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Comparative Legal Rhetoric

Lucille A. Jewel

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Comparative Legal Rhetoric

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ABSTRACT

This paper theorizes a new discipline, *comparative legal rhetoric*, which can accomplish two important goals. First, in a society broken down by intractable polarization and win/lose dichotomies, comparative legal rhetoric identifies alternative, nontraditional and non-Western ways to communicate and persuade. How we talk is deeply connected to how we see the world. If we take a break from the win/lose argument structure that defines Western legal communication, we can uncover opportunities for understanding and healing. Second, a study of comparative legal rhetoric can generate cross-cultural understanding. This new discipline contains a trove of knowledge about how persuasion works in different cultures. Comparative legal rhetoric might also identify universal modes of persuasion, which would be useful knowledge for any law advocate.

In Part One of the paper, I briefly explain why the comparative study of legal rhetoric is important and how traditional legal rhetoric often fails to achieve justice and equality. In Part Two, I provide a foundational introduction to the feeder disciplines that inform the new discipline of comparative legal rhetoric—legal rhetoric, comparative law, comparative rhetoric, and comparative cognitive psychology. Part Three explores lessons that comparative legal rhetoric can teach, studying rhetorical practices located outside of mainstream U.S. culture, including Navajo legal rhetoric, Quaker rhetoric, restorative rhetoric, and citizen’s rhetoric. Studying and applying these new communication processes can help solve disputes in a way that fosters more empathy, equity, and justice.

TABLE OF CONTENTS

INTRODUCTION..... 3

I. Why and how to study comparative legal rhetoric..... 7

II. The foundations of comparative legal rhetoric..... 16

 A. Legal Rhetoric 16

 B. Comparative Law 19

 C. Comparative Approaches to Rhetoric..... 23

 i. Contrastive Rhetoric..... 23

 ii. Comparative Rhetoric 28

 a. An Initial Survey of
 Comparative Rhetoric..... 28

 b. The Critical Turn in
 Comparative Rhetoric..... 36

 c. Diasporic Rhetoric..... 42

 D. Comparative Approaches in Social Psychology 43

 E. East/West Takeaways for Legal Rhetoric..... 50

III. Specific Lessons on Alternative Processes and
Alternative Legal Rhetoric 52

 A. Anthropology and Ethnology..... 52

 B. Indigenous Rhetoric: Navajo Jurisprudence 57

 C. Micro-Rhetorics..... 71

 i. Quaker Rhetoric 72

 ii. Restorative Rhetoric..... 76

 iii. Citizen’s Rhetoric 83

CONCLUSION..... 86

Comparative Legal Rhetoric

INTRODUCTION

“Long time no see.”¹ This idiom perfectly captures the Covid-19 zeitgeist of social distance and isolation. Historically, how this phrase came into U.S. parlance is unclear. One etymological theory is that the phrase is a direct translation of the Mandarin Chinese phrase *hǎojiǔ bújiàn*, which literally translates to “long time no see.”² The phrase must have made its way into U.S. language as Chinese immigrants translated it to English. Although this informal idiom is familiar to most Americans, it is unusual in its syntax. Rather than emphasizing the *subject*, which is the norm for standard American English, it retains a *topical* emphasis, which is more common in Asian languages.³ “Long time no see” captures the essence of this paper, which delves into critical but comparative approaches to language and culture to theorize a new discipline, *comparative legal rhetoric*.

The other theory for “long time no see” is that it derives from an indigenous greeting that author William F. Drannan overheard and found humorous.⁴ In the early 1900s, Drannan wrote popular adventure tales, which exoticized his experience with indigenous people on the U.S. frontier.⁵ This particular explanation contains a troubling undercurrent, the idea that White Americans popularized the “long time no see” idiom as a joke made at the expense of indigenous persons.⁶ This anecdote surfaces another theme of this paper, which considers the problematic ways that Western scholars have compared different communication traditions and accordingly advocates for

¹ Lakshmi Gandhi, *Who First Said ‘Long Time, No See and in Which Language?’*, *Code Switch*, NPR.ORG (March 9, 2014 7:05 PM ET), <https://www.npr.org/sections/codeswitch/2014/03/09/288300303/who-first-said-long-time-no-see-and-in-which-language>.

² *Id.*

³ *See supra* notes 299-301 and surrounding text.

⁴ Gandhi, *supra* note 1.

⁵ Gandhi, *supra* note 1 citing William F. Drannan, *Thirty-One Years on the Plains and in the Mountains* (Rhodes & McClure 1900).

⁶ Tanya Trusler, *Is “Long Time No See” Offensive?, Inclusive and Exclusive Language*, ESL LIBRARY (December 6, 2018), <https://blog.esllibrary.com/2018/12/06/is-long-time-no-see-offensive/>.

a critical, self-reflexive comparison process that remains conscious of colonial and racial power dynamics.⁷

This paper's topic is timely. A comparative approach to legal rhetoric has the potential to help people come together and heal. 2020 and 2021 has been a time of disease, death, and division. Covid-19 kills all people, but the disease has been particularly devastating to marginalized communities with limited access to money, medicine, and a safe place to work. In addition, people of color, including George Floyd, Ahmaud Arbery, and Breonna Taylor, continue to be summarily gunned down with no one to answer for the bloodshed. We live in a polarized landscape infected with fake news and conspiracy theories, which teem in social-media echo chambers. On January 6, 2021, fomented by President Trump's pugilistic rhetoric, a mob of people stormed the Capitol in a frenzy, leaving five people dead. While big-tech squelched some of the most toxic alt-right rhetoric circulating on social media, the U.S. remains starkly divided. We have lost the ability to hear each other, to really listen and understand, even if we do not agree.

Now, there seems to be a clarion call to identify, resist, abolish, and/or repair all the institutional things that have brought us to this crisis moment. The old ways aren't working anymore. In several previous papers, I roundly critiqued traditional Western legal rhetoric for being nonresponsive to the needs of the people whose problems are being solved. I called for the comparative study of legal rhetoric as a discipline that might bring healing to our legal system. This paper moves from a negative moment of death and despair to a theory of hope and repair.

The Sapir-Whorf hypothesis asserts that patterns within a group's rhetoric shape that group's perception of reality.⁸ Language does not just voice an idea, it shapes an idea.⁹ If our rhetoric is not working well, what if there are other rhetorics, operating using different patterns of speech and thought, that could rejuvenate or renovate existing models (deductive logic, adversarial process, black/white outcomes)? Learning, and potentially

⁷ See *supra* notes 49-62 and 201-238 and surrounding text.

⁸ Robert B. Kaplan, *A Further Note on Contrastive Rhetoric*, 24 *COMMUNICATIVE Q.* 12, 12 (1976) (citing E. Sapir, *The Status of Linguistics as a Science* 5 *LANGUAGE* 207 (1929)) [hereinafter Kaplan, *A Further Note on Contrastive Rhetoric*].

⁹ *Id.* (citing BENJAMIN LEE WHORF, *LANGUAGE, THOUGHT AND REALITY* 212-214 (M.I.T. Press 1956)).

borrowing, from other rhetorical traditions might make the process of persuasive communication more caring and responsive.

Building along these lines, this paper theorizes that the new discipline of comparative legal rhetoric can accomplish two important goals. First, in a society broken down by intractable polarization and win/lose dichotomies, comparative legal rhetoric identifies alternative, non-traditional and non-Western ways to communicate and persuade. How we talk is deeply connected to how we see the world. If we take a break from the win/lose argument structure that defines Western legal communication, we can uncover opportunities for understanding and healing. Second, a study of comparative legal rhetoric can generate cross-cultural understanding. This new discipline contains a trove of knowledge about how persuasion works in different cultures. Comparative legal rhetoric might also identify universal modes of persuasion, which would be useful knowledge for any law advocate.

Thematically, this paper sits within two disciplinary traditions—(1) critical legal theories of society, race, gender, and other marginalized identities; and (2) legal rhetoric. First, this is an unabashedly *critical* paper. The old classical modes of persuasion (i.e. Aristotle’s syllogism) do not always work.¹⁰ Deductive logic has been used to directly further social and racial inequality,¹¹ and more recently, to slow down or obstruct robust legal remedies, animated by a progressive view of the collective good and aimed at eradicating inequality, “root-and-branch.”¹² I use the word critical in the

¹⁰ See *infra*, notes 21-28 and surrounding text.

¹¹ See, e.g., *Scott v. Sandford*, 60 U.S. 393 (1857); *Plessy v. Ferguson*, 163 U.S. 537 (1896); *Buck v. Bell*, 274 U.S. 200 (1927). I discuss all of these cases in my 2019 article, *Does the Reasonable Man Have Obsessive Compulsive Disorder?* 54 WAKE FOREST LAW REV. 1049 (2019) [hereinafter Jewel, *Reasonable Man*].

¹² This point is most clearly illustrated in jurisprudence relating to remedying racial discrimination in U.S. public schools. See *Green v. County School Bd.*, 391 U.S. 430, 441-42 (1968) (holding that busing was necessary to eradicate racial discrimination “root and branch”). The root and branch metaphor is telling. At this time, the Supreme Court was willing to enforce robust remedies to excavate the deep-seated structures responsible for race-based segregation in the U.S. public school system. In the 1970s, however, the Supreme Court pivoted away from a rhizomatic approach and began limiting the reach of federal remedies designed to equalize the educational experience for children, regardless of race or class. See *Milliken v. Bradley*, 418 U.S. 717 (holding that the Federal government

way that Dr. Cornel West uses it, as a theory “begins with social structural analyses [but] also makes explicit its moral and political aims.”¹³ I aim to cultivate a critical “demystifying” approach to legal rhetoric that exposes “the monolithic and homogeneous in the name of diversity, multiplicity, and heterogeneity.”¹⁴

Second, this is a paper is written within the discipline of legal writing, which is not often situated with critical theory. Critical theory, in particular Critical Race Theory (CRT), became highly influential legal education in the 1980s and 1990s.¹⁵ CRT came about at a time in U.S. intellectual history when there was a great debate over a Eurocentric approach to knowledge and learning, when many scholars argued that knowledge must be diversified to account for multiple cultural and racial perspectives.¹⁶ However, identity-based critique has not fully been embraced in the legal writing discipline in part because legal writing has not long been recognized as a bona fide discipline.¹⁷ This is because legal writing has long been relegated to the realm of the non-doctrinal, non-substantive, and non-tenure-track, where

cannot remedy educational discrimination that derives from de facto, rather than de jure causes) and *San Antonio Ind. School Dist. v. Rodriguez*, 411 U.S. 1 (1973) (holding that vast differences in public school funding that correlated with the racial makeup of school districts did not raise an equal protection violation because economic inequality does not create a suspect class and education is not a fundamental right).

¹³ Cornel West, *The New Cultural Politics of Difference*, 53 THE HUMANITIES AS SOCIAL TECHNOLOGY 93, 105 (1990).

¹⁴ *Id.*

¹⁵ See Lucille A. Jewel, *Silencing Discipline in Legal Education*, 49 TOL. L. REV. 657, 666-67 (2018) (discussing critical identity centered legal scholarship that emerged in the 1990s) [hereinafter Jewel, *Silencing Discipline*].

¹⁶ LEE MORRISSEY, *DEBATING THE CANON* 1-2 (2005) (describing the 1990s debate over what, if any, Western canonical texts should be studied in the humanities).

¹⁷ There have been, however, a few powerful critical approaches to teaching legal writing and legal rhetoric. See, e.g., Kathryn M. Stanchi, *Resistance is Futile: How Legal Writing Pedagogy Contributes to the Law's Marginalization of Outsider Voices*, 103 DICK. L. REV. 7 (1998); Charles R. Calleros, *In the Spirit of Regina Austin's Contextual Analysis: Exploring Racial Context in Legal Method, Writing Assignments, and Scholarship*, 34 THE J. MARSHALL L. REV. 281 (2000).

teachers were not expected to engage in scholarship.¹⁸ Legal writing teachers have not had the opportunity to engage in sharp and reflective critique in the same way that other law teachers have.

Despite this hierarchy in legal education, over the past twenty years, legal writing teachers and scholars have grown a discipline with its own pedagogical and scholarly traditions.¹⁹ One of those traditions is a reverence for classical, Western rhetorical forms.²⁰ While the point of this paper is not to dismantle and reject all forms of Western rhetoric and reasoning, I do argue that legal writing needs to be diversified and infused with other valuable approaches to reasoning and persuasion. This paper is a bird's eye picture of a new discipline that offers myriad avenues for scholarly inquiry. It assumes that further research and writing will be undertaken to develop the discipline.

In Part One of the paper, I briefly explain why the study of legal rhetoric is important and how traditional legal rhetoric often fails to achieve justice and equality. In Part Two, I provide a foundational introduction to the feeder disciplines that inform the new discipline of comparative legal rhetoric—legal rhetoric, comparative law, comparative rhetoric, and comparative cognitive psychology. Part Three explores lessons that comparative legal rhetoric can teach, studying rhetorical practices located outside of mainstream U.S. culture, including Navajo legal rhetoric, Quaker rhetoric and process, restorative rhetoric, and citizen's rhetoric. Studying and applying these new communication processes can help solve disputes in a way that fosters more empathy, equity, and justice.

I. Why Study Comparative Legal Rhetoric?

We should study comparative legal rhetoric because it has the potential to repair traditional legal rhetoric, which contains toxic elements. *In Gut Renovations: Using Critical and Comparative Rhetoric to Remodel How the Law Addresses Privilege and Power*, my co-authors and I vigorously argued that traditional legal rhetoric reproduces preexisting relations of

¹⁸ See generally, J. Lyn Entrikin et al., *Treating Professionals Professionally: Requiring Security of Position for All Skills-Focused Faculty Under ABA Accreditation Standard 405(c) and Eliminating 405(d)*, 98 OREGON L. REV. 1 (2020).

¹⁹ Jewel, *Silencing Discipline*, *supra* note 15, at 680-81.

²⁰ See generally, KRISTEN KONRAD ROBBINS-TISCIONE, *RHETORIC FOR LEGAL WRITERS: THE THEORY AND PRACTICE OF ANALYSIS AND PERSUASION* (2009); Michael Frost, *Introduction to Classical Legal Rhetoric: A Lost Heritage*, 8 S. CAL. INTERDISC. L.J. 613 (2013).

inequality.²¹ Accordingly, traditional legal rhetoric should be subject to a “gut renovation.”²² We argued that comparative legal rhetoric could be one approach for remodeling the law.²³ Traditional legal rhetoric uses deductive reasoning, often cast in the form of a syllogism, resulting in an analysis that tends to exclude context, especially context related structural forms of inequality and marginalized identities based on race, ethnicity, gender, or sexual orientation. Traditional legal rhetoric “descends from classical Western rhetoric, formulated in ancient Greece and Rome, with Aristotle being a predominant influencer.”²⁴ In the U.S. legal system, traditional legal rhetoric is generally rational, linear, logical, and dependent on clean-cut categories.²⁵ We attacked the sacred cow of Western rhetoric and the Western concept of “reason,” pointing out that both Aristotle and Plato embraced human hierarchy and inequality and approved of male domination, slavery, and elitist governance norms.²⁶ Both Aristotle and Plato believed that poor people, working people, women, and enslaved people did not have the requisite cognitive ability to engage in civic governance.²⁷ We then connected Greek notions of rhetoric and reason to the baldly racist notions

²¹ Elizabeth Berenguer, Lucille A. Jewel, and Teri McMurtry-Chubb, *Gut Renovations: Using Critical and Comparative Rhetoric to Remodel How the Law Addresses Privilege and Power*, 23 HARV. LATINX L. REV. 205 (2020) [Hereinafter Berenguer et al., *Gut Renovations*]; Jewel, *Reasonable Man*, *supra* note 11; Mary Campbell and Lucille A. Jewel, *Death in the Shadows*, 16 HASTINGS J. OF RACE & POVERTY 157 (2019); [hereinafter Campbell & Jewel, *Death in the Shadows*]; Lucille A. Jewel, *Neuro-Rhetoric, The Law, and Race: Toxic Neural Pathways and Healing Alternatives*, 76 UNIV. OF MARYLAND L. REV. 663 (2017) [hereinafter Jewel, *Neuro-Rhetoric, Race, and the Law*]; Lucille A. Jewel, *Old School Rhetoric and New School Cognitive Science: The Enduring Power of Logocentric Categories*, 13 LEG. COMMUNICATION & RHETORIC: J. ALWD 39 (2016) [hereinafter Jewel, *Categories*].

²² Berenguer et al., *GUT RENOVATIONS*, *supra* note 21.

²³ *Id.* at 206.

²⁴ *Id.*

²⁵ *Id.* (citing Jewel, *Categories*, *supra* note 21, at 47, 55).

²⁶ *Id.* at 207.

²⁷ See PLATO, REPUBLIC bk. IV (discussing the concept of the Philosopher King); Aristotle, *General Theory on Constitutions and Citizenship*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY, available at <https://plato.stanford.edu/entries/aristotle-politics/#ConCit>, archived at <https://perma.cc/3GZJ-BKYX> (discussing what types of person were best suited for governance).

held by enlightenment thinkers—John Locke, David Hume, Immanuel Kant, Voltaire, and John Stuart Mill.²⁸ Like Aristotle and Plato, these men believed that people of color were not capable of engaging in reason and were not capable of exercising the privileges of citizenship. This paper laid the foundation for how a critical and comparative approach to legal rhetoric might be able to accomplish legal problem-solving in a way that fosters more equality, more justice, and more empathy.

Studying comparative legal rhetoric may actually help develop collective thought patterns that counter the negative stereotypes found in traditional legal rhetoric. In *Neurorhetoric, Race, and the Law: Toxic Neural Pathways and Healing Alternatives*, I applied neuroscience theories to explore how embodied legal rhetoric causes toxic racial stereotypes and categories to become embedded in the human brain.²⁹ In this paper, I explained how rhetoric becomes embedded in the human brain.³⁰ When a person considers a thought pattern over and over again, we are left with a somatic marker in our brain.³¹ Thus, the common rhetorical strategy of repetition seems designed to help entrench a thought or conclusion in the brain.³² In terms of toxic racial categories, I illustrated how the “Welfare Queen” metaphor became an entrenched thought pattern in the 1970s and 1980s, where the American public came to associate single mothers of color with visual concepts of graft and fraud.³³ The Welfare Queen metaphor activated parts of the brain dealing with fear and disgust to cement a collectively held racial stereotype that negatively influenced public attitudes toward public assistance.³⁴

Because of legal rhetoric’s iterative and repeated nature (the language of precedential opinions and statutes is repeated, over and over), legal language retains a special power within our minds and bodies.³⁵ The

²⁸ *Id.* at 210-211 (citing CHARLES MILLS, *THE RACIAL CONTRACT* 59-60 (1999)).

²⁹ *See generally*, Jewel, *Neurorhetoric, Race, and the Law*, *supra* note 21.

³⁰ *Id.* at 671-72.

³¹ *Id.* (citing ANTONIO R. DAMASIO, *DESCARTES’ ERROR: EMOTION, REASON, AND THE HUMAN BRAIN* 173-75 (1994)).

³² *Id.*

³³ *Id.* at 677-78.

³⁴ *Id.*

³⁵ *Id.* at 680-81 (citing Ann Cammett, *Deadbeat Dads & Welfare Queens: How Metaphor Shapes Poverty Law*, 34 B.C. J.L. & SOC. JUST. 233 (2014)).

repetitive nature of legal rhetoric, such as the legal categories of alien,³⁶ vagabond,³⁷ or master-and-servant,³⁸ helps entrench these exclusionary concepts in the collective mindset. Embodied legal rhetoric is given further power because it is imbued with the power of the state (being pronounced guilty means that the state takes away your liberty). Legal language has the literal ability to make reality.³⁹ Metaphor and categories within culture can get inside one's head. But legal rhetoric can both get inside one's head and carry coercive consequences.

In *Death in the Shadows*, a paper that I co-authored with an art-historian, we delved into the law-culture-law cycle.⁴⁰ We supported our thesis that communication from outside law (such as art and literature) have a lot to tell us about law and—vice versa—the narratives we find in U.S. legal history have influenced U.S. culture.⁴¹ In this paper, we talked about a difficult subject, Jim Crow lynchings, and traced the practice through artwork and music created in the 1930s as well as the violent antebellum laws that existed prior to this terroristic practice. The point of this paper was to say that culture is relevant to law and law is relevant to culture, even if the connections are not immediately visible.

³⁶ See, e.g., *In re Arab Bank, PLC Alien Tort Statute Litig.*, 808 F.3d 144, 160 (2d Cir. 2015), as amended (Dec. 17, 2015), *aff'd sub nom. Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 200 L. Ed. 2d 612 (2018) (“[H]ere, there are aliens on both sides of the litigation.”). Coincidentally, President Biden has recently moved to remove the term alien from Federal law. Catherine E. Shoichet, *Biden Wants to Remove this Controversial Word from US Laws*, *CNN Politics*, CNN.COM (Jan. 21, 2021 2:13PM), <https://www.cnn.com/2021/01/21/politics/alien-biden-immigration-law/index.html>.

³⁷ See, e.g., *Matthews v. State*, 8 Md. App. 712, 713, 261 A.2d 804, 804 (1970) (Defendant was convicted of being a “rogue and a vagabond.”).

³⁸ See, e.g., *I.H. ex rel. Litz v. Cty. of Lehigh*, 610 F.3d 797, 801–02 (3d Cir. 2010) (“In Pennsylvania, only a ‘master-servant’ relationship gives rise to vicarious liability for negligence.”) (internal citations omitted).

³⁹ See Pierre Bourdieu, *THE FORCE OF LAW: TOWARD A SOCIOLOGY OF THE JURIDICAL FIELD*, 38 *HASTINGS L.J.* 814, 827, 831 (Richard Terdiman trans., 1987) (explaining that legal language, because it is imbued with the power of the state, has a unique ability to construct social reality).

⁴⁰ Campbell & Jewel, *Death in the Shadows*, *supra* note 21.

⁴¹ *Id.* at 174-179.

In a later paper,⁴² I argued that law's emphasis on reason and reasonableness can cultivate the false belief that the law is always rational, neutral, and free from emotion.⁴³ This is not true because we now know that the mind cannot be separated from the body in strict Cartesian fashion.⁴⁴ In this paper, I argued that the Western approach of empirically infusing everything with ranking, order, and neatness creates a toxic mindset that has been used to reach legal conclusions that ignore the lived reality of many people. I traced how the emphasis on order and hierarchy has deep spiritual and intellectual roots in U.S. legal culture.

A recurring theme in all of my previous work has been the need for different legal processes, new ways of communicating, and alternative thought patterns, all of which might be able to create a more just legal system. This paper pivots from the critical scholar's impulse to smash dearly-held concepts in the name of radical change to theorize new avenues for accomplishing that change.

This paper argues that in the realm of legal skills, there is value in looking to alternative forms of rhetoric as guidance for reconstituting aspects of our legal system to make them less toxic and more healing. There is also a practical/skills-based component to the inquiry. For legal advocates, this study might disclose rhetorical approaches that can improve the quality of the arguments that lawyers make to persuade judges. Thus, this inquiry is aligned with the legal academy's recent turn toward emphasizing legal skills, but it infuses the practical approach with a robust dose of interdisciplinary legal theory.

Comparative legal rhetoric should be approached as a dynamic discipline for the comparative study of how legal meanings are produced by judicial actors (judges) as well as also other actors in the legal system. Like other subsets of comparative law, the goals of comparative legal rhetoric might include providing tools of research to identify universal theories of legal persuasion, give a critical perspective of legal communication to students, and promote cross-cultural understanding.⁴⁵

⁴² Jewel, *Reasonable Man*, *supra* note 11, at 1055.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ See, e.g., Esin Orucu, *Developing Comparative Law in COMPARATIVE LAW[:] A HANDBOOK* 44 (Esin Orucu and David Nelken eds. Hart Publishing 2007) [Hereinafter *COMPARATIVE LAW: A HANDBOOK*].

With respect to these goals, comparative legal rhetoric would study the rhetoric of judicial opinions as well as the rhetoric of lawyers, who, in making arguments to the court, create the legal meanings that become entrenched in the collective legal mind. Of course, part of this inquiry would require the evaluation of different systems, such as distinctions between common law and civil judicial opinions,⁴⁶ perhaps even questioning whether there can be such a thing as judicial rhetoric to compare, given the collective way that judges produce legal texts and the many constraints imposed upon them.⁴⁷ Further sources for inquiry, in developing a comparative approach to legal rhetoric might include non-Western approaches to argument structure and problem solving. Such jurisprudence can be located in formal legal systems maintained by non-dominant groups, such as native American tribal law, but it might also be located within systems of culture and processes that exist outside of formal legal regimes.

