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Lost in Translation in the Law School Classroom: Assessing Required Coursework in LL.M. Programs for International Students*

JULIE M. SPANBAUER**

Charlotte: I just don't know what I'm supposed to be.
Bob: You'll figure it out. I'm not worried about you.
*Keep writing.****

* The title of this article is a play on the 2003 movie title, "Lost in Translation," which was written and directed by Sophia Coppola. The phrase "lost in translation" also refers to the nuances and cultural implications that are lost in translations of "concepts and terminology across cultures." Darren Rosenblum, *Internalizing Gender: Why International Law Theory Should Adopt Comparative Methods*, 45 Colum. J. Transnat'l L. 759, 779 & n. 115 (2007) (citing "Derrida's theory that the translator will decide the meaning of the words being translated" and in so doing, "[t]he 'full presence of the author is inevitably lost in translation, in favor of a substituted presence of the translator'"). For similar reasons, Robert Frost, American poet, declared that "Poetry is what is lost in translation. It is also what is lost in interpretation." Louis Untermeyer, *Robert Frost* 18 (1964).

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*** This quotation, like the title of this article, is taken from the movie, "Lost in Translation." See *supra* Note *. The movie, which was filmed on location in Tokyo, features Bill Murray as Bob and Scarlett Johansson as Charlotte. The two characters live in Los Angeles and are at different stages in their lives, but they connect over their feelings of isolation in their marriages to other people. Tokyo, with its cultural and language differences, provides the backdrop to their shared sense of being lost.

INTRODUCTION

Many law schools have opened their doors to international students,¹ inviting them to participate in the following types of programs: (1) LL.M. programs designed exclusively or primarily for international students,² (2) LL.M. programs designed primarily for U.S.-trained lawyers and law students to which international students are admitted,³ (3) S.J.D. and J.S.D. degree programs to which international students are admitted,⁴ (4) J.D. programs to which international students are admitted,⁵ and (5) Intensive pre-law training programs for international students entering American law schools.⁶

¹ The references to international students in this article are intended to denote those students from other countries whose first or official language is not English, the “non-native” speakers of English, those students for whom English is a Second Language (ESL); it should also be noted that “L2” is another term for ESL learners.” Ramsfield, *infra* Note 12, at 158 & n. 1, 160 & n. 7. For a discussion of the difference between ESL students and EFL students, *see infra* Note 6. This article will use the words “international,” “foreign,” and “foreign-educated” as synonyms to refer to these students and programs, excluding for example, students educated in Great Britain, Canada, and Australia who speak English as a first language. Although the word, “foreign” may have negative connotations, it is the label most frequently invoked by law schools and is also used by the ABA to refer to these programs and students. *See* <http://www.abanet.org/legaled/postjdprograms/postjdc.html#2foreign> (listing “Post J.D. Programs by Category” and within this section listing “Programs for Foreign Lawyers or International Students”). *But see* Silver, *infra* Note 58, at 1043 & n. 10 (pointing out that if an international student obtains a law license in the U.S. after obtaining a U.S. law degree, the description “foreign lawyer is a misnomer”).

² *See infra* Notes 52 – 54 and accompanying text.

³ *See infra* Notes 47 – 51, 55 and accompanying text.

⁴ The ABA documents 31 U.S. law schools offering the following doctoral degrees: Doctor of Jurisprudence, J.S.D., Doctor of Judicial Science, S.J.D., and Doctor of Comparative Law, D.C.L. <http://abanet.org/legaled/postjdprograms/postjd-school.html>. The designation “S.J.D.” will be used throughout this article to refer to all of these doctoral programs. For a discussion of the reasons that only a small fraction of students are admitted to these programs, *see infra* Note 43 and accompanying text.

⁵ A similarly small number of international students enter J.D. programs in the U.S., although the number of foreign educated students pursuing J.D. degrees in the U.S. is increasing. *See* Van Zandt, *infra* note 9, at 217 (estimating that international students account for approximately five percent of students enrolled in the J.D. or joint J.D.- M.B.A. Program at Northwestern University School of Law). A small number of U.S. law schools permit foreign lawyers “with a first degree in law and

A recent survey,⁷ undertaken as part of the research for this article, indicates that 114 of the 195 ABA-accredited law schools in the United States admit international students, and because the vast majority of these students are admitted to LL.M. programs, this article is focused upon these graduate programs.⁸ The revenue generated by these programs and from these students

substantial post-first degree work experience” in another country to enroll in a “two-year J.D. program.” *Id.* at 218.

⁶ See Brostoff, Sinsheimer, and Ford, *infra* Note 11, at 137 (describing a three-week summer program offered at the University of Pittsburgh). See also Christine Feak & Susan Reinhart, *An ESP Program for Students of Law*, in *English for Specific Purposes 7-22* (Thomas Orr ed. 2002) (describing a six and one half week summer “program developed at the University of Michigan, . . . for nonnative speakers of English who have been accepted into a competitive U.S. law school, usually in the master of law (LLM) program). Of course, U.S. law schools also sponsor or participate in overseas programs designed for lawyers whose practice requires knowledge of English and for students entering European LL.M. Programs, which use English as a common language to teach courses. See generally Jacques deLisle, *Lex Americana?: United States Legal Assistance, American Legal Models, and Legal Change in the Post-Communist World and Beyond*, 20 U. Pa. J. Int’l Econ. L. 179, 206-07 (1999). When English is taught in a foreign country to students whose first language is not English and who were raised outside of the U.S., these students are often referred to as EFL students or students for who English is a foreign language). Ramsfield, *infra* Note 12, at 160 & n. 7. See also Sourcebook on Legal Writing Programs 203 (2d ed. Section of Legal Educ. & Admission to the Bar 2006) (explaining the reason for not including this group of students under the “ESL” label: EFL students “typically will not have the English language resources that are available to students who are studying in the United States or another English-speaking country”).

⁷ The information for this survey was last updated in July, 2007 and is available and on file with the author of this article. For further information about the manner in which the survey was conducted, see *infra* Note 152. A similar survey was conducted by another author in late 2003 in a similar manner: websites were consulted as the source of “the most accurate and recent information, based on the assumption that web sites are the most likely source of information for foreign law graduates contemplating application to U.S. law schools and the resulting incentive to keep web site program descriptions current.” Carole Silver, *Internationalizing U.S. Legal Education: A Report on the Education of Transnational Lawyers*, 14 *Cardozo J. Int’l & Comp. L.* 143, 145 & n. 2 (2006). Officials at schools with such programs were then contacted for more detailed program information. *Id.* at 157-158. The author found 102 LL.M. Programs open to international students at that time. *Id.* Twelve law schools have been added to the list of schools with programs for international lawyers in the intervening three years.

⁸ The ABA lists 196 accredited schools, including in its list the U.S. Army Judge Advocate General's School, which offers an officer's resident graduate course, a specialized program beyond the first degree in law.

is substantial; it is expected to increase as more law schools offer admission to international students and as the current law schools offering admission to such students increase enrollment in this area.⁹

Although approximately fifty-eight percent (58%) of all accredited law schools are currently admitting international students, the survey also indicates that, for the most part, these programs have evolved without real

<http://www.abanet.org/legaled/approvedlawschools/approved.html>. This latter school was not included in the survey used for this article. As of June, 2007, the most recent date provided by the ABA for its data, eight of the 195 schools that form the basis of this article were provisionally accredited and two were on probation. *Id.*

⁹ Silver, *supra* Note 7, at 155 (describing these programs as “a significant source of revenue”). *See also*

<http://www.abanet.org/legaled/statistics/charts/enrollmentanddegreesawarded>. As recently noted by the Dean of Northwestern University School of Law:

The number of students with first degrees in law from foreign institutions increased dramatically in the late 1980s and early 1990s.... Many non-U.S. firms and businesses realize that in order to provide value for their clients, their young attorneys need a basic understanding of Anglo-American law, the strong analytic training provided by common law education, and exposure to the American business and legal culture that is at the heart of the emerging global conventions. Obtaining an LL.M. degree has become important and sometimes necessary for a young foreign lawyer to advance at his or her firm and practice.

David E. Van Zandt, *Globalization Strategies for Legal Education*, 36 U. Tol. L. Rev. 213, 217 (2004). It should be noted, however, that the number of international students applying to U.S. law schools has declined. *Id.* (citing a 10-15% decrease in international student applications to general LL.M. programs in the U.S. in 2003-2004). This trend is not unique to law schools. *See* Stu Woo, *Several Other Countries Outpace U.S. in Growth in International Students, Report Says*, Chron. Higher Educ. Oct. 17, 2006 (citing a study utilizing “statistics from Unesco, the Institute of International Education, the National Science Board,” and other organizations); *but see* Elizabeth Quill, *Graduate Schools Again Admit More International Students, but Total Still Lags From 2003*, Chron. Higher Educ. Aug. 28, 2007 (citing Council of Graduate School survey finding an eight percent increase in 2007 in “admissions offers from American graduate schools” to foreign students and a nine percent increase in applications by foreign students); Burton Bollag, *Foreign Enrollments at Graduate Schools Increase, Reversing a 3-Year Decline*, Chron. Higher Educ. November 1, 2006 (citing a 1% increase in the fall, 2006 in total foreign enrollment in U.S. graduate schools following a three-year decline according to a survey conducted by the Council of Graduate Schools).

assessment of the students' needs and the best way to meet those needs.¹⁰ In fairness to these law schools and to those within these law schools making admission decisions, law schools do rely on indicators such as the Test of English as a Foreign Language (TOEFL).¹¹ Anyone who has taught students for whom English is a second language knows, however, that students who demonstrate a basic proficiency on such written tests often struggle with cultural differences, including fundamental differences in legal systems and in legal education.¹² These students also struggle with the pace of spoken English in the classroom and with the informal English and cultural references that infuse the law school classroom.¹³ Their struggle is exacerbated by differences in the formal structure of written legal analysis and argument in U.S. legal writing, which is situated within a reader-centered writing culture.¹⁴

One purpose of this article is very simply to alert law schools to the need to do more for international students to enrich their classroom experiences. Another purpose is to explore what law schools and academicians learn from these students and how that information can be used to inform and enrich J.D. classrooms. First, a summary will be presented of the programs offered by accredited U.S. law schools to international students, beginning with some background information on the evolution of the LL.M. degree within the United States.¹⁵ Second, this analysis will be contextualized with literature

¹⁰ For a discussion of the evolution of these programs, see *infra* Notes 26 - 70 and accompanying text.

¹¹ Silver, *supra*, Note 7, at 157-158. Some law schools also conduct telephone interviews with applicants to assess their English language proficiency; others look for applicants who have significant work experience "in an English-language environment." *Id.* at 158. See also Teresa Brostoff, Ann Sinsheimer, & Megan Ford, *Practice and Procedure: English for Lawyers: A Preparatory Course for International Lawyers*, 7 Berkeley Women's L.J. 137, 137 & n. 4 (2001).

¹² Jill J. Ramsfield, *Is "Logic" Culturally Based? A Contrastive International Approach to the U.S. Law Classroom*, 47 J. Legal Educ. 157, 185-189 (1997). For an explanation of the distinction between English as a second language (ESL) and English as a foreign language (EFL), see *supra* Note 6.

¹³ See Brostoff, Sinsheimer, & Ford, *supra*, Note 11, at 140; 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 Leg. Writing 127, 129 (1997).

¹⁴ "Legal writing, particularly brief writing, is 'reader-centered' writing. The legal writer, especially the brief writer, seeks to educate and persuade the court." Maria Perez Crist, *The AE-Brief: Legal Writing for an Online World*, 33 N.M.L. Rev. 49, 67-68 (2003). In educating the reader, the legal writer communicates "all steps" of the analytical process. Ramsfield, *supra*, Note 12, at 163.

¹⁵ See *infra* Notes 26 - 70 and accompanying text.

from the humanities and available legal scholarship assessing the special needs of students for whom English is a second language (ESL).¹⁶ This section will also present some feedback from international students who have completed LL.M. programs and from their employers to provide their collective views as to the effectiveness of these programs to meet their respective needs.¹⁷

The third section of this article will focus on a crucial component to the success of these programs—specialized, required legal writing courses, including information about course content, methodology, textbooks, academic support, and overall goals.¹⁸ In this section, the legal writing courses for these international ESL students will be compared with the legal writing courses offered to U.S.-educated J.D. students.¹⁹ In this part of the article, the comparison, as it relates to J.D. students, will primarily focus upon the first-semester, first-year required legal writing courses.²⁰ A great deal more research is available in this area than in regard to international students, and this section of the article is not intended to duplicate available research. Instead, this part of the article is included because J.D. students, like international ESL students, often undergo a painful transition when they enter law school: they are usually making the transition from undergraduate writing experiences (and some of them have specialized or technical writing training in other fields before coming to law school) to a more constrained, more formal, authority-driven, deductive, analytical process.²¹

The existing pedagogy addressing the writing issues of entering J.D. students can be utilized to inform the legal education of international students.²² The approach taken in J.D. writing programs can be (with

¹⁶ For a definition of ESL and other related terms, see *supra* Note 1. See also *infra* Notes 71 - 151 and accompanying text.

¹⁷ See *infra* Notes 138 - 148 and accompanying text. Some of this information has been collected by others and some student evaluation information was collected by this author. See *infra* Note 131 for a description of the student information collected by this author.

¹⁸ See *infra* Notes 152 - 186 and accompanying text.

¹⁹ See *infra* Notes 187 - 204 and accompanying text.

²⁰ See *infra* Note 187 and accompanying text.

²¹ “For any writer, international or not, the initiation into the U.S. legal discourse community is complex and challenging. The initiation involves acquired responses to conventions created by U.S. scholars and lawyers, to new language, and to expected behaviors.” Ramsfield, *supra* Note 12, at 164, 175.

²² There are numerous articles in which legal writing courses and programs have been critically assessed as to whether they meet entering law students’ needs. See

modification) translated into legal writing courses for international students. Conversely, teaching techniques and methods invoked in the international legal writing classroom can be exported into the first-year J.D. legal writing classroom with beneficial results. Of course, it is critical to respect the differences separating these two groups of students. The most obvious difference for international students is that while many have the advantage of being accomplished, experienced lawyers in a civil law system, they are disadvantaged by the fact that they will be reading and writing about a common law system in English, a second language.²³

In teaching the transition for J.D. students, legal educators must respect the prior writing experiences and skills J.D. students bring to the legal writing classroom, in which the common law, enacted law, and the deductive, analytical process are largely foreign.²⁴ For J.D. students, as well as for ESL students, however, educators “must not deny or exaggerate the differences in

Grearson, *infra* Note 25, at 73-61 (discussing social construction and the process approach as two different theoretical approaches to teaching legal writing). See generally Kenneth D. Chestek, *Reality Programming Meets LRW: The Moot Case Approach to Teaching*, 38 *Gonzaga L. Rev.* 57 (2003); Christopher Rideout and Jill J. Ramsfield, *Legal Writing: A Revised View*, 69 *Wash. L. Rev.* 35, 48-61 (1994); Anne Enquist *Critiquing and Evaluating Law Students' Writing: Advice from Thirty-five Experts*, 22 *Seattle U.L. Rev.* 1119, 1125-1127 (1999); Lisa Eichhorn, *Writing in the Legal Academy: A Dangerous Supplement?*, 40 *Ariz. L. Rev.* 105, 114 (1998). There are also many articles written about teaching writing beyond the legal writing classroom. See e.g., Andrea McArdle, *Teaching Writing in Clinical, Lawyering, and Legal Writing Courses: Negotiating Professionalism and Personal Voice*, 12 *Clin. L. Rev.* 501 (2006); Adam G. Todd, *Exam Writing as Legal Writing: Teaching and Critiquing Law Examination Discourse*, 76 *Temp. L. Rev.* 69 (2003); Kathleen Elliott Vinson, *Improving Legal Writing: A Life-Long Learning Process and Continuing Professional Challenge*, 21 *Touro L. Rev.* 507 (2005).

