he calls the "static pedagogical theory of L2 writing"—for why the organization of L2 texts can vary from person to person and culture to culture: linguistic (which "emphasizes the prominence of the writer's L1 as an influencing—if not determining—factor in the L2 organizational structures"); cultural (which "maintains that organizational structures are strongly influenced, if not determined, by the cultural background of the writer"); and educational (which "considers how writers acquire the patterns they use in their writing in the first place, and explains the structures of ESL texts in terms of educational backgrounds[;] . . . organizational structure in ESL text may be a result of developmental factors"). Matsuda, *supra* note 45, at 47–48. According to Matsuda, "[t]hese three explanations are not mutually exclusive. . . . At this point, little evidence exists to support the view that any one of them is most salient. . . . However, the accumulating evidence from contrastive rhetoric research warrants the view that linguistic, cultural, and educational backgrounds have some influence on the organizational structures of ESL text, although they are by no means the only factors." *Id.* at 48.

67. See Matsuda, *supra* note 45, at 49, 53.

68. See *id.* at 53.

69. *Id.*; see also Parvis Maftoon & Meisam Ziafar, *A Contrastive Lexical Approach to Second Language Acquisition: A Theoretical Framework and Related Techniques*, 5 TESOL J. 57, 61 (2014) ("Nowadays it is too simplistic and naïve to assume that the relations between L1 and L2 are accounted for by such concepts as interference or transfer.").

70. See, e.g., Kubota, *supra* note 8, at 199–200. Kubota notes "many teachers and [the] general public still seem to believe in the dichotomous cultural differences between the East and the West despite the trend toward cultural homogenization and the observed prescriptive/descriptive gap. The construction and transformation of the images of culture and language are complexly tangled with contradictions and paradoxes." *Id.* at 203. Of course, the rhetoric of a particular culture can be influenced by languages and cultures other than English, which also poses a problem for contrastive rhetoric. See, e.g., A. Suresh Canagarajah, *CRITICAL ACADEMIC WRITING AND MULTILINGUAL STUDENTS* 64 (2002), ("We now know that there is considerable interaction, borrowing, and fusion between cultures and communicative genres. The hybrid nature of cultures in the postmodern world creates considerable problems in defining which constructs of a particular culture are unique and 'native' to one community and which are borrowed (or interactively shaped in contact with another culture).").

71. See Kubota *supra* note 8, at 199–200.

pattern of English,” i.e., linear and direct, “has also influenced what is perceived as the ideal way of communicating in the native language.”⁷²

This phenomenon has been observed since at least the early 2000s in multiple studies, particularly of Chinese and Japanese students, suggesting that these students are already familiar with rhetorical conventions in the U.S. and other non-Asian countries.⁷³ A 2005 study, for example, found that language arts textbooks for junior high school students in China and Japan taught them “to follow a direct and linear pattern in opinion writing,” which was described in the textbooks as “‘good organization and paragraphing,’ ‘clarity,’ ‘effective supporting details and counter opinions,’ and ‘main point placed at the beginning.’”⁷⁴ These textbooks did not instruct students to organize according to any “culturally specific pattern” such as the four-unit style from Japan or the eight-legged essay from China.⁷⁵ Rather than teaching students to write indirectly, writing textbooks in Japan now “promote a deductive pattern with coherence, inclusion of examples, and a clear statement of one’s position in the beginning.”⁷⁶

It is not surprising, then, that studies of contemporary essays in Chinese schools showed the essays resembled English essays in organization in that they had an introduction, body, and conclusion.⁷⁷ In addition, one study of Chinese students found that, like college students in the U.S., college students in China “generally prefer directness.”⁷⁸ Moreover, the feature of Chinese and Japanese writing that Kaplan and others had interpreted as indirect logic has been reinterpreted as an “expansion or development of the preceding ideas,” such as counterargument.⁷⁹ Studies of contemporary Japanese academic texts found that their organization was “largely influenced by Western rhetoric,”⁸⁰ and that professors in Japan directed their students to write persuasive essays using deduction.⁸¹ Scholars have made the same observations about Slavic languages, noting that rhetoric in academic writing from Slavic countries had changed “under the strong influence of the patterns of English as a global language.”⁸²

72. *Id.* at 199. In Japan, “the preference for the Anglophone norm is observed in both oral and written communication, representing a struggle to survive in [a] globalized economy, which in turn homogenizes the ideal ways of speaking and writing.” *Id.* at 200.

73. See Kubota & Lehner, *supra* note 7, at 11 (stating that “[w]estern ideas of what constitutes good writing are not alien” to these students); Kubota, *supra* note 8, at 195, 199.

74. Kubota, *supra* note 8, at 195, 199; see also Ling Yang & David Cahill, *The Rhetorical Organization of Chinese and American Students’ Expository Essays: A Contrastive Rhetoric Study*, 8 INT’L J. ENG. STUD., no. 2, 2008, at 123. (“An examination of modern Chinese writing manuals found that Chinese rhetoricians also encourage directness in structuring expository essays.”).

75. Kubota, *supra* note 8, at 195.

76. *Id.* at 195, 199.

77. Cahill, *supra* note 62, at 186–87; Kubota & Lehner, *supra* note 7, at 11.

78. Yang & Cahill, *supra* note 74, at 113, 123.

79. Kubota & Lehner, *supra* note 7, at 11; see also Cahill, *supra* note 62, at 186–87.

80. Kubota & Lehner, *supra* note 7, at 11.

81. See McKinley, *supra* note 66, at 198–99 (“Japanese professors preferred expository and persuasive essays to be deductive, and that good Japanese essays share a similar writing structure to well written English essays.”).