Expanding beyond these laudable goals, comparative legal rhetoric, at least in the manner that I am framing it, offers an additional goal that is particularly relevant in our polarized times. Alternative legal communication methods might contain healing properties, when we infuse these new processes into legal systems that have historically struggled to dispense true justice.

With respect to the goal of finding healing alternatives, it is possible that the study might uncover effective methods of advocacy or persuasion that have been theoretically undeveloped in the target jurisdiction. This presupposes that there are problems with the target jurisdiction's legal system, thought patterns and forms of legal consciousness that are normatively or morally in need of repair. As I have written previously, as

⁴⁶ For instance there are distinct differences between the narrative approaches taken in common law judicial opinions and the spartan and austere style of Cour de Cassation opinions from France. See ARTHUR TAYLOR VON MEHREN AND JAMES RUSSELL GORDLEY, *THE CIVIL LAW SYSTEM: AN INTRODUCTION TO THE COMPARATIVE STUDY OF LAW* 1128 (2d ed. Little Brown & Co. 1977) (citing Touffait & Tunc, *Pour une motivation plus explicite des décisions de justice notamment de celles de la Cour de Cassation*, 72 *REVIEW TRIMESTRIELLE DE DROIT CIVIL* 487, 506 (1974) (noting that the laconic style of Cour de Cassation opinions, and its anonymity, has been critiqued). I am grateful to Professor Helena Whalen-Bridge for first raising these distinctions at an Applied Storytelling conference several years ago.

⁴⁷ See Peter Ben Friedman, *What Is a Judicial Author*, 62 *MERCER L. REV.* 519 (2011).

detailed above, the U.S. legal system suffers from over-formalization, hyper-competition, and decontextualization. In this context, comparative legal rhetoric might help us locate solutions to promote healing in the home legal system.

In this sense, healing is not just metaphoric. As described above, applications of neuroscience theories (such as neuroplasticity) suggest that rhetoric itself can actually change individual and collective thought patterns, for better or worse. Thus, infusing alternative legal methods into a parent legal system might improve the system. This rhetoric infusion method would differ from comparative law's "legal transplant" theory, where a less powerful jurisdiction "receives" law from a more powerful one.⁴⁸ The point of this paper is not to condescendingly argue for the reform of jurisdictions that may lack certain Anglo-American legal frameworks. Rather, the point of this paper is to search for alternative rhetorical practices that might heal an Anglo-American jurisdiction, which is ailing in certain respects.

When studying any alternative system of rhetoric for comparison purposes, we must remain self-reflexive, we must not fall into the trap of overly-reductive thinking, and we must not fetishize or marginalize the system under study as the inferior or exotic "Other." In his influential 1978 book *ORIENTALISM*, Professor Edward Said cogently explained how Western colonial writers inflicted epistemological pain upon the inhabitants of other cultures.⁴⁹ Through pages and pages of literary references, Said showed how English and French writers traveled to colonies located in Egypt, Turkey, and the Levant and wrote narratives that stereotyped other cultures as lazy and irrational and then remarked about how these qualities operated in direct opposition to the clarity and nobility of the Anglo-Saxon race.⁵⁰ Said illustrated how other European writers, working in the Victorian era, narrowly described the other cultures with titillating tales of sensuality and licentiousness, stereotyping Near Eastern individuals as sensual and exotic in juxtaposition with straight-laced Victorians (who most certainly also had a seedy side).⁵¹

⁴⁸ See David Nelken, *Defining and Using the Concept of Legal Culture in COMPARATIVE LAW: A HANDBOOK*, *supra* note 45, at 118.

⁴⁹ See generally, EDWARD SAID, *ORIENTALISM* (Random House 1978).

⁵⁰ *Id.* at 38-39, 145, 158.

⁵¹ *Id.* at 158 (discussing EDWARD WILLIAM LANE'S *MANNERS AND CUSTOMS OF THE MODERN EGYPTIANS*).

The problem was not just the too-broad brush. It was also troubling that the European writers never allowed people to speak for themselves. Said noted that Gustav Flaubert's near-Eastern woman "never spoke of herself, she never represented her emotions, presence, or history. He spoke for and represented her."⁵² Not allowing the subject to speak denied them their individual humanity. While speaking about and for others, European writers built an epistemological monopoly that encompassed the region and its culture. The Western scholar's knowledge about the region *became* the region.⁵³ Said detailed how Western ideas about the Near East became ossified, cemented, and representative of reality, a reality that Said located in 1970s geopolitics (for instance, in Henry Kissinger's views about the middle east).⁵⁴

Said's book traced a specific intellectual history that began in the 1700s and ended in the 1970s. Because of the power and influence of the various European writers who described the Near East, Said traced how these reductive and essentialized ideas became ossified and rigid.⁵⁵ In this way:

liberal humanism, of which Orientalism has historically been one department, retards the process of enlarged and enlarging meaning through which true understanding can be attained.

Said's criticism of liberal humanism would become the foundation for important critical scholarship within the humanities, works that "keep track of the complex dynamics of institutional and other related power structures in order to disclose options and alternatives for transformative praxis."⁵⁶ Said's perspective also provided the framework and vocabulary for rhetoricians who study rhetoric in a comparative, but critical way.⁵⁷

At the time, Said's critique of liberal humanism was an epic takedown—what could possibly be wrong with liberal humanism? Now, liberal humanism is often equated with biased, racist, and Euro-centric

⁵² *Id.* at 6.

⁵³ *Id.* at 31-33 (Discussing Arthur James Balfour, member of the British House of Commons and expert on Britain's imperial interests in Egypt).

⁵⁴ *Id.* at 5.

⁵⁵ *Id.* at 254.

⁵⁶ West, *supra* note 13, at 105.

⁵⁷ See *infra* notes 201-238 and surrounding text.

scholarship,⁵⁸ a lineage that can be traced to Said's critique referenced above. However, Said remained committed to a humanistic hope that scholars can exhibit a "will to understand for purposes of coexistence and humanistic enlargement of horizons" without dominating and controlling what is being studied.⁵⁹ It may not be that liberal humanism is the problem. Rather, it is conducting humanities research in a way that is neither liberal nor humane.

In comparative endeavors, there is also the temptation to fetishize or essentialize "Other" systems and improperly reduce other cultures to simple categories that function as foils to the Western system that is being compared. For an academic, big distinctions and comparisons create much more of a bang than a more granular approach. For instance, this Article profiles two contrastive rhetoric papers, written in the 1960s and 1970s. These papers contain some exciting takeaways related to logic and rhetoric differences between native-English writers and non-English writers.⁶⁰ This research was unfortunately based on inappropriately broad comparisons.⁶¹ The original paper was taken to task by younger researchers who pointed out the lack of nuance and cultural bias.⁶² Nonetheless, despite these shortcomings, the original research contains some grains of truth. I walk a kind of tightrope in this paper; my goal is to identify authentic differences in communication in a self-reflective and critical way, but also generate new and useful knowledge based on these differences.

Finally, my research indicates that alternative rhetorics may not provide a simplistic panacea for all that ails U.S. law. Many of the non-Western societies that use alternative rhetoric are rigidly hierarchical, sexist, and authoritarian. Any theory that a rhetorical Shang-ri-la exists somewhere in Eastern rhetoric or Eastern thought patterns steps into the same trap of essentialism and reductivism that Edward Said identified. There is also a danger of inappropriate uses of the knowledge. For instance, think of how some businesses have appropriated Eastern forms of thought (in the form of

⁵⁸ See Faisal Nazir, *Humanism With A Difference: Universality and Cultural Difference in Postcolonial Theory*, 2 J. CONTEMP. POL. 1, 6 (2018)

(Explaining how post-colonial literary criticism tends to equate humanism with Euro-centricism and racism).

⁵⁹ SAID, *supra* note 49, at xix. See also Nazir, *supra* note 58, at 6.

(Explaining that Said both criticized the colonial tradition within the liberal humanities but also embraced humanist ideals that recognize cultural differences).

⁶⁰ See *infra* notes 111-117 and surrounding text.

⁶¹ See *id.*

⁶² See *id.*

mindfulness mantras and yoga poses) and deployed them in a crass way to help workers become more efficient.⁶³ Shang-ri-la may not exist, but pockets of Nirvana may exist in various other cultures. These pockets are worth looking for. This paper will address these critical challenges, understanding that there are no easy answers other than keeping an open mind about the limits of new knowledge and remaining vigilantly critical in developing the discipline. The next section develops the foundations for the study of comparative legal rhetoric.

II. The foundations of comparative legal rhetoric.

This section explores various disciplinary approaches that, when synthesized, create the discipline of comparative legal rhetoric. Comparative legal rhetoric draws upon a number of different disciplines: legal rhetoric, comparative law, comparative rhetoric, contrastive rhetoric, diasporic rhetoric, and comparative cognitive psychology. This part of the paper will briefly introduce each one of these disciplines and explain its relevance for the study of comparative legal rhetoric. The disciplines of comparative law and comparative rhetoric both contain a highly critical sub-element; more recent scholars have critiqued earlier generations of comparatists for domineering analyses that impose a Western bias on non-Western law and rhetoric. Thus, this section concludes with some thoughts on avoiding essentialization and over-simplification. An overly reductive and biased analysis is a dangerous trap for comparatists because such approaches harm the overall project of developing an authentic and reflective understanding for other rhetorics.

A. Legal rhetoric

In order to apply a comparative approach to legal rhetoric, one must first get a handle on legal rhetoric as a discipline in the context of the U.S. legal system. Legal rhetoric could have both a narrow or broad definition. In its narrowest conception, legal rhetoric might be construed as the art of legal argumentation. For purposes of this paper, however, which seeks to outline

⁶³ See, e.g., Angela Harris, *Care and Danger: Feminism and Therapy Culture*, 69 *STUD. IN LAW, CULTURE AND SOC'Y* 113 (2016), available at <http://www.law.unc.edu/documents/faculty/eichner/harris-careanddanger.pdf> (describing how “therapy culture,” which embraces eastern forms of thinking (such as mindfulness), has been appropriated by business culture to promote worker productivity and other capitalist aims).

an approach for comparative legal rhetoric, a broad definition is most appropriate.

Legal rhetoric is the scholarly and theoretical arm of the legal writing discipline. In U.S. legal education, legal rhetoric has not long existed as a standalone inquiry of study. Rather, most law schools offer legal communication instruction in the form of legal writing classes, where students are taught how to write formal legal analysis, in both an objective and persuasive format. Linda Berger was one of the first professors in the U.S. to teach legal rhetoric as a separate field of study. For Berger, legal rhetoric “looks at how the law works by exploring a meaning-making process, one in which the law is ‘constituted’ as human beings located within particular historical and cultural communities write, read, argue about, and decide legal issues.”⁶⁴ In theorizing a definition for legal rhetoric, Berger was influenced by James Boyd White’s empowering conception of legal language, which flows from his liberating, anti-formalist view of what law is.⁶⁵ For White,

The law is not an abstract system or scheme of rules, as we often speak of it, but an inherently unstable structure of thought and expression. It is built upon a distinct set of dynamic and dialogic tensions, which include: tensions between ordinary language and legal language; between legal language and the specialized discourses of other fields; between language itself and the mute world that lies beneath it; between opposing lawyers; between conflicting but justifiable ways of giving meaning to the rules and principles of law; between substantive and procedural lines of thought; between law and justice; between the past, the present, and the future.⁶⁶

⁶⁴ Linda L. Berger, *Studying and Teaching "Law as Rhetoric": A Place to Stand*, 16 LEGAL WRITING: J. LEGAL WRITING INST. 3, 4 (2010).

⁶⁵ See *id.* at 4, n. 9 (citing James Boyd White, *Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life*, 52 U. CHI. L. REV. 684, 695 (1985)).

⁶⁶ James Boyd White, *An Old-Fashioned View of the Nature of Law*, 12 THEORETICAL INQUIRIES IN LAW 381, 381 (2011).

White's views on legal language is liberating because it gives lawyers, law students, and law theorists agency over the process of making legal meanings. The law is not just a static system of rules to be studied, rather, students and practitioners practice an "activity of mind and language" and claim "reconstitute the material of the past [legal texts, precedents, etc.] to claim new meaning in the present and future."⁶⁷

Legal rhetoric also allows legal writing teachers assert a meaningful professional identity in opposition to the stereotype of legal writing teaching as "donkey work" that does not carry substantive weight.⁶⁸ Instead, when we teach students how to write, we are teaching them *to do*—to craft new frames and language that, with novel applications of legal principles, can transform society. A broad conception of legal rhetoric moves legal writing beyond rote mechanics and into an empowering world of process and jurisprudence, where lawyers have great power to shift legal and cultural meanings for the better.⁶⁹

Berger and White's liberating conception of legal rhetoric is admittedly borne out of a common law process where advocacy and reasoning are highly connected to the production of legal meanings that then become vested with the power of the state. In other words, when an American common law lawyer argues what the law should be and the court adopts that meaning in its ruling, the lawyer has, in fact, made the law. The same can be said for a law professor whose theories are adopted by a court in a published decision. A broad definition of legal rhetoric could also apply in a civil law context, where it would be wildly inaccurate to confine all legal meaning to a code's text.⁷⁰ Meaning depends on context and culture, thereby justifying

⁶⁷ *Id.* at 386-387.

⁶⁸ See Lucille A. Jewel, *Oil & Water: How Legal Education's Doctrine and Skills Divide Reproduces Toxic Hierarchies*, 31.1 COLUMBIA JOURNAL OF GENDER AND LAW 111, 113 (2015).

⁶⁹ See Lucille A. Jewel, *The Doctrine of Legal Writing*, 1 SAVANNAH L. REV. 45, 57-59 (2014) (explaining how a broad and critical approach to legal writing and legal rhetoric prepares students to be transformative lawyers).

⁷⁰ Even in civil law jurisdictions, it is understood that the judge exercises discretion over the text and may look, in addition to the language of the code, to the social purpose the statute as meant to achieve. TAYLOR VON MEHREN AND GORDLEY, *supra* note 46, 1134-1136; see also, Rodolfo Sacco, *Legal Formants: A Dynamic Approach to Comparative Law*, 39 AM. J. OF COMP. L. 1, 33 (1991) (explaining that in civil law countries, there is a certain amount of "disharmony" between the law as it is stated and how the

a broad-based conception of how legal meanings are made and how those legal meanings should be studied. Moreover, to foreshadow a bit, a broad conception of legal rhetoric is helpful because it is aligned with a broad conception of what comparative law should be, which is the next foundational element of comparative legal rhetoric.

B. Comparative Law

Traditionally, comparative law has been described as the objective study of differing legal systems with the functional goal of comparing similar things for the purpose of producing knowledge useful for solving problems efficiently.⁷¹ The mainstream view was that “the study of foreign legal systems is a legitimate enterprise only if it results in proposals for the reform of domestic law.”⁷² The preeminent goal of the enterprise was harmonization and unification, identifying commonalities within legal systems with the aim of developing laws that cohered throughout different jurisdictions, such as the project of developing a single body of private law for Europe.⁷³ The goal of the traditional comparative approach was to remove legal differences and disagreements and to harmonize.⁷⁴

As with the study of legal rhetoric, comparative law can be (and has been) both broadly and narrowly conceptualized. Just as we should broadly formulate the boundaries of legal rhetoric, a complex and critical conception of comparative law offers the best chance for the production of reliable, ethical, and useful knowledge in the study of comparative legal rhetoric.

judge applies it); Pierre Legrand, *How to Compare Now*, 16 LEGAL STUD. 232, 236 (2006) (explaining that “to say that the study of French law consists in the study of French legislative texts and judicial decisions is plainly inadequate”) [hereinafter Legrand, *How to Compare Now*].

⁷¹ William Twining, *Globalisation and Comparative Law in COMPARATIVE LAW: A HANDBOOK*, *supra* note 45, at 78 (construing Zweigert and Kotz’s understanding of comparative law); Pierre Legrand, *Paradoxically, Derrida: For a Comparative Legal Studies*, 27 CARDOZO L. REV. 631, 637-38 (2005) [hereinafter Legrand, *Paradoxically Derrida*].

⁷² Sacco, *supra* note 70, at 1.

⁷³ Legrand, *Paradoxically Derrida*, *supra* note 71, at 637-638.

⁷⁴ Roger Cotterell, *Comparative Law and Legal Culture in THE OXFORD HANDBOOK OF COMPARATIVE LAW* 711 (Reimann and Zimmermann eds. Oxford Univ. Press 2006) [hereinafter THE OXFORD HANDBOOK OF COMPARATIVE LAW].

Contemporary legal comparatists have rightly criticized overly narrow conceptions of the field, with some arguing that a practical objective makes the study too “obsessively repetitious and sterile.”⁷⁵ Comparative law scholars have opined that comparatists must be careful not to oversimplify or engage in synecdoche, looking at only one part without looking at the entire system.⁷⁶

From a critical perspective, legal comparatists have also pointed out problems with translation:

Not only can two codes in different countries use the same words with different meanings, but two codes in the same country may give different meanings to the same words, as indeed, may two articles of the same code, two authors of doctrinal works, or two judges. Words do not, in fact, have absolute permanent meanings. Every speaker, whenever he uses an expression endows it with an unrepeatable specific meaning.⁷⁷

Thus, even when the same word or same root word is used, two countries with two different cultural traditions may give drastically different meanings to those words. For instance, the word *contract* in the U.K.’s common law tradition is very different from the French term *contrat*. The U.K. connotation for contract connotes an agreement to transfer property, whereas the French connotation of *contrat* reflects one person’s entrustment of property to another.⁷⁸ We must also recognize that words have political values, and if we ignore these competing values, we will experience translation failure.⁷⁹ For instance, saving has a positive valence in the U.S. and U.K. but a negative value in France.⁸⁰

Comparative law scholar William Twining has criticized the comparative law discipline for being too “state-oriented, secular, positivist, top-down, North-centric, unempirical, and universalist in respect of

⁷⁵ Legrand, *How to Compare Now*, *supra* note 70, at 233.

⁷⁶ Sacco, *supra* note 70, at 14-15.

⁷⁷ *Id.* at 12.

⁷⁸ *Id.* at 12.

⁷⁹ *Id.* at 14-15.

⁸⁰ *Id.*

morals.”⁸¹ Gunter Frankenberg lamented the false and oppressive dichotomies that can arise from a non-critical approach.⁸² These comparatists are tapping into the same sentiment voiced by humanities scholars like Edward Said⁸³ and Cornel West,⁸⁴ sharing the impulse to dismantle canonistic approaches, critique traditional analysis, and advocate for something more nuanced and reflective of the potential for bias.⁸⁵

This set of critical comparatists argue that comparative law scholars should compare different legal systems with an understanding that the law is not a bounded set of static rules but is instead a collection of “legal formants” comprised of the written statutes, case law, and the more implicit rules that actors actually follow and obey.⁸⁶ An effective comparison of law would explore existing legal and cultural differences between the home jurisdiction and other jurisdiction but also account for differences in power between the home jurisdiction and other jurisdictions.⁸⁷ Moreover, the comparative law scholar must understand that “[o]ne’s home culture is almost inevitably privileged through familiarity and the reinforcement of comfortable myths.”⁸⁸ This privilege invariably makes it so that the foreign or “other” culture is often framed as deficient or disadvantaged in relation to a scholar’s home culture.⁸⁹

The law-culture-law cycle provides another reason to take culture into account. Because law influences culture and culture influences law,⁹⁰ culture cannot be separated from law in a comparative endeavor. Culture is a hidden *infrastructure* that must be surfaced and understood in order to fully

⁸¹ William Twining, *Globalisation and Comparative Law in COMPARATIVE LAW: A HANDBOOK*, *supra* note 45, at 77.

⁸² Gunter Frankenberg, *Critical Comparisons: Re-thinking Comparative Law*, 26 HARV. INT’L L.J. 411, 422 (1985).

⁸³ *See supra* note 49 and surrounding text.

⁸⁴ *See supra* notes 13 and 14 and surrounding text.

⁸⁵ *See* Ugo Mattei, *Comparative Law and Critical Legal Studies in THE OXFORD HANDBOOK OF COMPARATIVE LAW*, *supra* note 74, at 817-27 (explaining how the critical legal studies movement has influenced comparative law scholars).

⁸⁶ Sacco, *supra* note 70, at 27.

⁸⁷ Mattei, *supra* note 85, at 822, 827.

⁸⁸ Cotterrell, *Comparative Law and Legal Culture in THE OXFORD HANDBOOK OF COMPARATIVE LAW*, *supra* note 74, at 733.

⁸⁹ *Id.*

⁹⁰ *See supra* notes 40-41 and surrounding text.

appreciate a different legal system.⁹¹ Thus, as a best practice for comparative legal rhetoric, good comparison requires engagement with the “cognitive structure of a given legal culture.”⁹² The comparatist should identify the community standards individuals use to make sense of the world.⁹³ Identifying culture requires more than a surface look because much of culture emanates from unconscious thought patterns that all members of a community share.⁹⁴ Engaging with a community’s culture in a granular and nuanced way can prevent overly reductive and simplistic analysis.⁹⁵

Finally, as explained above with respect to comparative analysis in general,⁹⁶ a good comparative law scholar must be self-critical and self-reflexive. This means that scholars should search for their own privilege and bias, which might color how they categorize concepts found in other legal systems. Scholars must be careful not to impose judgment on a foreign legal system based on pre-conceived notions of what law should be.⁹⁷ We must try to avoid too-easy comparisons and analogies that tend toward overly simplified and reductive conclusions. Outside of law and in the field of communication studies, comparative rhetoric scholars have also identified a

⁹¹ Cotterrell, *Comparative Law and Legal Culture in THE OXFORD HANDBOOK OF COMPARATIVE LAW*, *supra* note 74, at 709-737.

⁹² Pierre Legrand, *European Legal Systems Are Not Converging*, 45 INT’L & COMPARATIVE L. QUART. 52, 60 (Quoted in GEOFFREY SAMUEL, AN INTRODUCTION TO COMPARATIVE LEGAL THEORY AND METHOD 51 (Hart Publishing 2015)).

⁹³ Cotterrell, *Comparative Law and Legal Culture in THE OXFORD HANDBOOK OF COMPARATIVE LAW*, *supra* note 74, at 721.

⁹⁴ Pierre Bourdieu’s habitus concept best explains how collective, unconscious thought processes act as agents for a community’s social organization. See Lucille A. Jewel, *Bourdieu and American Legal Education: How Law Schools Reproduce Social Stratification and Class Hierarchy* 56 BUFF. L. REV. 1155, 1161 (2008).

⁹⁵ Legrand, *How to Compare Now*, *supra* note 70, at 232, 238 (2006) (“Only a keen awareness of this underlying cognitive framework—of the unconscious of law—can guard the comparatist against . . . misleading conclusions.”); Sacco, *supra* note 70, at 21-22, 26 (to avoid reductionism, scholars should synthesize the complexity of a legal system before undertaking a comparison of two systems).

⁹⁶ See *supra* notes 49-59 and surrounding text.

⁹⁷ However, there is room for some universal boundaries; foreign jurisdictions should not get a pass to practice rampant discrimination and human rights violations just because they are culturally different.

similar need for self-reflexivity. In laying the theoretical foundation for comparative legal rhetoric, we now examine comparative rhetoric.

C. Comparative Approaches to Rhetoric

This section discusses three subfields of rhetoric that have comparative dimensions: contrastive rhetoric, comparative rhetoric, and diasporic rhetoric. These three disciplines contain lessons on how to be sensitive and cognizant of the power dynamics that might be influencing how we perceive difference. Contrastive rhetoric relates to specific differences in logic and rhetoric, visible in how students from different cultures approach composition and writing. Comparative rhetoric is a relatively new field that has rhetoric scholars studying differences and similarities between rhetorical practices of different cultures. The third field is the study of diasporic rhetoric, oppositional rhetorical practices emerging from people who have been displaced by colonialism or who have migrated to spaces where they experience a marginalized minority identity.⁹⁸

i. Contrastive Rhetoric

As university education became more globally diverse, college composition professors began observing and noting differences in student writing that could be explainable by cultural differences.⁹⁹ The resulting discipline was contrastive rhetoric, which looks at the cultural characteristics

⁹⁸ See generally, Teri McMurtry-Chubb, *Still Writing at the Master's Table: Decolonizing Rhetoric in Legal Writing for a "Woke" Legal Academy*, 21 ST. MARY'S THE SCHOLAR 255, 274-91 (2019) [hereinafter McMurtry-Chubb, *Still Writing at the Master's Table*]; Berenguer et al., *Gut Renovations*, *supra* note 21, at 26.