²³ See Ramsfield *supra* Note 12, at 186:

International students bring to the U.S. law classroom analytical paradigms based largely on code-centered legal systems. Each country constructs its code differently; some write rules of construction into the laws themselves; others use implied or traditional rules of construction. Even those international students for whom the common law method is familiar may still experience odd interpretive clashes. South Africa's use of cases differs from Ghana's, which differs from ours [in the U.S.] (footnotes omitted).

²⁴ Lisa Eichhorn, *supra*, Note 22, at 126 (1998) (arguing that legal writing texts “may, however unintentionally, downgrade the writing skills and the voices that students have developed before arriving in law school.”)

purpose, audience and context that arise among the different disciplines and discourse communities.”²⁵ If common ground is recognized in teaching both groups of students, and if differences are simultaneously respected and cultivated, legal educators will enrich their classrooms and be enriched as teachers.

I. The Evolution of LL.M. Programs in the U.S. for Foreign Students

The Master of Laws degree has evolved to occupy a unique position within U.S. universities as a “post-graduate”²⁶ degree in law with the designation “Master” requiring as a prerequisite the Juris Doctor, J.D., degree.²⁷ The reason for this unusual progression from doctoral to master’s degree is largely the result of an historical accident set in motion in the middle of the nineteenth century when the apprentice system of legal education began to give way in this country to an undergraduate law degree.²⁸ As the

²⁵ Jessie C. Grearson, *Teaching the Transitions*, 4 Leg. Writing 57, 57 (1998). Indeed, just as some law schools are now providing summer programs for foreign students who will be entering U.S. LL.M. programs, *see supra* Note 6, some law schools are offering summer programs to prepare non-traditional U.S. law students (minorities and first-generation Americans, among others). Jean Boylan, *Crossing the Divide: Why Law Schools Should Offer Summer Programs for Non-traditional Students*, 5 Scholar 21, 22-24 (2002).

²⁶ Peggy Maisel, 30 Fordham Int’l L.J. 374, 406 (2007). *See also* Van Zandt, *supra* Note 9, at 215.

²⁷ Linda R. Crane, *Interdisciplinary Combined-Degree and Graduate Law Degree Programs: History and Trends*, 33 J. Marshall L. Rev. 47, 53 (1999) (commenting that “it seems odd that the first degree one earns, the J.D., is a doctorate, while the next two are masters, and then finally a second doctorate—an oddity that developed over time by coincidence”). The U.S. system of legal education is also unique in that there is no existing undergraduate law degree operating as a prerequisite to the J.D. degree. Ronald M. Pipkin, Ethan Katsh, *Undergraduate Legal Studies and Law School Gatekeepers*, 28 J. Legal Educ. 103, 103 (1976) (quoting Law School Admission Council and Association of American Law School Prelaw Handbook as advising that “no particular prelaw curriculum is prescribed”). *See also* David C. Safel, *Prelaw: A Political Approach to the Undergraduate Study of Law*, 28 J. Legal Educ. 310, 310-311 (1976) (discussing undergraduate prelaw programs). The J.D. degree is thus the first degree in law and, as a result, some legal educators in this country refer to it as an undergraduate degree reserving the graduate degree label for the LL.M and S.J.D. degrees. Henry D. Gabriel, *Graduate Legal Education: An Appraisal*, 30 S. Tex. L.Rev. 129, 133-35 (1988).

²⁸ James, E. Moliterno, *In-House Live-Client Clinical Programs: Some Ethical Issues*, 67 Fordham L. Rev. 2377, 2383 (1999). By 1860, this system, which “was an outgrowth of the Inns of Court,” was beginning to be eclipsed by the 21 law schools

universities' power over legal education strengthened, universities increased the required curriculum for these LL.B. or Bachelor of Laws degrees, which were initially two-year degrees, to a three-year and then to a four-year program of study.²⁹ Next, universities began restricting law school admission to college graduates.³⁰ As more universities began requiring a college degree for admission to law school, some institutions changed the law degree designation to "J.D." while others retained the "LL.B." designation.³¹

that had come into existence; in fact, by this time only a few states required any period of apprenticeship. William P. Quigley, *Introduction to Clinical Teaching for the New Clinical Law Professor: A View from the First Floor*, 28 Akron L. Rev. 463, 465 (1995). Pursuant to this system an apprentice was required to "read law" in the office of a practicing lawyer." *Id.* Some authors limit the description, apprentice, to refer to the English system of education existing at the time, preferring instead to refer to this system as it began operating in the U.S. colonies as a "system of legal clerkship," focusing upon the contractual nature of the relationship existing between the lawyer and his student. Charles R. McKirdy, *The Lawyer as Apprentice: Eighteenth Century Massachusetts*, 28 J. Legal Educ. 124, 125, 126 (1976). The student learned "by copying documents, by listening to his fellow students, his teacher and other members of the bar. ... by attending court [and] by reading the law books available to him." *Id.* at 127. The majority of these apprentices or legal clerks were college graduates and by the late eighteenth century most county bar associations required completion of "a liberal arts education or its equivalent" and a period "of study with a recognized barrister before requesting the bar to recommend him to the inferior court as an attorney." *Id.* at 125.

²⁹ Gabriel, *supra* Note 27, at 131.

³⁰ W. Burlette Carter, *Reconstructing Langdell*, 32 Ga. L. Rev. 1, 127 (1997). See also Crane, *supra* Note 27, at 53-54. In 1900, Harvard is credited as being the first University to require an undergraduate degree as a prerequisite to admission to law school because it viewed three years of legal education as comparable in intensity to the requirements for a Ph.D. in Philosophy or an M.D. (Doctor of Medicine) degree. *Id.* at 54.

³¹ *Id.* In many other countries, the law degree is a first degree, and is often the LL.B. degree. Lingyun Gao, *Comment: What Makes a Lawyer in China? The Chinese Legal Education System after China's Entry into the WTO*, 10 Willamette J. Int'l L. & Dispute Res. 197, 218-220 (2002). As a result, U.S. legal educators often assume that the majority of foreign-educated students entering LL.M. programs in the U.S. hold undergraduate degrees in law comparable to any undergraduate degree offered at U.S. universities and colleges. Mary C. Daly, *Topic VI: Money-Laundering and Ethical Considerations for the Lawyer and Trust Officer in Dealing with the International Trust*, 32 Vand. J. Transnat'l L. 1117, 1146-47 (1999). This assumption is not entirely accurate. If these students wish to practice law, they "must pursue professional training. In some countries, these students begin their professional training after completing their undergraduate degree. In other countries, they can

Although the expanded requirements for a law degree were uniformly embraced by law schools, law schools moved more slowly and less confidently away from the Bachelor of Laws degree to the Juris Doctor degree. In fact, in 1960, when the American Bar Association began keeping records of the number and types of law degrees conferred by U.S. law schools,³² the LL.B. degree remained the dominant law degree awarded in this country.³³

Another 1960 survey of law school deans reveals that some of the law schools awarding J.D. degrees were uncertain as to the nature of a J.D. degree and its future status.³⁴ Some of these same deans held contradictory views as to whether the J.D. degree was either a graduate or an undergraduate degree, while others avoided the distinction by characterizing the degree as “a first professional degree, comparable to an M.D.” degree.³⁵ One law school dean went so far as to assert, “[T]his school does not believe that the J.D. degree has any proper place in the hierarchy of law degrees.”³⁶ Of course, this dean’s view did not prevail; all law schools currently award J.D. degrees with a few remaining schools offering admission to a small number of students who do not hold an undergraduate degree.³⁷ These students are sometimes awarded an LL.B. degree.³⁸

enroll in a specialized series of training courses after two or more years of undergraduate education.” *Id.* Although the degree may be awarded as a first degree, it is often a program involving five or more years of study with grueling class schedules and lengthy oral examinations. Luz Estella Nagle, *Insights into Legal Education: Maximizing Legal Education: The International Component*, 29 *Stetson L. Rev.* 1091, 1095-1097 (2000). In some countries, the attrition rate is as high as 76%. *Id.* at 1098.

³² Jay W. Stein, *The Juris Doctor*, 15 *J. Legal Educ.* 315, 315 (1963). The information for the 1960-1961 study came from the publication, the American Bar Association Review of Legal Education (1961). *Id.* & n. 1.

³³ *Id.* Law school data for 1961 indicates that 134-accredited schools awarded 8,903 LL.B. degrees and 532 J.D. degrees. This data generated by the ABA also reveals that the University of Chicago was the first law school to award the J.D. degree in 1903. *Id.* at 316.

³⁴ *Id.* at 317-18. This survey was actually conducted in the spring of 1962 by Drake University, but contains data for 1960. *Id.* & n. 1.

³⁵ *Id.*

³⁶ *Id.* at 318.

³⁷ A small number of law schools admit students who have completed only three years of college; these law schools offer the LL.B. degree as an alternative if these students “have not received a college degree before the conclusion of their law school

The LL.M. degree, another expansion in law school curriculum, came into existence amid this nineteenth century transition when, in 1874, Columbia University offered this degree as an option for U.S. law school graduates who completed an additional year of law school study.³⁹ In 1903, Harvard began offering LL.M. degrees for another reason—to train law professors.⁴⁰ By 1924, Harvard offered two degrees, the LL.M. and the S.J.D., the latter then designed primarily for law professors and included a thesis or dissertation requirement involving “a significant contribution to legal literature.”⁴¹ At this time, the LL.M. degree was offered at Harvard primarily for practitioners who desired additional training or specialization.⁴²

Over time, this distinction changed, as both practitioners and those aspiring to an academic career enrolled in one-year LL.M. degree programs much more frequently than in S.J.D. programs,⁴³ with practitioners currently

course work.” Gabriel, *supra* Note 27, at 134 & n. 23. See also Crane, *supra* Note 27, at 54.

³⁸ *Id.*

³⁹ Henry D. Gabriel, *supra*, Note 27, at 131.

⁴⁰ *Id.* In 1912, Harvard awarded its first graduate degree, an S.J.D. degree, to a law professor in Cincinnati; in 1923, Harvard began offering an LL.M. degree. Erwin N. Griswold, *Graduate Study in Law*, 28 *Can. B. Rev.* 172, 173, 174, 175-76 (1950); Frederick E. Snyder & Jerome A. Cohen, *Harvard's Program in Law Teaching—A New Dimension in Graduate Legal Education*, 31 *J. Leg. Educ.* 140, 141 (1981) (commenting that law schools offer these graduate programs “to help enhance the aspiring law teacher’s capacity for legal scholarship and pedagogy or facilitate in other ways the transition to the academic life.”).

⁴¹ Crane, *supra* Note 27, at 56 & n. 62 (*quoting* Arthur E. Sutherland, *The Law at Harvard: A History of Ideas and Men, 1817-1967*, 233 (1967)). Since 1935, Harvard has described the S.J.D. candidate’s thesis requirement in this manner. *Id.*

⁴² Gabriel, *supra* Note 27, at 132. The reasons for pursuing these advanced degrees have not changed. As recently as 1992, authors of a guide to graduate law programs cited “today’s intensely competitive legal market” as the reason that the vast majority of graduate law degree candidates enter these programs. *Directory of Graduate Law Degree Programs* (eds. Richard L. Herman, et. al., 3d ed. 1992).

⁴³ The LL.M. degree is favored for several reasons: most LL.M. programs require only one year of study and neither the LL.M. degree nor the S.J.D. degree, the latter of which requires one to three years in residence at a law school, are necessary prerequisites to an academic career. Crane, *supra* Note 27, at 56; Silver, *supra* Note 7, at 146 & n. 8. In fact, even though the S.J.D. degree is a research degree requiring a doctoral-level dissertation, and is designed primarily for academicians, only a small percentage of faculty at U.S. law schools hold S.J.D. degrees. Sanjeev S. Anaand, *Canadian Graduate Legal Education: Past, Present, and Future*, 27 *Dalhousie L.J.* 55, 66 & n. 35 (2004). Another reason that the overall enrollment in S.J.D. degree programs is much lower than in LL.M. programs is the requirement at many schools

comprising the bulk of LL.M. candidates.⁴⁴ The thesis requirement, which was incorporated into LL.M. degree programs early in their evolution, is no longer standard.⁴⁵ Today, there are many LL.M. degree programs focused on specific subject matter areas and course work with either a final examination or paper due at the end of the course.⁴⁶

At the end of World War II, U.S. law schools experienced a significant increase in the enrollment of international students in graduate programs,⁴⁷ and “[s]everal leading American law schools—Columbia, Georgetown, Harvard, New York University, and Tulane”—responded with another type of LL.M. program: a program specifically tailored to these

that students first obtain an LL.M. degree from the law school as a condition of matriculation into the law school’s S.J.D. program. Leon E. Trakman, *The Need for Legal Training in International, Comparative and Foreign Law: Foreign Lawyers at American Law Schools*, 27 J. Legal Educ. 509, 521 & n. 53 (1975). Finally, the opportunity to pursue an S.J.D. degree is much more limited with only 31 law schools offering doctoral level degrees. *See supra* Note 4. *See also* <http://www.abanet.org/legaled/postjdprograms/postjd-school.html>. *See also*, Silver, *supra* Note 7, at 146 & n. 8.

⁴⁴ Gabriel, *supra* Note 27, at 139. Practitioners generally enroll in LL.M. programs focused on specific areas of law, such as tax and patent law. *Id.* These LL.M. programs are dominated by practitioners from other countries. *Id.* at 149 (reporting ABA data from 2004, which reveals “that 96 U.S. law schools enrolled a total of 4469 foreign law graduates”).

⁴⁵ Silver, *infra* Note 58, at 1048. Some LL.M. programs allow students to choose either a thesis track or a course track. *Id.* & n. 26. “The current trend in LL.M. programs not only avoids the thesis requirement, it also avoids the prescription of a set curriculum, in contrast to the core classes common to the first year of J.D. programs.” *Id.* at 1048. Silver argues the reason that a core curriculum is not a common feature of LL.M. programs is financial—it would require hiring additional faculty and might limit applicant interest. *Id.*

⁴⁶ Crane, *supra* Note 27, at 61-62 & n. 100 (citing 52 areas of concentration available to LL.M. candidates at U.S. law schools). *See also* Silver, *supra* Note 7, at 160-61 (finding that there are 23 different subject areas that subject matter specific LL.M. degree programs for foreign lawyers focus on, including, for example, international and comparative law, energy law, dispute resolution, and real property).