82. Petrić, *supra* note 55, at 216.

One of the most vocal critics of contrastive rhetoric, Ryuko Kubota, argues that these studies show that the traditional rhetorical conventions of many cultures “are converging into the idealized rhetoric of English.”⁸³ Thus, the predictions contrastive rhetoric makes about how writers from different cultures will organize their writing may no longer be valid because it is no longer true that each culture has its own rhetoric.⁸⁴ The studies on which Kubota based her observation are already more than seven years old, so the influence of English rhetorical conventions on ESL writing is likely even more pronounced now.⁸⁵

As a result of the influence of English as a global language along with the relative dearth of recent scholarship on contrastive rhetoric, linguists’ understanding of contrastive rhetoric is still limited. More than 40 years after Robert Kaplan proposed contrastive rhetoric as an important explanation for the errors language learners made when communicating in a second language, researchers in applied linguistics acknowledged that they still knew “very little” about contrastive rhetoric.⁸⁶ Acknowledging this deficit, one scholar identified four key questions contrastive rhetoric should be trying to answer:

1. Whether the imputed cross-cultural differences in the rhetorical configuration of texts actually exist,
2. If they exist, which cultural or educational factors may help to account for such differences (e.g., values, norms, learning processes and educational trends),
3. Which precise difficulties with discourse structure and other rhetorical features do second language learners from a given non-English writing culture experience when writing in English as an L2, [and]
4. Whether difficulties experienced with discourse structure and other rhetorical features by L2 learners of English are attributable to interference (or negative transfer) from the first language.⁸⁷

As of 2008, these questions had not yet been answered. Researchers were still collecting data to see “what shakes out,”⁸⁸ and did not yet have a “shared understanding” of contrastive rhetoric and its role in language learning.⁸⁹ Ten years later, that does not seem to have changed.⁹⁰ For this reason, writing professors should be wary of relying on potentially outdated notions of contrastive rhetoric as a basis for their writing pedagogy. The next Part will offer suggestions on how contrastive rhetoric can be used in the legal writing classroom.

83. Kubota, *supra* note 8, at 199.

84. *See id.* (“[T]he concept of cultural uniqueness in rhetoric is a false assumption.”).

85. No more recent studies had been done as of 2017.

86. *See* Matsuda & Atkinson, *supra* note 17, at 287–88, 290.

87. Moreno, *supra* note 50, at 26.

88. *See* Matsuda & Atkinson, *supra* note 17, at 287–88, 290.

89. *See id.*

90. The past ten years have seen little research on contrastive rhetoric. This is at least in part due to the criticism of it, which has caused researchers to shy away. It is also difficult methodologically to do a study on contrastive rhetoric that accounts for all the possible variables, but without that, the validity of the results will be questionable and of very limited use.

III. USING CONTRASTIVE RHETORIC IN THE LEGAL WRITING CLASSROOM

Given the many criticisms of contrastive rhetoric over the past 50 years, one could argue it would be the better practice to dispense with it completely when teaching legal writing to ESL students. However, despite the problems with contrastive rhetoric and the dangers of relying on it to predict learner errors, careful use of contrastive rhetoric in the classroom can benefit students who are learning to write legal memos and briefs in the legal writing classroom. This Part will first address the criticism that contrastive rhetoric is English-centric in light of the specific requirements of legal writing in the United States. It will then offer suggestions on how writing professors might use contrastive rhetoric appropriately in the legal writing classroom.

A. Response to sociocultural criticism of contrastive rhetoric

Contrastive rhetoric's focus on the influence of culture on the process of learning a second language has been very important in the study of second language writing and acquisition because it was one of the first steps toward understanding how complex the learning of a second language really is—that it is not simply a matter of grammar. As one scholar has noted, contrastive rhetoric has raised awareness among writing teachers that a learner's culture as well as her native language can influence that learner's acquisition of a second language.⁹¹ That said, the criticism leveled toward proponents of contrastive rhetoric—that they are ultimately elevating the status of English at the expense of the rhetoric of other cultures—has done much to detract from contrastive rhetoric's influence on applied linguistics studies. For those seeking to use contrastive rhetoric in the legal writing classroom, a response to this criticism is in order.

As noted in Part II, one of the main criticisms of contrastive rhetoric is its tendency toward prescriptivism; that is, requiring students to write in the rhetorical style of the target language.⁹² Regardless of whether prescriptivism is appropriate when writing in other genres or in other cultures, it is essential when teaching legal writing in the United States given the purpose- and audience-focused nature of legal writing in this country.⁹³ When legal writing professors teach organizational paradigms such as CREAC or TREAT,⁹⁴ they are teaching as prescriptivists because

91. See Enkvist, *supra* note 12, at 190 (positing that the ultimate effect of Kaplan's "Doodles Paper of 1966," a "provocative and seminal article" of contrastive rhetoric, was that it "compelled students and teachers of rhetoric to look at discursal macro-patterns in the light of underlying cultural traditions and not only in terms of syntactic features on the linguistic surface").