⁹⁹ Robert B. Kaplan, *Cultural Thought Patterns in Inter-Cultural Education*, 16 LANGUAGE LEARNING 1 (1966) [hereinafter Kaplan, *Cultural Thought Patterns*]; Robert B. Kaplan, *A Further Note on Contrastive Rhetoric*, *supra* note 8; Carolyn Matalene, *Contrastive Rhetoric: An American Writing Teacher in China*, 47 COLLEGE ENGLISH 789, 789-90 (1985); Ryuiko Kubota, *A Reevaluation of the Uniqueness of Japanese Written Discourse: Implications for Contrastive Rhetoric*, 14 WRITTEN COMMUNICATION 460, 460 (1997); Jill J. Ramsfield, *Is "Logic" Culturally Based? A Contrastive, International Approach to the U.S. Law Classroom*, 47 J. LEGAL EDUC. 157, 167-68 (1997); Diane B. Kraft, *Contrastive Analysis and Contrastive Rhetoric in the Legal Writing Classroom*, 49 N.M. L. Rev. 35, 39 (2019).

of text written in different languages.¹⁰⁰ The question to be answered by contrastive rhetoric, is whether or not logic (as conceptualized in the West) is a universal skill or rather a product of cultural communication norms?¹⁰¹

Robert Kaplan is considered the “father of contrastive rhetoric,” based on his 1966 article *Cultural Thought Patterns in Inter-Cultural Education*.¹⁰² In this article, Kaplan noted that logic, as it is taught in U.S. English composition courses, derives from a “Platonic-Aristotelian sequence, descended from the philosophers of ancient Greece and shaped subsequently by Roman, Medieval European, and later Western thinkers.”¹⁰³ Kaplan theorized that when foreign students receive poor feedback on their writing, it could be because the study is employing a different mode of thought and logic that “violate[s] the expectations of the native reader.”¹⁰⁴

In reviewing student-written paragraphs, Kaplan detailed his perceptions with respect to several different cultural traditions. Kaplan first hypothesized that Semitic languages (including Hebrew and Arabic) use many more parallel constructions than English and, as a result, an essay written by an Arabic speaker comes off as more complex than necessary.¹⁰⁵ For Asian writers, Kaplan observed a tendency to approach a topic by indirection in a circular fashion.¹⁰⁶ “The circles or gyres turn around the subject and show it from a variety of tangential views, but the subject is never looked at directly.”¹⁰⁷ For a writer whose first language is Spanish or French, Kaplan diagnosed a tendency to digress inside the paragraph, producing an interesting thought, but one that does not contribute to the paragraph’s substance.¹⁰⁸ Russian writers apparently begin with two short and direct sentences, but then move on to one or more lengthy sentences that do not relate to the main point but which support subordinate points.¹⁰⁹ Kaplan

¹⁰⁰ Kubota, *supra* note 99, at 460; Ramsfield, *supra* note 99, at 167.

¹⁰¹ Kaplan, *Cultural Thought Patterns*, *supra* note 99, at 2.

¹⁰² Kraft, *supra* note 99, at 39.

¹⁰³ Kaplan, *Cultural Thought Patterns*, *supra* note 99, at 3.

¹⁰⁴ *Id.* at 4.

¹⁰⁵ *Id.* at 6-9 (using the King James translation of the Bible as an example of the parallel construction prevalence in Hebrew).

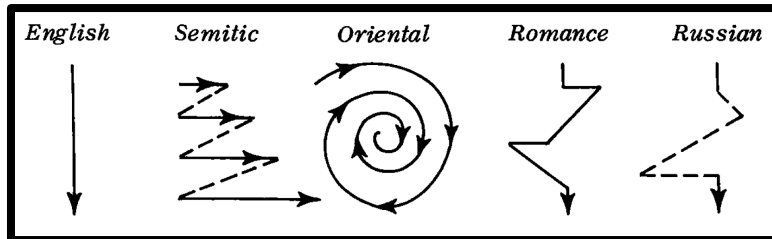
¹⁰⁶ *Id.* at 10 (using Chinese and Korean as his examples).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 11-12.

¹⁰⁹ *Id.* at 13-14.

concluded his analysis with a drawing that was supposed to illustrate these cultural differences in logic:¹¹⁰



Eventually, Kaplan's article became known as the "doodle paper."¹¹¹ Kaplan's approach has been roundly criticized, even ridiculed, for using too small of a data set, for being overly reductive, for essentializing, and for imperialistically elevating the English norm as preferential over logical practices from other cultures.¹¹² Ryuiko Kubota, in discussing contrastive rhetoric as applied to native Japanese writing, pointed out the wrongness of a generalization that Asian rhetoric is always "indirect."¹¹³ Such a sweeping generalization inaccurately frames Japanese rhetoric as a static practice rather than practice that, like Western rhetoric, can take many different forms.¹¹⁴ Also problematic is contrastive rhetoric's impulse to organize and categorize different rhetorical practices, placing so-called English linearity at the top.¹¹⁵ Finally, Kaplan's approach ignored the strong influence that Western rhetoric has had on Asian writing, such that contemporary writing teachers in Asia now expect their students to master linear logic.¹¹⁶

¹¹⁰ *Id.* at 15.

¹¹¹ Ramsfield, *supra* note 99, at 168.

¹¹² See, e.g., Matalene, *supra* note 99, at 790 (explaining that Kaplan's methodology was based on too small of a data-set and produced too reductive of an analysis); Ramsfield, *supra* note 99, at 169 (explaining that Kaplan's analysis improperly treated other cultures as a monolithic, static thing, which is incorrect because cultures cannot be captured so easily); Kraft, *supra* note 99, at 41-42 (explaining that Kaplan's analysis is too essentializing of the complexities of other cultures).

¹¹³ Kubota, *supra* note 99, at 461.

¹¹⁴ *Id.* at 464-65.

¹¹⁵ *Id.* at 471.

¹¹⁶ *Id.* at 469, 472.

Robert Kaplan committed the sin of trying to devise a “master narrative [for] . . . monolithic culture[s].”¹¹⁷ Despite the flaws in his analysis, the fact remains that there are real differences in how reason is conducted in various cultures. For instance, as set forth more fully below, Asian rhetoric emphasizes the skill of “multiple definition,” which looks at a problem from various vantage points.¹¹⁸ Multiple definition aligns with Kaplan’s observation that Asian rhetoric uses a circular pattern and views an issue from a variety of stances.¹¹⁹ Other differences include the Chinese cultural de-emphasis on individual authorship. Instead of treasuring creativity and individuality in writing, Chinese culture exalts authors who have memorized a vast amount of material (metaphors, proverbs, etc.) who can then repeat “maxims, exempla, and analogies presented in established forms and expressed in well-known phrases.”¹²⁰

Chinese communication norms also privilege metaphor and unstated premises (enthymemes) more than the English tradition of direct and linear thoughts.¹²¹ For instance, in the 1960s, Chinese readers readily understood a headline “Chairman Mao went swimming” to mean that Chairman Mao had taken charge to quell his political adversaries so that he could launch the Chinese cultural revolution.¹²² It is highly unlikely that English readers would be able to comprehend the headline in the same way. That Asian communication is perceived as more indirect is also related to a different orientation. Asian communication is a listener rather than a speaker oriented system (which is the case in English).¹²³ In a listener-oriented system, the listener or hearer is expected to interact with the rhetoric and actively parse out the speaker’s meaning, whereas in the Western tradition, the speaker is supposed to do this work for the listener. Neither way is inherently better than

¹¹⁷ Henry A. Giroux, *Democracy and the Discourse of Difference: Towards a Politics of Border Pedagogy*, 12 BRITISH J. SOCIO. EDUC. 501, 509 (1991).

¹¹⁸ See *infra* note 190 and surrounding text.

¹¹⁹ Kaplan, *supra* note 99, at 10.

¹²⁰ Matalene, *supra* note 99, at 790-795.

¹²¹ *Id.* at 800-802; Kraft, *supra* note 99, at 40.

¹²² Matalene, *supra* note 99, at 802.

¹²³ RICHARD NISBETT, *THE GEOGRAPHY OF THOUGHT HOW ASIANS AND WESTERNERS THINK DIFFERENTLY. . . AND WHY* 60-61 (Free Press 2003). Coincidentally, Hebrew culture is also listener oriented. See Margaret D. Zulick, *The Active Force of Hearing: The Ancient Hebrew Language of Persuasion*, 10 RHETORICA: A JOURNAL OF THE HISTORY OF RHETORIC 367, 368 (1992).

the other, although Western writing teachers often counsel students to make the reader's job easier, not harder.¹²⁴ Kaplan's error was not necessarily that he pointed out differences, but that he painted with too broad of a brush and improperly elevated English norms over other approaches.¹²⁵

Despite the errors made by Kaplan and other scholars who have compared and contrasted different logical traditions, studying logic in a comparative or contrastive way has value. Professor Diane Kraft explained that law professors who teach law students from non-English backgrounds can make critical and cautious use of contrastive rhetoric to "reach proficiency in legal writing without negating the rhetoric of students' native language and cultures."¹²⁶ Law professor Jill Ramsfield argued that contrastive rhetoric can help "close the gap between legal cultures and between the initiated and uninitiated."¹²⁷

Professor Kubota explained that contrastive rhetoric is useful for providing insight into the cultural aspects of writing as long as scholars employ a critical framework.¹²⁸ A critical approach to contrastive rhetoric can help communication scholars and teachers bridge gaps but might also help identify approaches that work better than the dominant English approach.¹²⁹ For instance, because legal writing is so heavily dependent on precedent and

¹²⁴ See, e.g., TIM TERRELL AND STEVEN ARMSTRONG, THINKING LIKE A WRITER 39-40 (PLI 3d Ed. 2008) (Advising writers to help readers understand information by providing a focus, making the information's structure explicit, and using a structure that moves from familiar information to newer information).

¹²⁵ Arguably, Kaplan does this by placing the English "linear" tradition on the left of his doodles, with all other norms following. *Cultural Thought Patterns*, *supra* note 99, at 15. Kaplan also makes implicitly biased statements when he declares that a foreign student's paper is "out of focus" if it does not comply with English standards. *Id.* at 4.

¹²⁶ Kraft, *supra* note 99, at 58.

¹²⁷ Ramsfield, *supra* note 99, at 159.

¹²⁸ Kubota, *supra* note 99, at 475. In a later paper, Kubota defines "critical" as examining "how politics, ideologies, and power relations shape and transform the nature of language teaching and learning in the classroom and beyond." Ryuko Kubota and Theresa Austin, *Critical Approaches to World Language Education in the United States: An Introduction*, 4 CRITICAL INQUIRY IN LANGUAGE STUDIES 73, 74-75 (2007)

¹²⁹ Professor Kraft makes a similar point, explaining that contrastive rhetoric is useful for increasing the inventory of different rhetorical styles available for persuasion. Kraft, *supra* note 99, at 53.

key legal terms, the Chinese approach to rhetoric (de-emphasizing individual authorship and emphasizing the use of time-honored forms phrases) could augment a Eurocentric approach to authorship. Indeed, much of legal writing departs from a romantic notion of authorship.¹³⁰ Lawyers routinely cut and paste language from other briefs (without any attribution) and judges routinely cut and paste language from the briefs lawyers submit on a case, for inclusion in the case opinion.¹³¹

There might also be situations where a listener-oriented approach to legal communication might work better than a speaker-oriented approach. A listener-oriented approach is definitely the better approach for a law advocate's "shadow story," the part of the case narrative that contains the advocate's ultimate legal conclusions.¹³² These conclusions are strongest for our readers/listeners when the author enables the audience to reach these conclusions on their own, without the advocate having to explicitly tell them.¹³³ Directly telling the audience to adopt these conclusions can come off as a too-strident drop-kick.¹³⁴

ii. Comparative Rhetoric

a. An Initial Survey of Comparative Rhetoric

In 1998, venerable classics professor George A. Kennedy wrote *Comparative Rhetoric*, a book that compared rhetorical traditions from across the world and time.¹³⁵ Kennedy's book begins with an expansive definition of rhetoric—non-verbal, verbal, and written communication forms that exists "in all life forms that can give signals" including "nonhuman animals."¹³⁶ Kennedy then defined comparative rhetoric as "the cross-cultural study of rhetorical traditions as they exist or have existed in different societies around the world."¹³⁷ Kennedy first located rhetorical practices within the swaggering struts of stag deer, the distinctive calls of vervets signaling the approach of different predators, and the particular

¹³⁰ Friedman, *supra* note 47, at 528-529.

¹³¹ *Id.*

¹³² RUTH ANNE ROBBINS, STEVE JOHANSEN, AND KEN CHESTEK, *YOUR CLIENT'S STORY* 141-47 (Wolters Kluwer 2d ed. 2012).

¹³³ *Id.*

¹³⁴ Special thanks to Professor Browning Jeffries at Atlanta's John Marshall Law School for the drop-kick metaphor.

¹³⁵ GEORGE A. KENNEDY, *COMPARATIVE RHETORIC* 1 (Oxford 1998).

¹³⁶ *Id.* at 4.

¹³⁷ *Id.* at 1.

caws of crows calling for group assembly.¹³⁸ Kennedy then addressed rhetoric in tribal indigenous cultures, found in the form of narrative, myths, and community speeches.¹³⁹ He concluded the book by considering rhetoric in ancient societies such as Mesopotamia, Egypt, China, and Greece.¹⁴⁰

One of the takeaways from Kennedy's book is that much rhetoric from around the world is profoundly conservative, in the sense that it seeks to conserve communities from danger or change. Rhetoric's conservativeness is visible in the rhetoric of animals, who use rhetoric to signal the appearance of dangerous predators,¹⁴¹ and in ancient communities and contemporary tribal societies, who use rhetoric to reinforce traditional values and social hierarchy in the community.¹⁴²

In analyzing indigenous or traditional cultures (Australian aborigines, African Ashanti society, and indigenous tribes in the U.S.), Kennedy opined that "the most common function of rhetoric in traditional societies is preservation of their accustomed beliefs and way of life."¹⁴³ Even in so-called "egalitarian" indigenous societies, women are not often allowed to speak. They are not allowed to speak in formal meetings, but may be allowed to have a voice in less formal settings.¹⁴⁴

Ancient societies also deployed rhetoric for conservative aims. For instance, the ancient Aztecs used formal oratory "as a conservative force, preserving the moral and political values of the past and reinforcing class divisions."¹⁴⁵ In ancient China, rhetoric was "conservative, even reactionary, aimed at consensus, and sought to reaffirm social and political hierarchies, modeled on family relationships in which great emphasis was put in the authority of a father over his sons and the respect of a son for a father."¹⁴⁶ Perhaps the most hierarchical ancient society was India, with its rigid caste system, where one was supposed to accept one's lot and act his/her part to obtain a better station in the next life.¹⁴⁷ Fascinatingly, India's hyper-hierarchical caste system may be directly related to its Indo-European

¹³⁸ *Id.* at 12-17.

¹³⁹ *Id.* at 48-50, 63, 64.

¹⁴⁰ *Id.* at 113-212.

¹⁴¹ *Id.* at 41.

¹⁴² *Id.* at 51, 102.

¹⁴³ *Id.* at 51.

¹⁴⁴ Kennedy, *supra* note 135, at 63, 83-84.

¹⁴⁵ *Id.* at 102.

¹⁴⁶ *Id.* at 143.

¹⁴⁷ *Id.* at 175.

language, Sanskrit, which easily allowed for abstraction and category making.¹⁴⁸ Ancient Indian society used everyday language to maintain its hard-line social boundaries, with strict grammar rules indicating that an untouchable could never use the first-person when addressing someone of a higher caste.¹⁴⁹ An untouchable must always refer to himself/herself in the third person or simply say “your slave.”¹⁵⁰ In thinking about some of the most spectacular human rights failures in the West, such as the racialized social codes in the Jim Crow south, where men of color were always addressed as “boy” and had to refer to White men as “sir,” or Nazi Germany’s violent social control of Jewish people, the unfortunate takeaway is that these forms of social control are not limited to the West. In many ways, non-Western rhetoric is not that different from Western rhetoric, which is often deployed to put everything and every being in its hierarchical place.¹⁵¹

Thus, in this learning journey to locate healing alternatives for Western legal rhetoric, ancient, tribal, or indigenous rhetorics may not contain the powerful elixir we seek. Nonetheless, Professor Kennedy’s study raises some fascinating observations garnered from ethnographies of acephalous indigenous societies, societies that may not egalitarian along the lines of gender but are committed to equality in terms of social class.¹⁵² In his book, Kennedy draws upon the work of Donald Brenneis, an anthropologist who studied the traits of speech in acephalous communities.¹⁵³ In a book chapter exploring the Bhatgoans, an acephalous community in Fiji, Brenneis explains that “clear-cut leadership does not exist and decision making is consensual.”¹⁵⁴ In these societies, formal rhetoric is highly polite and any criticism is indirect, allusive, with ambiguous referents.¹⁵⁵ Further, in order to cultivate confidence in one’s leadership, one must demonstrate an “overt reluctance to assume leadership.”¹⁵⁶ (This sounds like many law faculty

¹⁴⁸ *Id.* at 172-173.

¹⁴⁹ *Id.* at 175.

¹⁵⁰ *Id.*

¹⁵¹ See Jewel, *Reasonable Man*, *supra* note 11, at 64 (generally discussing Aristotle’s influence on the Western preference for hierarchical categories).

¹⁵² *Id.* at 63.

¹⁵³ *Id.* at 63.

¹⁵⁴ Donald Lawrence Brenneis, *Straight Talk and Sweet Talk: Political Discourse in an Occasionally Egalitarian Community in DANGEROUS WORDS: LANGUAGE AND POLITICS IN THE PACIFIC* (Donald Lawrence Brenneis ed. NYU Press 1984)

¹⁵⁵ Kennedy, *supra* note 135, at 63.

¹⁵⁶ Brenneis, *supra* note 154, at 73.

members, explaining that the ideal law school dean doesn't really want to be a dean.)

Brenneis's work on the Bhatgoans also surfaces the important role that process plays in comparing different rhetorics. The Bhatgoans solved problems through arbitration sessions, a process managed by committee that entailed fact-finding and discussion of topics that could not be discussed elsewhere.¹⁵⁷ The committee members chairing the session must not appear "too eager" and should not dominate the proceedings.¹⁵⁸ The arbitration sessions collected facts and served as a record for future discussions, but intentionally did not include any kind of structured resolution or remedy.¹⁵⁹ The process served as a method of airing out grievances in front of the entire community. The non-confrontational, open-ended Bhatgoan arbitration session seems similar to the processes used by many contemporary indigenous communities to reintroduce a criminal offender back into society¹⁶⁰ The Bhatgoan way also shares some similarity to Quaker and Anarchist approaches to problem-solving, which will also be discussed, *infra*.¹⁶¹

A host of rhetorical practices from around the world and time indicates some universality in what is considered effective rhetoric. Kennedy's book also questions the widely-held belief that the ancient Greeks produced most of the world's knowledge on the art of persuasion. For instance, both Buddhist and Chinese rhetoric emphasize sincerity and restraint as an effective way for generating speaker credibility, similar to the Greek notion of ethos.¹⁶² The Aztecs deployed formal repetition as a strategy,¹⁶³ similar to the Greek and Roman tricolon (stating a concept three times for emphasis)¹⁶⁴ and the African American diasporic tradition of using rhythmic repetition for point emphasis.¹⁶⁵ Indigenous tribes in the U.S. drew

¹⁵⁷ *Id.* at 79-81.

¹⁵⁸ *Id.* at 79.

¹⁵⁹ *Id.* at 79-81.

¹⁶⁰ See *infra* notes 513-530 and surrounding text.

¹⁶¹ See *infra* surrounding text and notes 443-477 (discussing Quaker rhetoric) and 531-542 (discussion anarchist rhetoric).

¹⁶² Kennedy, *supra* note 135, at 151, 182.

¹⁶³ *Id.* at 106.

¹⁶⁴ Bruce Ching, *Things in Threes—Utilizing Tricolons—a Linguistic Look*, 2008 THE LAW TEACHER 18 (2008).

¹⁶⁵ Felicia R. Walker, *An Afrocentric Rhetorical Analysis of Johnnie Cochran's Closing Argument in the O.J. Simpson Trial* in UNDERSTANDING

upon the rhetorical skill of memory (one of Aristotle's five canons necessary for effective persuasion) by using elaborate wampum belts to chart out the pieces of a lengthy speech.¹⁶⁶ And finally, ancient Hebrew rhetoricians relied heavily on finding the right time to make an argument, which strongly mirrors the Greek concept of *Kairos*.¹⁶⁷

Kennedy's book also brings up a potentially universal relationship between rhetoric style and social ranking. In Wolof society, for instance, persons of lower rank used rhetoric that was loud, high-pitched, repetitious, with many points of emphasis.¹⁶⁸ Higher ranked persons spoke more softly, with a lower pitch, with less repetition and emphasis.¹⁶⁹ For Ethiopia's Mursi people, a successful, high-ranking orator does not show emotion, does not repeat himself, and speaks in a clear way.¹⁷⁰ The idea that softer, subtle speech connects with higher social rank and louder more garish speech links to lower social rank may have some universality. In ancient Greece, for instance, successful rhetors showed restraint and confidence in their mannerisms, which were derived from the physical habits of elite Greek military-men.¹⁷¹ Non-elite speakers were weak rhetors described as having overly shrill voices and too-large hand gestures.¹⁷² In a masterful article, Michigan State Law Professor Daphne O'Regan traced the class-based connections between Grecian norms for public speaking (based on the nonverbal demeanor of elite warriors) and today's legal culture, where restraint, control, and clarity are expected.¹⁷³ Similarly, French sociologist Pierre Bourdieu pointed out that French upper-class culture approved the use of highly restrained language and slow gestures but found spontaneous verbal

AFRICAN AMERICAN RHETORIC(S) 252-53 (Elaine B. Richardson & Ronald L. Jackson eds. Southern Ill. Univ. Press 2007).

¹⁶⁶ Kennedy, *supra* note 135, at 6-7, 99.

¹⁶⁷ *Id.* at 134; *see also*, Linda L. Berger, *Creating Kairos at the Supreme Court: Shelby County, Citizens United, Hobby Lobby, and the Judicial Construction of Right Moments*, 16 J. APP. PRAC. & PROCESS 147 (2015).

¹⁶⁸ Kennedy, *supra* note 135, at 67 (citing Judith T. Irvine, *Formality and Informality in Communicative Events*, 81 AMERICAN ANTHROPOLOGIST 773, 777 (1979)).

¹⁶⁹ *Id.*

¹⁷⁰ Irvine, *supra* note 168, at 780-81.

¹⁷¹ Daphne O'Regan, *Eying the Body: The Impact of Classical Rules for Demeanor, Credibility, Bias, and the Need to Blind Legal Decision Makers*, 37 PACE L. REV. 379, 387-405 (2017).

¹⁷² *Id.* at 401.

¹⁷³ *See generally, id.*

outspokenness, irritation, and rapidity to be vulgar.¹⁷⁴ The distinction traverses into consumer preferences, as Bourdieu noted that the wealthy desire “quiet caress of beige carpets” and a perfume “as imperceptible as a negative scent” over the “tattered, garish linoleum” and “harsh smell of bleach” found in the lower class homes.¹⁷⁵ In the U.S., wealthy consumers signal their status in a subtle fashion with clothing that contains tiny status markers, like Ralph Lauren and Brooks Brothers shirts.¹⁷⁶

Western cultural critics are well aware that subtlety is upper-class and garishness is lower-class, in the context of speech, clothing, and other taste signifiers. The interesting point here is that a study of comparative rhetoric indicates that these associations may have universality beyond Western culture. Across cultures, if one has a high social rank, one can afford to signal at a lower volume and still command respect and attention. One *can* speak softly without having to yell because power means that others will hear and listen to your voice. However, in order to maintain that power, one must visibly display subtlety and restraint, reminding everyone that he/she will be listened to no matter how softly they speak.