⁴⁷ Mitchell Franklin, *On the Teaching of Advanced Foreign Civilians in American Law Schools*, 2 J. Leg. Educ. 455, 455 (1950); Julia E. Hanigsberg, *Swimming Lessons: An Orientation Course for Foreign Graduate Students*, 44 J. Leg. Educ. 588, 590 (1994); Matthew A. Edwards, *Teaching Foreign LL.M. Students About U.S. Legal Scholarship*, 51 J. Leg. Educ. 520, 520 (arguing that the influx “of foreign-trained lawyers into our graduate law programs” imposes responsibilities for these students upon law schools).

foreign students focused on either U.S. law or on international law.⁴⁸ During the 1970's more law schools began offering graduate degrees to international students whose enrollment in U.S. law schools has steadily continued to increase.⁴⁹ This increase in enrollment has continued despite rising tuition costs and challenges external to law schools, such as the restrictions on entry into the U.S. after September 11, 2001.⁵⁰

Law schools currently offer international students admission to a variety of graduate programs, including both general and specialized subject matter LL.M. programs to which both U.S. and foreign law graduates are admitted.⁵¹ Foreign students are also offered admission to masters programs designed exclusively or predominantly for foreign lawyers; these latter degree programs are most often Masters in Comparative Law Programs (M.C.L.), Masters in Comparative Studies (M.C.S.) Programs, and Masters in the American Legal System (M.A.L.S.) Programs, the latter of which are focused on U.S. law.⁵²

⁴⁸ Roger J. Goebel, *Professional Qualification and Educational Requirements for Law Practice in a Foreign Country: Bridging the Cultural Gap*, 63 *Tulane L. Rev.* 443, 461 (1989).

⁴⁹ *Id.* During the late 1990's, law schools enrolled greater numbers of foreign students in part to respond to an overall decline in applications of U.S. students to J.D. programs. Silver, *supra* Note 7, at 150.

⁵⁰ See Silver, *supra* Note 7, at 164, 172. See also Bollag, *supra* Note 9, at I13 (discussing recent declines in enrollment of foreign students in U.S. university programs, including both undergraduate and graduate study programs). One high-level official at a major higher education association commented on the reasons for declining enrollment:

A variety of factors combine to diminish the interest of foreign students in the United States, ... Among the problems, ... is the legal requirement for all visa applicants to be interviewed individually by a U.S. consular officer, restrictions on foreign students working in the U.S. after graduating from an American institution, and repeated cases of foreign scholars who are denied a visa or turned away when they arrive at a U.S. airport even with a visa.

Id.

⁵¹ See <http://www.abanet.org/legaied/postjdprograms/postjd.html> ("Overview of Post J.D. Programs"). The ABA estimates that "roughly half of all the individuals enrolled in LL.M. programs are graduates of foreign law schools." *Id.* ("Programs for Foreign Lawyers").

⁵² *Id.* ("Programs for Foreign Lawyers"). The MALS also designates a masters in American Legal Studies. Silver, *supra* Note 7, at 144 & n. 1.

As of 2007, 114 law schools admitted foreign students to a total of 179 LL.M. programs.⁵³ Of these 179 LL.M. programs, sixty-five LL.M. programs, approximately thirty-seven percent (37%), limit enrollment to foreign law students.⁵⁴ The majority of LL.M. programs to which foreign students are admitted (114 programs), therefore, offer admission to both U.S. and foreign students.⁵⁵ American Bar Association oversight of these graduate programs is extremely limited⁵⁶ and, as a result, LL.M. programs for international students vary widely. Curriculum and degree requirements are also likely influenced by the fact that without a J.D. degree most of these students are ineligible to sit for a bar exam in the U.S. and they overwhelmingly return to their home countries after graduation from a U.S. LL.M. program.⁵⁷ As a result, the only feature common to all U.S. LL.M. programs is the consistent requirement of one academic year in residence at a

⁵³ Survey on file with this author. *See also* Silver, *supra* Note 7, at 147 (listing 102 law schools with LL.M. programs for international students). The twelve schools I have added to the list since Silver's 2003 study are: the University of Akron, Arizona State University, Chapman University, Catholic University, Duquesne University, Marquette University, Ohio Northern University, Ohio State University, the University of Oregon, Southern Illinois University, Southwestern University, and Thomas M. Cooley Law School.

⁵⁴ *See* survey on file with the author of this article. In 2003, there were 66 programs exclusively for foreign students. Silver, *supra* Note 7, at 153. Apparently, the number of programs limited to international students has decreased slightly as the total number of graduate programs to which international students are admitted has grown.

⁵⁵ *Id.*

⁵⁶ The ABA accreditation process does not evaluate in any way whether a school's post-J.D. degree program ensures that students in the program gain the basic knowledge and skills necessary to prepare the student adequately for the practice of law. ... The Standards for Approval of Law Schools prohibit an approved law school from establishing a post-J.D. program *without first obtaining the acquiescence of the Council of the Section of Legal Education and Admissions to the Bar*. However, the ABA reviews post-J.D. degree programs only to determine *whether the offering of such post-J.D. program would have an adverse impact on the law school's ability to comply with the Standards that the ABA establishes for J.D. programs*. (Emphasis added). <http://www.abanet.org/legaled/standards/councilstatements.html> ("Council Statements").

⁵⁷ The following six states permit foreign law graduates to take the bar exam if these students obtain an LL.M. or other graduate degree from an ABA-approved law school: California, Connecticut, New Hampshire, New York, North Carolina, and Virginia. *Comprehensive Guide to Bar Admission Requirements 2007* (National Conference of Bar Examiners & ABA Section of Legal Education and Admissions to the Bar).

law school.⁵⁸ This one-year requirement, however, translates into vastly different credit hour requirements at different law schools, with graduation requirements ranging from as few as sixteen credit hours in one program to as many as thirty or more credit hours in several programs.⁵⁹

Although the law schools differ in their approaches to LL.M. programs for international students, these schools face similar concerns about international students. These concerns are rooted in language issues faced by these ESL students and these concerns have changed very little over time.⁶⁰ A Harvard professor's remarks in 1950 resonate today:

Finally, we come to foreign students whose training has not been in the Anglo-American common law. They present special problems, often of great difficulty. We have learned that we must first be extremely careful that they have adequate facility in the English language. All of our instruction is in English, and our experience is that a foreign student cannot learn English while studying law—or perhaps I should say, cannot study law while learning English. Often it is hard to tell how good a foreign student's English is, when our only contact is by correspondence. If a student has a really good background in English, he usually has little difficulty after he gets here, and his English improves rapidly.⁶¹

⁵⁸ See generally Carole Silver, *The Case of the Foreign Lawyer: Internationalizing the U.S. Legal Profession*, 25 *Fordham Int'l L.J.* 1039 (2002). Another common feature of LL.M. programs is that they are often "built around foreign students taking a majority of their courses with J.D. students." *Silver supra* Note 7, at 155.

⁵⁹ Students enrolled in either the LL.M. in Comparative Law or the Master of Comparative Law (M.C.L.) at California Western University School of Law must satisfactorily complete a minimum of 16 and a maximum of 25 credit hours. <http://www.cwsl.edu>. At the other end of the spectrum is the University of Illinois College of Law International LL.M. Program with 32 required credit hours for graduation. http://www.law.uiuc.edu/academic/llm_courses.asp. Schools requiring 30 credit hours for graduation are numerous and include, for example: the University of Baltimore School of Law, <http://www.law.ubalt.edu/academics/concentrations/llm.html>; and Indiana University School of Law, <http://www.law.indiana.edu/graduate/index.shtml>. (for students enrolled in the thesis track).

⁶⁰ Griswald, *supra* Note 40, at 176-177.

⁶¹ *Id.* The author also expresses concern with students from civil law countries. *Id.* at 177. Of course, other officials at law schools were likely more concerned about the experiences of the U.S. students pursuing graduate degrees in law. See e.g., Banks

The second-language students who experience little difficulty generally comprise a small group of students who have immersed themselves for significant periods of time in English-speaking environments prior to enrolling in U.S. graduate schools.⁶² The majority of students, who are new to living in the U.S. do not, however, readily adapt; throughout the course of their studies they continue to face language barriers and complications associated with their backgrounds in different legal systems and systems of legal education.⁶³ U.S. law schools attuned to these problems unique to ESL students respond with required foundational course work in the U.S. legal system and in U.S. legal writing.⁶⁴ Law schools differ, however, in the manner in which they provide these courses and in the depth of training they provide.

A small number of schools offer abbreviated summer programs for international students prior to their matriculation, the most common of which are either mandatory or elective three-to-four week orientation programs.⁶⁵

McDowell, Jr. & A.W. Mewett, *What Are Teachers Made of?: A Critical Appraisal of Graduate Study in the United States*, 8 J. Leg. Educ. 79 (1955).

⁶² See Sourcebook on Legal Writing Programs, *supra* Note 6: "It is unrealistic to expect a student to acquire a level of fluency in academic and professional legal English within only a semester or two of study, when mastery typically takes several years." Many ESL students enrolled in U.S. LL.M. programs have difficulty in speaking, listening to, and writing in English, "reading is in fact one of their weakest skills, given their lack of experience in reading U.S. legal cases and the demanding nature of such reading." Feak & Reinhart, *supra* Note 6, at 10.

⁶³ See *supra* Note 23 and *infra* Notes 97-98. See also Ramsfield, *supra* Note 12, at 157-158 (describing difficulties international students encounter in U.S. law school classrooms).

⁶⁴ See *infra* Notes 67 – 69 and accompanying text.

⁶⁵ Some of these programs provide an introduction to the U.S. legal system and include some additional topics such as legal English, research, writing, and civil procedure. See, e.g., University of California, Los Angeles School of Law Program at <http://www.law.ucla.edu/home/index/asp?page=802> (offering an orientation program beginning one week prior to the start of the fall semester); Case Western Reserve University School of Law Program at <http://www.law.case.edu/curriculum/llm/-content.asp?id=364> (offering a four-week Summer Language and Law Institute exclusively for foreign students); Duquesne University School of Law Program at <http://www.law.duq.edu/Academics/AcaPgmLLM.html> (offering Orientation to the American Legal System Program for one week prior to the beginning of the fall semester); Georgetown University School of Law Program at <http://www.law.georgetown.edu/foundations/> (offering a month-long Foundations of American Law and Legal Education to foreign students); University of Pennsylvania Law School Program at <http://www.law.upenn.edu/prospective/grad/summerprogram/> (offering

Other law schools incorporate requirements into their LL.M. programs consisting of full semester or year-long course work in either or both the U.S. legal system and legal writing.⁶⁶ For example, seventy-one of 114 law schools admitting these ESL students (approximately 62%) require them to enroll in a course in the U.S. legal system.⁶⁷ In comparison, fewer law schools, forty-seven of 114 (41%), require these students to enroll in a legal writing course, and thirty-eight of these same 114 schools require that these students enroll in both courses (33%).⁶⁸

These law schools are responding in somewhat different ways to the language issues and cultural differences of ESL students; they do, however, share a common focus on courses in the U.S. legal system and legal writing, the latter of which will be assessed in light of available research in the humanities documenting ESL undergraduate and graduate student needs.⁶⁹ Before assessing the work of these schools that are actually attempting to address second language student needs, however, it is important to note that

mandatory four-credit course in Foundations of the U.S. Legal System and Legal Research); University of Pittsburgh School of Law Program at <http://www.law.pitt.edu/academics/programs/docs/EFLBrochure.pdf> (offering an elective summer English for Lawyers program); University of Southern California Gould School of Law Program at <http://www.lawgip.usc.edu/sle/info.cfm> (offering a Summer Law and English Program); Washington University School of Law Program at <http://www.law.wustl.edu/lmall/suminstinfo07.pdf> (offering a two-week Summer Institute in U.S. Law); Wayne State University School of Law Program at <http://www.law.wayne.edu/docs/LLM%20Regulations%20Dec%202003.pdf> (offering a one-week mandatory International Student Orientation focused on legal research, analysis and writing); University of Wisconsin School of Law Program at <http://www.law.wisc.edu/grad/> (offering a Summer Program in U.S. Law and Legal Institutions).

⁶⁶ See *infra* Notes 67 - 69.

⁶⁷ These courses in the U.S. legal system range from one to four credit hours, with the majority of schools requiring a two-credit course. See, e.g., Loyola University School of Law, Chicago at http://www.luc.edu/law/academics/graduate/business_structure.html#international (one-credit course, Fundamentals of American Law); Duke University School of Law at <http://www.law.duke.edu/internat/graduateDegrees.html> (two-credit course, Distinctive Aspects of American Law); Case Western Reserve University School of Law at <http://www.law.ubalt.edu/academics/concentrations/lm2.html> (three-credit course, Introduction to U.S. Law); University of Denver Sturm College of Law at <http://law.du.edu.maclaw/curriculum.cfm> (four-credit course, Introduction to United States Law).

⁶⁸ See *infra* Note 152 and accompanying text.

⁶⁹ See *infra* Notes 71 - 151 and accompanying text.

nearly one-third of all law schools offering admission to international students, thirty-four (30%), require no supplementary course work and treat these students similarly to U.S. graduate law students who have no language barriers and who have immersed themselves for three years studying U.S. law and the U.S. legal system.⁷⁰ Consequently, it is important to first explore the likely assumptions and misconceptions legal educators in this country entertain about these graduate ESL students.

II. Language, Culture, and the Problems of Second-Language Students

Researchers in the field of contrastive rhetoric have for several decades studied the problems second-language students face in undergraduate and graduate classrooms.⁷¹ This broad interdisciplinary field of research encompasses “linguistics, reading theory, composition theory, and rhetoric concerned with the development of communication skills across languages and cultures.”⁷² A fundamental assumption underlying contrastive rhetoric is that “language and writing are cultural phenomena. As a direct consequence, each language has rhetorical conventions unique to it,” and the “linguistic and rhetorical conventions of the first language [actually] interfere with writing in the second language.”⁷³ Researchers in this field, therefore, attempt to

⁷⁰ Some of these schools make accommodations for ESL students enrolled in LL.M. programs by allowing them to take courses on a pass / fail basis, or to submit a paper in lieu of a final examination in a course. See, e.g., the University of Alabama School of Law. <http://www.law.ua.edu/prospective/info.php?re=int-overview>.

⁷¹ Melanie L. Schneider & Naomi K. Fujishima, *When Practice Doesn't Make Perfect: The Case of a Graduate ESL Student*, in *Academic Writing in a Second Language: Essays on Research and Pedagogy* 3, 4 (Diane Belcher & George Braine eds. 1995) (citing to research in the undergraduate and graduate classroom in this area conducted in the 1980's). Researchers in this field also use the label “cultural rhetorical preferences” to denote studies in contrastive rhetoric. Ramsfield, *supra* Note 12, at 169.

⁷² Philippa J. Benson & Peggy Heidish, *The ESL Technical Expert: Writing Practices and Classroom Practices*, in *Academic Writing in a Second Language* 313, 315 (1995). Anthropologists, psychologists, and researchers in the field of education have also conducted empirical research in this area of “learning literacy and the effects of literacy on learners’ thinking as well as social behavior.” Ulla Connor, *Contrastive Rhetoric: Cross-Cultural Aspects of Second-Language Writing* 20 (Cambridge Univ. Press 1996).