92. See, e.g., Corbett, *supra* note 44, at 31–32; Kubota, *supra* note 8, at 197, 202; Matsuda, *supra* note 45, at 51.

93. See, e.g., MARY BETH BEAZLEY, A PRACTICAL GUIDE TO APPELLATE ADVOCACY 3–6 (4th ed. 2014); LAUREL CURRIE OATES & ANNE ENQUIST, THE LEGAL WRITING HANDBOOK: ANALYSIS, RESEARCH, AND WRITING §§ 11.2, 15.1–15.1.2, 16.2–16.3, 17.1–17.1.3, 18.2–18.2.3 (6th ed. 2014); JOAN M. ROCKLIN ET AL., AN ADVOCATE PERSUADES 9–10 (2016); HELENE S. SHAPO ET AL., WRITING AND ANALYSIS IN THE LAW 163–64, 401–02 (6th ed. 2013).

94. CREAC stands for Conclusion – Rule – Explanation – Application – Conclusion. See, e.g., COUGHLIN ET AL., A LAWYER WRITES: A PRACTICAL GUIDE TO LEGAL ANALYSIS 82 tbl.6-B (2d. ed.

they are requiring students to use the rhetoric of the target culture: lawyers in the United States.⁹⁵ In the context of legal writing, this is entirely appropriate.⁹⁶ As one applied linguistics scholar has noted, “[t]he job of a composition teacher is to make students write texts which serve certain definite types of communication with maximal efficiency. And in most instances this means that a text should look native and idiomatic, and conform to established patterns. . . . [Texts] are not supposed to distract or delight the reader by the use of strange or weird patterns.”⁹⁷ This is true for legal writing professors in the United States.⁹⁸

The legal writer in particular has a professional obligation to zealously represent her client, which means writing in a way that will help the client prevail. That means writing in a way that judges and other attorneys can easily follow and that will persuade judges to rule in favor of the client. For that reason, arguments against “prescribing patterns”⁹⁹ should not deter legal writing professionals from teaching paradigms such as CREAC. One applied linguistics scholar recognized this

2013). TREAT stands for Thesis – Rule – Explanation – Application – Thesis. *See, e.g.*, MICHAEL D. MURRAY & CHRISTY HALLAM DESANCTIS, *LEGAL WRITING AND ANALYSIS* 139 tbl. (2009).

95. Organizational paradigms like CREAC and TREAT represent deductive reasoning, which is the standard organization for legal analysis in the U.S. *See, e.g.*, Diane B. Kraft, *CREAC in the Real World*, 63 CLEV. ST. L.R. 567, 568–70 (2015); Kristen K. Robbins-Tiscione, *A Call to Combine Rhetorical Theory and Practice in the Legal Writing Classroom*, 50 WASHBURN L.J. 319, 328 (2011); Lurene Contento, *Demystifying IRAC and Its Kin: Giving Students the Basics to Write “Like a Lawyer,”* SECOND DRAFT, Dec. 2006, 8 at 8–9; Gerald Lebovits, *The Legal Writer, Cracking the Code to Writing Legal Arguments: From IRAC to CRARC to Combinations in Between*, N.Y. ST. B. ASS’N. J., July/Aug. 2010, at 64. For this reason, such organizational paradigms are taught in most legal writing textbooks. *See, e.g.*, CHARLES R. CALLEROS, *LEGAL METHOD AND WRITING* 85–86 (7th ed. 2014); VEDA CHARROW ET AL., *CLEAR AND EFFECTIVE LEGAL WRITING* 210–19 (5th ed. 2013); LINDA H. EDWARDS, *LEGAL WRITING: PROCESS, ANALYSIS, AND ORGANIZATION* 82–83 (6th ed. 2014); LAUREL CURRIE OATES ET AL., *JUST BRIEFS* § 1.10.2 (3d ed. 2013); JAMES A. GARDNER, *LEGAL ARGUMENT: THE STRUCTURE AND LANGUAGE OF EFFECTIVE ADVOCACY* § 1.3 (1993); CATHY GLASER ET AL., *THE LAWYER’S CRAFT* 64–69 (2002); MURRAY & DESANCTIS, *supra* note 94, 19–20; TERESA J. REID RAMBO & LEANNE J. PFLAUM, *LEGAL WRITING BY DESIGN* §§ 1.9, 2.1 (2d ed. 2013); DEBORAH A. SCHEDEMANN & CHRISTINA L. KUNTZ, *SYNTHESIS: LEGAL READING, REASONING AND WRITING* 81–82 (3d ed. 2007); ROBIN WELLFORD SLOCUM, *LEGAL REASONING, WRITING, AND OTHER LAWYERING SKILLS* 156–59 (3d ed. 2011). Applied linguistics scholars studying legal English have also recognized the centrality of organizational paradigms in legal rhetoric in the United States. C.N. Candlin et al., *Developing Legal Writing Materials for English Second Language Learners: Problems and Perspectives*, 21 ENG. FOR SPECIFIC PURPOSES 299, 303 (2002).

96. Of course, this assumes that the goal of a legal writing class for international students in the U.S. is to teach them to write for law practice in the U.S. In reality, many international LL.M. students at U.S. law schools do not plan to practice law in the U.S. *See* Lazarus-Black & Globokar, *supra* note 1, at 49–50. Therefore, the “prescriptivist” approach of legal writing classes for these students may not be appropriate.

97. Enkvist, *supra* note 12, at 191; *see also* Connor, *supra* note 66, at 497 (“[P]referred patterns of writing are genre dependent. . . . [R]eaders’ expectations determine what is perceived as coherent, straightforward writing.”).

98. *See* Hartig, *Conceptual Blending in Legal Writing*, *supra* note 5, at 67 (“[M]any [legal writing] instructors describe this focus on using a prescribed format as being intended not so much to ensure that students master a single ‘correct’ form as it is to help students become familiar with the common law analytical framework and pay greater attention to the kinds of details that will be expected in a given [law] firm’s house style.”).