Another interesting observation is that some egalitarian societies made decisions based on consensus rather than majority rule.¹⁷⁷ In traditional societies, a speech is often followed by silence, effectively signaling group agreement.¹⁷⁸ In some of these societies, when the Greek method of majority rule by vote was introduced, it was resented.¹⁷⁹ A call for a vote was regarded as leading to a fight, to winners and losers, creating a hard situation where the loser must preserve self-respect.¹⁸⁰ The Greeks introduced an *eristic* winner-takes-all kind of rhetoric with a particularly competitive and pugilistic mode of argument.¹⁸¹ The Greeks were outliers in their contentiousness.¹⁸² “In the traditional and early literate societies. . . , the goal

¹⁷⁴ PIERRE BOURDIEU, *DISTINCTION: A SOCIAL CRITIQUE OF THE JUDGMENT OF TASTE* 77 (Richard Nice trans., Harvard Univ. Press 1984) [Hereinafter BOURDIEU, *DISTINCTION*].

¹⁷⁵ *Id.* at 77.

¹⁷⁶ *See generally*, LISA BIRNBACH, *THE OFFICIAL PREPPY HANDBOOK* (Workman Publishing 1980); LISA BIRNBACH AND CHIP KID, *TRUE PREP* (Knopf 2011).

¹⁷⁷ Kennedy, *supra* note 135, at 65.

¹⁷⁸ *Id.* at 65.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* (discussing Trobriander and Maori communities).

¹⁸¹ *Id.* at 197.

¹⁸² *Id.* at 197.

of deliberative rhetoric [was] usually consensus and concord in accordance with conservative values, and sharp altercation [was] avoided if possible.”¹⁸³ “In the ancient rhetoric of Egypt, Palestine, India, and China, there are injunctions to turn away wrath with a soft answer, or even to be silent.”¹⁸⁴ The Greek practice of vote-counting also encouraged muscular rhetoric aimed at those who would vote in favor, without any need for currying favor to those who would disagree, as would be necessary if consensus was the model.¹⁸⁵ Thus, in the ancient and non-Western world, rhetoric was generally used for agreement and conciliation, but the Greek view of life being a contest took hold and has been a part of Western society ever since.¹⁸⁶ Some pockets of Western culture, such as Quaker and Anarchist approaches, differ by embracing less pugilistic forms of debate. We will discuss those pockets *infra*.¹⁸⁷

Finally, Kennedy’s book touches on one of the most enduring comparisons in comparative rhetoric—the differences between Eastern thought (typically defined as Asian, China, Japan, Taiwan, Korea, etc.) and Western European thought.¹⁸⁸ Kennedy traced the multi-variegated foundations of Chinese rhetoric, covering Confucian, Taoist, and Buddhist influences as well as distinct rhetorical traditions popular in different eras of Chinese history.¹⁸⁹ Throughout these broad influences, Kennedy identifies key generalities relevant for understanding Chinese rhetoric. These include:

- The concept of multiple definition—the belief that “if something is to be understood and communicated correctly, it requires description from multiple objective and subjective stances.”¹⁹⁰

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 201. (“If a speaker does not need to secure consensus, he need not try to conciliate the more extreme opponents, can largely ignore some of their concerns, and can concentrate on solidifying support with those already inclined to agree and winning over the doubtful.”)

¹⁸⁶ *Id.* at 198.

¹⁸⁷ *See infra* Section Three.

¹⁸⁸ LUMING MAO, *READING CHINESE FORTUNE COOKIE* 36-37 (University Press Colo. 2006) (explaining that “the polarity between Europe and Asia is one of the most important frameworks that has been used to categorized knowledge.”) [hereinafter MAO, *READING CHINESE FORTUNE COOKIE*].

¹⁸⁹ Kennedy, *supra* note 135, at 152-167.

¹⁹⁰ *Id.* at 155-56.

- The belief that persuasion is not a battle to be won as differences in view point cannot be overcome by persuasion.¹⁹¹
- The interests of the individual and society should be regarded as identical.¹⁹²
- There should be basic equality for all but with some limits because everyone must fulfil his/her hierarchical station in life.¹⁹³
- Engaging with contradiction is important in the pursuit of knowledge, holding that what is real might be an illusion, and what is a dream might be real.¹⁹⁴
- Silence and introspection are important in the process of locating the truth.¹⁹⁵

Chinese rhetoric is not monolithic, however. Even as Taoist thought rejects categories, deductive argument, and verbal distinctions, other schools of Chinese thought (such as the School of Names) embraced logical argument forms in ways that mirrored classical Western rhetoric, particularly the sophists.¹⁹⁶ Even as most of Chinese thought can be generalized as privileging the group over the individual, a notable Chinese philosopher from the Fourth Century, Yang Chu, argued that decisions should be evaluated based on their impact on the individual.¹⁹⁷ Kennedy concluded his chapter on Chinese rhetoric by noting that throughout its history, most Chinese thinkers believed that an authoritarianism provided the most reasonable and stable society.¹⁹⁸ Kennedy also explained that throughout its history, Chinese society has clamped down on free speech and criticism of authority, which

¹⁹¹ *Id.* at 157.

¹⁹² *Id.* at 157-58.

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 158.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at 159.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at 142.

was thought to lead to disorder.¹⁹⁹ And, he notes that “Marxism in China took up many features of traditional Chinese rhetoric.”²⁰⁰

Kennedy’s book opened up exciting avenues for rhetorical inquiry, especially in connecting knowledge gained from anthropological and ethnographic study of the communication forms in non-Western and traditional societies. Within Kennedy’s book, there is a lot of material that could be helpful for facilitating cross-cultural communication. There seems to be some incidences of universal modes of persuasion, exciting knowledge to pursue. And finally, certain rhetorical practices might be useful as alternative strategies to aid Westerners in communication—practicing silence or holding two contradictory concepts in the mind at the same time comes to mind. But in looking at rhetoric from around the world, it seems like there are no grand theory solutions where we might import one culture’s rhetoric into our own culture and reach a Shang-ri-la stage.

b. The Critical Turn in Comparative Rhetoric

In the same way that Robert Kaplan’s contrastive rhetoric thesis was critiqued as too reductive and essentialist, there were similar critiques of Kennedy’s book.²⁰¹ These critical comparative rhetoric scholars problematized comparing Eastern and Western traditions in a rigidly

¹⁹⁹ *Id.* at 152.

²⁰⁰ *Id.* at 165.

²⁰¹ See LuMing Mao, *Beyond Bias, Binary, and Border: Mapping out the Future of Comparative Rhetoric in* COMPARATIVE RHETORIC: THE ART OF TRAVERSING RHETORICAL TIMES, PLACES, AND SPACES 1 (LuMing Mao ed., Routledge 2014) [hereinafter Mao, *Beyond Bias, Binary, and Border*]; LuMing Mao et al., *Manifesting a Future for Comparative Rhetoric*, 34 RHETORIC REVIEW 239, 273 (2015); Guo-Ming Chen, *Moving Beyond the Dichotomy of communication studies in* COMPARATIVE RHETORIC: THE ART OF TRAVERSING RHETORICAL TIMES, PLACES, AND SPACES 157, 157-167 (LuMing Mao ed., Routledge 2014); Bo Wang, *Comparative Rhetoric, Postcolonial Studies, and Transnational Feminisms: A Geopolitical Approach in* COMPARATIVE RHETORIC: THE ART OF TRAVERSING RHETORICAL TIMES, PLACES, AND SPACES 18 (Lu Ming Mao ed., Routledge 2014); Georgette Wang, *Orientalism, Occidentalism and communication research in* DE-WESTERNIZING COMMUNICATION RESEARCH 58, 58-64 (Routledge 2011); MAO, *READING CHINESE FORTUNE COOKIE*, *supra* note 188; LuMing Mao, *Reflective Encounters: Illustrating Comparative Rhetoric*, 37 STYLE 401 (2001) [hereinafter Mao, *Reflective Encounters*].

dichotomous way.²⁰² On this point, critical rhetoric scholars were highly influenced by a seminal essay by Linda Alcoff, *The Problem of Speaking for Others*.²⁰³ “[T]he practice of privileged persons speaking for or on behalf of less privileged persons has actually resulted (in many cases in increasing or reinforcing the oppression of the group spoken for.”²⁰⁴ Alcoff suggests that Foucault’s “ritual of speaking” offers a good approach to consider rhetoric. Speech is comprised of just words, but “discursive practices of speaking or writing that involve not only the text or utterance but their position within a social space including the persons involved in, acting upon, and/or affected by the words.”²⁰⁵ Alcoff urged rhetoricians to engage with context, the location of speech, and the particular political and power dynamics at play between the agents carrying the messages.²⁰⁶ Rather than retreating and not speaking at all, Alcoff encourages rhetoricians to engage in a dialogue with the subject’s speech, speaking with the subject rather than speaking for the subject.²⁰⁷ Speaking should always carry accountability and responsibility such that “anyone who speaks for others should only do so out of a concrete analysis of the particular power relations and discursive effects involved.”²⁰⁸

Perhaps the most important point of critique is that some previous comparative rhetoric scholars placed different rhetoric traditions in a *discourse of deficiency*.²⁰⁹ Robert Kaplan’s doodle paper²¹⁰ is an example of a discourse of deficiency because it placed the English linear approach on the left side (processed first by the Western eye) and all the other approaches toward the right.²¹¹ Kaplan’s overly-reductive conclusions were biased

²⁰² Chen, *supra* note 201, at 160.

²⁰³ Linda Alcoff, *The Problem of Speaking for Others*, 20 CULTURAL CRITIQUE 5, 7 (1991-1992).

²⁰⁴ *Id.*

²⁰⁵ *Id.* at 12.

²⁰⁶ *Id.* at 15.

²⁰⁷ *Id.* at 23 (citing Gayatri Chakravorty Spivak, *Can the Sub-Altern Speak in MARXISM AND INTERPRETATION OF CULTURE* 271-313 (Cary Nelson and Lawrence Grossberg eds. U. Ill. Urbana 1988).

²⁰⁸ *Id.*

²⁰⁹ MAO, READING CHINESE FORTUNE COOKIE, *supra* note 188, at 94.

²¹⁰ Kaplan, *Cultural Thought Patterns*, *supra* note 99, at 15.

²¹¹ Mao, *Reflective Encounters*, *supra* note 201, at 401-402; MAO, READING CHINESE FORTUNE COOKIE, *supra* note 188, at 94 (identifying the doodle paper as a exemplary model of a deficiency framework).

because they painted the differences too broadly and placed the English approach as the standard against which all the other traditions were judged.²¹²

Another aspect of the discourse of deficiency is the implicit judgment that comes from saying that one culture lacks something that the dominant culture possesses. For instance, the allegation that Chinese culture does not emphasize individualism like Western culture places Chinese culture in a deficiency framework.²¹³ Instead of pointing out the *absence* of a concept in one culture, a better approach would be to focus on the *presence* of something else analogous in the culture. For instance, Professor Mao points out that the Chinese emphasis on group harmony could be framed as a method of producing valuable social capital²¹⁴ that produces palpable benefits for the group.²¹⁵ Whereas Western culture emphasizes individualism and competition for “getting ahead,” Chinese culture achieves a similar group, but through group effort. Instead of this more nuanced kind of comparison, many scholars simply emphasize the absence of individualism within Chinese culture, which implicitly places the absence in a framework of deficiency.

Finally, there is the problem of Western scholars inappropriately organizing material into forms that align with European culture. Indigenous spirituality scholar Barbara Alice Mann refers to this process as “euro-form[ing] the data, . . . lopping, cropping, and cramming into Western molds, regardless of fit.”²¹⁶ Professor Mann provides the example of European thinkers bending over backwards to find evidence of a non-existent monotheism in North American indigenous spiritual practices.²¹⁷ Heavily imprinted with Judeo-Christian monotheism, Western scholars also have a difficult time with knowledge models that depart from *one-thinking* (that there is one explanation, one agent, one father, etc.). Mann gives the example of Charles Colcock Jones, a white observer of the Creeks in the 1870s, who was befuddled that the Creeks had two different origin stories, one from the earth, and one from the sky. Unable to process the concept of two origin stories, he described the stories as “competing,” and opined that one story

²¹² See *id.* at 402.

²¹³ MAO, READING CHINESE FORTUNE COOKIE, *supra* note 188, at 289.

²¹⁴ On this point, Mao cites Pierre Bourdieu’s concept of social capital. See BOURDIEU, DISTINCTION, *supra* note 174, at 114 (defining social capital as the family connections that help one rise through institutions).

²¹⁵ MAO, READING CHINESE FORTUNE COOKIE, *supra* note 188, at 289.

²¹⁶ BARBARA ALICE MANN, SPIRITS OF BLOOD, SPIRITS OF BREATH: THE TWINNED COSMOS OF INDIGENOUS AMERICA 1 (Oxford 2016).

²¹⁷ *Id.* at 22-29.

most be an impostor.²¹⁸ The refusal to understand another culture on its own terms is a kind of deficiency discourse because it assumes that any departures from a Euro-centric one-thinking model just cannot be.

Recently, critical comparative rhetoric scholars came together and drafted a manifesto for how comparative rhetoric should be carried out. That manifesto defined comparative rhetoric as follows:

Comparative rhetoric examines communicative practices across time and space by attending to historicity, specificity, self-reflexivity, processual predisposition, and imagination. Situated in and in response to globalization, comparative rhetoricians enact perspectives/performances that intervene in and transform dominant rhetorical traditions, perspectives, and practices. As an interdisciplinary practice, comparative rhetoric intersects with cognate studies and theories to challenge the prevailing patterns of power imbalance and knowledge production.²¹⁹

To avoid the perils of a too-reductive and hierarchical view of culture, a comparative rhetorician should take an *emic*, as opposed to an *etic* approach. An emic approach would study the non-Euroamerican rhetorical practices on their own terms, being cognizant of the dominant rhetorical tradition that provides the vantage point.²²⁰ On the other hand, an etic approach looks at a system and makes judgments based on components not in the system being studied.²²¹ For instance, concluding that Chinese society lacks individualism would be a problematic etic approach because it is attempting an analogy within a culture that does not contain the same deep-seated cultural referents.²²² In other words, to say that Chinese rhetoric is not

²¹⁸ *Id.* at 45-46 (citing CHARLES COLCOCK JONES, ANTIQUITIES OF THE SOUTHERN INDIANS: PARTICULARLY OF THE GEORGIA TRIBES 4 (New York: D. Appleton, 1873).

²¹⁹ Mao et al., *Manifesting a Future for Comparative Rhetoric*, *supra* note 201, at 273.

²²⁰ Mao, *Beyond Bias, Binary, and Border*, *supra* note 201, at 5.

²²¹ Mao, *Reflective Encounters*, *supra* note 201, at 417.

²²² *Id.* at 417; Mao, *Beyond Bias, Binary, and Border*, *supra* note 201 at 5; MAO, *READING CHINESE FORTUNE COOKIE*, *supra* note 188, at 89.

individualistic is a “non-application.”²²³ Concluding that there is an absence of a dominant concept and moving on commits the error of comparing before the comparatist truly knows the culture.²²⁴ The practice also “reinforces a stereotypical binary that unfortunately pits one against the other.”²²⁵

Instead of concluding that Chinese society lacks individualism and moving on, an emic approach would look for the “appropriate frames and languages [that] can be developed to deal with differences as well as similarities between different traditions.”²²⁶ A rhetorical comparatist would look for clusters of concepts that may not be equivalent, but could be construed as analogous.²²⁷ And, a thoughtful comparatist would try to bridge the gap between “what we think we know about and can speak for the other and what has to happen in order for us to begin to know about and speak for the other.”²²⁸

For instance, Professor LumMing Mao, the chair of the writing and rhetoric program at the University of Utah developed a compelling emic explanation of a concept that connects with—but does not equate to—the Western concept of individualism. Mao explained that China did not have a word to depict individualism until very recently.²²⁹ The Chinese concept of self is “irreducibly social, . . . forever intertwined with other selves . . . with an ever-expanding circle of relations.”²³⁰ Unlike Western concepts of the self, the Chinese have no correlate concept for self-actualization, a constantly running self-improvement treadmill.²³¹ Instead of the quest to improve one’s self, Chinese culture celebrates the development and maintenance of a network of interrelatedness and interdependence.²³²

²²³ MAO, READING CHINESE FORTUNE COOKIE, *supra* note 188, at 97.

²²⁴ *Id.* at 99.

²²⁵ *Id.* at 98.

²²⁶ Mao, *Beyond Bias, Binary, and Border*, *supra* note 201, at 417.

²²⁷ MAO, READING CHINESE FORTUNE COOKIE, *supra* note 188, at 98.

²²⁸ Mao, *Beyond Bias, Binary, and Border*, *supra* note 201, at 9.

²²⁹ For a short time during the twentieth century, *Geren Zhuyi*, a neologism imported from Japan, generally signified individualism, modernization, and a rejection of old Confucian ideals. *Id.* at 95. During the communist revolution in the 1920s, the communists denigrated *Geren Zhuyi* as bourgeoisie, selfish, and illicit. *Id.* at 95-96. *Geren Zhuyi* was portrayed as un-Chinese. *Id.* This is the connotation that continues in mainland China.

²³⁰ MAO, READING CHINESE FORTUNE COOKIE, *supra* note 188, at 91.

²³¹ *Id.* at 93.

²³² *Id.* at 93.

Professor Mao contrasts Western individualism (as a positive moral value) with the Chinese concept of *Shu*. A person practicing *shu* uses one's heart and mind to compare oneself with others.²³³ *Shu* is the process of looking inside oneself and connecting one's own needs and desires with the needs and desires of others.²³⁴ In Chinese philosophy, practicing *shu* is the crux of becoming a "humane person."²³⁵ In the way that self-actualization is most valued in Western culture, the practice of becoming is most valued in Chinese culture.²³⁶

In looking at different rhetorical (and, more broadly, philosophical) traditions that could be applied to law, the takeaway is that one should deeply study the other culture on its own terms. The analysis should focus on selecting concepts that might be worth analogizing to. For instance, in the discussion of individualism and *shu*, one might think about how *shu*—the process of becoming—could apply to lawyers entering the legal profession. Instead of a focus on hyper-competitive individual merit (LSAT scores, GPA, law school rank), *shu* might provide an alternative barometer, a healing alternative, for evaluating value. Instead of looking at a law student's grades and scores, how well has the law student built a network of caring and support? The emic approach also provides a helpful framework for evaluating other culture's processes and rhetorical cultures that might be applied to law.

Overall, these critical points are well-thought out and could easily be applied to a discipline focused on comparative legal rhetoric. The critical comparative rhetoricians' call to cultivate granular "grids of intelligibility" and avoid binaries and borders is especially instructive.²³⁷ This advice is quite similar to the critical law comparatists, discussed above, who exhorted scholars to view two legal systems as a complex and foundational set of formants, touching on both law and culture.²³⁸ Following this advice would have legal scholars engaging in comparative legal rhetoric would first, try to understand the other legal rhetoric culture on its own terms, then construct responsive frameworks for the two systems being compared, and finally make thoughtful and self-reflexive analogies or distinctions.

²³³ *Id.* at 102.

²³⁴ *Id.* at 104.

²³⁵ *Id.* at 104.

²³⁶ *Id.* at 108.

²³⁷ Mao et al., *Manifesting a Future for Comparative Rhetoric*, *supra* note 201, at 274-75.

²³⁸ See *supra* notes 81-97 and surrounding text.

iii. Diasporic Rhetoric

The final piece of comparative rhetoric helpful for studying comparative legal rhetoric is diasporic rhetoric. Diasporic rhetoric captures the rhetorical practices of people who have been uprooted from their homelands (such as Black Americans descended from enslaved persons or indigenous Americans who have been dispossessed by U.S. settlers) or who have migrated to a place where they are now a marginalized minority.²³⁹ In an exceptional recent law review article, Professor Teri McMurtry-Chubb details the emergence of diasporic rhetoric, focusing on indigenous, African diasporic, Asian diasporic, and Latinx rhetoric.²⁴⁰ Professor McMurtry-Chubb explains that because diasporic rhetoric emerged “on the contested terrain of the colonizer and the colonized,” it operates in opposition to mainstream rhetorics.²⁴¹ The oppositional style of diasporic rhetoric is useful because it an “help to create alternate conversations, oppositional discourse, to Western discourses of privilege and power.²⁴² For instance, Indigenous rhetoric within the U.S. centers on “rhetorical sovereignty” and “survivance,” two concepts that directly relate to the indigenous experience in the U.S.²⁴³ Rhetorical sovereignty and survivance are oppositional in part because they are not countenanced in mainstream legal decisions disposing of indigenous claims in deeply unjust ways.²⁴⁴

While diasporic rhetoric does not directly involve comparison, critical comparison is part of it. Because diasporic rhetoric creates alternative modes of knowing, understanding, and communicating in contrast to the majority approach, it is inherently comparative. Diasporic rhetoric enables what Henry Giroux refers to as border pedagogy, a form of teaching, centered on difference, that allows students and teachers to highlight “contradictions in American society between the meaning of freedom, the demands of social justice, and the obligations of citizenship, on the one hand, and the accumulated suffering, domination, force, and violence that permeates all aspects of everyday life on the other.”²⁴⁵ A topic like diasporic rhetoric also gives a voice to “students whose multilayered and often contradictory. .

²³⁹ McMurtry-Chubb, *Still Writing at the Master’s Table*, *supra* note 98, at 274.

²⁴⁰ *Id.*

²⁴¹ *Id.* at 275 (discussing indigenous rhetoric).

²⁴² Berenguer et al., *Gut Renovations*, *supra* note 21, at 223-224.

²⁴³ McMurtry-Chubb, *Still Writing at the Master’s Table*, *supra* note 98, at 274-276.

²⁴⁴ *Id.*

²⁴⁵ Giroux, *supra* note 117, at 509.

.experiences [do] not fit easily into the master narrative of a monolithic culture.’’²⁴⁶

D. Comparative Social Psychology – East/West Differences

Relevant to comparative rhetoric are social psychology approaches that connect cognition with culture. Psychology is important if we are to truly understand other rhetorical traditions in a deep sense, on their own terms. In this field, knowledge is gleaned through studies calculated to discern differences in worldview, language, and communication styles which can then be extrapolated to form generalities about different cultures.²⁴⁷ Richard Nisbett, a social psychology professor at the University of Michigan is a pioneer in this field.²⁴⁸ Nisbett’s contributions focus on identifying differences in how Asians (including Korea, Japan, and China) and Westerners perceive and think about the world.²⁴⁹ Nisbett’s *The Geography of Thought: How Asians and Westerners Think Differently . . . and Why* identifies differences in ways of reasoning and knowing between East and West.²⁵⁰ Although Nisbett sometimes engages in the fallacy of placing Western traditions above Eastern traditions,²⁵¹ overall, the book covers real cultural differences in a sensitive and respectful way. Nisbett’s book contains a treasure trove for scholars interested in teaching and learning about legal rhetoric, as so much of what Nisbett describes functions in opposition or polarity to the way Western-influenced legal reasoning works in the U.S.

A key takeaway from Nisbett’s book is that economic or environmental factors can affect cognitive habits. Field dependence is one such example. Field dependence is measured by how well one can discern an

²⁴⁶ *Id.* at 516.

²⁴⁷ *See, e.g.*, Lea Winerman, *The Culture-Cognition Connection*, 37 AMERICAN PSYCHOLOGICAL ASSOCIATION MONITOR 64 (2006), available at <https://www.apa.org/monitor/feb06/connection>

²⁴⁸ *Id.*

²⁴⁹ *See generally*, NISBETT, *supra* note 123.

²⁵⁰ *Id.*

²⁵¹ One such example is his conclusion that because debate and spirited peer review is less common in Asia, Japanese scientists have received fewer Nobel prizes. *Id.* at 5, 73. This causal conclusion is not countenanced by the evidence (there could be many reasons for the lesser number of Nobel Prizes). This contention also improperly judges the progress of Japanese science by Western standards (Nobel prizes).

embedded figure in a larger visual scene.²⁵² In one famous study, subjects were asked to look at an image containing a figure embedded in a scene; people from agricultural environments had more trouble identifying the embedded image than individuals living in hunting and gathering or industrial societies.²⁵³ In an agricultural economy, people must pay more attention to social roles and obligations than people living in a more individualistic hunting and gathering society.