⁷³ Connor, *supra* Note 72, at 5 (ascribing the origins of the field of contrastive rhetoric to Robert Kaplan and describing it as “the first serious attempt by applied linguists in the United States to explain second language writing”). In 1966 Robert Kaplan did introduce the concept of contrastive rhetoric, but his conclusions were criticized for over-simplifying or generalizing patterns of cultural thought. Ramsfield,

understand and explain ESL student writing problems by reference to the rhetorical strategies of the student's first language rather than through error correction analysis of the student's English-language skills.⁷⁴

Very little of the research in this area has found its way into legal scholarship, which may explain why a majority of law schools offering admission to ESL students do not provide corresponding academic support measures.⁷⁵ In fact, many law schools may simply assume that because these graduate students demonstrate a high level of English-language proficiency on standardized tests, such as TOEFL, they are not in need of training in written and spoken legal English during their time in residence at U.S. law schools.⁷⁶

supra Note 12, at 160-161 & n. 13. In 1976, he modified his findings. *Id.* at 161 & n. 13 (citing Robert B. Kaplan, *A Further Note on Contrastive Rhetoric*, 24 *Comm. Q.* 2 (1976)). For a discussion of these interfering effects, see *infra* Note 74.

⁷⁴ Connor, *supra* Note 72, at 5. Educators early on believed that the way to teach ESL students was to focus on grammar and usage and to correct for these types of errors. Ramsfield, *supra* Note, 12, at 159. Error correction analysis originally consisted of reviewing and analyzing paragraph structure and organization for problems and relating these problems to "the language background from which the student came." Connor, *supra* Note 72 at 15. For a discussion of the history of error correction, see, Mike Rose, *The Language of Exclusion: Writing Instruction at the University*, in *Negotiating Academic Literacies: Teaching Across Languages and Cultures* 9, 11-18 (Vivian Zamel & Ruth Spack eds. 1998). See also Dana R. Ferris, *Response to Student Writing: Implications for Second Language Students* 42 (2003). Such problems were ascribed to the negative, interfering effect a first language was thought to have on second-language acquisition. *Id.* at 12. Researchers have always recognized the interfering effects, known as "transfer," a first language has on an individual's acquisition of a second language. *Id.* at 13. Theories regarding the role of transfer vary—in early studies, the first language was believed to interfere with acquisition of the second language. *Id.* Later studies suggested that transfer had a more complex effect on an individual's ability to learn a second language depending upon the learner's knowledge about the second language, the learner's strategies, the learning situation, and the combination of these factors. *Id.* Ramsfield, *supra* Note 12, at 159. During the 1960's when Kaplan conducted his research on contrastive rhetoric, researchers were beginning to compare the process of second-language acquisition with first-language acquisition. Connor, *supra* Note 72, at 12.

⁷⁵ A computer search of all U.S. law reviews and journals revealed only two articles in which the field of contrastive rhetoric is either mentioned or discussed. Ramsfield, *supra* Note 12, at 159-164 (discussed in depth). See also Rideout & Ramsfield, *supra* Note 22, at 88 & n. 174 (mentioning contrastive rhetoric).

⁷⁶ Hanigsberg, *supra* Note 47, at 597-98 & n. 28 (describing TOEFL as "notoriously unreliable"). TOEFL also measures "general English proficiency," not U.S. legal English. Paul A. Deeringer, *No Shirt, No Shoes, No English ... No Dice? How Should We Test English Proficiency for Foreign-Trained Attorneys?*, 18 *Geo. J.*

Available research documents that this measure of English-language proficiency is insufficient as a predictor of academic success for these ESL students.⁷⁷

The reason the test is an insufficient measure is rooted in the premise of contrastive rhetoric, i.e., the link between language and culture is reciprocally and socially constructed.⁷⁸ The link or connection is one of interdependence: “language reflects and affects culture” as culture reflects and affects language; just as “language serves as the construct that aids [our] cultural development” as we learn to communicate in our first language, the cultural context associated with the second language is an integral part of mastering that language.⁷⁹ Thus, because “culture is communication,”⁸⁰ a written test of English-language proficiency that fails to test for the cultural components of the language used, is a very incomplete measure.

A TOEFL test, for example, does not test for the cultural aspects of the communication specific to the U.S. legal culture or system and communication specific to the U.S. law school classroom and its culture.⁸¹ In

Legal Ethics 691, 712 (2005). *See also* Ramsfield, *supra* Note 12, at 190 (asserting that “even excellent scores on so-called standard English tests may not guarantee good performance in law school”).

⁷⁷ Melanie L. Schneider & Naomi K. Fujishima, *supra*, Note 71, at 9 (citing a study of “376 foreign graduate students” showing after one semester “TOEFL scores did not correlate highly with GPA”).

⁷⁸ Alvino E. Fantini, *Language: Its Cultural and Intercultural Dimensions*, in *New Ways in Teaching Culture* 3, 5 (TESOL 1997).

⁷⁹ *Id.*

⁸⁰ *Id.* The origin of this famous statement is attributed to the anthropologist, Edward T. Hall. *Id.* *See* Edward T. Hall, *The Silent Language* (1973). Language “allows us to develop ‘human’ qualities, which in turn “allows culture development through interaction and communication with other individuals.” Fantini, *supra* Note 78, at 5.

⁸¹ Deeringer, *supra* Note 76, at 712. *See also* Ramsfield Note 12, at 164 (describing a student’s initiation “into the U.S. legal discourse community” as “complex and challenging.”). For purposes of the classroom,

[a]cademic culture consists of a shared experience and outlook with regard to the educational system, the subject or discipline, and the conventions associated with it. These conventions may, for example, take the form of the respective roles of student and lecturer/tutor/supervisor, etc. and their customary behavior; or conventions attached to academic writing, with its structuring and referencing system.

R.R. Jordan, *English for Academic Purposes* 98 (Cambridge Univ. Press 1997).

fact, the test itself may lead ESL students to believe that they will successfully negotiate a law school classroom and its requirements (as measured by their performance on exams and other writing) by invoking the process they apply to the TOEFL test: “translating words and filtering meaning from one language to another.”⁸²

The problem with attempting to understand a new language by translating from another language again relates to linguistic relativity. Researchers in the field of contrastive rhetoric find that, due to this link of culture to language, “different languages affect perception and thought in different ways . . . , and that language influences thought” and the thought process.⁸³

Examples of languages with some marked differences from the English language⁸⁴ best illustrate the point. Within cultures in which the language does not have an “elaborate future tense,” people have been observed to be more present-oriented:

The Trukese language lacks an elaborate future tense, and Trukese people may be observed living more in the present than planning for the future. For instance, arrangements for future events such as meetings or boat trips are always tentative, when they are made at all. It may be an overstatement to say that the lack of a future tense

⁸² Connor, *supra* Note 72, at 29 (discussing the problems and the loss associated with strict translation of one language to another). Benson & Heidish, *supra* Note 72, at 313, 318 (1995) (discussing the process approach or a more holistic approach to thinking and writing in another language).

⁸³ Connor, *supra* Note 72, at 28, 29. The Sapir-Whorf hypothesis, which is also known as the Whorfian hypothesis, originated with Edward Sapir in 1951; his student, Benjamin Whorf, developed the hypothesis that “native language influences and controls thought.” *Id.* at 28-29. Linguists and psychologists have leveled frequent criticism at this “strong” hypothesis. *Id.* Beginning in the 1990’s, however, psychologists have resurrected a weaker version of the Sapir-Whorf hypothesis as one concerning “language performance rather than a linguistic hypothesis about language competence (the native speaker’s conscious knowledge of language and its grammar).” *Id.*

⁸⁴ References to the English language in this article are intended primarily as references to Anglo-American English. It should be noted, however, that linguistic research has revealed “numerous differences between spoken and written modes of American and British English” and “other ‘native’ Englishes (e.g., Canadian, Australian, and New Zealand English” as well as nonnative varieties of English norms.” Connor, *supra* Note 72, at 16.

dictates present-orientation, but Whorf (1956) made a similar observation about the Hopis, whose language also lacks a future tense. The Hopi people use statements of intentions to refer to future events; and Hopi behavior, like Trukese, displays qualities of present-orientation. Americans, using English with its far more developed future tense, aim toward the near future, stress planning, and project the future in making decisions.⁸⁵

The “subject-verb-object syntactic form” of the English language also requires that speakers “constantly represent causality.”⁸⁶ When, for instance, the sentence contains no subject, structural rules of English assume a subject, with “*it*” frequently referencing the missing subject, “as in, *It happened one night*. The implication is that ‘happenings’ do not simply occur on their own” and that a causal event must be present.⁸⁷ “In its conception of action and events, English is an actor-action-result model, and tends to suggest that perception of this universe and what happens in it.”⁸⁸ The very structure of the English language, therefore, cognitively “suggests the question ‘What caused that?’”⁸⁹

It is, thus, important for those of us who teach these ESL students to understand that legal analysis in the U.S., which incorporates its own logical structure, adds another layer of cultural logic upon a language which itself incorporates a causal structure or logical organization.⁹⁰ In some other

⁸⁵ Milton J. Bennett, *How Not to Be a Fluent Fool: Understanding the Cultural Dimension of Language*, in *New Ways in Teaching Culture* 16, 19 (Alvino E. Fantini ed., TESOL 1997 (adapted from *How Not to Be a Fluent Fool: Understanding the Cultural Dimension of Language*, 27 *The Language Teacher* 9 (1993)). The Micronesian Islands of Truk (also known as the Truk Islands) are located in the western Pacific Ocean east of the Philippines and north of the equator. The American Heritage Dictionary of the English Language 1140, 1919 (3d ed. 1992). Hopi reservation land is located in northeast Arizona. *Id.* at 871.

⁸⁶ Bennett, *supra* Note 85, at 19-20. The author cited another unique aspect of the Trukese language—a single word, “araw,” is used to indicate the color blue and green. *Id.* at 17. The author and teacher realized that in addition to teaching these students English, he “was also teaching them how to experience something (the difference between blue and green) that they did not experience using their own language.” *Id.*

⁸⁷ *Id.* at 19.

⁸⁸ *Id.* at 20 (concluding that the “actor-action-result pattern is very useful for conceptualizing mechanics, business, and much of science.”)

⁸⁹ *Id.*

⁹⁰ Ramsfield, *supra* Note 12, at 175-177. Ramsfield explains,

languages, such as Japanese, the syntactical structure does not incorporate a causality requirement; events or “happenings” can simply occur.⁹¹ Other languages, including Chinese, predispose speakers “toward perceiving complementary relationships” rather than “lineal chains of causes and effects.”⁹²

Although thought patterns may differ from culture to culture due, in part, to the structure of language within each culture, this difference is not presented to either imply or assert that the American English language structure of social perception is superior to or more sophisticated or more complex than any other structure.⁹³ Linguistic differences as reflected in different status markers in different languages illustrate this point.⁹⁴

Some Asian languages incorporate an “elaborate system of second person singular (*you*)” and “variable forms of *I* to indicate relative status,” which indicates “a more acute experience of status difference than does American culture, where English provides only one form of *you*.”⁹⁵ European cultures often fit somewhere between the complex Asian structure and the singular American structure with two forms of *you*, again indicating a

In the U.S. legal discourse community, analytical paradigms are often implicitly, not explicitly defined. Further, all these paradigms assume certain cultural preferences and innate features of the discourse community. U.S. lawyers often prefer moving from general information to specific information, that is, from the legal principle or rule through analogical reasoning to a conclusion about how the rule applies to specific facts. This deductive approach, mixed with analogical thinking, dominates most memos and briefs.

Id. at 175. See also Laurel Currie Oates & Anne Enquist, *The Legal Writing Handbook: Analysis, Research, and Writing* 823-876 (4th ed. 2006). This legal writing textbook contains an entire section entitled “*Legal Writing for English-as-a-Second-Language Students*.” *Id.* It also contains a chart, “*Contrasting Rhetorical Preferences*,” which spans 12 pages and compares U.S. legal writing conventions with Chinese, Japanese, Korean, French, Spanish, Arabic, and Russian conventions. Other textbooks devoted entirely to ESL law students include Jill J. Ramsfield, *Culture to Culture: A Guide to U.S. Legal Writing* (2005); Nadia E. Nedzel, *Legal Reasoning, Research, and Writing for International Graduate Students* (2004); Mark E. Wojcik, *Introduction to Legal English: An Introduction to Terminology, Reasoning, and Writing in Plain English* (2d ed. 2001).

⁹¹ Bennett, *supra* Note 85, at 20.

⁹² *Id.*

⁹³ Benson & Heidish, *supra* Note 72, at 327.

⁹⁴ Bennett, *supra* Note 85, at 18.

⁹⁵ *Id.*

different experience of status than in the U.S.⁹⁶ Legal educators should be aware of this potential for differences in perspective based upon culture that ESL students may bring to their understanding of English in a U.S. law school classroom.

A second assumption law schools may erroneously entertain is that these students, who frequently have extensive legal experience in other countries before entering LL.M. programs in the U.S., will “catch on” or “catch up.” Again, available research establishes that even students who are “technical experts” in a field prior to enrolling in advanced degree programs in their field in the U.S., need training in or exposure to sociolinguistic and cultural norms, which can only be acquired through training in reading U.S. texts, creating or writing documents common in the U.S., and instruction in and exposure to U.S. graduate school classroom conventions⁹⁷:

Regardless of how knowledgeable nonnative speakers may be about discipline-specific content areas, they may not be able to effectively communicate that knowledge, either in speaking or writing, because of their lack of familiarity with more general communicative patterns in U.S. academic and work environments. One of the communicative environments most unfamiliar to many ESL students

⁹⁶ Different representations of objects and space are reflected in the different counting systems contained in different languages. *Id.* Again, American English contains a single way to count, e.g., “one, two, three, etc.” *Id.* In contrast, both the Japanese and Trukese language incorporate different systems of counting and both languages count people using “a set of words different from all others used for objects.” *Id.* Other differences exist:

In American English, things can be either *here* or *there*, with a colloquial attempt to place them further out *over there*. In the Trukese language, references to objects and people must be accompanied by a location marker that specifies their position relative to both the speaker and the listener. Again, we assume that Trukese people experience “richer” space than do Americans, whose language does not provide as many spatial boundary markers and for whom space is therefore more abstract.

Id.

⁹⁷ Schneider & Fujishima, *supra* Note 71, at 4. The phrase, “technical expert,” is used in the literature in this field to denote “non-native speakers of English who are adults in graduate-level programs, who have developed relatively high levels of expertise in specific content areas.” Benson & Heidish, *supra* Note 72, at 314.

when they arrive to study in the United States is, in fact, the American classroom.⁹⁸

Research also demonstrates that if ESL students are not provided basic training in reading, writing and other classroom conventions, they will revert to learning strategies that mirror their native learning style.⁹⁹ One problem with this approach is that their prior educational system, and socio-cultural background, which influence thinking and thought process, also influence study habits and learning strategies.¹⁰⁰

Over the past decade or more, comparative or cross-language studies and reading studies have developed a “connectionist view of reading and writing” as skills that should be taught together to ESL students to discourage translation from one language to another.¹⁰¹ Many ESL composition researchers have turned to first-language composition research to advocate teaching the process approach to writing in order to induce ESL students to take a holistic approach to writing in another language.¹⁰² Researchers assert that “teaching writing as a manageable and changeable process can be a

⁹⁸ Benson & Heidish, *supra* Note 72, at 325. For a general discussion of educational practices in different countries, see *Understanding Your International Students: An Educational, Cultural, and Linguistic Guide* (Jeffra Flaits, et. al., eds. 2003).