99. For example, the five-paragraph essay that ESL students often must follow in their writing. *See, e.g.*, Baldwin, *supra* note 5, at 437.

when saying of professional writing, “[p]rofessionals working in business and industry need to transform their rhetoric to accommodate the multicultural traditions and expectations of people they may never speak to face-to-face.”¹⁰⁰ As discussed below, one way to accomplish this is to teach the expected rhetorical pattern along with the reason for the pattern, or the context of the writing: the document purpose and audience. At the same time, it is also essential to teach U.S. legal rhetoric as just one kind of rhetoric, certainly the kind used by lawyers in the U.S., but not necessarily anywhere else in the world. As critics of contrastive rhetoric rightly argue, “it is a serious fallacy to assume that the genres of English are in some way universal.”¹⁰¹ This includes the genre of legal writing.

B. Response to methodological limits of research on contrastive rhetoric

The applied linguistics scholars who study contrastive rhetoric are the first to recognize its limitations, and agree that the research needs to be “more and more rigorous, reliable, and explanatory”¹⁰² before it can be really useful in the classroom. This is important for those who teach writing because making assumptions about a student’s writing based on flawed research is not going to help the student become a better writer. Thus, contrastive rhetoric should be used in the legal writing classroom with great care.

The criticism that contrastive rhetoric oversimplifies the language-learning process because it ignores the many factors that affect language learning is certainly true regarding ESL students in LL.M. programs, particularly when it comes to the effects of globalization and prior experiences. By the time foreign students enter LL.M. programs, they “are thoroughly ‘modern’” in that “[t]hey engage, and are engaged by, contemporary forms of knowledge, power, and discipline.”¹⁰³ Some even describe themselves as “global citizens.”¹⁰⁴ Students in LL.M. programs “come from many different countries, backgrounds, and educational and legal systems.”¹⁰⁵ Many, if not most, LL.M. students already have a law degree from their home countries, and some also have spent time in the United States as students or even as working professionals.¹⁰⁶ This suggests that any influence from rhetorical norms of a student’s native culture and language may already be minimal for LL.M. students.¹⁰⁷ So, while legal writing professionals should “be aware of the differing

100. Woolever, *supra* note 19, at 49.

101. Kaplan, *Foreword: What in the World is Contrastive Rhetoric?*, *supra* note 18, at xi.

102. Moreno, *supra* note 50, at 25.

103. Lazarus-Black & Globokar, *supra* note 1, at 10.

104. *Id.* at 34. For example, a study of LL.M. applicants’ personal essays as part of the admissions process found “structural similarities in [the] narratives.” *Id.* at 12. “Foreign attorneys learn to conform to the style and implicit and explicit values they uncover in sample admission essays that they find on the Internet or through fellow students, alumni, teachers, or family members.” *Id.* at 59. This is true despite the fact that personal essays for admissions are unusual outside the U.S. *See id.* at 61. The narratives often emphasize the students’ “familiarity with and connection to Western culture.” *Id.* at 34, 59.

105. *Id.* at 13.

106. *See* Baldwin, *supra* note 5, at 401; *id.* at 21, 43.

107. This may also be true for ESL J.D. students, who may have undergraduate law degrees from their native countries.

cultural, linguistic, and rhetorical traditions that students bring with them,”¹⁰⁸ they should also be aware of the factors that may already have limited the influence of those traditions.

Therefore, contrastive rhetoric should rarely, if ever, be used to predict the errors a student from a particular culture might make. This is especially true if the studies on which such predictions are based were published before the rise of English as a global language and before the internet became the ubiquitous source of information and communication it is today. Even if contrastive rhetoric were a reliable source for predicting probable language errors, it would become impractical to predict errors if many languages and cultures were represented in a single classroom. Moreover, it would be impossible to account for the ways all the other relevant variables (such as educational background, ability in the first language, and world experience) affected a particular student’s ability to learn English as a second language. The process of learning a second language is simply too complicated in today’s world for contrastive rhetoric to be used to predict learner errors. However, this does not mean contrastive rhetoric has no role in the legal writing classroom.

C. Using contrastive rhetoric and contrastive analysis in the legal writing classroom

Despite the myriad criticisms of contrastive rhetoric, it has a role in the legal writing classroom, as does its more widely accepted precursor, contrastive analysis. Each will be discussed in turn below.

1. Contrastive Rhetoric

The initial purpose of contrastive rhetoric was to help writing teachers be more effective in ESL and EFL classrooms by making them aware of the effect culture has on rhetoric and, therefore, the impact culture has on a person’s acquisition of a second language, particularly in writing.¹⁰⁹ Ten years after initiating the study of contrastive rhetoric, Kaplan emphasized that the rhetoric of a particular culture “can be learned through teaching.”¹¹⁰ That it cannot necessarily be used in the way Kaplan originally intended—to predict language errors based on the rhetoric of the language learner’s culture—does not mean it cannot be used at all. To the contrary, the understanding that a student’s writing is affected by culture as well as by many other factors, is integral to the effective teaching of ESL writing students.

The most effective way to use contrastive rhetoric in the legal writing classroom is to explicitly teach the differences between legal writing in the United States and writing the students have done in other cultures and contexts, keeping in mind that the rhetoric used by ESL students will not necessarily reflect a rhetoric traditionally associated with their cultures.¹¹¹

108. Matsuda, *supra* note 45, at 47.

109. See Kaplan, *Cultural Thought Patterns in Inter-Cultural Education*, *supra* note 21, at 14, 16–20; Matsuda & Atkinson, *supra* note 17, at 279.