Thus, a greater amount of cognitive energy devoted to the social field gives rise to field dependence, more difficulty parsing out individual items in a complex scene.²⁵⁴ Other scientists have theorized that levels of field dependence correlate to how much social hierarchy exists in a society.²⁵⁵ For instance, psychology Professor Zachary Dershowitz analyzed field dependence of Orthodox Jewish boys (conservative social boundaries), reformed Jewish boys, and protestant boys. The psychologist found that the Orthodox Jewish boys exhibited the most field dependence.²⁵⁶

After explaining the social science supporting the culture/cognition connection, Nisbett tackles some of the large metaphysical distinctions between the East and the West.²⁵⁷ As a springboard, Nisbett begins with the observation that Asians generally see the world as a complex world that is always moving, whereas Westerners tend to see the world as a series of discrete unmoving objects.²⁵⁸ Westerners see the individual as having discrete rights whereas Asians see rights as belonging to the entire community.²⁵⁹ Applying the theory that the environment can influence cognitive habits, Nisbett traces these differences back to historical differences between China and Greece (as the cradle of Western reasoning), with China being more dependent on a farming economy that required social cooperation

²⁵² *Id.* at 42-43 (citing Herman Witkin, *Field Dependence and Interpersonal Behavior*, 84 PSYCHOLOGICAL BULLETIN 661 (1977)).

²⁵³ *Id.*

²⁵⁴ *Id.* at 43.

²⁵⁵ *Id.* at 43-44 (citing Zachary Dershowitz, *Jewish Subcultural Patterns and Psychological Differentiation*, 6 INT'L J. PSYCH. 223 (1971)).

²⁵⁶ *Id.*

²⁵⁷ *Id.* at xvii.

²⁵⁸ *Id.* at xvi.

²⁵⁹ *Id.* at 6.

whereas Greece was more dependent on fishing and herding, more individualistic activities.²⁶⁰

Psychology studies indicate that generally, Asians pay more attention to the holistic context of what they are seeing than Westerners do. In one study, Japanese and American subjects were asked to look at an animated vignette of a fish pond.²⁶¹ When asked to describe what they saw, the Japanese subjects focused on how big the pond was.²⁶² The Americans focused on the one big fish in the pond.²⁶³ In another study, Japanese and American children were shown objects that could be categorized based on shape or substance.²⁶⁴ The study involved three objects: a porcelain lemon juicer, pieces of porcelain, and a lemon juicer made out of wood.²⁶⁵ American children grouped the two lemon juicers together, whereas the Japanese children responded at chance levels, selecting either the other juicer or the porcelain pieces.²⁶⁶ The cognitive distinction points to a cultural difference but also to a linguistic one—the Japanese language “provides no guidance as to whether simple objects should be seen as objects or substances.”²⁶⁷ For Nisbett, this specific study illustrates that “Westerner and Asians literally see different worlds.”²⁶⁸

Overall, Asian societies are considered a high context society, meaning that individuals perceive of themselves and others in the specific

²⁶⁰ *Id.* at 34-35. Nisbett does not surface this, but it is important to note that despite the Greek reputation for individualism, both ancient Greek and ancient Chinese societies were extremely hierarchical. Nisbett uses the views of Confucius and Aristotle to do a comparison—both of these thinkers fully embraced hierarchy. *See id.* at 15, 29 (Confucius was very hierarchical); Berenguer et al., *Gut Renovations*, *supra* note 21, at 207-211 (Aristotle and Plato were very hierarchical).

²⁶¹ *Id.* at 89-90 (citing Takahiko Masuda & Richard E. Nisbett, *Attending Holistically Versus Analytically: Comparing the Context Sensitivity of Japanese and Americans*, 81 *J. PERSON. & SOC. PSYCH.* 922 (2001)).

²⁶² *Id.*

²⁶³ *Id.*

²⁶⁴ *Id.* at 81 (citing Mutsumi Imai & Dedre Gentner, *A Cross-Linguistic Study of Early Word Meaning: Universal Ontology and Linguistic Influence*, 62 *COGNITION* 169, 186 (1997)).

²⁶⁵ Imai & Gentner, *supra* note 264, at 180.

²⁶⁶ Nisbett, *supra* note 249, at 81.

²⁶⁷ Mutsumi & Gentner, *supra* note 265, at 188.

²⁶⁸ Nisbett, *supra* note 249, at 82.

context of a situation.²⁶⁹ For instance, an Asian person might say that he/she is a serious person when he/she is at work, whereas a Westerner may just say, unequivocally that he/she is a serious person.²⁷⁰ In a low-context society such as the U.S., the individual is seen as a “bounded, impermeable free agent” whereas in a high-context society, people are “connected, fluid, and [their identity] is conditional” on the context.²⁷¹ This difference in context also explains why and how Asians don’t have the same reference points for “individualism” as Westerners do.²⁷² When evaluating an event involving a person, Asians focus more heavily on a person’s circumstances than Westerners. For instance, when a Chinese graduate student shot his faculty advisor at the University of Iowa in 1991, U.S. media outlets reported on the student’s alleged personality defects whereas Chinese media outlets focused on the situation—the student’s relationships, his stress-levels, and his access to firearms.²⁷³

Asians also approach history in a more contextualized way.²⁷⁴ Japanese history teachers ask their students to imagine the “mental and emotional states of historical figures by thinking about the analogy between their situations and situations of the students’ everyday lives.”²⁷⁵ History students are considered skillful when they can empathize with the historical figures they are studying.²⁷⁶ In contrast, U.S. history emphasizes factual outcomes and causal factors in a fairly abstract fashion (The Roman Empire collapsed for three main reasons).²⁷⁷ Nisbett theorizes that the Western approach to history, which evaluates the past for cause and effect, matches up with a worldview that assumes that individuals have control over their destiny.²⁷⁸

Moving from approaches to history education to broader generalizations, because their worldview emphasizes dynamism and cyclical patterns, Asians generally believe that individuals don’t have control over

²⁶⁹ Nisbett, *supra* note 249, at 50.

²⁷⁰ *Id.* at 53.

²⁷¹ *Id.* at 50.

²⁷² See *infra* notes 226-236 and surrounding text.

²⁷³ NISBETT, *supra* note 123, at 112 (citing Michael W. Morris & Kaiping Peng, *Culture and Cause: American and Chinese Attributions for Social and Physical Events*, 67 J. PERSON. & SOC. PSYCH. 949 (1994)).

²⁷⁴ *Id.* at 127-128.

²⁷⁵ *Id.* (citing the work of Japanese sociologist Masako Watanabe).

²⁷⁶ *Id.*

²⁷⁷ *Id.*

²⁷⁸ *Id.*

much.²⁷⁹ In response to a change in circumstances, Asians tend to adapt themselves to the situation rather than trying to control the external event that is happening.²⁸⁰ This fundamental difference in Asian and Western thinking elucidates a very different approach to knowledge based on categories. Westerners generally believe that the world is relatively simple, that material objects can be analyzed in isolation, and that outcomes are highly subject to personal control.²⁸¹ Categorization is based on the idea that the things in the world are static. These thought patterns date back to the Greeks, who took pleasure in a linear process of categorization at abstract levels.²⁸² The ancient Chinese, however, rejected abstract categorization schemes and often categorized using a logic of contradiction.²⁸³ For example, in *The Tao Te Ching*, an ancient Chinese poet wrote:

The five colors cause one's eyes to be blind

The five tones cause one's ears to be deaf

The five flavors cause one's palate to be spoiled²⁸⁴

The ancient Chinese poet rejected categories for their own sake because breaking the world down into atomistic categories fractures the world in a negative, unnatural way.²⁸⁵ For the Chinese, relationships and similarities between categories were more analytically important than whether or not something fit into a particular category.²⁸⁶ Ancient Chinese thinkers divided the world into five core processes—spring, east, wood, wind, and green.²⁸⁷ Each of these processes are ineluctably influenced by the others. For Chinese knowledge, this “multiple echo” effect was the thing to study, as opposed to the task of putting various objects into the right categorical box, which was of most interest to ancient Greek thinkers.²⁸⁸

²⁷⁹ *Id.* at 97.

²⁸⁰ *Id.* at 100.

²⁸¹ *Id.* at 100.

²⁸² *Id.* at 24.

²⁸³ *Id.* at 137-138.

²⁸⁴ *Id.* at 137-138.

²⁸⁵ *Id.* at 138.

²⁸⁶ *Id.* at 138, 167.

²⁸⁷ *Id.* at 138.

²⁸⁸ *Id.*

Cultural differences in categorization approaches are also visible when social scientists look at how children are acculturated by their parents. In general, Asian children learn how to categorize later than Western children.²⁸⁹ Asian mothers exhibit a relational approach to objects when they talk to their children, saying things like “the toy is crying because you threw it.”²⁹⁰ On the other hand, Western mothers can be heard asking their children to identify an object and its color.²⁹¹ In one study, Western and Asian children were presented with images of grass, a chicken, and a cow and asked to select the two that should be grouped together.²⁹² A majority of the Asian children selected the cow and the grass because cows eat grass.²⁹³ A majority of the Western children grouped the chicken and the cow together because they are both animals.²⁹⁴ This study shows that for Asians, relational aspects tend to be more important for categorization decisions than they are for Westerners.

That Asian children are encouraged to consider relational aspects carries through to adulthood, where there is evidence that, in general, Asians are more attuned to the emotional states of others than Westerners are.²⁹⁵ With respect to categorization versus relational analysis, there are also linguistic effects. Western parents and children can be described as “noun obsessed,” as nouns are necessary to categorize.²⁹⁶ Western children learn nouns faster than they learn verbs.²⁹⁷ On the other hand, Asian children learn verbs and nouns at about the same rate, sometimes they learn verbs faster.²⁹⁸ There are also important differences in the languages themselves. Asian languages do not generally have a mechanism for making an adjective into a noun (i.e. darkness) like Indo-European languages.²⁹⁹ English is a subject

²⁸⁹ *Id.* at 152.

²⁹⁰ *Id.* at 59.

²⁹¹ *Id.* at 59, 162.

²⁹² *Id.* at 140-41 (citing Lian-Hwang Chiu, *A Cross-Cultural Comparison of Cognitive Styles in Chinese and American Children*, 7 INT’L J. PSYCH. 235 (1972)).

²⁹³ *Id.*

²⁹⁴ *Id.*

²⁹⁵ *Id.* at 59.

²⁹⁶ *Id.* at 150.

²⁹⁷ *Id.* at 149 (citing Dedre Gentner, *Some Interesting Differences Between Nouns and Verbs*, 4 COGNITION AND BRAIN THEORY 161 (1981)).

²⁹⁸ *Id.* (citing Twila Tardif, *Nouns Are Not Always Learned Before Verbs: Evidence from Mandarin-speakers Early Vocabularies*, 32 DEVELOP. PSYCH. 492 (1996)).

²⁹⁹ *Id.* at 9.

prominent language (it is more specific), whereas Asian languages are topic-prominent.³⁰⁰ A Western person may remark that Aspen, Colorado is a great place to go skiing. An Asian person may express the same thought as “This place, skiing is good.”³⁰¹

Further, Asians don’t often categorize something as good or bad, rather, an event can be good, in a moment, but it can easily turn into something bad.³⁰² Nisbett provides a famous Chinese parable to illustrate this point.³⁰³ When a farmer’s horse ran away, his neighbors came to offer sympathy.³⁰⁴ The farmer responded by saying, why offer sympathy, because who knows if my runaway horse is a good or bad thing?³⁰⁵ A few days later, the runaway horse returned with a wild horse.³⁰⁶ When the neighbors came to congratulate the farmer, he replied that this too was not clearly a good or bad thing.³⁰⁷ Then, the farmer’s son rode the wild horse but was thrown, breaking his leg.³⁰⁸ And then, a few days later, military officers came to the down to draft young men for the army, but spared the farmer’s son on account of his broken leg.³⁰⁹ And so on. The parable illustrates the Asian worldview of ever-changing events and the impossibility of capturing a conclusion in a static way.

This classic Asian parable also illustrates cultural differences in approaches to narratives. As Westerners, we expect stories to have a beginning, a middle, and an end.³¹⁰ Generally, Westerners prefer an ending that resolves conflict. But in general, Asians expect many different reversals of fortune, and have no particular desire for a linear narrative that proceeds neatly from A to B.³¹¹ Instead, Asians aesthetically engage with

³⁰⁰ *Id.* at 157.

³⁰¹ *Id.* For instance, the idiom “long time, no see” is thought to be an English translation of either an Indigenous Native American, or, a Chinese saying. Gandhi, *supra* note 1. The saying represents a topical approach as opposed to a subject approach.

³⁰² *Id.* at 12.

³⁰³ *Id.* at 12.

³⁰⁴ *Id.*

³⁰⁵ *Id.*

³⁰⁶ *Id.*

³⁰⁷ *Id.*

³⁰⁸ *Id.*

³⁰⁹ *Id.*

³¹⁰ Aristotle defined a story as a narrative that has a beginning, a middle, and an end. ARISTOTLE, POETICS, Part VII.

³¹¹ *Id.* at 108.

contradictions and multiple views, trying to either resolve each perspective and seeing the truth in both.³¹² Instead of A is correct and B is incorrect, the Asian approach might be to say that A is right and B is not wrong.³¹³ Or, A is right, for the time being, but B might be correct in a different situation.³¹⁴

Asians are comfortable engaging with multiple pieces of information whereas Westerners traditionally home in on one item.³¹⁵ Asians tend to see multiple, sometimes conflicting causal factors whereas Americans focus on a single factor.³¹⁶ In one study, when Asians and Americans were presented with human faces, Asians tended to see both positive and negative emotions in a face, whereas Americans only saw one kind of emotion, positive or negative.³¹⁷ In a similar vein, when a scientist provided Koreans and Americans with one hundred pieces of information related to a news story about a murder, the Americans thought that 45% of the informational items was relevant, whereas the Koreans thought that 63% of the information items was relevant.³¹⁸ This study illustrates that Asians emphasize a greater amount of context and factors, whereas Westerners tend to simplify the analysis to a fewer number of brass tacks.

E. East/West Takeaways for Legal Rhetoric

Comparative rhetoric and comparative social psychology present a trove of cultural kernels that can be applied to rethink or remodel aspects of U.S. legal reasoning. While an entire article could be written on East/West differences in communication and their applications for legal rhetoric, there are six takeaways worth mentioning here:

- Western legal rhetoricians should always rethink either-or dichotomy and try approaching a problem by understanding that an outcome may

³¹² *Id.* at 173-74 (explaining that Asians prefer wisdom literature (proverbs) that contain contradiction, like “half a loaf is better than none” or “a man is stronger than iron and weaker than a fly.”)

³¹³ *Id.* at 176.

³¹⁴ *Id.*

³¹⁵ *Id.* at 19, 21-22, 24.

³¹⁶ *Id.* at 205-206.

³¹⁷ *Id.* at 187 (citing Kaiping Peng et al., *Culture and Judgment of Facial Expression* (unpublished manuscript)).

³¹⁸ *Id.* at 129 (citing Incheol Choi et al., *Culture and Judgment of Causal Relevance*, 84 J. PERSON. & SOC. PSYCH. 46 (2003)).

be neither good, nor bad, but there might be a middle way³¹⁹ that reconciles each side. Looking at a problem from multiple angles, instead of just one view, may also lead to increased wisdom.³²⁰

- Legal rhetoricians should become attuned to Asian wisdom that things cannot be fully understood in isolation and that context matters greatly. Indeed, critical race theorists have long advocated that the law take more context into account.³²¹
- Law advocates should re-consider categories a from relational standpoint. For instance, is it possible to re-organize facts and problems based on relational aspects, as oppose to the way the law has always classed the information?³²²
- Inspired by Asian linguistics, which favor verbs over nouns,³²³ legal advocates can brainstorm their theory and theme of the case using only action verbs as a starting point.
- Legal analysts should embrace complexity and understand that concepts can be linked with more than one factor or cause. For instance, many legal writers engage with information discretely, describing case A, then case B, then case C. The writer then applies each case to the facts in linear succession. This is a classic Western way of doing analysis. An alternative approach, however, might synthesize the underlying inputs together and reason from there. True synthesis results in more sophisticated legal analysis and argument.

³¹⁹ *Id.* at 101. The middle way sees truth in both sides. *Id.* at 44-45. Of course, in some legal situations, there is so clearly a right and a wrong that the middle way approach would be counter-productive. But even in these situations, the middle way might be used to resolve sub-issues (such as what sentence should go with a conviction).

³²⁰ The concept of multiple definition was discussed *supra*, in notes 118-120, 190.

³²¹ See Regina Austin, “Bad for Business”: Contextual Analysis, Race Discrimination, and Fast Food, 34 J. MARSHALL L. REV. 207 (2000-2001) (explaining how the law often leaves out so many details that regular people would consider crucial in assessing solutions).

³²² For an explanation of how categories can be reconstituted in creative ways, see Jewel, *Categories*, *supra* note 21, at 53-55.

³²³ See *supra* notes 296-298 and surrounding text.

- Finally, law advocates can and should revise their understanding of narrative and story and realize that not all cultures respond aesthetically to information that is put in a beginning, middle, and end framework. Asian rhetorical culture places aesthetic emphasis on multiple turns and reversals as well as contradiction. Creating narratives with more dynamic frameworks might enliven one's legal advocacy while also creating cross-cultural appeal.

III. Specific Lessons on Alternative Processes and Alternative Legal Rhetoric

Do other cultures have better ways of speaking and arguing that produce more justice and less inequality? This section of the paper explores this question, identifying possible sources for the new discipline of comparative legal rhetoric beyond the more obvious feeder disciplines discussed above. Here, there is a distinction between rhetoric as a *way of speaking* and the specific *process* that a culture uses, which can frame a way of speaking. This part of the paper addresses three major sources of alternative rhetorical knowledge: (1) anthropology and ethnography, (2) Navajo legal rhetoric, and (3) various microrhetorics within mainstream U.S. culture. All of these sources support different ways of speaking and knowing that contrast with a traditional rhetorical approach. Within these areas, this paper aims to identify sources of knowledge but also establish areas for future inquiry, recognizing that this is just the start.

A. Anthropology and Ethnology

Is there rhetoric wisdom to be gained from studying other cultures? Howard University Law Professor Harold McDougall opines that small groups are better at social justice work, pointing out that in human history, it is when humans organize themselves into larger groups that hierarchy, inequality, and injustice become a problem.³²⁴ McDougall raises the theory that in ancient societies, women and men were equal, but men quickly moved to subordinate women.³²⁵ Men then acted to create class-based status differences based on the idea that some men were superior to others.³²⁶ McDougall theorizes that returning civic culture to small group units such as

³²⁴ Harold McDougall, *Humans, Hierarchy, and Human Rights*, 74 NATIONAL LAWYER'S GUILD REVIEW 129, 129-130 (2017).

³²⁵ *Id.* at 132 (citing MARILYN FRENCH, FROM EVE TO DAWN, A HISTORY OF WOMEN IN THE WORLD: REVOLUTIONS AND STRUGGLES FOR JUSTICE IN THE 20TH CENTURY (2008)).

³²⁶ *Id.*

people's assemblies might "create solidarity, self-help, and cooperative options."³²⁷ This would be an example of a *process* that might produce new rhetoric strategies that in turn produce more justice and more equality.³²⁸ Here, the inquiry is whether or not anthropological approaches can generate new ideas about rhetoric. Following Professor McDougal's train of thought, there are non-Western cultures that are matriarchal and/or egalitarian.³²⁹ What rhetorical knowledge can we learn from studying egalitarian cultures through an anthropological lens?

Law and anthropology has been done before, illustrated in the mid-century work of anthropologist E. Adamson Hoebel. Hoebel studied anthropology at Columbia University under Franz Boas, a progenitor of American anthropology (Boas also taught famed anthropologists Margaret Mead and Zora Neale Hurston).³³⁰ While studying anthropology at Columbia,

³²⁷ *Id.* at 141. Professor McDougal proposes a system, borrowed from indigenous practices, where groups are arranged in "concentric circles bound together by dialogue, without utilizing bureaucracy, hierarchy, or subordination." *Id.*

³²⁸ The citizen's assemblies that Jackson, Mississippi mayor Chokwe Antar Lumumba has created mirror McDougal's ideas for achieving more direct democracy. See Ko Bragg, *Hot and Collective, Inside the People's Assembly*, JACKSON FREE PRESS (Dec. 6, 2017)

<https://www.jacksonfreepress.com/news/2017/dec/06/hot-and-collective-inside-peoples-assembly/>. Afro-Caribbean theorist C.L.R. James also wrote positively about the potential for direct democracy processes, particularly in the citizen's assemblies utilized in ancient Greek democracies. See C.L.R. JAMES, A NEW NOTION: TWO WORKS BY C.L.R. JAMES 136-55 (Aakar books 2010). Despised by both Aristotle and Plato, the Greek city-state refused to hand governance over to a small group of elite experts, but instead trusted the "intelligence and sense of justice of the population at large." *Id.*

³²⁹ See Cyndy Baskin, *Women in Iroquois Society*, 4 CANADIAN WOMEN'S STUDIES 42 (1982) (explaining that Iroquois society was originally matriarchal and matrilineal); Brenneis, *supra* note 154, at 70 (explaining that society in a Bhatgoan village was egalitarian in the sense that men (but not women) were considered socially equal).

³³⁰ E. Adamson Hoebel, WIKIPEDIA, https://en.wikipedia.org/wiki/E._Adamson_Hoebel; Franz Boas, Wikipedia, https://en.wikipedia.org/wiki/Franz_Boas.

Hoebel took law courses from famed legal realist Karl Llewellyn.³³¹ Influenced by Professor Llewellyn, Hoebel studied non-Western cultures with the aim of identifying norms and practices that could be viewed as having the force of law.³³²

Hoebel's work could connect egalitarian cultures with new rhetorical knowledge, as many of the cultures that Hoebel wrote about were egalitarian, in the sense that they did not have rigid social structures.³³³ Unfortunately, Hoebel's analysis often becomes mired in Eurocentric, elitist, racist, and sexist bias; he clearly believed the White and Western way of doing things was superior. For example, he referred to the Kiowa process of mediating disputes (wronged individuals displayed anger and emotion until there was a resolution) as an "inherently defective" way to solve problems.³³⁴ He referred to Ashanti matrilineal culture as a "shibboleth of ignorance."³³⁵ And he described Ifugao men accused of rape as "poor chap[s]. . . with a tough time knowing whether the girl is putting on an act (by saying no) or is really fending him off."³³⁶ Hoebel's book title—*Law of Primitive Man: A Study in Comparative Legal Dynamics*—speaks for itself, problematically. Nonetheless, after taking time to contemplate how scholarly knowledge, infected with sexism, racism, and elitism, becomes monumentalized in the work of scholars like Hoebel, we can still mine his work for value.

There are, in fact, some useful kernels in Hoebel's work. Eskimo public confessions, where villagers collectively confessed to wrongs and collectively obtain forgiveness, is an interesting rhetorical practice that functions as an alternative to individual shaming and atonement.³³⁷ Also useful is Hoebel's description of the Cheyenne approach to crime, which, like other tribal societies, emphasized rehabilitation and reintegration rather than

³³¹ *Id.* Indeed, Hoebel and Llewellyn wrote a book together, which purported to be an ethnography of the Cheyenne people. KARL LLEWELLYN & E. ADAMSON HOEBEL, *THE CHEYENNE WAY: CONFLICT AND CASE LAW IN PRIMITIVE JURISPRUDENCE* (1941).

³³² E. ADAMSON HOEBEL, *LAW OF PRIMITIVE MAN: A STUDY IN COMPARATIVE LEGAL DYNAMICS* (Harvard 1954).

³³³ *Id.* at 81, 101, 191 (discussions of Eskimo, Ifugao, and Ashanti societies). While these societies were egalitarian in respect to men, they were not egalitarian at all in terms of relations between the sexes.

³³⁴ *Id.* at 172-173.

³³⁵ *Id.* at 188-189.

³³⁶ *Id.* at 119-120.