⁹⁹ Schneider & Fujishima, *supra*, Note 71, at 15-16. Learning style for purposes of this article “is the particular approach by which a student tries to learn.” R.R. Jordan, *supra* Note 81, at 95. “Learning strategies” for language learners include “specific actions, behaviors, steps, or techniques . . . used by students to enhance their own learning”; beginning in 1975, researchers in the field have studied “the learning strategies of good language learners.” Schneider & Fujishima, *supra* Note 71, at 14, 15. These language learning strategies include: memory strategies, cognitive strategies, compensation strategies, metacognitive strategies, affective strategies, and social strategies. *Id.* at 15.

¹⁰⁰ R.R. Jordan, *supra* Note 81, at 95. Individual personality variables also influence learning style and, in turn, learning strategies. *Id.*

¹⁰¹ Benson & Heidish, *supra* Note 72, at 315-316 (commenting that although research is expanding in the areas of “linguistics, reading, and writing skills,” there are “widely divergent practices in experimental methodology that provide results that, by design, are at best difficult to compare and, at worst fundamentally flawed”).

¹⁰² *Id.* at 318. The process approach generally divides writing into steps: “(1) prewriting, with its planning, researching, analyzing, and organizing functions; (2) writing preliminary drafts of the legal document; and (3) editing, revising, and polishing the drafts.” Jo Anne Durako, et. al, *From Product to Process: Evolution of a Legal Writing Program*, 58 U. Pitt. L. Rev. 719, 723 (1997). For further discussion of the process approach to the writing classroom, see also *infra* Note 181.

powerful idea for many ESL” students; the problem, however, for writing teachers “in getting ESL composition students to adopt a broader view of writing as process is in finding ways to loosen their grip on the focus on the written product and its form, that which is so often viewed as the immediate measure of success in many writing classes.”¹⁰³ A process approach can also help these students to focus upon and critically assess the cultural differences in terms of their first language and their prior learning environments and learning strategies.¹⁰⁴

An ESL student’s ability to write in English may also be affected by how much writing training the student has had in the student’s native language prior to enrolling in U.S. LL.M. programs.¹⁰⁵ U.S. educators, who are immersed in a legal culture that places great emphasis on formal written communication, simply may not think to ask this very important question about these students’ writing backgrounds.¹⁰⁶ In some other cultures, however, legal writing may be reserved “for only the most official court proceedings; in still other cultures, written advice to clients “may be short and conclusion-centered.”¹⁰⁷ Additionally, some legal cultures may not place a high priority on proofreading because, for instance, a “flawless presentation” is not expected from attorneys.¹⁰⁸

Beyond writing training, learning strategies and study habits, ESL students struggle with classroom conventions. For instance, research has shown that the educational systems of different cultures vary widely, and “[c]lassroom talk is deeply embedded in culture.”¹⁰⁹ Different cultural expectations regarding appropriate behavior in the classroom include: when and how frequently a student is expected to participate in classroom discussions, whether the teacher is respected as the authority or questioned or

¹⁰³ Benson & Heidish, *supra* Note 72, at 317, 318. The authors caution that the idea of writing as a process must be consistently reinforced throughout writing courses. *Id.* at 318.

¹⁰⁴ Benson & Heidish, *supra* Note 72, at 318-319.

¹⁰⁵ *Id.* at 319.

¹⁰⁶ See *supra* Note 14 and accompanying text. We know that generally J.D. students with strong writing backgrounds perform well in a legal writing class. Susan R. Daley, *Linking Technology to Pedagogy in an Online Writing Center*, 10 *Legal Writing* 181, 182-183 (2004).

¹⁰⁷ Ramsfield, *supra* Note 12, at 163.

¹⁰⁸ *Id.*

¹⁰⁹ Connor, *supra* Note 72, at 23; G. Hull, et. al., *Remediation as a Social Construct: Perspectives from an Analysis of Classroom Discourse*, 42(3) *College Composition and Communication* 299, 301 (1991).

challenged, and how much feedback students should expect from their teacher.¹¹⁰

These students may bring to a U.S. law school classroom differing ideas about what approach to learning is valued. For instance, some ESL students believe a “methodical and precise” approach to studies is more important than are intellectual curiosity and critical thinking.¹¹¹ As such, an ESL student may have difficulty navigating the U.S. educational culture and the value it places upon questioning authority and individual opinion.¹¹²

In fact, students from collectivist ideological cultures can experience great difficulty in their attempts to adapt to U.S. linguistic and rhetorical conventions, which value individualism; for example, a native speaker of Chinese, from Taiwan, who enrolled in a graduate program in the U.S. in international public administration, explains his struggle in “redefining” himself and his reaction to his English composition and literature teachers’ directives “to just ‘write what *you* think’ and ‘be yourself’”:¹¹³

By such redefinition I mean not only the change in how I envisioned myself, but also the change in how *I* perceived the world. The old “I” used to embody only one set of values, but now it had to embody multiple sets of values. To be truly “myself,” which I knew was a key to my success in learning English composition, meant *not to be*

¹¹⁰ *Id.* For example, one researcher described classroom behavior in typical Indonesian university English classes as

extremely informal. The students have considerable respect for their teachers, but university English classes are regarded as a ritual in which the participants have ritually prescribed roles. The teacher is ‘active, respected, ineffective’, and the student is ‘passive, respectful, inattentive’. In other words, students spend a great deal of the time ignoring the teacher and talking to each other.

R.R. Jordan, *supra* Note 81, at 99.

¹¹¹ R.R. Jordan, *supra* Note 81, at 99 (citing “[t]he mismatching of expectations by students and academic staff” as a “recurring theme in research reports”).

¹¹² Diane Belcher & George Braine, *Introduction*, in *Academic Writing in a Second Language: Essays on Research and Pedagogy* xx (Diane Belcher & George Braine eds., 1995). The authors note that although this graduate student views the change as “welcome,” others experience the process as a cultural conversion and a loss of self. *Id.* at xx-xxi.

¹¹³ *Id.* at xx. Although this student speaks of change through “redefining” himself, “becoming an insider in Anglophone academia does not require cultural conversion.” *Id.* at xx-xxi. Instead, students can experience “an enlargement of identity” rather than a change. *Id.* at xxi.

my Chinese self at all. That is to say, when I write in English I have to wrestle with and abandon (at least temporarily) the whole system of ideology which previously defined me in myself. . . . I had to put aside an ideology of collectivism and adopt the values of individualism.¹¹⁴ (Emphasis in original).

This student perspective sends the powerful message to those who teach ESL students: 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.

ESL students should be further encouraged to critically assess the “complex and dynamic social and historical [cultural] scene” within which they acquire their first language and the different social and historical traditions of the environment in which they learn to use another language.¹¹⁵ As an illustration, one author and writing teacher explained the importance of her struggle growing up during the Cultural Revolution in 1950’s China

¹¹⁴ *Id.* The student, Zhang, enrolled in the graduate degree program at the Monterey Institute of International Studies in Monterey, California. Schneider & Fujishima, *supra* Note 71, at 5-6. Zhang was 30 years old, held a B.S. degree in agricultural economics from a university in Taiwan, and had studied English for the required six years for “two to four hours a week, in grades 7-12.” *Id.* at 6. In his studies in the U.S., however, Zhang did not meet the minimum grade requirements and was dismissed after one year. *Id.* A study of students from Hong Kong noted cultural differences in their attitudes toward the classroom and in particular, toward lectures. R.R. Jordan, *supra* Note 81, at 96. The authors concluded that these students, whose “education was firmly based on ‘those Chinese historical, cultural, and traditional philosophical patterns broadly referred to as ‘Confucianism,’” exhibited the following attitudes: respected the authority of the lecturer, believed the lecturer should never be questioned, placed a positive attitude “on effacement and silence,” and also emphasized a “group orientation to learning.” *Id.* For these students, accustomed to collaboration and group problem-solving, independent study may be difficult. *Id.* at 100.

¹¹⁵ Min-zhan Lu, *From Silence to Words: Writing as Struggle*, in *Negotiating Academic Literacies: Teaching and Learning Across Languages and Cultures*, 71, 82 (Vivien Zamel & Ruth Spack eds. 1998).

where she learned and spoke only Standard Chinese in school and then shifted to learning English outside of school and speaking only English at home:

As I think about what we might do to complicate the external and internal scenes of our students' writing, I hear my parents and teachers saying: "Not now. Keep them from the wrangle of the marketplace until they have acquired the discourse and are skilled at using it." And I answer: "Don't teach them to 'survive' the whirlpool of crosscurrents by avoiding it. Use the classroom to moderate the currents. Moderate the currents, but teach them from the beginning to struggle." When I think of the ways in which the teaching of reading and writing as classroom activities can frustrate the development of students, I am almost grateful for the overwhelming complexity of the circumstances in which I grew up. For it was this complexity that kept me from losing sight of the effort and choice involved in reading and writing with and through a discourse.¹¹⁶

Moreover, unlike graduate students in other disciplines, a graduate law student is a "technical expert" in the law of another country and, particularly in the case of law students from civil law countries, does not carry this technical expertise as a foundation to the study of law in the U.S.¹¹⁷ In fact, the assumptions about law that the foreign-educated law student may bring to the U.S. law school classroom are often at odds with and counterproductive to learning a Western or U.S. form of legal analysis.¹¹⁸ Of course, not all foreign-educated LL.M. students will focus on U.S. law in their LL.M. studies, but all of them will be studying law in a U.S. classroom subject to cultural and legal conventions unique to this country and its legal system.¹¹⁹

¹¹⁶ *Id.* at 83.

¹¹⁷ For a definition of the phrase, "technical expert," see *supra* Note 97. In contrast, the LL.M. students for whom English is a second language are unlike "[s]tudents in masters or doctoral programs in fields such as art, history, chemistry, mathematics, engineering, or medicine" who "often have been exposed to the vocabulary, norms, and expectations of the fields as undergraduates or through prerequisite courses." Brostoff, Sinsheimer, & Ford, *supra* Note 11, at 140.

Ramsfield, *supra* Note 12, at 186 (footnotes omitted).

¹¹⁸ Brostoff, Sinsheimer, & Ford, *supra* Note 11, at 139 (describing an international LL.M. student who is a lawyer in another country as a "novice in terms of U.S. law"). See also *supra* Note 23.

¹¹⁹ For a description of the different LL.M. programs available to international students, see *supra* Notes 51-55 and accompanying text.

To the extent that the law schools are aware of these students' needs, a third pragmatic, and perhaps even fatalistic, reason may explain why some law schools omit this fundamental coursework from LL.M. program requirements: these schools may assume that significant improvement requires more than the limited one-year these students spend in residence in the U.S.¹²⁰ It is certainly unreasonable "to expect that any ESL student will master all of the skills necessary within a single semester or even a year."¹²¹ The goal, however, should be to provide these students with the most fulfilling educational experience possible for them within the available time-frame and to prepare them for the next step in their careers.

It is important for legal educators "to learn more about the wider social contexts in which students [will] function when they leave" U.S. law schools so as to enable students to understand "the discourse that they must somehow become conversant in" and navigate.¹²² According to available research "the typical student in graduate programs today is a practitioner rather than a scholar."¹²³ The student is also more likely to "gravitate toward transaction work as opposed to litigation."¹²⁴ Additionally, only a small number of these students will remain in the U.S. working at U.S. law firms.¹²⁵

¹²⁰ There is support in the legal literature for this perspective:

[T]here is a limit to what can be done for a foreign student who has a fundamentally different perception of the role and operation of law. Many foreign lawyers will inevitably be confused by their inability to clearly and systematically relate their newly acquired American legal experiences to their past legal training. There is much sense in the remark that the Continental lawyers' "adjustment difficulties cannot be eliminated. They can only be reduced."

Trakman, *supra* Note 43, at 528-29 (quoting Mirjan Damaska, *A Continental Lawyer in an American Law School: Trials and Tribulations of Adjustment*, 116 U. Pa. L. Rev. 1363, 1378 (1968)).

¹²¹ Mark Wojcik, *Designing Writing and Research Courses for International Students*, 14/2 Persps. 84, 84 (2006). In fact, English "language mastery at the level expected in U.S. law practice could easily take five or six years to achieve, and even then only with sustained and intensive instruction." *Id.*

¹²² Belcher & Braine, *supra* Note 112, at xxii-xxiii.

¹²³ Silver, *supra* Note 7, at 156.

¹²⁴ Silver, *supra* Note 58, at 1077. The author consulted "approximately 300 foreign lawyer LL.M. graduates working in New York between 1999 and 2000, ... hiring partners at a number of U.S.-based elite international firms," and other sources. *Id.* at 1043, 1062, 1078.

¹²⁵ Silver, *supra* Note 58, at 1041. The reason that so few of these students are hired by U.S. firms is likely twofold: (1) "the position of strength enjoyed by U.S. law firms in the international market for legal services," and (2) the fact that "the business

Many of these students, however, will work either in English-language environments or in non-English language environments in which their work may focus on English-language-based legal issues.¹²⁶

ESL students, therefore, desire exposure to U.S. legal English, and legal culture, including the norms of the various documents produced in different practice areas and the litigation system and appellate process.¹²⁷ The simple fact that large numbers of these students will not be working in U.S. law firms, does not mean that they should not be taught how to draft litigation or transactional documents unique to the U.S. legal system.¹²⁸ Again, the students need to be taught about this aspect of U.S. legal culture because they 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.¹²⁹ Moreover, teaching these ESL students to critically read these documents and to construct them incorporates the “connectionist view” of the benefits of teaching reading and writing together to second-language learners.¹³⁰

of many U.S. firms that participate in the international legal market continues to be dominated by domestic matters, where the benefit of a foreign legal approach is ambiguous.” *Id.* Another reason that these students are not hired by U.S. law firms is that most of them are ineligible to sit for a state bar exam. *See supra* Note 57.

¹²⁶ The value of a U.S. LL.M. degree was explained by one author:

For many, the importance of U.S. clients in their home countries convinces them of the need to acquire a U.S. law experience and the skills that go along with it. Learning English, particularly legal English, is crucial, as is having some exposure to U.S. culture. Foreign lawyers from diverse countries—including Latin America, Europe, and Asia—report that at least half of the work in their home country is performed in English.

Silver *supra*, Note 7, at 156. *See also* Ramsfield *supra*, Note 12, at 158 (predicting that international law practice will “dominate legal practice” in this century).

¹²⁷ Silver, *supra* Note 7, at 156.

¹²⁸ Thus, arguments against a legal writing course for these reasons miss the point. *See, e.g.,* Peter B. Friedman, *Symposium on Working Together: Developing Cooperation in International Legal Education: What are Legal Writing Professors Doing as International Legal Educators?*, 20 Penn. St. Int’l L. Rev. 43, 45-46 (2001).

¹²⁹ Benson & Heidish, *supra* Note, 72, at 327.

¹³⁰ *See supra* Notes 101-104 and accompanying text.