110. Kaplan, *A Further Note on Contrastive Rhetoric*, *supra* note 25, at 14.

111. See, e.g., Connor, *supra* note 66, at 505 (“[R]esearchers and others working in the current contrastive rhetoric paradigm have adhered to the position that cultural differences need to be explicitly taught in order to acculturate EFL writers to the target discourse community. Teachers of English and

The importance of explicitly teaching the differences in writing conventions in different cultures has long been recognized by researchers in contrastive rhetoric. As one scholar recently put it, “the conventions of English academic discourse are . . . community-specific, not universal, hence the need to make them ‘overtly apparent’ to those outside the English academic community—to non-native speakers of English in particular.”¹¹² Even Kaplan in his 1966 article advocated for teaching the differences explicitly.¹¹³ He continued to call for the explicit teaching of differences thirty-five years later, asserting that “[l]earning . . . about writing cannot be left to the learner’s intuition; rather, these things have to be taught explicitly.”¹¹⁴ This is particularly important for teaching the organization required by legal writing conventions, such as CREAC, which are not necessarily intuitive.¹¹⁵

However, teaching the differences, by itself, is not enough. An essential part of teaching the differences is to teach the reasons for the differences.¹¹⁶ Writers choose a particular rhetorical style because it best serves the purpose for the writing and the reader’s expectations of the writing. Multiple studies in contrastive rhetoric show that “individuals from different cultures can have different expectations regarding the same kind of document.”¹¹⁷ These differing expectations can drastically alter the way a person chooses to write or speak.¹¹⁸ By discussing with

others, such as consultants in grant proposal writing, need to educate students or clients about readers’ expectations.”); Kubota & Lehner, *supra* note 7, at 13 (“Overall, researchers supporting contrastive rhetoric hypotheses recommend making rhetorical differences explicit, raising students’ awareness of such differences, and acculturating students through language exercises with concrete models that meet audience expectations.”). “What should be added to [familiar teaching strategies] is . . . a contrastive rhetoric foundation, and this can be accomplished by making Western writing conventions explicit.” Panetta, *supra* note 36, at 8.

112. Li, *supra* note 7, at 105.

113. See Kaplan, *Cultural Thought Patterns in Inter-Cultural Education*, *supra* note 21, at 16–18. To that end, Kaplan suggested teachers use methods such as the “scrambled paragraph” and fill-in-the-outline exercises, which can reveal differing expectations regarding rhetoric. See *id.* According to Kaplan, the scrambled paragraph in particular “can be used effectively to point out the very disparity.” *Id.* at 16.

114. Kaplan, *Foreword: What in the World is Contrastive Rhetoric?*, *supra* note 18, at xiv.

115. Matsuda, *supra* note 45, at 58 (“[T]extual organization is one of the areas with which ESL students have most difficulties, it needs to be taught in ESL writing classrooms. . . .”).

116. See, e.g., Panetta, *supra* note 36, at 11.

117. Maria Loukianenko Wolfe, *Different Cultures – Different Discourses?* (quoting Helen Constantinides et al., *Organizational and Intercultural Communication: An Annotated Bibliography*, 10 TECHNICAL COMM. Q. 31, 32 (2009)), in CONTRASTIVE RHETORIC: REACHING TO INTERCULTURAL RHETORIC, *supra* note 9, at 87, 89.

118. Two examples bear this out: A 2008 study comparing business letters written by native Russian speakers in Russian to Russians with business letters written by native English speakers in English to Americans showed, for example, that the English writers tried to reduce the power distance between the writer and reader by addressing the reader personally (for example, by first name) and referring to previous meetings or conversations. In contrast, the Russian writers maintained the power distance by avoiding personal greetings and by not referring to previous encounters with the reader. (These are just some of the differences the study discusses.) Why? The study’s author believes it’s because the writers viewed the purpose of the letter differently: For the Americans, the purpose of the letter was to sell a product/service; for the Russians, the purpose was to announce their company’s existence, not necessarily to sell anything. But if the Russians were writing to an American audience, and the purpose was clearly to sell a product or service, the Russian writers would be more likely to use American letter-writing conventions like using the reader’s name and referring to previous encounters between the writer and reader. See *id.* Another study showed that a Finnish fish broker who was fluent in English and had to write to his suppliers in

students the reasons they choose to organize their writing in a certain way in their first language, writing professors can begin to understand some of the choices students make.¹¹⁹

Discussing the reasons for stylistic choices in legal writing is crucial if ESL students are to adjust to a new rhetorical style. As one law professor of international students has warned:

it is not enough to simply provide models or examples of written legal analysis and to instruct students to use deductive or critical analytical paradigms in creating documents and arguments. It is also critical to explain why we use these models and to help these students understand the models and instructions we provide by reference to their system of legal writing and analysis so that they can reflect upon and consider how the two systems differ.¹²⁰