³³⁷ *Id.* at 71.

punishment and vengeance.³³⁸ Also interesting was the Ifugao people's use of a *monkalun*, an individual to facilitate dispute resolutions without arbitrating them.³³⁹ The *monkalun* clearly mirrors modern mediation processes in the law, although such processes were not known in Hoebel's time.³⁴⁰

With a more critical and reflective lens, comparative rhetoric scholars might glean wisdom from indigenous cultures that are structured in egalitarian ways.³⁴¹ Iroquois³⁴² society, for instance, differed from U.S. society, in that women had complete control over the household, personal property in the household, and the land.³⁴³ While the Iroquois did not consider land as something that could be individually owned, women, not men, were vested with the responsibility for controlling, cultivating, and stewarding land.³⁴⁴ Iroquois women also held a tremendous amount of political power, with the exclusive ability to appoint and remove clan chiefs (sachems).³⁴⁵ Iroquois women also had decisional authority to wage or refrain from waging war.³⁴⁶ With respect to rhetoric, Iroquois women voiced their opinions in a skillful way, taking special care to warn sachems who were not leading the clan effectively.³⁴⁷ Iroquois women crafted their warnings with a strong sense of decorum so that they would be respected.³⁴⁸ Iroquois women participated in council meetings although sometimes they chose a male speaker through which they would voice their opinions.³⁴⁹ The visible strength of women in

³³⁸ *Id.* at 152-53; *see also* notes 513-530 and surrounding text.

³³⁹ *Id.* at 126.

³⁴⁰ Hoebel insultingly dismisses the Ifugao *monkalun* process: "of true juridical process [the Ifugao] have not a glimmer." *Id.*

³⁴¹ See Natsu Taylor Saito, *Different Paths*, 1 J.L. POL. ECON. 46, 50 (2020) (recognizing that many indigenous societies have more "reciprocal and also much more fluid" understandings of social organization, especially gendered relations).

³⁴² The Iroquois were comprised of the Onondaga, Oneida, Seneca, Cayuga, and Mohawk people. They lived in the Northeast United States and in Canada. Baskin, *supra* note 329, at 43.

³⁴³ *Id.* at 44.

³⁴⁴ *Id.*

³⁴⁵ *Id.*

³⁴⁶ *Id.* at 45

³⁴⁷ *Id.* at 44. (An erring sachem was entitled to three warnings before being removed).

³⁴⁸ *Id.*

³⁴⁹ *Id.*

Iroquois society inspired women like Elizabeth Cady Stanton to push forward with a suffragist agenda.³⁵⁰

Unfortunately, the influence of Anglo law and culture changed Iroquois society and made it more patriarchal and patrilineal.³⁵¹ An 1869 Canadian Act declared that “any Indian women marrying any other than an Indian shall cease to be an Indian, . . . nor shall the children of such a marriage be considered as an Indian.”³⁵² Similar laws were enacted in the U.S.³⁵³ These forced assimilationist changes make it difficult to actually locate and study Iroquois rhetoric. Nonetheless, there are pockets of Iroquois people, so-called “longhouse Iroquois” that reject Eurocentric values and continue to abide by traditional female-oriented rules.³⁵⁴ Future studies into this space could be highly fruitful.³⁵⁵ For such a project, the comparatist should consult anthropology scholars like Audra Simpson (of Mohawk)³⁵⁶ and Michel-Rolph Trouillot (Haitian),³⁵⁷ both of whom have written lucidly about giving subjects “literary sovereignty”³⁵⁸ by enabling the first-person voice and rejecting the “us and all of them” binary that privileges Western knowledge as superior to all others.³⁵⁹

Similar to the Iroquois, the Navajo Nation, whose rhetoric is discussed more in depth below, also adheres to matrilineal and matrilineal forms of social organization.³⁶⁰ In a matrilineal family, daughters continue to live with their parents and unmarried siblings; their husbands come to reside

³⁵⁰ Sally Roesch Wagner, *Iroquois Women Inspire 19th Century Feminists*, PEACE COUNCIL NET, <http://www.peacecouncil.net/noon/iroquois-women-inspire-19th-century-feminists-by-sally-roesch-wagner> (originally published in the Summer 1999 issue of NOW (National Organization of Women) Times).

³⁵¹ Baskin, *supra* note 329, at 45.

³⁵² *Id.*; see also AUDRA SIMPSON, *MOHAWK INTERRUPTUS: POLITICAL LIFE ACROSS THE BORDERS OF SETTLER STATES* 108 (Duke 2014).

³⁵³ Baskin, *supra* note 329, at 46.

³⁵⁴ *Id.*

³⁵⁵ However, it is not entirely clear what such a study would produce. Just because a culture is broadly egalitarian along gender-lines does not mean that its rhetoric mirrors or represents the culture’s social structure.

³⁵⁶ See SIMPSON, *supra* note 352, at 95-113;

³⁵⁷ See MICHEL-ROLPH TROUILLOT, *GLOBAL TRANSFORMATIONS* (2003).

³⁵⁸ SIMPSON, *supra* note 352, at 105.

³⁵⁹ ROLPH-TROUILLOT, *supra* note 357, at 27.

³⁶⁰ See Mary Shepardson, *The Status of Navajo Women*, 6 AM. INDIAN QUART. 149 (1982).

with them.³⁶¹ In the family, decision-making is egalitarian with an emphasis on individual autonomy.³⁶² Navajo matrilineal tradition provides that the family descends from the mother and becomes part of her clan. Like Iroquois culture, U.S. interference has attenuated Navajo women's traditionally high status. In the 1800s and 1900s, the Board of Indian Affairs (BIA) attempted to civilize the Navajo people by ignoring matrilineal clan designations, assigning the patronym of the father to the child, and grouping household members under a male head in its registration procedures.³⁶³ In addition, land reforms aimed at reducing the livestock population (stock reduction) harmed Navajo women, taking away their livelihood (livestock cultivation) and forcing them into wage-labor, where they did not fare as well as men.³⁶⁴ Nonetheless, in more recent years, the traditionally high status of Navajo women has recovered from losses that occurred during stock reduction and BIA rule.³⁶⁵

Gender hierarchy is just one example of the Navajo Nation's more egalitarian and more holistic approach to social organization. The Navajo Nation also has a rich body of jurisprudence in the form of written legal opinions, which can be studied for their alternative approaches to legal rhetoric and legal understanding. As Natsu Taylor Saito has cogently written, "[t]hose of us steeped in colonial cultures can learn a great deal from perspectives that remain 'outside the logic of possession,' while remaining mindful that such ways of understanding are grounded, quite literally, in space or place, and, therefore, cannot be universalized."³⁶⁶ In terms of learning from indigenous rhetoric, Navajo legal rhetoric offers a trove of lessons. Studied through its written judicial opinions, Navajo legal rhetoric emphasizes process over rules; elevates care and restoration over retribution and incarceration; and privileges consensus over top-down decisions made by one individual. Navajo jurisprudence is where we now turn.

B. Indigenous Rhetoric: Navajo Jurisprudence

Navajo legal rhetoric serves as a helpful example of legal rhetoric that exists separate and apart from our Anglo system.³⁶⁷ A thorough study of

³⁶¹ *Id.* at 150.

³⁶² *Id.*

³⁶³ *Id.* at 160.

³⁶⁴ *Id.* 151-153.

³⁶⁵ *Id.* at 162, 167.

³⁶⁶ Saito, *supra* note 341, at 61.

³⁶⁷ This is a topic that I briefly addressed in my article *Neurorhetoric, Race, and the Law*, *supra* note 21, at 692, n. 17. In researching and writing on

Navajo rhetoric is beyond the scope of this article; indeed, to truly study Navajo rhetoric, one would need to travel to the jurisdiction, sit in on court proceedings, and really immerse oneself in the jurisprudence.³⁶⁸ For purposes of this article's more limited study, I will review emblematic decisions that showcase the Navajo Nation's approach to legal rhetoric and legal problem-solving.³⁶⁹

Since the creation of its Supreme Court in 1958, the Navajo Nation has produced a significant amount of legal jurisprudence in the form of written decisions.³⁷⁰ Through these written decisions, previously unwritten customs were codified and institutionalized; norms and values became tribal common law.³⁷¹ The Navajo word for law, *beehaz'áanii*, refers to a higher law, something "way at the top" that corresponds roughly to the Anglo concept of natural law.³⁷² The Navajo Nation Code of Judicial conduct mandates that Navajo judges apply Navajo concepts to adjudicate issues.³⁷³ Navajo judges should "apply Navajo concepts and procedures of justice, including the principles of maintaining harmony, establishing order, respecting freedom, and talking things out in free discussion."³⁷⁴ Disputes can be resolved in a traditional litigation format, through the Navajo tribal court system, or the parties might select a peacemaking process to resolve their dispute.³⁷⁵

this issue, I was inspired by Prof. Gabrielle Stafford's brilliant presentation on indigenous law and indigenous rhetoric at the Fifth Applied Storytelling Conference at City University Law School, London, U.K.

³⁶⁸ I hope to engage in such a project in the very near future.

³⁶⁹ I sourced most of these decisions from a comprehensive law review article that traces the evolution of Navajo jurisprudence. Daniel L. Lowery, *Developing a Tribal Common Law Jurisprudence: The Navajo Experience, 1969-1992*, 18 AM. INDIAN L. REV. 379 (1993).

³⁷⁰ *Bennett v. Navajo Board of Election Supervisors*, No. A-CV-26-90, 18 Indian L. Rep. 6009, 6010 (Nav. Sup. Ct. Dec. 12, 1990) (discussing the chronology for the establishment of the Navajo Supreme Court).

³⁷¹ Lowery, *supra* note 369, at 381.

³⁷² *Id.* at 390.

³⁷³ Navajo Nation Code of Judicial Conduct, Canon 1 (1998).

³⁷⁴ *Id.*

³⁷⁵ *Id.* at 628-629; Lowery, *supra* note 369, at 383-84; James W. Zion, *The Navajo Peacemaker Court: Deference to the Old and Accommodation to the New*, 11 AM. INDIAN L. REV. 89, 89-92 (1983).

Before studying individual Navajo opinions, it is helpful to consider the worldview, or nomos,³⁷⁶ of Navajo jurisprudence. One of the keys to Navajo jurisprudence is the concept of *sa'ah naaghái bik'eh hózho*, a concern for harmony within and in connection to the physical/spiritual world.³⁷⁷ An alternative to rugged individualism, the Navajo approach to law and problem-solving emphasizes “respect, reference, kindness, and cooperation.”³⁷⁸ Whereas U.S. legal culture treats the law as something to be applied to solve an individual problem, Navajo law, and North American indigenous systems in general, treats law as a “way of life. . .[believing] that justice is a part of the life process.”³⁷⁹ Also relevant is the characterization of the Navajo legal system as robustly participatory, all Navajos—men and women—have long been expected to participate in decision-making.³⁸⁰ In comparison to the U.S./Anglo legal system, the Navajo approach can be described as holistic rather than atomistic, participatory and horizontal rather than top-down. As will be explored below, these mindset differences produce discernable differences in the legal rhetoric.

In reading Navajo court decisions, one of the first rhetorical differences of note is the amalgamated nature of the legal reasoning. As a “micro-jurisdiction,”³⁸¹ Navajo law combines Anglo-American and

³⁷⁶ Nomos is the “the normative universe” where rhetoric functions and is commonly understood by the audience. Chubb, *Still Writing at the Master's Table*, *supra* note 98, at 258.

³⁷⁷ James W. Zion, *Navajo Therapeutic Jurisprudence*, 18 *TOURO L. REV.* 563, 603 (2015) (The acronym SNBH is often used to refer to this concept) [hereinafter *Zion, Navajo Therapeutic Jurisprudence*]. See also Gerry Philipsen, *Navajo World View and Culture Patterns of Speech: A Case Study in Ethnorhetoric*, 39 *SPEECH MONOGRAPHS* 132, 133 (1972) (The Navajo mindset views the world is an “inherently harmonious order of causally related things and occurrences.”).

³⁷⁸ *Id.* at 607.

³⁷⁹ Ada Pecos Melton, *Indigenous Justice Systems and Tribal Society*, available at http://www.aidainc.net/Publications/ij_systems.htm

³⁸⁰ *Bennett v. Navajo Board of Election Supervisors*, No. A-CV-26-90, 18 *Indian L. Rep.* 6009, 6011 (Nav. Sup. Ct. Dec. 12, 1990) (placing the Navajo legal system in a political and historical context).

³⁸¹ Here, I use the term “micro-jurisdiction” to refer to a small area with some independent sovereignty that is ensconced or within a larger jurisdiction, areas like Seychelles (with a legal system influenced by both common and civil law traditions). See Tony Angelo, *From Code Noir to Entrenched Rights*, 50 *VICT. U. WELLINGTON L. REV.* 359, 368, n.1 (2019)

indigenous reasoning. Navajo judges “are in the often untenable position of reconciling two competing philosophies in the courtroom.”³⁸² The written court decisions, however, often turn on precise Navajo concepts, which are written in the Navajo language and orthography. Although the concepts are subsequently translated into English, the Navajo concept is the primary text that propels the concept.

In reading the written decisions, one sees how Navajo legal principles operate in contradistinction to legal formalism, which uses a rigid syllogistic structure with a narrow rule, application, and conclusion. Instead of looking to see how the rule applies to the facts in a narrow fashion, a Navajo appellate judge looks to see if the process aligns with Navajo values and principles. If these values are violated, a judicial decision that would have passed muster under a formalistic analysis is reversed or modified. For instance, in *Green Tree Servicing LLC v. Duncan*, a financial servicing company acted to foreclose on the defendant’s mobile home. The defendant counterclaimed with claims of fraud, intentional emotional distress, harassment, and assault.³⁸³ There was an arbitration clause in the financing agreement that contained, in all capital letters, language indicating that the parties voluntarily and knowingly waived their right to a jury trial. The court held, despite the clear waiver language in the agreement, that the clause violated the Navajo principle of *nábináheezlágo be t’áá lahji algha’ deet’q*, which conditions enforcement of an agreement only if all participants agree that all concerns or issues have been addressed in the agreement.³⁸⁴

The *Green Tree* court also found that the waiver language did not comply with the Navajo concepts of *íishjáni ádooníil*, the necessity of making something clear or obvious, and *házhó’ógó*, which requires a “patient, respectful discussion. . . before a waiver is effective.”³⁸⁵ The Navajo Supreme Court framed *házhó’ógó* not as a rule to be applied, but as a “fundamental tenet informing us *how we must approach each other as*

(citing Mathilda Twomey, *Legal Metissage in a Micro-Jurisdiction: The Mixing of Common Law and Civil Law in Seychelles*, 6 COMPARATIVE LAW JOURNAL OF THE PACIFIC 1 (2017).

³⁸² Manning v. Abeita, slip op., No. SC-CV-66-08 7 (Nav. Sup. Ct 2011).

³⁸³ Green Tree Servicing LLC v. Duncan, slip op., No. SC-CV-46-05 at 1 (Navajo Supreme Court August 18, 2008)

³⁸⁴ *Id.* at 7-8.

³⁸⁵ *Id.* at 10, 11.

individuals.”³⁸⁶ Accordingly, the Navajo Supreme Court found the arbitration clause unenforceable based on Navajo legal principles.

Rhetorically, the *Green Tree* opinion stands out because the legal principles are not just abstract rules, but instead are deep-seated principles that impact the entire Navajo community. By comparison, the U.S. approach to arbitration clauses is visible in a run-of-the-mill Federal case from the Sixth Circuit.³⁸⁷ In that case, *Rowan v. Brookdale Senior Living Communities, Inc.*, the plaintiffs argued that an assisted living facility’s arbitration clause and jury waiver clause were unenforceable under Michigan law. The Sixth Circuit decided otherwise, stating that Michigan law “‘presumes that one who signs a written agreement knows the nature of the instrument,’ and a signatory ‘will not be heard to say, when enforcement is sought, that he did not read it, or that he supposed it was different in its terms.’”³⁸⁸ The U.S. Supreme Court stated the concept similarly:

[I]t will not do for a man to enter into a contract, and, when called upon to respond to its obligations, to say that he did not read it when he signed it, or did not know what it contained. If this were permitted, contracts would not be worth the paper on which they are written. But such is not the law. A contractor must stand by the words of his contract; and, if he will not read what he signs, he alone is responsible for his omission.³⁸⁹

In contrast to the Navajo approach of framing the principle of agreement in terms of a conversation and discussion that takes place mindful of community bonds and enduring social relations, the mainstream U.S. approach places all of the burden to know and understand on the individual alone. The Navajo concept of *házhó’ógó* places the burdens on both sides; the party seeking to enforce an arbitration cause has a duty to make these clear and understandable to the person signing the document.³⁹⁰ Within the

³⁸⁶ *Id.* at 10-11 (emphasis added).

³⁸⁷ I chose the Sixth Circuit here to illustrate because that is the jurisdiction in which I reside.

³⁸⁸ 647 F. App’x 607, 611 (internal citations omitted).

³⁸⁹ *Upton v. Tribilcock*, 91 U.S. 45, 50, 23 L. Ed. 203 (1875)

³⁹⁰ *Green Tree*, slip op., No. SC-CV-46-05 at 10, 11.

U.S, a person signing an agreement, even if they cannot read the language, has an absolute duty to ascertain the meaning of the language:

Thus, where a person cannot read the language in which a contract is written, it is ordinarily as much the person's duty to procure someone to read and explain it to him or her before signing it as it would be to read it before the person signed it if he or she were able so to do, and his or her failure to obtain a reading and an explanation of it is such negligence as will estop the person to avoid it on the ground that he or she was ignorant of its contents.³⁹¹

From a simple linguistic standpoint, the Navajo decisions routinely use the plural first person (we) and consistently frame principles as collective maxims. The U.S. approach, just in viewing this example, relies heavily on singular third person pronouns, often male gendered.

Navajo decisions are also written in such a way to explicitly reject Anglo legal norms when they conflict with Navajo principles. For instance, in *Watson v. Watson*, a dispute concerning past-due alimony and child support amounts, the ex-wife requested that the ex-husband obtain a life insurance policy to guarantee the payment of the alimony, in the event that he died.³⁹² In most U.S. jurisdictions, this is a routine post-divorce remedy designed to secure one party's (usually the ex-wife's) entitlement to post-divorce spousal support (usually from the ex-husband).³⁹³ The Navajo

³⁹¹ 17A C.J.S. Contracts § 211.

³⁹² Slip op., No. SC-CV-40-07 (Navajo Supreme Court Jan. 21, 2010).

³⁹³ See, e.g., Fla. Stat. Ann. § 61.08 (West) ("To the extent necessary to protect an award of alimony, the court may order any party who is ordered to pay alimony to purchase or maintain a life insurance policy or a bond, or to otherwise secure such alimony award with any other assets which may be suitable for that purpose."); *Braun v. Braun*, 74 Mass. App. Ct. 1118, 907 N.E.2d 682 (2009) ("It is within the discretion of the judge to order the husband to maintain life insurance as security for alimony even where, as here, the order for alimony does not continue after the husband's death."); *Hawkins v. Hawkins*, 268 Ga. 637, 638, 491 S.E.2d 806, 807-08 (1997) ("We conclude that the trial court made a valid award of periodic alimony when it required the husband to maintain a life insurance policy for five years for the benefit of his former wife.");

Supreme Court soundly rejected the concept of a life insurance policy, opining that it represented *diné biz nídizin*, “the notion of wishing ill-will or early death on an individual.”³⁹⁴ The court explicitly noted that while the life-insurance policy was a “*bilagaana* [U.S./Anglo] way of making arrangement for payment of indebtedness,” it represented an “uncouth and especially vulgar” approach to Diné [traditional Navajo] values. The court went so far as to declare the practice and request as *yówéé át’áo*—“unbelievable.”³⁹⁵ Accordingly, the *Watson* court denied the request that the ex-husband take out an insurance policy. Because the life insurance policy practice conflicted so deeply with Diné values, the *Watson* court devoted a significant amount of text to repudiating the practice with direct and unapologetic language interwoven with Navajo concepts. The *Watson* court’s lucid explanation reinforced Navajo values and excised U.S. values as inapplicable to the situation.

Sometimes Navajo decisions operate on an additional meta-level in that they specifically define what an effective resolution process looks like. For instance, in *Ashkii v. Kayenta Family Court*, the parties were in a dispute over child custody.³⁹⁶ The lower court ordered each party to pay \$1,000 to a third-party child custody evaluator who would recommend an outcome.³⁹⁷ If a party could not pay the \$1,000 fee, the trial court judge indicated that he would award custody to the opposing side.³⁹⁸ The Navajo Supreme Court found that the outsourcing of the custody decision to a third

Groves v. Groves, 70 Wash. 2d 614, 616, 424 P.2d 654, 655 (1967) (“[T]he trial court was clearly exercising sound discretion [by] securing her rights as a beneficiary [of the life insurance policy] for a period of time. The trial court’s judgment in this respect is affirmed.

³⁹⁴ *Watson*, Slip op., No. SC-CV-40-07 at 17.

³⁹⁵ *Id.*

³⁹⁶ Slip op., No. SC-CV-28-13 (Navajo Sup. Ct. August 19, 2013)

³⁹⁷ *Id.* at 2-3.

³⁹⁸ *Id.*

party violated the Navajo principle of *Diné bi beenahaz 'áanii*, which encourages the parties to work out problems themselves.³⁹⁹ In requiring the third-party custody evaluator, “the Family Court *surrendered its sacred responsibility* to an outside custody evaluator who, more likely than not, is unaccustomed with Diné traditional laws and values.”⁴⁰⁰ In the Navajo legal system, process is not just a dry concept concerned with pleadings and response times. Adhering to an authentic process is imbued with a sacred power.⁴⁰¹

In *Manning v. Abeita*, another case involving a family law alimony issue, the Navajo Supreme Court emphasized the participatory nature of resolving disputes, further illustrating how the Navajo legal process should work.⁴⁰² The appellant alleged that the court did not follow appropriate pre-trial procedures that would have given the parties a chance to resolve the issues in mediation. Accepting appellant’s argument, the Navajo Supreme Court explained that Navajo justice is founded on *K'é*, “principles of relationship, courtesy, and respect.”⁴⁰³ The trial court’s summary adjudication of the alimony issue conflicted with the Diné resolution process, “which does not rely on a superior decision-maker, who imposes decisions on others. It does not use coercion or force, and is instead based upon an agreed need for harmony in the community.”⁴⁰⁴

The *Manning* court reversed the trial court’s decision that was based on a win/lose, top/down, individualistic approach and instead emphasized the need for consensus, process, and harmony, an approach that differs markedly from the mainstream U.S. legal system. The *Watson*, *Manning*, and *Ashkii* cases surface an education campaign of sorts. These cases function as reminders to the Navajo legal community that Navajo legal principles must be vigilantly thought about because they are so different from what seems natural and procedurally correct from a U.S. standpoint.

Rhetoric describing the Navajo Nation’s horizontal and consensus-based process is also discernible in *Navajo Nation v. MacDonald*, where the

³⁹⁹ *Id.* at 1-4.

⁴⁰⁰ *Id.* at 8 (emphasis added).

⁴⁰¹ An inquiry into the sacred roots of U.S./Anglo law is beyond the scope of this paper, but U.S. law descends from the British common law, which rested on theocratic principles. Sacred principles reside in U.S. law in some corners.

⁴⁰² Slip op., No. SC-CV-66-08 (Nav. Sup. Ct 2011).

⁴⁰³ *Id.* at 5.

⁴⁰⁴ *Id.*

appellant, a well-known tribal leader, appealed his convictions for bribery and fraud, arguing that he had received ineffective assistance of counsel.⁴⁰⁵ The Navajo Supreme Court described the correct process in terms of the “affected individuals ‘talking’ about the offense and the offender to resolve the problem.”⁴⁰⁶ As the court explained, effective legal rhetoric is less about “winning” and more about guiding the participants:

The effectiveness of the speaker (and there could be more than one) was measured by what the speaker said. If the speaker spoke wisely and with knowledge while persuading others in their search for consensus, that indicated effectiveness. If the speaker hesitated, was unsure, or failed to move the others, that person was not a good speaker and was thus ineffective.⁴⁰⁷

In evaluating appellant’s counsels’ performance, the Navajo Supreme Court found that they spoke “wisely, and with knowledge, consistent with a traditional Navajo ‘talking things out’ session.”⁴⁰⁸ The appellant also received effective counsel because “[p]lanning is an important Navajo value, and the record show[ed] that the defense was prepared and planned well.”⁴⁰⁹ In contrast to the Navajo conception of effective assistance of counsel, the mainstream U.S. standard for ineffective assistance of counsel rests on an adversarial foundation; a lawyer is ineffective only if his/her lack of skill and effort fails to “render the trial a reliable adversarial testing process.”⁴¹⁰

In contrast to the crucible style of justice that pervades the U.S. system, the *MacDonald* decision stressed a different sort of process. At the end of the appellate opinion, the Navajo Supreme Court made a remarkable conclusion statement:

We have approached our task with respect for leadership and the honor due a public figure. We have assessed the law and evidence as

⁴⁰⁵ Navajo Nation v. MacDonald, No. A-CR-09-90, 19 I.L.R. 6053, 6053-54, 6056-6055 (Navajo Supreme Court 1991).