It is also possible that law schools are simply unwilling or unable to invest the resources necessary to provide such a course for these students.¹³¹ Given the relatively small number of foreign-educated students enrolled in a given law school's LL.M. program, a staffing or resources issue seems unlikely.¹³² At only a small number of law schools are J.D. and international LL.M. class sizes comparable; in fact, many U.S. law schools enroll significantly fewer than fifty international LL.M. students annually.¹³³ Consequently, even though legal writing courses are generally taught in

¹³¹ Eichhorn, *supra* Note 22, at 112-113. One author, who is also the Dean of Pericles, the American Business and Legal Education Project in Moscow, interviewed more than 50 attorneys at 18 Western law firms in Moscow and a dozen other lawyers working for "international and foreign not-for-profit organizations." Marian Dent, *Designing an LL.M. Curriculum for Non-Western-Trained Lawyers*, 13/2 Persp. 87, 88 (2005). She summarized their views on the need for legal writing education for the ESL LL.M. students:

Writing is a skill often ignored in LL.M. programs. The partners and associates I interviewed said that they would structure an LL.M. program with a greater emphasis on analytical writing skills. Those who had taken the trouble to look at applicant transcripts were chagrined that many LL.M. graduates had no writing courses on their transcripts, or had only an "Intro to American Law" course, in which the students had touched on writing and analysis in the context of writing for law school exams, rather than in the context of professional work. The interviewees commented favorable on the few LL.M. programs that contained strong writing components.

Id. at 89. Evaluations completed at the conclusion of courses and programs by these international students often rank very high the courses providing an opportunity to practice legal writing and analysis and gain instructor feedback. Student evaluations are on file with the author and available from students who completed an intensive summer course in legal research and writing at the International Law Institute in Washington, D.C., some of whom entered LL.M. programs in the U.S. after completion of this summer course.

¹³² See Silver, *supra* Note 7, at 149-150. Some law schools admit as few as five international students to an LL.M. program in a given year. *Id.*

¹³³ *Id.* (surveying LL.M. programs for international students and finding "the average number of students in the graduate programs at these thirty-five law schools [responding to the survey] for the 2003-04 academic year was approximately fifty-four students"). *But see* Peter B. Friedman, *supra* Note 128, at 45-46 (arguing that "the resources devoted to legal writing programs for J.D. students are by and large stretched far too thin for most schools, ... to even consider offering anything resembling the standard first-year legal writing program to foreign lawyer LL.M. students"). The LL.M. program budget, however, should be separate from the J.D. budget and not all legal writing professors have experience with ESL students.

smaller sections than are doctrinal courses, the average enrollment in these programs translates into a need for a handful of additional faculty.¹³⁴

As to the statistic showing a greater percentage of law schools requiring a course in the U.S. legal system than requiring a basic legal writing course, law schools may be motivated by yet another reason—a desire driven in part by the competitive market for these students—schools may fear alienating potential applicants who are frequently experienced, sophisticated attorneys seeking an advanced or specialized program of study.¹³⁵ If officials at U.S. law schools believe such “rudimentary” training in writing is unwanted, such a belief may, in fact, reflect a bias against legal writing as a valued core component of the law school curriculum and as a discipline.¹³⁶ In short the failure to provide coursework in legal writing to these ESL students may be reflective of the longstanding status issues faced by legal writing professionals in this country.¹³⁷

¹³⁴ The ABA Sourcebook on Legal Writing Programs 173-174 (2d ed. 2006) recommends that “the number of writing students per full-time professor in any semester should not exceed 35 to 45” and that the student faculty ratios in advanced writing courses may be optimally as low as 12-15. On average, in the 2006-2007 academic year a fulltime legal research and writing faculty member at a U.S. law school “taught an average of 44.36 entry-level students.” Association of Legal Writing Directors, Legal Writing Institute 2007 Survey Results vi, available at <http://www.lwionline.org> (hereinafter [*Survey Results*]).

¹³⁵ It is true that many of these “attorneys-cum-students” have practiced law or have “worked in legal jobs for at least a year, sometimes many years before entering an international LL.M. program at a U.S. law school.” Elizabeth L. Inglehart, *Teaching U.S. Legal Research Skills to International LL.M. Students: What and How*, 15/3 Persps. 180, 180 (2007) (commenting in the context of the need for research training that their experience is different and they are in need of training).

¹³⁶ Kathryn M. Stanchi & Jan M. Levine, *Gender and Legal Writing: Law School's Dirty Little Secrets*, 16 Berkeley Women's L.J. 1, 4-5 (2001) The authors point out that in U.S. law schools,

[t]he legal writing course, which requires intensive labor by teachers and an individual focus on each student, is taught by faculty accorded the lowest status in the institution. Almost all of them are severely underpaid, and many of them are discouraged from (or forbidden from) teaching at the school for very long.

Id. But see *infra* Note 145 and accompanying text (discussing entering LL.M. student aversion to legal writing training).

¹³⁷ Stanchi & Levine, *supra* Note 136, at 5-6 (arguing that law schools' creation of this “second track” and its treatment of legal writing faculty, who are predominantly women, amounts to intentional gender discrimination). See also

Whatever the underlying motivations of these law schools, both the employers of foreign-educated LL.M. students and these students are frequently frustrated by the failure of U.S. LL.M. programs to provide sufficient training in legal writing and legal analysis. An extensive survey of Western lawyers working in Moscow revealed their desire that these students have more extensive training in legal writing, and traditional legal analysis:

“Writing, writing, and more writing” was the comment I heard from a former managing partner of one large firm’s Moscow office in response to a question about what LL.M. programs should include. This was the most frequently expressed idea among all the attorneys interviewed. They mean, particularly, analytical writing and the ability to put together memoranda and client letters explaining complex nuances of law.¹³⁸

This same survey group was not enthusiastic about LL.M. students learning U.S. legal research because these ESL students would not be expected to perform the research, except “in a pinch.”¹³⁹ The hiring partners and law firms wanted legal writing courses that “emphasized logical analysis

Eichhorn, *supra* Note 22, at 113 (citing Rideout & Ramsfield, *supra* Note 22, at 41-48 (arguing that while teaching methods in legal writing courses “have become more sophisticated, institutional investment today in terms of funding and administrative support for writing programs remains relatively low. Issues of status, salaries, and course credit still dog the legal writing field and put its practitioners on the defensive”). National survey results of legal writing programs and professionals for 2007 reveal that legal writing professionals continue to receive lower pay and less job security than do professors in traditional doctrinal areas. Survey Results, *supra* Note 134, at 51-60.

¹³⁸ Dent, *supra* Note 131, at 88 (2005). “[M]ore than 50 partners and senior associates from 18 Western law firms ... as well as about a dozen lawyers working on rule-of-law development for international and foreign nonprofit organizations” were surveyed. *Id.* The author conducted oral interviews and also requested that attorneys answer written survey questions. *Id.* & n.3. Managing partners at large law firms in Moscow were the subject of the survey, most of whom were not Russian, but were originally from the U.S. *Id.* In addition to surveying employers, surveying the students during and after the completion of a legal writing course will provide useful information. Mark E. Wojcik, *Designing Writing and Research Courses for International Students*, 14/2 *Persps.* 83, 85-86 (2006) (asserting that these “[s]tudents will have a good idea of their own needs, their own learning styles, and the effectiveness of our teaching; we should use that knowledge to benefit future students”).

¹³⁹ Dent, *supra* Note 131, at 89. If research is taught, these attorneys “want computerized research emphasized.” *Id.* at 90.

... more than grammar or syntax.”¹⁴⁰ They believed “that language usage works itself out over time” and preferred that LL.M. programs focus on the analysis taught in core first-year doctrinal courses in J.D. programs.¹⁴¹ These employers found the advanced LL.M. courses failed to develop analytical skills.¹⁴² It should be noted that in their opinion, traditional legal writing courses could teach “only a small portion” of the analytical skills the employers believed these students needed and that an optimal approach would involve providing legal writing in tandem with these other core courses.¹⁴³

Other surveys of international students who have completed LL.M. programs reveal similar concerns with English communication skills overall, including vocabulary (both legal and general), reading and briefing cases, outlining, exam-writing, and a request that “legal writing be taught in greater depth.”¹⁴⁴ Many of these students, however, are not enthusiastic about enrolling in a U.S. legal writing course before they begin their LL.M. studies. As one professor explained:

As civil lawyers, they can't fathom the research component of a common law lawyer's work until they see it. They don't realize the full value of the writing until they get a grasp on the importance of judicial precedent. Some are here on scholarships or subsidies from their home law firms. I had a student from Baker's Bogotá office last year. It was clear that they thought she was partner material. She was here to do an LL.M. in I.P, and they were underwriting large parts of the endeavor. The partner in charge of her practice group told her to look for a legal research and legal writing course, which is why she landed in my class. She wound up loving the course—again not realizing all she didn't know. It was only at the end that she told me that she'd been more or less forced to take the course by her office. If

¹⁴⁰ *Id.* at 89.

¹⁴¹ *Id.* at 90.

¹⁴² *Id.*

¹⁴³ *Id.* These same attorneys expressed a desire that the LL.M. students be graded on par with J.D. students so that the prospective employers could evaluate the students' “credentials against a standard they [the employers] know.” *Id.*

¹⁴⁴ Brostoff, Sinsheimer, and Ford, *supra* Note 11, at 149-150. Student evaluations submitted by a colleague who teaches a summer Legal Writing and Research Workshop for international students who may be entering U.S. LL.M. programs reveal that the students prefer learning legal writing and are not all that interested in learning U.S. legal research skills. The evaluations are on file with the author and are available.

it had not been on their dime, she admitted, she probably would not have enrolled. She was very glad she had.¹⁴⁵

For students who have completed LL.M. programs, the emphasis is upon learning more English, specifically legal English, and they also desire more “exposure to U.S. culture.”¹⁴⁶ As a part of this culture these students desire greater interaction with U.S. law students; ESL students often describe their law school experience as “extremely isolating,” finding it “very difficult” to interact and socialize with U.S. students.¹⁴⁷

These ESL students also desire a specific kind of interaction with U.S. lawyers; they want legal jobs.¹⁴⁸ U.S. law firms, however, hire only a small percentage of these students.¹⁴⁹ Some law schools have responded to this issue by offering internships for their ESL LL.M. students during the summer after they complete the LL.M. coursework.¹⁵⁰ An internship provides another opportunity for these students to experience U.S. legal culture and to immerse themselves in reading and writing documents common in a particular practice area of law.

The internship should, however, not substitute for coursework in legal

¹⁴⁵ See *supra* Note 7 and *infra* Note 152 for a discussion of how the survey information for this article was compiled. In addition to consulting websites and sending written survey requests to law schools, individuals who teach legal writing and research to the ESL students enrolled in the LL.M. programs were interviewed. This statement was made by a one of the professors with a great deal of teaching experience in this field at several different law schools. This same professor asserted that generally the students without much practice experience place greater emphasis on the LL.M. as a credential. She found that experienced attorneys from other countries were more inclined to be focused on particular practice areas and substantive coursework rather than the credential or degree. See Silver, *supra* Note 7, at 159, 160, 164 (asserting that these students choose a particular LL.M. program based on U.S. News & World Report ranking, subject matter of the program, financial aid from the law school, and connection to the law school).

¹⁴⁶ Silver, *supra* Note 7, at 156. The author interviewed graduates of U.S. LL.M. programs. *Id.* at 143.

¹⁴⁷ Brostoff, Sinsheimer, & Ford, *supra* Note 11, at 150. Belcher and Braine, *supra* Note 112, at xiii (discussing the need of ESL instructors to understand the isolationist tendencies of ESL students and to view such a student broadly as “language learner” or as “specialist-in-training” and to communicate with other instructors about the student’s progress so as to save a student from academic failure).

¹⁴⁸ Silver, *supra* Note 58, at 1041.

¹⁴⁹ *Id.*

¹⁵⁰ Silver, *supra* Note 7, at 159-160.

writing and reading. Instead, it should provide a continuation of the educational experience so that the educational experience remains a meaningful opportunity for these students to immerse themselves in the English language and in U.S. legal culture.¹⁵¹ The internship should also be a continuation of the ESL students' education and not a substitute for it because the students, their employers, and the experts who research in this area, all agree that the more opportunities for legal writing that are provided, the more these students will learn and gain from their time studying at U.S. law schools. Accordingly, an assessment of the core legal writing courses required at the U.S. law schools that recognize this need follows.

III. Assessing Legal Writing Courses for Foreign LL.M. Students

The following law schools require ESL students to enroll in legal writing courses:

1. Albany	25. Michigan State
2. American University	26. Northwestern University
3. University of Arizona	27. Ohio State University
4. University of Baltimore	28. University of Pittsburgh
5. Boston University	29. St. John's University
6. Brigham Young University	30. St. Louis University
7. University of California, Hastings	31. St. Mary's University
8. California Western University	32. University of San Diego
9. Catholic University	33. University of San Francisco
10. University of Connecticut	34. SUNY Buffalo
11. University of Denver	35. Stetson University
12. Duke University	36. Suffolk University
13. Duquesne University	37. Temple University
14. Fordham University	38. Touro
15. Georgetown University	39. Tulane University
16. George Washington University	40. University of Tulsa
17. University of Georgia	41. Vanderbilt University
18. Golden Gate University	42. Wake Forest University
19. Hamline University	43. Washington and Lee
20. Hofstra University	44. University of Washington
21. University of Houston	45. Washington University
22. John Marshall, Chicago	46. Widener University
23. Louisiana State	47. Yeshiva University (Cardozo)
24. Loyola University, Chicago	

¹⁵¹ See *supra* Notes 78 – 100, 109 – 121 and accompanying text.

As part of the research for this article, a written survey was circulated to individuals who teach legal writing to the ESL LL.M. students at each of these law schools.¹⁵² The response-rate (approximately forty-nine percent) was not nearly as high as is the response rate to the annual national survey of legal writing programs for J.D. students, and the analysis that follows is not intended to provide an exacting overview of the legal writing courses offered at U.S. law schools to international ESL students.¹⁵³ Rather, as the first of its kind, this survey is intended to initiate a dialogue about legal writing courses for these students.¹⁵⁴

The survey responses revealed that just as the LL.M. programs and program requirements vary widely, so too do the required legal writing courses. For example, the credit-hours range from a one-credit course at three law schools to a four credit course spanning two semesters at three law schools, with thirteen law schools requiring these students to enroll in a two-credit legal writing course and another four schools requiring them to enroll in a three-credit course.¹⁵⁵

¹⁵² Individuals who teach the legal writing and research components of the LL.M. program at each of these schools were sent a survey. Twenty-three of 47 (49%) responded. The written survey questions were modeled after the Association of Legal Writing Directors, Legal Writing Institute Annual Survey of legal writing programs. Seven respondents also sent syllabi and one individual also sent a detailed, 22-page document which included a syllabus and a detailed statement of “course objectives.”