It is also important to emphasize that while legal writing in the United States is usually organized in a particular way, i.e., deductively, this does not mean it is the “right way” to organize legal writing outside of the United States.¹²¹ Instead of suggesting that the “deductive” form of organization used by U.S. attorneys should replace or “fix” whatever form of organization a student used in her first language, teachers can emphasize that it is but another form of writing the student can add to her repertoire of writing styles, to be used when appropriate and replaced by a different style when the purpose and audience so demands.¹²² As one applied linguistics scholar has noted, “[n]ative writers have at their disposal a number of rhetorical alternatives, but non-native writers do not possess this inventory. . . . Pedagogically, our job should be to increase this inventory.”¹²³ Used in this way, contrastive rhetoric is a valuable tool for legal writing professors working with ESL students.¹²⁴

A writing teacher with students from multiple countries and cultures and with multiple first languages cannot be expected to know the preferred rhetorical styles of all her students.¹²⁵ Even if a teacher is well versed in the various rhetorical

English because they were from different countries, used his knowledge (or perceived knowledge) of his supplier’s cultures to accommodate his English to his audience. He wrote to his Estonian suppliers in simple language with easily recognizable words; he wrote to his Japanese suppliers in simple language, but with more politeness features because he thought they would understand that. *See* Connor, *supra* note 9, at 310–11.

119. *See* Panetta, *supra* note 36, at 11 (“[By explicitly teaching rhetorical differences], we can gain some understanding of students’ native rhetorical choices, bridging rhetorical gaps so writer, instructor, and even peer reader have a common ground from which to work with and on the writing. Most important, this knowledge can open up avenues for the instructor to make the assignment more explicit to ESL writers.”).

120. Spanbauer, *supra* note 2, at 423.

121. *See, e.g.*, Kubota & Lehner, *supra* note 7, at 15.

122. *See id.* at 21–22.

123. Panetta, *supra* note 36, at 6.

124. *See id.* (noting that contrastive rhetoric “can become a powerful resource for conquering the difficult ESL (and other ‘difference’) issues that present themselves in all rhetoric and composition classes”).

125. *See id.* at 8; *supra* Section II.B.

styles of many countries and cultures, her students will not necessarily be influenced by those styles due to factors such as native-language proficiency and world experience, as discussed in Part II above.¹²⁶ One solution is to have students provide the information about their own rhetorical preferences.¹²⁷ Writing teachers can have students “think about, discuss, and write about how they perceive the ways in which they write—or not—in their first languages and critically bring their perceptions to bear on the work of composing texts in [English].”¹²⁸ To that end, some law schools have incorporated a “comparative focus” into all writing assignments for ESL students, which “encourages these students to reflect upon the cultural differences that distinguish their native language and legal system from the U.S. legal system as they learn English.”¹²⁹

The results of a study of Russian students¹³⁰ in their final year of legal studies at Russian universities illustrate both the limits and uses of contrastive rhetoric in the legal writing classroom, and suggest that the approach of explicitly teaching the differences can help ESL students to master rhetorical patterns.¹³¹ The students in the study were taking a two-week writing course in English, the purpose of which was to “help the students ‘develop as a writer within the English speaking academic community by raising awareness of, practising, [sic] and reflecting upon the conventions of written texts.’”¹³² As part of the course, the students were asked to reflect upon their views about the similarities and differences between writing in Russian and English.¹³³ They looked at and discussed Kaplan’s doodles, and immediately identified the English and Slavic doodles.¹³⁴ They also discussed audience expectations and the writer’s responsibility to consider those expectations

126. Petrić, *supra* note 55, at 226 (“[I]t should be borne in mind that students may significantly differ in the degree to which they feel they belong to ‘their’ culture as well as in their perceptions of it. [Example: ‘loud Americans who think they’re always right.’] Therefore, when addressing cultural differences in the writing classroom it is important not to make assumptions about the cultural membership of students based on the facts of their country of origin. Even when sharing the same native language, students should not be expected to have the same views of the differences in the writing patterns of English and their native language. The process of exploring such differences in the classroom brings to light students’ perceptions, which . . . are also a product of culture, rather than objectively existing differences.”); *see also* Canagarajah, *supra* note 70, at 68 (“[Contrastive rhetoric] must develop more complex types of explanation for textual difference if [it] is to enjoy continued usefulness. Though difference is always going to be there in writing, and though much of it may derive from culture, the ways in which this influence takes place can be positive or negative, enabling as well as limiting, and teachers have to be aware of all these possibilities when they teach student writing. More importantly, teachers must keep in mind that no one needs to be held hostage by language or culture; students can be taught to negotiate conflicting rhetorical structures to their advantage.”).

127. *See* Kubota & Lehner, *supra* note 7, at 21.

128. *Id.* “[S]orting out such understandings of what writing entails, what it ‘looks’ like (*Who decides this?*), and how it gets done (again, *Who decides and why?*) is a discursively constructed process and cannot be supplanted, manipulated, or controlled simply by a teacher’s belief that ‘English writing is linear and yours is not.’” *Id.*

129. Spanbauer, *supra* note 2, at 435.

130. The students had been chosen to attend a one-year English-Language Legal Studies program in Hungary.

131. *See* Petrić, *supra* note 55, at 220–25.

132. *Id.* at 220 (quoting a 2002 Study Pack).

133. *See id.* at 220–21.