⁴⁰⁶ *Id.* at 6055.

⁴⁰⁷ *Id.*

⁴⁰⁸ *Id.*

⁴⁰⁹ *Id.*

⁴¹⁰ Strickland v. Washington, 466 U.S. 668, 688 (1984).

judges, and we have reviewed the ‘talking’ about our former leader as Navajos. We have strived to carry out our duties as required by law. The events which have culminated in this decision have tried us all, but the lesson it teaches is, the Navajo Nation will survive as a government of law, nourished by the values, morals, and ideals of equality and sharing which have made Navajo society unique and valuable.

Here, the Navajo Supreme Court framed the consensus-seeking process as more important to the conception of justice than the end result (affirm, deny, guilty, not-guilty). The question was not whether or not the assistance of counsel was “reasonable” in an adversarial courtroom battle,⁴¹¹ but whether or not counsel engendered an effective process, a “talking-it-out” session. In concluding its opinion in this manner, the *MacDonald* court both affirmed the trial court’s jury verdict as correct, but also reinforced the importance of the process, breaking the fourth wall and remarking on the process’s trying nature, for all involved. It is difficult to imagine a U.S. federal Judge making similar remarks or using a similar voice. In this way, Navajo jurisprudence offers an alternative style of judicial rhetoric that both addresses the individual merits of a case, but also explicitly recognizes the communitarian values that require a consensus-building process.

In another case, the Navajo Supreme Court had occasion to remark on the differences between the adversarial system commonly found in the U.S. and the Navajo method of achieving justice. In *Shorty v. Greyeyes*, the appellant was jailed for contempt, for failing to pay child support.⁴¹² The record reflected that defendant was not notified that his contempt hearing would be converted from a civil hearing to a criminal hearing.⁴¹³ The Shorty court ruled that the contempt proceeding violated the Navajo concept (discussed above) of *íishjáni ádoolniil*, the need to make things clear. Further, in concluding its opinion, the *Shorty* court explicitly pointed out the tension between the power of a court to jail an individual for contempt and Navajo principles, which proceed on a different axis:

⁴¹¹ *Id.* at 687 (“[T]he proper standard for attorney performance is that of reasonably effective assistance.”)

⁴¹² *Shorty v. Greyeyes*, slip op., No. SC-CV-06-14, 1-2 (Navajo Supreme Court 2014).

⁴¹³ *Id.*

Trial courts should understand that the exercise of contempt powers should be done with upmost restraint. This is true in any court system but it is particularly true in the Navajo Court system, which prides itself on applying *restorative concepts of justice and horizontal concepts of power*. The adversarial system which is in existence in our court system creates tension with traditional dispute resolution and some contempt powers may be essential in the adversarial system, but our courts shall limit their application by applying Navajo concepts when applicable.⁴¹⁴

The *Shorty* court supported its decision with logic and rules, but augmented its reasoning with commentary on the proper role of the judge in the Navajo legal system. The reference to “restorative concepts of justice and horizontal concepts of power” is supremely at odds with the top-down conception of the judge’s power that permeates the U.S. legal system.⁴¹⁵ To a Western trained lawyer, this decision presents a refreshing idea—power in a legal system should operate in a more democratic and participatory way, and this norm is binding; it limits an individual judge’s ability to jail a litigant for not obeying an order.

Other notable Navajo cases surface a theme of restoration and care as ethical principles that trump more adversarial goals. For instance, in *Haungooah v. Greyes*, the defendant was jailed for violating the terms of his parole.⁴¹⁶ He left the Navajo jurisdiction without approval and he was found in possession of intoxicating liquors and controlled substances.⁴¹⁷ Defendant was not personally served with a notice of the bench warrant for his probation violations.⁴¹⁸ In overturning defendant’s re-incarceration, the *Haungooah* court admonished the prosecution for not approaching the case from the perspective of need and care, opining that:

⁴¹⁴ *Id.* at 9 (emphasis added).

⁴¹⁵ For a discussion of the Judge’s patriarchal role in traditional U.S. jurisprudence, see Jewel, *Reasonable Man*, *supra* note 11.

⁴¹⁶ *Haungooah v. Greyeyes*, slip op., No. SC-CV-06-13 1-2 (Nav. Sup. Ct. 2013).

⁴¹⁷ *Id.*

⁴¹⁸ *Id.* at 1-3.

[The] prosecution. . . had the discretion and responsibility to find a solution for Petitioner other than seek reinstatement of his original jail sentence. There is a duty on our government to provide avenues for restoration. Diné justice throws no one away.⁴¹⁹

In Navajo law, there “is a fundamental right of our people to expect that their governmental agencies pursue restorative measures, especially where dire living circumstances are beyond a defendant’s control, as in this case.”⁴²⁰

In Re A.W. also features a rhetoric of care and restoration, this time in the context of juvenile justice.⁴²¹ In this case, the police pulled over a thirteen-year-old appellant and observed him to have liquor on his breath and twenty-one beer cans in his car.⁴²² Arraigned with no attorney present, the child pled guilty to all offenses.⁴²³ Law enforcement called the child’s mother but did not make any effort for her to retrieve him from custody.⁴²⁴ The Navajo Supreme Court found that the child’s due process rights and right to be free from cruel and unusual punishment had been violated and that law enforcement had failed in its duty “[t]o preserve and restore the unity of the family whenever possible.”⁴²⁵ Law enforcement also failed in its duty to “provide for the care, the protection, and wholesome mental and physical development of those children who are detained.”⁴²⁶ Finally, law enforcement did not, in accordance with the Navajo Bill of Rights section on Cruel and Unusual Punishment, provide a “padded area to lie on, a blanket, and food to eat.”⁴²⁷ The Navajo Supreme Court underscored the binding duty the State owes all Navajo children, opining that “We as a nation must fulfill our duty to protect our children” because “children are precious above all else.”⁴²⁸

⁴¹⁹ *Id.* at 6-7 (internal citations omitted).

⁴²⁰ *Id.*

⁴²¹ No. A-CV-19-86, 15 I.L.R. 6041 (Nav. Sup. Ct. 1988)

⁴²² *Id.* at 6041-42.

⁴²³ *Id.*

⁴²⁴ *Id.*

⁴²⁵ *Id.* at 6042 (citing The Navajo Children’s Code, 9 Nav. T.C. §1001(1) (1985 Cumm. Supp.).

⁴²⁶ *Id.*

⁴²⁷ *Id.*

⁴²⁸ *Id.* at 6042, 6043.

Navajo employment law demonstrates how the state can elevate care and communitarian goals over harsh individualism and not have the sky fall. In Navajo law, an employment relationship can only be terminated for just cause, in contrast to the “at-will” norm found in most U.S. jurisdictions.⁴²⁹ In *Hadley v. Navajo Nation Dept. of Public Safety*, the appellant police officer alleged employment discrimination.⁴³⁰ The Navajo Supreme Court found for the appellant, who had demonstrated a pattern of harassment, discrimination, and adverse discipline without just cause.⁴³¹ The *Hadley* court’s decision reads very similarly to federal workplace legal decisions, except for one point regarding the burden of proof. On this point, the Hadley court explained:

[T]he burden of proof . . . is appropriately placed on the employer to prove: *nizhónigo hahodit’é*, requiring the employer to show his place of employment is maintained in harmony. Much like a home, one’s place of employment offers a family of employees where each employee spends a considerable part of the day with great expectations that his/her health, safety and welfare are foremost considerations of the employer.⁴³²

The *Hadley* decision analogizes the workplace to a home, with the employer in the role of a nurturing parent. Operating at odds with mainstream U.S. employment law, which allows an employer to terminate an employee for any reason or no reason (except discriminatory reasons) and which places almost all of the burden to prove discrimination on the employee,⁴³³ the Navajo legal universe elevates principles of care and nurturing over concepts like the need to maintain flexibility over labor costs. In this way, Navajo law and rhetoric counters the ascendant U.S. model of work and wages, which

⁴²⁹ Navajo Employment Preference Act, 15 N.N.C. § 604(b)(8), available at <https://www.onlr.navajonnsn.gov/Portals/0/Files/Navajo%20Preference%20in%20Employment%20Act.pdf>.

⁴³⁰ Slip op., No. SC-CV-20-15 1-2 (Navajo Supreme Court, 2016).

⁴³¹ *Id.* at 9-10.

⁴³² *Id.* at 9-10.

⁴³³ See, e.g., Bradley A. Areheart, *Organizational Justice and Anti-discrimination*, 104 MINN. L. REV. 1921, 1932 n. 55 (2020) (noting the high burdens placed on plaintiffs seeking redress for employment discrimination).

places most of the economic burden on the individual employee and almost none of the burden on the employer.⁴³⁴

The rhetoric found in Navajo decisions, focused on provision, care, and restoration, is difficult to separate from Navajo law, which grants rights and issues duties based on an ethic of care, creating a truly “responsive state” to care for those who are not fully in control of their life situations.⁴³⁵ For instance, how does one effectively speak in such a system, where the goal is not to win, but to engender a process of restoring the accused back into the community? Of course, lawyers advocating for poor and vulnerable persons would thrive if given sharper tools—new positive rights and new duties to persuasively frame. As it stands now, attorneys for vulnerable populations must grapple with the accepted jurisprudential premise, grounded in social Darwinism, that one’s life situation is a result of one’s choices and one’s innate characteristics (or merit).⁴³⁶

At one time, however, binding principles of care and restoration existed just beneath the surface of American jurisprudence, particularly in the context of equal protection and welfare assistance. Dissenting in *Dandridge v. Williams*, where the petitioner challenged the state of Maryland’s scheme for allocating welfare benefits, Thurgood Marshall synthesized the pre-existing law of equal protection:

[T]his Court has already recognized several times that when a benefit, even a ‘gratuitous’ benefit, is necessary to sustain life, stricter constitutional standards, both procedural and

⁴³⁴ The erasure of collective or state responsibility for individual outcomes is a hallmark of the neoliberal ideology that is ascendant in U.S. law. See Corinne Blalock, *Neoliberalism and the Crisis of Legal Theory*, 77 L. CONTEMP. PROB. 71, 88 (2014).

⁴³⁵ The Navajo ethic of care is similar to the vulnerability theory espoused by Prof. Martha Fineman. See Martha Albertson Fineman, *The Vulnerable Subject and the Responsive State*, 60 EMORY L.J. 251 (2010).

⁴³⁶ For a thorough discussion of this premise, see Jewel, *Merit and Mobility: A Progressive View of Class, Culture, and the Law*, 43 UNIV. OF MEMPHIS L. REV. 239 (2012).

substantive, are applied to the deprivation of that benefit.⁴³⁷

If Justice Marshall's synthesis of the existing law had been accepted and reinforced as the "rule," then U.S. poverty jurisprudence might have started to look more like the Navajo approach. If state action touches upon an individual's needs for sustenance, then we must closely scrutinize the state's action. However, the *Dandridge* majority rejected elevated constitutional scrutiny for deprivation of benefits that touched upon sustenance and life (such as welfare assistance for children).⁴³⁸ The conservative turn in poverty happened as public animosity toward welfare grew and the Supreme Court became more conservative and economically oriented in general.⁴³⁹

The Navajo approach offers a refreshing take on how the law might care for society's most vulnerable individuals, not just in terms of scrutiny when a right has been infringed upon, but by placing new positive rights and duties into the system.⁴⁴⁰ In terms of rhetoric, new rights and duties would positively impact the types of rhetoric available in one's advocacy toolkit. No longer limited by dry constructs like reasonableness, rational basis, and ends/means, advocates would be free to make concrete arguments about what the state must do to protect and buffer its citizens. Thus, comparative legal rhetoric is helpful for providing a vision of an alternative world, a *nomos*⁴⁴¹ of what could be once a paradigm shift occurs.

C. Micro-Rhetorics

Within mainstream Western culture, some systems resolve social problems in ways that markedly depart from the law's adversarial, extroverted ways. I refer to these communication ways as micro-rhetorics,⁴⁴²

⁴³⁷ *Dandridge v. Williams*, 397 U.S. 471, 522, 90 S. Ct. 1153, 1180, 25 L. Ed. 2d 491 (1970) (Marshall, J., dissenting).

⁴³⁸ *Id.* at 485.

⁴³⁹ See generally, Julie Nice, *No Scrutiny Whatsoever: Deconstitutionalizing of Poverty Law, Dual Rules of Law, and Dialogic Default*, 629 *FORDHAM URB. L.J.* 629 (2008).

⁴⁴⁰ Navajo Employment Preference Act, 15 N.N.C. § 604(b)(8), available at <https://www.onlr.navajo-nnsn.gov/Portals/0/Files/Navajo%20Preference%20in%20Employment%20Act.pdf>.

⁴⁴¹ See supra note 376 (defining *nomos*).

⁴⁴² Thank you to my colleague Professor Joan Heminway for the idea of Micro-Rhetorics as a helpful way to think about this material. I am also

rhetorical practices that exist within a broader mainstream culture, but contain their own rules, processes, and styles of rhetoric. Within law alone, one could study micro-rhetoric from a variety of categorical frameworks: litigation, transactional, or alternative dispute resolution, for instance. This paper analyzes micro-rhetorics from a socio-cultural framework, looking at other styles of problem solving, including the Quaker approach, reconciliation and reintegration strategies, and participatory movements.

A synthesis of these alternate systems indicates that they are introspective rather than extroverted; they embrace participatory goals of giving all voices the floor rather than a top-down one speaker/many listeners approach; and they reach for consensus rather than meting out a black-and-white win or loss. Most of traditional legal rhetoric is based on an adversarial contest, with one speaker (usually the lawyer) attempting to persuade several others (the jury, a judge, a panel of judges) in order to “win.” Microrhetorics offer alternative ways to solve problems. By studying these other ways, we can identify and cultivate new skills for speaking, listening, and moderating that could be useful legal advocacy tools.

i. Quaker Rhetoric

In studying micro-rhetorics, we start with Quaker rhetoric. The Quakers immigrated to the United States in great numbers in the 1600s and 1700s, settling in the mid-Atlantic region that now encompasses Pennsylvania, Delaware, and New Jersey.⁴⁴³ The Quakers had some impact on American culture, often voicing minority viewpoints related to pacifism and abolitionism.⁴⁴⁴ Quaker theology differs from more liturgical Christian sects in its reliance on a theory that God is a “God of love and light whose benevolent spirit harmonized the universe.”⁴⁴⁵ Quakers believe that every

drawing upon the micro-jurisdiction concept, of a jurisdiction that exists within or adjacent to another jurisdiction, that draws upon multiple legal traditions to create its own legal system. *See supra*, note 381.

⁴⁴³ DAVID HACKETT FISCHER, *ALBION’S SEED: FOUR BRITISH FOLKWAYS IN AMERICA* 419-421 (Kindle version 1989), <https://read.amazon.com/>.

⁴⁴⁴ Paula V. Lippard, *The Rhetoric of Silence: The Society of Friends’ Unprogrammed Meeting for Worship*, 36 *COMMUN’N QUART.* 145, 153 (1988); Carey Brycchan, *FROM PEACE TO FREEDOM: QUAKER RHETORIC AND THE BIRTH OF AMERICAN ANTI-SLAVERY 1657-1761* 8 (Yale Univ. Press 2012).

⁴⁴⁵ FISCHER, *supra* note 443, at 425. Fischer points out that the Quaker theology was much more positive than the Puritan’s conception of a deity

person has the capacity to experience “the inner light” or “light from within,” a divine spirit of goodness and virtue.⁴⁴⁶

The Quaker doctrine of the inner light is mirrored in an egalitarian communication process that gives all participants a voice.⁴⁴⁷ For instance, in a Quaker worship service, congregants sit together in a meeting house with no pulpit, no sermon, and no preacher; all who wish to speak can speak.⁴⁴⁸ This egalitarian worship structure is also used for Quaker business meetings.⁴⁴⁹ The process is more important than the outcome.⁴⁵⁰ The Quaker system is also non-adversarial⁴⁵¹ and built on a goal of reaching a consensus.⁴⁵² For Quakers, speech has to do with generating a sense of shared identity, cooperation, and community rather than persuading another person.⁴⁵³ Even with an egalitarian view that all voices have merit, the Quakers encouraged efficiency in their business meetings. Quaker meeting

that could terrify and do terrible things or the Anglican conception of a deity that ruled orderly over a strict hierarchy of creatures. *Id.* at 425-426.

⁴⁴⁶ *Id.* at 426; Lippard, *supra* note 444, at 148.

⁴⁴⁷ Lippard, *supra* note 444, at 148.

⁴⁴⁸ MICHAEL J. SHEERAN, BEYOND MAJORITY RULE: VOTELESS DECISIONS IN THE RELIGIOUS SOCIETY OF FRIENDS 4-5 (Philadelphia Yearly Meeting, Religious Society of Friends 1983).

⁴⁴⁹ *Id.*

⁴⁵⁰ Elizabeth Molina-Markham, *Finding The “Sense of the Meeting”:* *Decision Making Through Silence Among Quakers*, 78 WESTERN J. OF COMMC’N 155, 155 (2014).

⁴⁵¹ Brycchan, *supra* note 444, at 8 (noting that Quaker non-hierarchical speech styles are revered by modern day anarchists). As a point of convergence, when the Navajo Nation sought to institutionalize its peacemaking process within its court system, tribal leaders found that the Quakers had incorporated a non-adversarial peacemaking process into their court system in 1683. James W. Zion, *The Navajo Peacemaker Court: Deference to the Old and Accommodation to the New*, 11 AM. INDIAN L. REV. 89, 96 (1983) (citing Scott, *Fishing in Troubled Waters*, FRIENDS J. 8, 9 (January 1982), <https://www.friendsjournal.org/wp-content/uploads/remember/downloads/1982/HC12-50713.pdf>).

⁴⁵² Brycchan, *supra* note 444, at 17; SHEERAN, *supra* note 448, at 47-48.

Although “consensus” is the concept that most fits here, the Quakers themselves preferred the term “sense of the meeting,” believing that the word consensus was too secular of a concept. Molina-Markham, *supra* note 450, at 157-58.

⁴⁵³ Lippard, *supra* note 444 at 152.

guidelines admonish speakers not to offer repetitive remarks that others have already stated.⁴⁵⁴

Quakers reach consensus when a “sense of the meeting” has been reached.⁴⁵⁵ At the conclusion of a Quaker meeting, the clerk of the meeting records a minute that reflects the meeting’s sense.⁴⁵⁶ Consensus is different from a win/lose vote where the losers no longer have a voice. Consensus can be thought of as the “general, though not necessarily unanimous, approval of the group.”⁴⁵⁷ Consensus is achieved when the minority, not changing their minds so-to-speak, nonetheless decide go along with the majority when an agreement is ideal and the majority position is reasonable.⁴⁵⁸ When minority voices are too loud to fade into a consensus, then the solution is to table the discussion for the next meeting, with the hope that a sense of the meeting will emerge with more time.⁴⁵⁹

A problem-solving system where consensus (rather than a decisive win/lose vote) is the goal, “contrary voices [can] continue to be heard even when the majority was against them.”⁴⁶⁰ “[N]o single perspective is imposed on the group; rather a consensual multi-perspective is allowed to emerge, without resort to majority opinion nor dominance of a single, strongly advocated voice.”⁴⁶¹ Further, where “majority rule frequently leads to a contest between the two most popular positions, . . . consensus often necessitates the integration of the position among all group members.”⁴⁶² Interestingly, the Quaker method is aligned with some of the ancient societies, discussed above, which valued consensus and found up/down voting to be insulting.⁴⁶³

⁴⁵⁴ SHEERAN, *supra* note 448, at 49.

⁴⁵⁵ Molina-Markham, *supra* note 450, at 155.

⁴⁵⁶ SHEERAN, *supra* note 452, at 3, 48.

⁴⁵⁷ *Id.* at 48 (quoting PHILADELPHIA YEARLY MEETING, *Faith and Practice* 17-18 (1972)).

⁴⁵⁸ SHEERAN, *supra* note 452, at 51 (quoting BURTON R. CLARK, *THE DISTINCTIVE COLLEGE: ANTIOCH, REED, AND SWARTHMORE* 51-52 (Chicago, Aldine 1970))

⁴⁵⁹ *Id.*

⁴⁶⁰ Brycchan, *supra* note 444 at 17 (explaining that it was through a consensus process that the Quakers’ commitment to the abolition of slavery (once a minority position) became a major tenet of their faith).

⁴⁶¹ Lippard, *supra* note 444 at 152.

⁴⁶² Molina-Markham, *supra* note 450, at 157-58.

⁴⁶³ *See supra* notes 177-183 and surrounding text.

Listening and silence are important hallmarks of Quaker rhetoric.⁴⁶⁴ Instead of a persuasive speech that a talented individual delivers while an audience listens, for Quakers, the highest form of communication originates in silence.⁴⁶⁵ Every Sunday, Quakers worship by sitting for an hour in silence.⁴⁶⁶ The silence is punctuated occasionally when a participant stands up and speaks, if they believe they have received a message from the Light worth sharing with the group.⁴⁶⁷ To make decisions related to the congregation, Quakers similarly deploy silence to find the sense of the meeting, which the clerk (secretary) then records.⁴⁶⁸

Contrary to how we intuitively think about speech from a Western standpoint, silence is not the opposite or even the absence of speech; it is a “deeply meaningful communicative event that can be analyzed in its own terms as actively achieved.”⁴⁶⁹ William Penn stated, “True silence is the rest of the mind; and is to the spirit, what sleep is to the body, nourishment, and refreshment.”⁴⁷⁰ Silence also elevates the role of the listener, which is refreshing in Western culture, which places the speaker in a heroic position.⁴⁷¹ In the Quaker communication process, it is the group, sitting together and listening in silence, that is responsible for the conclusion, the message, and the outcome.⁴⁷² In this way, Quaker rhetoric expands communication from being a dialogue between the speaker and the audience to a group experience that enables a spiritual experience that could not be achieved in individuals acting alone.⁴⁷³

The process of finding the sense of the meeting creates meaning in a way that is both participatory and communitarian.⁴⁷⁴ The process offers possibilities for community building because everyone, even those who disagree, are included in the sense of the meeting.⁴⁷⁵ Any individual

⁴⁶⁴ SHEERAN, *supra* note 452, at 49.

⁴⁶⁵ Lippard, *supra* note 444 at 147.

⁴⁶⁶ Molina-Markham, *supra* note 450, at 159.

⁴⁶⁷ *Id.*

⁴⁶⁸ *Id.* at 161, 170.

⁴⁶⁹ *Id.* at 171.

⁴⁷⁰ WILLIAM PENN, WORKS 325 (1774) (quoted in Lippard, *supra* note 444 at 147).

⁴⁷¹ *Id.* at 155.

⁴⁷² *Id.* at 157.

⁴⁷³ Lippard, *supra* note 444, at 150.

⁴⁷⁴ Molina-Markham, *supra* note 450, at 157.

⁴⁷⁵ *Id.* at 171; Lippard, *supra* note 444, at 152.

perspective, no matter how limited, is listened to and given voice.⁴⁷⁶ Thus, when a decision has been reached, it is not a yes/no, up/down message; instead, it reads as a “generally yes, but there are concerns” message, allowing those in the minority to be included in the continuing discussions.⁴⁷⁷ For law, Quaker rhetoric offers a potentially tool that is not often utilized. There are situations where seeking consensus out of silence could locate solutions that may not be visible in the adversarial legal system.

ii. Restorative Rhetoric

Another form of micro-rhetoric can be found in processes designed to bring healing from harm and trauma yet which do not contain a strong retributive remedy (such as punishment or incarceration). Retributive criminal justice refers to a remedy that is “intended to satisfy the community’s retaliatory sense of indignation that is provoked by the [crime or] injustice.”⁴⁷⁸ Restorative justice is focused on restoring what was lost to the victim as well as restoring the offender to the status of law abiding citizen.⁴⁷⁹ This part of the paper looks at what rhetoric lessons might be learned from two restorative justice procedures: (1) truth and reconciliation hearings and (2) repentance ritual ceremonies. Starting in the 1970s, truth and reconciliation commissions were formed by governments so that the members of the public could voice their experiences with atrocities committed during a state’s previous administration.⁴⁸⁰ Repentance or reintegration ceremonies represent an indigenous form of criminal justice where a criminal offender and his/her family stand with the victims’ family to reach closure and healing.⁴⁸¹ Both of these processes are communicative events that engage with a desire to find closure and healing after harmful, maleficent, and traumatic events. They do so, however, without the traditional retributive remedies of punishment and incarceration. In this way, these processes are referred to as restorative rather than retributive.⁴⁸²

⁴⁷⁶ Lippard, *supra* note 444, at 152.