¹⁵³ The 2007 survey of legal writing programs for U.S. J.D. students was circulated to “all AALS Member law schools and AALS Non-Member Fee-Paying schools, and the University of Windsor in Ontario, Canada.” Survey Results, *supra* Note 134, at i. The response rate exceeded 92%. *Id.*

¹⁵⁴ *Id.* It should be noted that unless someone responding to the written survey explained what portion of the legal writing course was devoted to writing and what portion was devoted to research, respondents were not specifically asked to make this distinction. Although more detail as to this breakdown would be helpful, the answers to the questions about research training provide some indication that significantly less time is devoted to legal research training in the legal writing course. In fact, a number of respondents indicated that legal research is a separate one-credit course.

¹⁵⁵ The written survey information is available and on file with the author. *See supra* Notes 7 and 152 for an explanation of how the information was collected. Two of the three law schools requiring four-credit hours of legal writing instruction structured the course as consisting of three credits in the fall and one credit in the spring semester. Included in this list of three is a law school listing the course on its website as consisting of “3-4” credits, which was interpreted as meaning that the credit-hours varied from year to year. One of the law schools requiring only one credit-hour in legal writing instruction also requires that students with TOEFL scores

Different schools reported using different textbooks, but these same schools uniformly reported using either textbooks exclusively designed for ESL students and sometimes supplementing the textbooks with teaching material or using textbooks designed for U.S. J.D. students supplemented with teaching material developed for these ESL students.¹⁵⁶ Other variables include how much research is taught and the type of research instruction: some law schools, for example, offer instruction limited to computer research while the vast majority teach both manual and computer research.¹⁵⁷

This latter statistic, in particular, appears to suggest that U.S. law schools are out of touch with what employers of these ESL students and the students themselves desire and need from an LL.M. education.¹⁵⁸ To the extent that the research training is incorporated into the legal writing course as an alternative method of teaching legal analysis and problem-solving in the U.S., it provides another means with which to immerse these students in the U.S. legal culture and its analytical conventions.¹⁵⁹ The research process

below 580 enroll in an “English for Lawyers” course. At another school requiring one credit-hour of legal writing instruction, the students are also required to enroll in a three-credit course entitled “Fundamentals of U.S. Law,” with two credits described as a “classroom component” and one credit devoted to both legal writing and legal research.

¹⁵⁶ The text most frequently used at these schools is Nadia Nedzel, *Legal Reasoning, Research and Writing for International Graduate Students* (2004) (ten—43 % of those responding—schools reporting use of this textbook). Several law schools reported using texts not frequently used in a J.D. legal writing course, including Toni Fine, *American Legal Systems: A Resource and Reference Guide* (1997); Morris L. Cohen & Kent C. Olson, *Legal Research in a Nutshell* (2007); and Charles F. Abernathy, *Law in the United States* (2006). It should be noted that some of the textbooks adopted for ESL legal writing purposes although traditionally used in teaching legal writing to J.D. students, incorporate topics that are useful in the ESL legal writing classroom. For example, some of the textbooks used at several law schools include sections devoted to client letters, demand letters, and exam writing. *See, e.g.*, Richard K. Neumann, Jr. *Legal Reasoning and Legal Writing: Structure, Strategy, and Style* 279-298 (5th ed. 2005). This same text also includes a chapter devoted to client interviewing, *id.* at 79-83, in addition to the standard Appendix of sample documents and the information about English language usage, grammar, and punctuation. *Id.* at 451-536.

¹⁵⁷ Twenty of the twenty-three law schools responding to the written survey request reported teaching both manual research and computer research training, including both Westlaw and LEXIS. Only three law schools (14%) reported teaching only computer research.

¹⁵⁸ *See supra* Notes 125-130, 138-149 and accompanying text.

¹⁵⁹ *See supra* Notes 12-14, 78-81, 90, 117-119 and accompanying text.

itself is an opportunity for reading and thinking in English. It provides an opportunity for ESL students to experience the organizational and analytical norms associated with U.S. law. Through research, the ESL student is also exposed to additional primary authority, its conventions, and the vast array of secondary legal authority that synthesizes, criticizes, and moves U.S. law toward organic change.¹⁶⁰ Exposure to this critical, “lawmaking” function of secondary authority reinforces the value the U.S. legal educational system and law places upon individual opinion, critical thinking, and questioning authority.¹⁶¹

The important question for professors who spend time teaching manual research is whether at least some of this time might be better spent focused on other reading, writing, and thinking activities. For example, several of the law schools reported incorporating a comparative focus into all writing assignments to illustrate the comparative common and civil law traditions. This method of instruction has a dual purpose: it not only introduces ESL students to substantive law, but it also 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. The professor who uses a comparative focus as an underlying theme to the legal writing course also gains something: he or she is enlightened about the cultural background these students bring to a U.S. law school classroom and encouraged toward awareness of U.S. legal cultural norms.¹⁶²

Academic support represents another area in which different practices exist at these law schools with a surprising number providing no access to a writing specialist experienced in teaching writing to ESL students.¹⁶³ At the

¹⁶⁰ Secondary authority is an important part of the legal system. Jaime S. Dursht, Note, *Judicial Plagiarism: It May Be Fair Use, But Is It Ethical?*, 18 *Cardozo L. Rev.* 1253, 1290-1291 (discussing the U.S. Supreme Court’s inclination to cite to secondary authority primarily in the form of law review articles).

¹⁶¹ See *supra* Notes 111-113 and accompanying text.

¹⁶² For a discussion of the interdependence of language and culture and the issues for ESL students, see *supra* Notes, 71-96, 101-104, 115-119, and accompanying text.

¹⁶³ A total of 11 (48 % of all schools responding) other schools reported either providing access to a writing specialist within the law school who has expertise in ESL issues. Several schools reported that although students are advised to consult with the writing specialist, very few students take advantage of this opportunity. Of the 11 law schools providing a writing specialist for these ESL students, two law schools reported that the student must request individual help, and the ESL specialist is a part of the larger university and not within the law school or a part of the legal writing course.

other end of the spectrum, one law school reported providing an ESL coordinator who met weekly with the students in groups to work with them on their English conversation skills and to serve as a writing “coach.”¹⁶⁴ Given the fact that all of the law schools surveyed reported providing individual conferences and also the fact that many of the legal writing professors have extensive experience working with ESL students, the schools may have concluded that a separate ESL writing specialist was not needed or was not an optimal use of teaching resources.¹⁶⁵ Nonetheless, it is critically important for ESL students to have opportunities for individual, one-on-one work with a teacher; in fact, studies document individual instruction as a key element of feedback to second language writers.¹⁶⁶ To the extent that some law schools provide more opportunities for one-on-one feedback and instruction, the students who utilize the opportunities are better served.

These required legal writing courses for international LL.M. students also exhibited many consistent features. For instance, twenty-one of the twenty-three law schools responding to the written survey (91 %) reported that they are offering a course uniquely tailored to ESL students and not simply requiring that these students enroll in the first-semester, first-year, J.D. legal writing course.¹⁶⁷ The vast majority of schools also integrate the

¹⁶⁴ See written survey available and on file with the author.

¹⁶⁵ For example, one professor reported

I have a master’s degree in Linguistics, with a specialization and certification in teaching English as a Second and Foreign Language. I worked in the field for nearly ten years before going to law school, as instructor, course designer, and materials developer. I also worked extensively in curriculum development for ESP (English for Specific Purposes). In those years, the special purpose was business (I worked for Arthur Andersen most of this time). Here, the special purpose is obviously law.

Survey response available and on file with the author.

Fourteen of the 23 schools responding to the written survey reported requiring at least one individual conference with the legal writing professor. The remaining law schools conducted voluntary individual conferences with these students, which one respondent described as “endless.”

¹⁶⁶ Opportunities for individual conferences provide one of the three general types of feedback appropriate for ESL student writers: “peer evaluation, conferences (i.e. teacher-student interaction) and written comments (by the teacher).” R.R. Jordan, *supra* Note 81, at 168.

¹⁶⁷ Only one law school actually reported that these ESL students were required to enroll in a legal writing class with first-year J.D. students and the reason given was that the school enrolls as few as two or three ESL LL.M. students annually. The other school required that these students enroll in the same course as is offered to U.S. J.D.

research training into the legal writing instruction.¹⁶⁸ Again, this integration indicates that research instruction is not intended solely to teach a lawyering skill, but instead, is offered as an opportunity to learn the way U.S. lawyers approach legal analysis and as an opportunity for reading different legal texts.¹⁶⁹

Most of these law schools also include instruction in citation format and plagiarism in the legal writing course.¹⁷⁰ As to this latter subject, the concept of plagiarism and citation usage varies from culture to culture, due in part to differing views about respect for the written word and for individual ownership of that written expression.¹⁷¹ Instruction in conventions unique to

students, but these students are placed in separate sections consisting only of ESL LL.M. students. In this situation, the LL.M. legal writing class size is often smaller than is the J.D. legal writing course.

¹⁶⁸ Sixteen law schools reported integrated teaching of research with seven reporting separate training and even separate courses at some of the law schools.

¹⁶⁹ See *supra* Notes 12-14, 78-81, 90, 117-119 and accompanying text.

¹⁷⁰ Only two of the 23 law schools reported teaching solely the ALWD system of citation with an overwhelming majority, 16 teaching the Bluebook and five teaching both systems.

¹⁷¹ R.R. Jordan, *supra* Note 81, at 100. “[A]ccusations of plagiarism have been the strongest charge laid against Chinese writers.” Joel Bloch & Lan Chi, *Comparison of the Use of Citations in Chinese and English Academic Discourse*, in *Academic Writing in a Second Language: Essays on Research and Pedagogy* 231, 238 (Diane Belcher & George Braine eds. 1995). Researchers have explored the possible reasons for the problem in the U.S. for Chinese writers:

Underlying many of the assumptions about how Chinese writers use source texts is the assumption that the concept of plagiarism is understood differently in China than in the West, perhaps as a result of a different concept of what constitutes private property (e.g., Matalene, 1985). Therefore, plagiarism could be considered an expert strategy in Chinese writing, reflecting how composition has been traditionally taught in China. Matalene (1985) refers to the use of Confucian teachings in the civil service examinations as exemplifying places where rote memorization and plagiarism are considered acceptable. Thus it might appear that Chinese rhetoric does not place the same taboo on plagiarism that Western rhetoric does. (Citations in original).

Id. (citing C. Matalene, *Contrastive Rhetoric: An American Writing Teacher in China*, 47 *College English* 789-808 (1985)).

U.S. law schools is critical due in large part to the serious sanctions that attach to plagiarism at U.S. law schools.¹⁷²

Again, what is a seemingly routine and mechanical process to U.S. lawyers and professors of law is quite foreign to many ESL students whose cultural and educational backgrounds create different expectations regarding the use of authority and attribution.¹⁷³ Of course, in order to effectively teach these conventions, the legal writing professor should have some awareness of the different conventions the ESL students bring to the U.S. law school classroom so that the professor can assist the students to reflect upon and compare their prior writing experiences with U.S. expectations and ultimately to adapt their practices.¹⁷⁴

Another common feature of these legal writing courses is that they are graded; in fact, a majority of schools responding to the survey reported that the students were awarded grades in the legal writing course and these grades were included in the students' overall grade point average.¹⁷⁵ Awarding grades, which are incorporated into a student's overall GPA sends these students a critical signal that the legal writing component of their LL.M.

¹⁷² Deborah R. Gerhardt, *Plagiarism in Cyberspace: Learning the Rules of Recycling Content with a View Towards Nurturing Academic Trust in an Electronic World*, 12 Rich. J. L. & Tech. 10 (2006) (discussing the serious consequences of plagiarism).

¹⁷³ Laura A. Heymann, *The Birth of the Authonym: Authorship, Pseudonymity, and Trademark Law*, 80 Notre Dame L. Rev. 1377, 1443 & n. 210 (2005) (describing plagiarism as "a particularly Western concept, given the more elevated status in other cultures for tradition and replication").

¹⁷⁴ *Id.* Of course, plagiarism is not unique to second-language writers and is sometimes "a compensatory strategy used both by novices just entering a field and experts well established in their disciplines" due to the pressure they experience "to conform to the linguistic standards of an academic community." *Id.* Foreign students for whom English is a second language may plagiarize not as a result of failing to understand cultural expectations, but because they too experience this pressure to conform "when they are expected to produce high-quality research papers in a language they may have barely mastered." *Id.*

¹⁷⁵ Sixteen of twenty-three reported awarding grades with one law school awarding grades that are not included in the students' overall grade point average and six law schools reporting that the legal writing course was administered on a pass / fail basis or some similar system. A professor at one of these latter five law schools explained: "The only grade recorded on the transcript is High Pass, Pass, or No Credit. 'Shadow' numerical grades and a GPA based on the same mean and curve as the rest of the class are given to the students via email for their information, or for optional use on applications elsewhere, etc."

coursework is important and is valued equally with their other LL.M. coursework. Twenty of the twenty-three law schools responding to the written survey also reported providing opportunities for professor feedback and student response to that feedback in the form of required submission of first drafts and rewriting of some assignments, with fifteen of these schools reporting that grades are assigned to first draft documents.¹⁷⁶

As would be expected, there are important differences separating legal writing courses for ESL students from legal writing courses for U.S.-educated J.D. students. In the ESL legal writing classroom, more time is devoted to writing mechanics, spoken English, and legal English.¹⁷⁷ The writing assignments represent another difference. As with U.S. J.D. students, the office memorandum is routinely assigned.¹⁷⁸ In the ESL legal writing classroom, however, client letters also frequently form the basis of the writing assignment, and, when other documents are assigned, they are more likely to include litigation-oriented persuasive writing so as to present both predictive and persuasive writing to these students who, unlike J.D. students, will generally not enroll in a second semester of legal writing.¹⁷⁹ The variety of

¹⁷⁶ Two of these fifteen schools assigned either a set number of points to all students who made a good faith effort on their draft document or assigned “✓+” or a “✓-” on the draft document. One law school reported that “[r]ewrites are required only where the first draft is of such poor quality that it demonstrates a failure to learn and apply concepts.”

¹⁷⁷ With the exception of the single law school that placed these students in a legal writing course with U.S. J.D. students, the law schools offered the ESL legal writing students a greater focus on mechanics—grammar, punctuation and sentence structure—and more focus on spoken English. This was the case even when these students were required to enroll in a separate class in Legal English. Thirteen of the 23 law schools reported a greater focus on comparative law issues within this legal writing course in comparison to the J.D. legal writing course. Ten law schools also reported that the legal writing course for these ESL students involved more one-on-one work with the legal writing professor than did the J.D. legal writing course.

¹⁷⁸ Twenty of 23 schools reported assigning the predictive or objective office memorandum or an abbreviated form of this document. One professor explained,

I focus on the legal memorandum because this is the type of document our students will be expected to prepare in their summer internships, they are very unlikely to be asked to assist with an appellate brief, drafting legislation, or drafting wills or similar documents. I focus on the writing and analytical skills they will need to succeed in their substantive classes (which are different for each student), and in their internships.

¹⁷⁹ Other documents commonly assigned in the ESL legal writing classroom included client letters and trial memoranda (ten law schools). Five law schools

assignments also offers these students an opportunity to learn more about different aspects of the U.S. legal culture and its conventions.