134. *See id.*

if the reader is to understand the point of the writing.¹³⁵ In considering rhetorical differences in writing, the students read and discussed writing from different cultures, did reflective writing, and analyzed an argumentative essay.¹³⁶ The results of the study, which focused on the use of thesis statements in deductive writing—something contrastive rhetoric predicts Russian writers will not normally use—showed that in essays written after the two-week course, the students used thesis statements more frequently and more uniformly.¹³⁷

What was also interesting about the study, though, is that the pre-course essays did not follow a single logical pattern regarding thesis statements, contrary to the predictions of contrastive rhetoric.¹³⁸ Rather, some of the essays had thesis statements at the beginning of the essay, some had them later in the essay, and some lacked thesis statements altogether.¹³⁹ The study's author observed, "[t]he lack of a dominant pattern seems to reflect the variety of influences shaping students' writing including . . . the pattern found to be dominant in the native language (i.e., delayed expression of purpose), lack of instruction in argumentative essay writing in the native language, and exposure to writing instruction in English. This suggests that although [contrastive rhetoric] findings about the native pattern may provide an indication of general tendencies, they should not be understood as a strong predictor of students' writing behavior in English."¹⁴⁰

This same study found "little evidence" of negative transfer of Russian rhetorical patterns as students learned to use thesis statements in English.¹⁴¹ The students' "dominant native pattern" of not using thesis statements did not hinder most students' ability to learn a new writing pattern.¹⁴² In other words, the expectation that native Russian speakers would not use thesis statements in legal writing did not always prove to be true,¹⁴³ bolstering the view that many more factors than L1 transfer were at play in the students' process of acquiring a second language.

135. *See id.* at 221 ("[R]eaders may find it difficult to understand the text if it does not follow the expected 'logic' and that it is therefore important to take into consideration one's audience.").

136. *See id.* ("[T]he course addressed the issue of differences in the writing patterns in various ways, such as through reading materials, discussion, reflective writing activities and, later in the course, text analysis of an argumentative essay written by a former student. . . . The most common technique used in addressing the differences in writing was comparison, . . . [which] was elicited from the students in various ways: through teacher questions, which involved genuine information gap since the teacher was not familiar with the students' language, tasks for small group discussion, and individual reflection in writing.").

137. *See id.* at 224–25.

138. *See id.* at 225.

139. *See id.*

140. *Id.* (citation omitted).

141. *Id.*

142. *Id.* As the study's author noted, "[t]his is partly because . . . some students did not follow it even when writing the first essay." *Id.*

143.

[O]ne student [in the study] resisted the acquisition of the new pattern and supported her decision by reasons that can be attributed to the transfer of the native language pattern. In such situations [contrastive rhetoric] may provide explanations of the background of such resistance. . . . In such situations, it is important to stress the idea of writing for different audiences, and the notion of multiliteracy instead of replacement of one pattern by another.

Id.

As noted above, the practice of explicitly teaching rhetorical differences can be used with NES as well as ESL students.¹⁴⁴ Law students come from many different educational and professional backgrounds, and often find CREAC-style organization to be different from the rhetoric they have previously used in writing.¹⁴⁵ Comparing and contrasting the rhetoric found in U.S. legal writing to the rhetoric used in other fields, and discussing the reasons for the differences, can help all law students become better legal writers, regardless of their native language.¹⁴⁶

2. Contrastive Analysis

Using contrastive analysis in the legal writing classroom when teaching ESL students has become increasingly common, to the benefit of students. Even if one believes grammar and punctuation should only rarely be taught in the legal writing classroom, the reality is that many ESL students will need help in those areas.¹⁴⁷ To the extent that legal writing professors have the time to do so, using ideas from contrastive analysis can help students improve their writing in many ways.

One important idea in applied linguistics that can be readily adapted to contrastive analysis is the “noticing hypothesis,” which emphasizes the conscious awareness of language features as an important part of the process of learning a second language.¹⁴⁸ According to this hypothesis, “if a learner is not consciously aware of a specific language feature, i.e., is unable to articulate that it is problematic, the learner will not be able to learn that language feature whether grammatical, lexical, or pragmatic.”¹⁴⁹ The noticing hypothesis can be used with contrastive analysis by explicitly pointing out the differences in language use in English compared to a student’s native language when discussing grammar, punctuation, and citation.¹⁵⁰

For example, contrastive analysis can be used in the legal writing classroom to identify the various ways cohesive devices are used in writing in different languages and cultures in an effort to help ESL students use them appropriately in U.S. legal writing.¹⁵¹ It can also be used when teaching formulaic sequences,

144. See *supra* Part III.

145. See Baldwin, *supra* note 5, at 401; Spanbauer, *supra* note 2, at 400.

146. See, e.g., Panetta, *supra* note 36, at 8 n.6 (“[E]ven my Anglo students have benefited from such clarity.”).

147. See, e.g., Baldwin, *supra* note 5, at 405–06; Lazarus-Black & Globokar, *supra* note 1, at 56.

148. See, e.g., Hugh Bishop, *Noticing Formulaic Sequences—A Problem of Measuring the Subjective*, 4 LSO WORKING PAPERS IN LINGUISTICS 15, 15–16 (2004).

149. *Id.* at 16. For an excellent source of exercises based on the noticing hypothesis, refer to Stephen B. Horowitz’s presentation, Stephen Horowitz, *The Power of Noticing in Teaching Legal Writing to LL.Ms PowerPoint* (May 1, 2017), <https://www.law.msu.edu/glws/presentations/PowerNoticingHorowitz.pptx>. Horowitz suggests ways to use the noticing hypothesis with LL.M. students when teaching capitalization, punctuation, grammar, vocabulary, plagiarism, citation, and rule application.

150. Here, too, students can provide the relevant information about the native language, as no writing professor will know the languages of all her students.