⁴⁷⁷ *Id.* at 152.

⁴⁷⁸ PUNISHMENT, Black's Law Dictionary (11th ed. 2019).

⁴⁷⁹ Albert W. Dzur, *Restorative Justice and Civic Accountability for Punishment*, 36 POLITY 3, 5 (2003).

⁴⁸⁰ TERESA GODWIN PHELPS, SHATTERED VOICES: LANGUAGE, VIOLENCE, AND THE WORK OF TRUTH COMMISSIONS 77-78 (Univ. of Penn Press 2006).

⁴⁸¹ John Braithwaite, *Survey Article: Repentance Rituals and Restorative Justice*, 8 J. POL. PHIL. 115 (2000).

⁴⁸² See Jonathan Allen, *Between Retribution and Restoration: Justice and the TRC*, 20 S. AFR. J. PHIL. 22, 25 (2001) (referring to South Africa’s Truth

Truth and reconciliation commissions were established in the later part of the 20th century to deal with atrocious human rights violations committed during a previous state regime.⁴⁸³ Prominent examples include Argentina's Nunca Más commission, a national commission constituted in 1983 to address thousands of "disappeared" victims during Argentina's prior military dictatorship,⁴⁸⁴ and South Africa's Truth and Reconciliation Commission, organized to address the murderous violence of its apartheid regime.⁴⁸⁵ Instead of a full-blown Nuremberg style trial to convict and punish all the wrongdoers, these states held restorative rather than retributive proceedings because the new leadership doubted the new state could survive if full retribution for the past occurred.⁴⁸⁶ Accordingly, states sanctioned truth and reconciliation proceedings in order to introduce "those unjustly excluded from legal recognition into the realm of civic respect."⁴⁸⁷ Instead of prosecution and punishment, the goal was to collect and record narratives of what happened.⁴⁸⁸ Victims did not get retribution in an official sense; instead, the process was designed to produce what Archbishop Desmond Tutu referred to as *ubuntu*, or humaneness.⁴⁸⁹ Offenders who would have been punished in a retributive setting received amnesty, but only if they attended the hearings, listened, and fully disclosed all facts in their knowledge.⁴⁹⁰

Because of its emphasis on process, one hallmark of restorative rhetoric is an emphasis on listening to the victim's voice. Professor Teresa Godwin Phelps's incisive book, *Shattered Voices: Language, Violence, and the World of Truth Commissions*, illuminates the restorative rhetoric that occurs in a truth commission setting. The rhetorical focus is on the victim, who takes back the power to "use language for themselves and to shape for themselves the chaos of their experiences of violence into their own coherent stories."⁴⁹¹

and Reconciliation Commission as following a restorative justice model); Braithwaite, *supra* note 481, at 115 (defining restorative justice as a process where all parties who have been affected by an offense come together to heal from the offense).

⁴⁸³ *Id.* at 22-23; PHELPS, *supra* note 480, at 77, 78.

⁴⁸⁴ PHELPS, *supra* note 480, at 82-87.

⁴⁸⁵ *Id.* at 104-105.

⁴⁸⁶ Allen, *supra* note 482, at 22-23.

⁴⁸⁷ *Id.* at 29.

⁴⁸⁸ PHELPS, *supra* note 480, at 75, 78-79.

⁴⁸⁹ Allen, *supra* note 482, at 25.

⁴⁹⁰ *Id.* at 25.

⁴⁹¹ PHELPS, *supra* note 480, at 90.

The South African proceedings began with lighting a white candle, reminding all that the process was both sanctioned by the state, but also imbued with a sense of the sacred.⁴⁹² Because the focus was on the speaker, who determined what to say and how to say it, truth and reconciliation proceedings have been described as “polyphonic and uncensored,” a diversity of voice that “oppose[d] all that threatens to be authoritarian.”⁴⁹³ Victims were permitted to “ramble, cry, and scream.”⁴⁹⁴ Audiences were expected to listen.

The non-linear and impromptu nature of the truth and reconciliation narratives functioned rhetorically to dethrone the previous regimes, which thrived on censorship and tightly controlled stories.⁴⁹⁵ The victim also received fulfilment from telling his/her story, one of humankind’s most deep-seated desires.⁴⁹⁶ Because telling or re-telling a story of harm can be therapeutic for trauma victims, the process was also therapeutic.⁴⁹⁷ “The storyteller move[d] from passive victimization to being a morally responsible agent capable of choosing the shape of the narrative in which he or she [was] cast.”⁴⁹⁸ Finally, in a truth and reconciliation hearing, the sacred—usually buried within the law—surfaces as the deep-seated human desire for vengeance (retributive) powerfully transmutes into language and narrative. In contemporary law, dispassionateness and order are imbued into civil procedure and legal rhetoric. The restorative rhetoric within truth commissions contain lessons on when free-form storytelling might be an appropriate means to achieve healing, if retribution is not possible.

Truth and reconciliation proceedings try to find a balance between retribution and healing.⁴⁹⁹ Allowing victims to name their oppressors and

⁴⁹² *Id.* at 12, 25, 70, 108-09; see also Peter Goodrich, *Justice and the Trauma of Law: A Response to George Pavlich*, 18 *STUD. L. POL. SOC’Y* 271, 271-272 (1998) (tracing the spiritual and sacred connections within contemporary understandings of justice).

⁴⁹³ PHELPS, *supra* note 480, at 90.

⁴⁹⁴ *Id.* at 109.

⁴⁹⁵ *See id.*

⁴⁹⁶ PHELPS, *supra* note 480, at 58 (Quoting/citing HAYDEN WHITE, *THE CONTENT OF THE FORM: NARRATIVE DISCOURSE AND HISTORICAL REPRESENTATION 1* (Baltimore: Johns Hopkins Univ. Press 1987)).

⁴⁹⁷ PHELPS, *supra* note 480, at 55.

⁴⁹⁸ *Id.* at 59.

⁴⁹⁹ *Id.* at 53.

their suffering enables some form of non-violent retribution.⁵⁰⁰ However, many of those participating did not feel that they received justice because the wrongdoers, for the most part, escaped retributive punishment.⁵⁰¹ When retributive punishment is not allowed, the primeval desire for a vengeance erupts. This occurred during a South African truth and reconciliation proceeding when the mother of a youth killed by South African police threw her shoe at the police officer who may have killed her son.⁵⁰² The shoe-throwing incident can be viewed as positive aspect of the truth and reconciliation process—the mother was able to voice her anger and grief in a truth and reconciliation proceeding where a traditional trial setting would deny her that voice.⁵⁰³

On the other hand, the shoe throwing incident could represent a limitation on restorative rhetoric. When violent and oppressive power-relations have been maintained for years, the need to enact punitive retaliation with state sanctioned violence should perhaps not be denied. Punishment of the previously powerful might be the best “way of defeating the offender’s claim to superiority. . . [;] It actually masters the perpetrator in a manner comparable to the way that he mastered the victim and therefore signals the refutation of his claim to mastery.”⁵⁰⁴ Especially where the powerful have arbitrarily sought retribution, it does not do justice to deny that remedy to those who have borne the brunt of unjust notions of punishment and crime.

In the U.S., retribution is one of the most important policy goals in criminal law.⁵⁰⁵ In addition to an “eye-for-an-eye” retaliatory vengeance,⁵⁰⁶ retribution also houses the emotion of shame.⁵⁰⁷ After a crime has been

⁵⁰⁰ *See id.* at 110 (explaining that retribution can happen when the voiceless are given a voice).

⁵⁰¹ *Id.* at 124; Allen, *supra* note 482, at 29.

⁵⁰² PHELPS, *supra* note 480, at 68.

⁵⁰³ *Id.*

⁵⁰⁴ Allen, *supra* note 482, at 37.

⁵⁰⁵ *See Hudson v. United States*, 522 U.S. 93, 101 (1997) (recognizing that retribution and deterrence are the “traditional goals of punishment.”).

⁵⁰⁶ PHELPS, *supra* note 480, at 61.

⁵⁰⁷ Some scholars have carefully demarcated the lines between vengeance, retribution, and shame to argue that pure shaming remedies are not actually retributive. *See* Dan Markel, *Are Shaming Punishments Beautifully Retributive? Retributivism and the Implications for the Alternative Sanctions Debate*, 54 VAND. L. REV. 2157, 2207 (2001). This article takes a less granular approach to retribution and relies on a more social/psychological approach to retribution.

committed, those affected need to be able to communicate with the offender and explain the harmful consequences of his/her actions.⁵⁰⁸ Not all shaming is bad, however. In writing about restorative forms of indigenous justice, John Braithwaite distinguishes good shame from bad shame. Bad shame is the type of shame that is often inflicted on an offender in a harsh retributive regime. Psychologically harmful shame is the kind where there is no reprieve; the offender is made to “feel completely worthless and degraded from head to foot.”⁵⁰⁹ Psychologist James Gilligan identifies this kind of shame as “the primary and ultimate cause of all violence, whether toward others or toward the self.”⁵¹⁰ Harmful shame can cause a person to withdraw from the community, to self-medicate through alcohol and substance abuse, and to repeat the behavior that triggered the shame in the first place.⁵¹¹ The shame experienced in a harshly retributive system, where there is no way to re-enter the community that cares for the offender, produces a shame-rage spiral, when then leads to more violence.⁵¹²

Legal scholars have identified indigenous repentance rituals as a method of engaging with a more positive form of shame, a kind of shame that communicates the harm caused by the offender, but does so with the ultimate goal of having the offender come back into the community (rather than being banished to a years-long sentence of incarceration).⁵¹³ A repentance ritual facilitates good shame because it “treats the person as a good person who has done a bad thing” and contains a truly restorative conclusion—the ceremony concludes with repentance and forgiveness.⁵¹⁴ In the Maori (New Zealand) justice tradition, a repentance ceremony emphasizes the victim’s voice. There is a facilitator whose job is to encourage the conversation, but intervene if any one person’s speech becomes too dominating.⁵¹⁵ The shaming is not forced—it occurs through a natural dialogue as the victim and his/her supporters describe the consequences of the crime on himself/herself and her

⁵⁰⁸ Braithwaite, *supra* note 481, at 118.

⁵⁰⁹ MARIO JACOBY, SHAME AND THE ORIGINS OF SELF-ESTEEM: A JUNGIAN APPROACH 1 (Whitcher trans. Routledge 2016).

⁵¹⁰ JAMES GILLIGAN, VIOLENCE: OUR DEADLY EPIDEMIC AND ITS CAUSES 110-11 (1992).

⁵¹¹ Zion, *Navajo Therapeutic Jurisprudence*, *supra* note 377, at 574-75.

⁵¹² Braithwaite, *supra* note 481, at 116-117.

⁵¹³ See, e.g., Zion, *Navajo Therapeutic Jurisprudence*, *supra* note 377; Braithwaite, *supra* note 481.

⁵¹⁴ Braithwaite, *supra* note 481, at 118.

⁵¹⁵ *Id.* at 121.

family.⁵¹⁶ A repentance ritual is also not individualistic. The offender stands together with his family, who bears the shame with him/her.⁵¹⁷ Even when the offender is shameless, his/her mother might carry the shame of the act, even breaking down and sobbing upon hearing about her child's behavior.⁵¹⁸

In terms of culpability, there is a causal approach (most similar to a Western approach of evaluating the elements of the crime), but there is also a reactive approach, which looks at the offender's marginal responsibility for the crime and his/her reaction to it.⁵¹⁹ In terms of assessing guilt or innocence, the offender may decline to assert innocence but also decline to admit guilt.⁵²⁰ There is less emphasis on proving culpability and more emphasis on the offender's responsibility for the harm done.

In the Maori repentance ceremony, after the victim and her supporters have spoken, the offender has a chance to apologize, which he/she often does, without being asked to do so.⁵²¹ In the ensuing dialogue, the victim is often prone to forgive.⁵²² Then, there is a break and the victim's family formulates a plan to restore the victim and the community.⁵²³ Restorative actions might include an apology, reparation (emotional and monetary), community restoration (community service work), and re-assurances that there won't be a re-occurrence.⁵²⁴ In the end, the offender returns to a community of care that welcomes him/her back.⁵²⁵

Restorative justice produces a type of process-based rhetoric that has many commonalities with what has already been discussed in this article. It

⁵¹⁶ *Id.* at 119-120. Braithwaite notes that the Maori repentance ritual is similar to other indigenous traditions, such as Navajo peacemaking and Native American healing circles. *See also* James W. Zion, *The Dynamics of Navajo Peacemaking*, 14 J. CONTEMP. CRIM. JUST. 58 (1998); *The Origin of Our Healing Circles*, HEALING JUSTICE, November 16, 2018, <https://healingjusticeproject.org/news/2019/2/26/healing-circles>.

⁵¹⁷ *Id.* at 119.

⁵¹⁸ *Id.* at 120; John Braithwaite & Stephen Mugford, *Conditions of Successful Reintegration Ceremonies*, 34 BRIT. J. CRIMINOLOGY 139, 144 (1994).

⁵¹⁹ *Id.* at 126-127.

⁵²⁰ *Id.* at 126-27.

⁵²¹ *Id.* at 123.

⁵²² *Id.* at 123.

⁵²³ *Id.* at 126.

⁵²⁴ *Id.* at 126-27.

⁵²⁵ *Id.* at 120-122.

is not hierarchical, it is not adversarial, it does not focus on proving fault or culpability. The speaker is usually the victim (or someone speaking on his/her behalf). As illustrated in the South African truth and reconciliation proceedings, the speech is not planned or organized, but allowed to run freely and full of emotion.⁵²⁶ Questions about guilt, severity of the crime, or appropriate punishment are not answered through one individual's advocacy (as would be the case with a prosecutor); rather, these questions are answered collectively, though a conversation conducted by community members. On this point, the most challenging paradigm shift to deal with is that rhetoric is not a heroic enterprise conducted individually.⁵²⁷ Instead, restorative rhetoric is borne out of a polyphonic dialogue of many voices. Rhetorical merit is not awarded based on individual performance. If at all, merit is allocated based on one's ability to ignite a healing conversation and keep it going. Merit is adjudged based on one's ability to engage with ties in the community. For lawyers trained on the rhetor as heroic author model, this requires some rethinking.

If restorative rhetoric can repair wicked and intractable problems, what types of rhetoric might work to heal and repair the U.S.'s unvoiced history of human rights violations—in particular, the grievous harm done to indigenous people and the enslaved? A retributive rhetoric, where a prosecutor holds up an offender for shame and punishment, is not that different from what is voiced at a truth and reconciliation commission. In both systems, the victim is humanized, her story is told, and her suffering is made visible.⁵²⁸ Retributive rhetoric deployed in a restorative process could allow victims to feel some amount of vindication, but they would not be able to punish. Because the racial harms wrought by white supremacy in this country include repeated instances of maiming, dismemberment, lynchings, and other acts of genocide, it is unclear whether restoration without retribution or monetary reparation can ever lead to true healing. In a restorative system, the rhetoric could spotlight the harm and hold the offender

⁵²⁶ See *supra* notes 493-494 and surrounding text.

⁵²⁷ For an illuminating explanation of the individualistic conception of legal authorship, see Friedman, *supra* note 47.

⁵²⁸ The other issue here is that the offender is the collective policies of the U.S., not any single individual. For a highly readable explanation on how Western analytical structures make it impossible to receive redress for collective harms, see Teri A. McMurtry Chubb, *The Rhetoric of Race, Redemption, and Will Contests: Inheritance as Reparations in John Grisham's Sycamore Row*, 48 UNIV. OF MEM. L. REV. 889, 915-938 (2018).

up for shame, but such a process side-steps the human desire, eminently reasonable, to retaliate against those who have wronged them.

Admittedly, this part of my paper raises more questions than answers, especially when we add prison abolition, which jettisons retributive theories of punishment altogether, into the mix.⁵²⁹ One conclusion, however, is that any attempt to create reparations or restoration for racial injustice that does not consider the deep-seated human need for retribution and vengeance will likely fail. Of course, some restorative systems utilize punishment, just a more reflective, deliberative, and democratic style of punishment.⁵³⁰ There is likely a middle ground here, a restorative rhetoric that embraces the need to shame the offender and the need to witness punishment. This kind of restorative process could break the cycle of racial harm this country has experienced and is still experiencing.

The other observation is that our criminal and civil justice systems are overly carceral, racially unbalanced, with massive access to justice inequities on the civil and criminal sides. The system is not working. It is unlikely that restorative justice procedures will ever supplant the entire legal system. As a micro-rhetoric, however, restorative rhetoric can be deployed in certain legal pockets. For instance, a secular repentance ritual could, for instance, be used in juvenile justice cases, criminal misdemeanor cases, or for other non-violent offenses. Orienting criminal justice around an ethic of care and a community of care could transform and heal some of the most broken aspects of our legal system.

iii. Citizen's Rhetoric

Citizen's rhetoric⁵³¹ (like many of the rhetorics studied in this paper) is participatory and emphasizes horizontality and community support over a top-down approach to speaking. One type of citizen's rhetoric can be found in anarchist communities. Anarchists believe that society should organize itself cooperatively and voluntarily, without the machinery of a coercive state.⁵³² With a long history as an underground mode of the thought,

⁵²⁹ See ZOE HAMMER, *CRITICAL RESISTANCE AND THE PRISON ABOLITIONIST MOVEMENT IN HUMAN RIGHTS IN OUR OWN BACKYARD* 244, 249, 250 (Univ. Penn. Press 2011).

⁵³⁰ Dzur, *supra* note 479, at 16, 21.

⁵³¹ Citizen's rhetoric is my term.

⁵³² Anarchism, OXFORD REFERENCE, <https://www.oxfordreference.com/view/10.1093/oi/authority.20110803095410908>.

anarchism surfaced in U.S. culture during Occupy Wall Street and it re-emerged in the summer of 2020, as communities sought state-less alternatives in response to the continuous stream of state-sanctioned police killings of black and brown people. Anarchist movements have been described as pre-figurative; the movement tries to create a structure that eschews alienation nor exploitation, prefiguring the new transformed society it hopes to create.⁵³³ Seattle's Capitol Hill Autonomous Zone is one such example of an anarchist enclave where people gathered together to provide food, medical care, education, art, and childcare, without the intervention of the state.⁵³⁴ In Seattle, the anarchists were reviled for trying to imagine and building a society where people, not individual leaders, are in control.⁵³⁵ The mainstream press was quick to gloat when the attempt to build a utopia in the middle of a vast dystopia failed.⁵³⁶

Anarchist rhetoric emphasizes horizontal principles, meaning that no one person holds a sway when speaking, and everyone is given a voice. In a meeting, the stack is the list of people ready to speak.⁵³⁷ Sometimes a "progressive" stack is used, in which case, marginalized group members are allowed to speak first.⁵³⁸ Perhaps the best symbol of anarchist rhetoric is the "people's mic." When the people's mic is in use, the person speaking pauses after each phrase and the people nearby repeat it in unison.⁵³⁹ In this way, "[t]he people's mic can give the speaker a sense of power, and for those playing the role of the mic amplifying a speaker's voice, the call and

⁵³³ John L. Hammond, *The Anarchism of Occupy Wall Street*, 79 *SCI. & SOC'Y* 288, 292-93 (2015).

⁵³⁴ Saito, *supra* note 341, at 69.

⁵³⁵ See, e.g., Jonathan Turley, *How Seattle Autonomous Zone is Dangerously Defining Leadership*, THE HILL, <https://thehill.com/opinion/judiciary/502576-how-seattle-autonomous-zone-is-dangerously-defining-leadership> (arguing that leadership principles require the Seattle Mayor to step in and take back control of the autonomous zone).

⁵³⁶ See, e.g., Christian Britschgi, *After 3 Weeks and 4 Shootings, Seattle Dismantles Its 'Autonomous Zone'*, REASON.COM, July 1, 2020, <https://reason.com/2020/07/01/after-3-weeks-and-4-shootings-seattle-dismantles-its-autonomous-zone/>.

⁵³⁷ Hammond, *supra* note 533, at 295.

⁵³⁸ *Id.*

⁵³⁹ *Id.* at 295-96.

response is physically energizing and provides a strong sense of participation.”⁵⁴⁰

Beyond anarchist enclaves, citizen’s rhetoric can be found in other participatory fora, such as the citizen’s assemblies and cooperatives in Jackson, Mississippi, where Mayors Chokwe Lumumba and his son Chokwe Antar Lumumba (both attorneys) created multiple opportunities for participatory democracy.⁵⁴¹ In this pluriverse, the polyphonic voice of the people is the driving force; there is no unitary narrative that offers up a solution for the problems being discussed.⁵⁴² For Westerners trained to find the grand narrative that will solve all the things, accepting the pluriverse is a challenge. But there is hope that these micro-rhetoric bubbles might multiply, congeal together in some fashion, and remake the world into something different.

In order to facilitate citizen’s rhetoric, the rhetor must be willing to build community and allow the spotlight to shine on all those in attendance, not just the one person at the podium. Personal glory is not the goal of a leadership style that emphasizes horizontality. It is difficult, but not impossible, to envision a citizen’s rhetoric gaining ground in our top-down society obsessed with competition and winning. Nonetheless, it has flourished in a few corners. Professor Natsu Taylor Saito has compellingly written that even if the majoritarian state is not ideal, “sub-state forms of governance can be just as influential as state government.”⁵⁴³ Different people and groups have long shared land within a territory and human society has long been organized in different ways, before the advent of the modern state.⁵⁴⁴ Saito’s sub-state concept is helpful for imagining the role of transformative micro-rhetorics. Alternative forms of rhetoric can influence and shape outcomes even if they do not become accepted in a majoritarian way.

For lawyers trained in traditional legal rhetoric, the people’s mic offers a refreshing take on communication. Instead of arguing at the

⁵⁴⁰ *Id.*

⁵⁴¹ *See supra* note 328 and surrounding text, *see also* Saito, *supra* note 341, at 67-68 (discussing Jackson, Mississippi’s many different progressive initiatives, including co-operative businesses and citizen’s assemblies).

⁵⁴² Saito, *supra* note 341, at 66-69.

⁵⁴³ Informal sub-state forms of governance can be just as influential as state government. The micro-rhetorics within these sub-states, then, can . . . Saito, *supra* note 341, at 64.

⁵⁴⁴ *Id.*

podium or in front of a jury, the argument takes on the voice of a chorus, where all are engaged in the speech. In law school, what if we had a moot court experience that used alternative rhetorics to create meanings and community, as a method to build new ways of making legal arguments?⁵⁴⁵

CONCLUSION

Comparative legal rhetoric contains a trove of knowledge that can be used to improve communication, enhance persuasion, and envision new forms of community building. Learning how other cultures solve legal problems generates new ideas that might be infused into the traditional legal system. Categorizing rhetoric into micro-rhetorics is helpful because it allows us to see how alternative rhetorical strategies can be employed when the overall system maintains deference to traditional argumentative forms. Studying comparative legal rhetoric, however, is particularly challenging when other rhetoric forms depart from core tenets of Western rhetoric, including individual authorship, the adversarial system, and logocentric argument. Future inquiries that will surely spring from this paper include lessons from rhetoric around the world that might augment our understanding of human persuasion and help locate possible universalities in how humans communicate. Rhetoric from other cultures might identify effective persuasion techniques that have been overlooked in the West. There is so much that comparative legal rhetoric can teach us if we approach the topic with an open mind, a deep sense of humility, and an awareness of how pre-existing power-relations relates to communication forms.

⁵⁴⁵ Please stay tuned, my colleagues Elizabeth Berenguer and Teri McMurtry-Chubb are working to create legal simulations and moot court scenarios that ask students to use alternative rhetoric.