In a small number of these specialized legal writing courses for ESL students, assignments include one or more case briefs and seminar paper proposals; because many of these students from civil law countries find difficult the concept of precedent and its malleability, exercises are occasionally assigned, which break the analytical process down. For example, students are sometimes required to identify a legal rule from a group of case holdings and then to state the rule both broadly and narrowly.¹⁸⁰ These smaller writing assignments once again provide these students with more concrete information about the U.S. common law system, and they also encourage a process approach to legal writing, which in turn, encourages reflection upon prior writing experiences and cultural differences.¹⁸¹ These assignments additionally accommodate these second-language learners who generally read and compose in English more slowly than do their J.D. counterparts.

Class time is also allocated somewhat differently in the ESL classroom than in the J.D. legal writing classroom with a greater percentage

reported assignments in drafting contract provisions or documents. Several schools assigned a mixture of abbreviated forms of all of these documents, some of which are not graded and some of which are graded assignments.

¹⁸⁰ One professor described the unique features of the legal writing class for international LL.M. students as follows:

The workload is more difficult, and I expect the students to progress more rapidly. I also give a practice exam in class in the fourth week, based on cases we have read and discussed. This gives the students practice with a written legal analysis, while preparing them for issue-spotting, raising and disposing of all issues, etc., which most of their professors will require them to do on exams. This exam format is new to our students and they seem to benefit from this early exam experience. These exams are not graded. I mark them up extensively, and we discuss them in class and individually at their first conferences.

¹⁸¹ For a general definition of the process approach to writing, *see supra* Notes 102-104 and accompanying text. The process approach recognizes “that it is through the process of analyzing and writing that a student constructs meaning.” Ellie Margolis & Susan L. DeJarnatt, *Moving Beyond Product to Process: Building a Better LRW Program*, 46 Santa Clara L. Rev. 93, 98-99 (2005). The role of the legal writing professor in a process-based legal writing course is “to intervene in the writing process, giving substantial attention to individual students’ drafts through critiques and conferences on work in progress.” *Id.* at 99.

of time spent lecturing.¹⁸² The issue for the ESL legal writing teacher is again whether some of this lecture time would be better spent on other less passive activities for the students. One professor responding to the survey, an experienced ESL teacher who holds advanced degrees in the area, commented: “I try very hard not to dominate the course, since I already speak English, and am already a common law lawyer. If I didn’t watch it, I could easily spend 50% of the time lecturing.”¹⁸³

While it may appear that the professor is dominating classroom time, most legal writing courses balance the lectures with, on average, more in-class writing assignments, which include constructing case briefs and writing answers to essay examination questions. Additionally, ESL legal writing students from collectivist cultures are comfortable working collaboratively on group activities, which provide opportunities for connecting reading and writing activities, for peer assessment (which itself includes practice speaking English), and for breaking the writing assignment down into a process.¹⁸⁴

For example, they spend class time reading classmates’ written products, offering suggestions for revision, and writing group outlines and group case briefs in preparation for some of their individual writing assignments.¹⁸⁵ These students are also expected to give formal presentations to their legal writing classmates, but rather than engage in the first-year J.D.

¹⁸² More than one-half of the schools could not estimate how course time is allocated due to individual professor discretion. For the remaining eleven schools, lecture and student question and answers comprise the bulk of class time with one law school reporting as much as 70% of class time devoted to the professor lecturing (with four reporting 50% of class time consisting of professor lecture).

¹⁸³ For an example of an assignment based on a professor’s lecture, *see infra* Note 184.

¹⁸⁴ One professor offered an assignment related to the lecture, which is focused on teaching listening skills:

Another “teaching” activity in which I engage is to have pre-lecture reading assignments. This is for the particular benefit of those students whose listening skills are weak. I post pre-reading materials online every week, and then lecture based on these notes. “Based on” is the operative word, however. I do not just read them, which would defeat the linguistic purpose (listening skill improvement), to say nothing of putting them to sleep, like any other audience. I sometimes send out post-lecture notes. ... This way, I am sure they have access to the information covered in class.

¹⁸⁵ Not surprisingly, five law schools of ten responding to this question reported devoting 25% or more of class time to in-class writing exercises and in-class group exercises.

student oral argument, the ESL students are much more likely to make a report on a particular topic or area of law.¹⁸⁶ In addition to practice with formal spoken English, the oral presentation combines reading, writing, and organizing activities.

ESL legal writing courses share common features with the required legal writing courses offered to first-semester, first-year J.D. students in terms of the number of credit-hours allocated to the legal writing course and the substance of the course. As an example, both manual and computer research are generally taught during the first-semester J.D. legal writing course, the office memorandum is a focal point of the writing assignments, individual conferences are required, and grades are awarded for written assignments, including initial drafts of documents.¹⁸⁷

The entering J.D. student may also have a different cultural understanding of the concept of citation in the sense that legal citation provides more than attribution.¹⁸⁸ For a U.S. lawyer, the citation represents authority for the statement; the language the entering J.D. student is now manipulating is the law.¹⁸⁹ The student must further “learn that the manner by which lawyers make reference to legal authority is conventionalized, even considered a language unto itself.”¹⁹⁰ Plagiarism, and its ramifications, also holds potentially new meaning for the law student who may have previously understood plagiarism as “cheating,” but now must learn the ethical

¹⁸⁶ A total of seven law schools reported requiring that these students engage in an oral argument based upon either a pretrial motion (two law schools), a trial motion (two law schools), or an appellate brief (three law schools). Eleven law schools of the twenty-three responding required presentations, including a presentation sequence at one law school described as follows: “They choose between two role-play activities on the same facts and law as their interoffice memorandum: (1) Meeting with the client; and (2) Office meeting to discuss legal issues they identify from cases they research, read, and brief; and they also must engage in a negotiating activity.”

¹⁸⁷ As a point of comparison, the 2007 national Survey Results of legal research and writing programs at U.S. law schools for J.D. students reveal the following: it is common at U.S. law schools to require a first-semester two-credit legal writing course, these law schools overwhelmingly integrate teaching research with teaching writing, assessment is in the form of grades included in the students’ GPA, and the Bluebook method of citation is taught more frequently than is the ALWD Citation Manual. Survey Results, *supra* Note 134, at 7, 8, 11, 16.

¹⁸⁸ Marie A. Monahan, *Towards a Theory of Assimilating Law Students into the Culture of the Legal Profession*, 51 *Cath. U. L. Rev.* 215, 222 (2001).

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

responsibilities of an attorney and the consequences in terms of a license to practice law.¹⁹¹

The non-traditional minority students entering U.S. law schools today share a great deal with the foreign-educated ESL LL.M. students. A number of these minority students are also ESL students.¹⁹² As a result, they “may be less comfortable and less confident in their communication skills; the skills that are essential to succeed in law school.”¹⁹³ As a consequence, these students, like the international LL.M. students, frequently experience the same feelings of isolation from other J.D. students.¹⁹⁴ These issues of acculturation and feelings of isolation can diminish their likelihood of success.¹⁹⁵ The overall result is a lack of access for minorities to a U.S. legal education.¹⁹⁶

All entering U.S.-educated J.D. students, thus, possess a cultural and language barrier that is not unlike those that face ESL students. One professor explained the painful transition for the students and the professor’s response:

¹⁹¹ Steven K. Berenson, *Education Law: What Should Law School Student Conduct Codes Do?*, 38 Akron L. Rev. 803, 820 (2005) (pointing out that “citation to authority in the legal education and practice context certainly provide applications of plagiarism principles that are likely to be completely unfamiliar to many new law students”).

¹⁹² Boylan, *supra* Note 25, at 23.

The presence of ESL students in a J.D. program is far from unusual; indeed, in many parts of the United States, it will be rare for a legal writing professor to have a class that does not include an ESL student. Where students have been in the United States for some time, the fact that a particular student speaks English as a second language may not even be known to the admissions office, which may look only at the student’s undergraduate institution.

Sourcebook on Legal Writing Programs, *supra* Note 6, at 202-203.

¹⁹³ *Id.*

¹⁹⁴ *Id.* See *supra* Note 147 and accompanying text. Law schools should also be attuned to other minority students who are not ESL students, but who also bring a different cultural context to the J.D. classroom in U.S. law schools. *Report of the Oregon Supreme Court Task Force on Racial / Ethnic Issues in the Judicial System*, 73 Or. L. Rev. 823, 922-923 (1994).

¹⁹⁵ Boylan, *supra* Note 25, at 23.

¹⁹⁶ Leslie G. Espinoza, *Empowerment and Achievement in Minority Law Student Support Programs: Constructing Affirmative Action*, 22 U. Mich. J.L. Reform, 281, 281 (1989).

I used lectures, writing assignments, exercises, in-class work, group work, extensive written feedback, self-evaluations, peer review, and one-on-one sessions. I knew my students were learning, but I was not completely satisfied with the process or their progress. My students were not either. The students, many of whom had never before received a bad grade or had trouble grasping new concepts, were increasingly frustrated and upset. They were not only mad about the grade, but mad about always feeling like they were groping around in the dark. It was fairly easy to teach the students to understand and properly use words and concepts such as holding, ruling, concurring opinion, or persuasive authority. What was not working well was their transition from college writing to legal writing. The students could memorize the new legal terminology, but they could not easily apply and translate the concepts into their writing.¹⁹⁷

This professor's statement captures both the professor's and the student's frustration as the student undertakes the cultural shift that is so difficult for many entering law students.¹⁹⁸ In response to the J.D. student's need to learn cultural conventions unique to law and to the language of the law, professors have developed teaching techniques and strategies similar to those utilized in the ESL legal writing classroom. For example, legal writing professors often incorporate familiar topics into their first-year, J.D. writing course, such as literature, to illustrate legal concepts and to help these students

¹⁹⁷ Marcia Canavan, *Using Literature to Teach Legal Writing*, 23 *Quinnipiac L. Rev.* 1, 3-4 (2004).

¹⁹⁸ In fact, this frustration may be increasing for both student and teacher. The following studies indicate that entering J.D. students may be less prepared than ever before in terms of both reading and writing skills: the 2003 National Commission Report on Writing, the 2004 National Endowment of the Arts Survey, and the 2004 National Assessment of Adult Literacy Survey. Cathaleen A. Roach, *Is the Sky Falling? Ruminations on Incoming Law Student Preparedness (and Implications for the Profession) in the Wake of Recent National and Other Reports*, 11 *Legal Writing* 295, 295-296 (2005). Thus, the legal writing course is increasingly important for entering J.D. students, whose problems in using language become more like those faced by entering ESL students. Some scholars believe that entering law students think differently because their learning environment, technology (their culture) has influenced them in some negative ways and that they utilize "law-byte" reasoning and analysis. Molly Warner Lien, *Technocentrism and the Soul of the Common Law Lawyer*, 48 *American U.L. Rev.* 85, 87, 88 (1998) ("[i]nsensate use of computers, both in legal education and practice, is altering the way we think about and use the law").

as they learn to become conversant in the new language and culture of the law.¹⁹⁹

Legal writing professors also utilize the process approach and other pedagogical approaches, such as social construction, which demonstrate an awareness of the similar cultural shift these students face, and the need to assist these students to transition more fluidly into the study of the law.²⁰⁰ Legal writing professors also incorporate classical rhetoric into the legal writing classroom²⁰¹ Professors frequently supplement the process approach with simulations of how attorneys approach legal analysis and legal writing.²⁰² Sample documents, often times used as teaching tools to augment the process approach, offer opportunities to implement a connectionist view of reading and writing within this new culture.²⁰³

Rewriting or revision, sometimes incorporating peer review, plays a fundamental role in many first-semester, first-year, legal writing courses.²⁰⁴ Legal writing professors also recognize the benefits to J.D. students when in-class exercises or collaboration are incorporated into the classroom, including

¹⁹⁹ Canavan, *supra* Note 197, at 2.

²⁰⁰ For a discussion of the process approach, *see supra* Notes 102 and 181 and accompanying text. Social construction theory is premised on the assumption that we “write within and are influenced by the sometimes unarticulated rules of the discourse communities” we enter. Greason, *supra* Note 25, at 68 Table 3. *See generally* Linda L. Berger, *A Reflective Rhetorical Model: The Legal Writing Teacher as Reader and Writer*, 6 *Legal Writing* 57, 80-81 (2000). This form of “[c]ontemporary rhetoric is an outgrowth of the concept from modern philosophy that reality is not ‘fixed,’ but rather is ‘constructed.’” Michael R. Smith, *Rhetoric Theory and Legal Writing: An Annotated Bibliography*, 3 *J. ALWD* 129, 138-139 (2006).

²⁰¹ Classical rhetoric includes the works of “Aristotle (384 B.C.-322 B.C.); Cicero (106-43 B.C.); and Quintilian (35-95 A.D.)” *Id.* At 130. Classical rhetoric is used to teach modes of persuasion: *logos* (logic), *pathos* (emotion), and *ethos* (credibility). *Id.* At 131. Classical rhetoric is also used to teach analytical organization, *dispositio*. *Id.* At 133.

²⁰² Judith B. Tracy, “*I See and I Remember; I Do and Understand*”: *Teaching Fundamental Structure in Legal Writing Through the Use of Samples*, 21 *Touro L. Rev.* 297, 300-315 (describing a curriculum designed to reflect and teach how lawyers approach analysis).

²⁰³ *Id.* at 299 (offering sample documents as a method of teaching “students to identify and apply a structure to their legal writing and adapt it for future assignments”).

²⁰⁴ Susan M. Taylor, *Students as Revisionaries: Or, Revision, Revision, Revision*, 21 *Touro L. Rev.* 265, 281-287 (2005) (describing the benefits of peer review in a first-year legal writing class).

“the reduction of writing anxiety, overcoming some of the difficulties students encounter in ‘getting started,’ ... and establishing a norm of critical self-evaluation.”²⁰⁵

Even though these two groups of students, U.S. J.D. students and ESL LL.M. students, undergo a similar cultural transition and have similar needs, they have been addressed separately both in the classroom and in the legal literature or scholarship, and as a result, the strategies and pedagogy for J.D. students and ESL LL.M. students have evolved separately. Given a deeper appreciation for the shared cultural context between teacher and J.D. student, the legal writing professor can more comfortably and self-assuredly draw upon the J.D. students’ prior experiences to aid in their transition than with ESL students. This difference may account, in part, for the relative paucity of available scholarship focusing on ESL students.

Although the cultural context may be more complicated with the ESL students, the goal remains the same: to encourage student self-awareness regarding prior writing conventions and expectations and to compare these prior experiences with U.S. legal conventions and expectations as the students immerse themselves in U.S. legal education. Additionally, available research in the humanities can and should be consulted as well as the substantial body of existing legal scholarship exploring writing pedagogy for the similarly situated, yet different, J.D. students. This material will not be a perfect fit for the ESL legal writing student, but is a rich source for all who teach in this area.

Conclusion

Those who teach ESL students are engaging in wonderful, creative work, which should be shared with the larger legal writing community. This article is designed to begin a conversation through scholarship in this area. This scholarship will encourage legal educators to become more aware of the influence of culture and language on their understanding of the law and they will, in turn, be better teachers. Through this scholarship, all will gain—ESL students, J.D. students, professors, and scholars. As legal writing professors encourage both ESL and J.D. students as they make their transition, it would be wise to follow Bob’s advice to Charlotte in the film, “Lost in Translation”: “Keep writing.”²⁰⁶

²⁰⁵ *Id.* at 283.

²⁰⁶ *See supra* Note ***.