151. See Baldwin, *supra* note 5, at 446. In her excellent article on cohesive devices, Baldwin describes a four-step exercise in which students “identify the meaning and use of cohesive devices” in an English-language persuasive essay, write a persuasive essay, do a peer-review and self-reflection on the use of cohesive devices in the student essay, and revise the original essay. *Id.* at 437. Time permitting, an additional step could be added to Baldwin’s exercise, where students would first reflect on the use of

including idioms, collocations,¹⁵² metaphors, phrasal verbs, and prepositional phrases.¹⁵³ Commonly used legal phrases (such as beyond a reasonable doubt, statute of limitations, alternative dispute resolution, adverse possession), including common Latin phrases (such as *res ipsa loquitur*, guardian ad litem, do novo), can be taught much like vocabulary.¹⁵⁴

Beyond grammar, contrastive analysis can also be used to help students learn when and how to cite to legal authorities. In particular, contrastive analysis can be used to help ESL students avoid plagiarism by discussing the different understandings of attribution in the U.S. legal community compared to legal communities elsewhere in the world.¹⁵⁵ Here, too, explicitly teaching the differences in expectations regarding attribution can help ESL students understand and avoid plagiarism when writing papers in languages and cultures other than their own.

When deciding whether and how to use contrastive rhetoric in the legal writing classroom, professors should also consider the goals of students, and whether they need to become highly proficient as writers in English or just need to be aware of legal writing conventions in the U.S.¹⁵⁶ Students in both categories, however, can

cohesive devices in their own languages and cultures. *Id.* at 441. As Baldwin notes, “having a sense of the tendencies of [ESL] writers will help [writing professors] facilitate contrastive discussions and analysis.” *Id.* at 436.

152. Collocations are words that are commonly used together. For example, we usually say “fast food” and “a quick meal” as opposed to “quick food” and “a fast meal.” *Collecting Collocations: Fast Food and Quick Meal*, WORD (2014), <http://www.theword.cz/inotherwords/collecting-collocation-fast-food-and-quick-meal/>.

153. See David Wood, *Mastering the English Formula: Fluency Development of Japanese Learners in a Study Abroad Context*, 29 JALT J. 209, 210, 212 (2007); Bishop, *supra* note 148, at 15. Formulaic sequences, which some consider to be “the key to fluency,” are “pre-fabricated chunks of language” or “single lexical units” that are retrieved by native speakers essentially as vocabulary rather than constructed grammatically. Wood, *supra*, at 209, 212; see also Bishop, *supra* note 148, at 15. For this reason, formulaic sequences can be particularly difficult for non-native speakers to learn. According to one scholar, “Formulaic sequences appear to be less readily mastered incidentally than words. This is important, because incidental learning, the learning of vocabulary while doing something else such as reading, is an important source of vocabulary for second language learners, especially with low-frequency lexical items that appear only in print.” Bishop, *supra* note 148, at 16. For that reason, they must be taught explicitly. Applied linguistics researchers hypothesize that second language learners do not easily recognize formulaic sequences, so “making unknown formulaic sequences typographically salient increases readers’ willingness to seek glosses, and this glossing might also lead to some increased comprehension of lexical items. . . . [However,] it will be necessary to make a clear distinction between comprehending lexical items in context and actually learning them. *Id.* at 18.

154. See, e.g., Wood, *supra* note 153, at 227.

155. See Nilon, *supra* note 5, at 7–8. Nilon argues that “[i]t stands to reason that the pedagogy that we create for [ESL] students should accommodate not only the conventional, textual interpretation of U.S. law, but also the multitude of contrastive perspectives that will emerge in their studies. *Id.* at 22. To that end, she shares a series of exercises designed to help students consider ideas such as attribution and weight of authority in the context of the students’ own cultures as well as U.S. culture. See *id.* at 24–46; see also Horowitz, *supra* note 149.

156. Not all LL.M. students come to the U.S. with the goal of becoming highly proficient in writing in English. As Julie Spanbauer notes, LL.M. students “need to experience this differing cultural preference for articulating knowledge so that they can become conversant in it, not so that they can replicate or produce it with the same proficiency as would an attorney whose first language is English and whose legal education occurred in the U.S.” Spanbauer, *supra* note 2, at 426.

benefit from legal writing professors using contrastive rhetoric to explicitly teach the differences between legal writing in English in the U.S. and writing in other languages and cultures.

CONCLUSION

Contrastive rhetoric has been an important part of second language writing research since Robert Kaplan's 1966 article in which he introduced the idea that culture influences rhetoric. It has been on the radar of legal writing professionals since at least the mid-1990s, and has generally been viewed as a positive addition to the pedagogy of teaching legal writing to ESL students. However, even though contrastive rhetoric is not a new area of study in applied linguistics, it is controversial, and not yet well understood. It has been criticized for focusing too heavily on culture as a predominant influence on rhetoric, ignoring the role of many other important factors such as native language ability, experience, and globalization. Contrastive rhetoric studies have also been criticized for flaws in methodology, such as failing to compare like writing with like writing (e.g., modern writing with modern writing, persuasive writing with persuasive writing).

Despite the deficiencies of contrastive rhetoric, both contrastive rhetoric and contrastive analysis can be valuable additions to the teaching repertoire of legal writing professionals. Most important, contrastive rhetoric is the basis for the idea that legal writing professors should explicitly teach, or at least explicitly discuss, the differences between legal writing in English and writing in the students' native languages and cultures. When doing so in a way that emphasizes rhetoric in U.S. legal writing as one of many world rhetorics, it can help ESL students reach proficiency in legal writing without negating the rhetoric of students' native languages and cultures.