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The Unending Conversation: Gut Renovations, Comparative Legal Rhetoric and the Ongoing Critique of Deductive Reasoning

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I. INTRODUCTION

Elizabeth Berenguer, Lucy A. Jewel and Teri A. McMurtry-Chubbs' *Gut Renovations: Using Critical and Comparative Rhetoric to Remodel How the Law Addresses Privilege and Power* interrogates one of the shibboleths of legal writing and analysis: deductive reasoning.[1] *Gut Renovations* begins from the premise that deductive reasoning, if it is even mentioned at all in the scholarly arguments about the law's bias, is largely discounted as being a minor player and a neutral organizational tool.[2] This is, the authors argue, not only misguided but also counterproductive.[3] Deductive reasoning, they posit, is not objective or neutral; rather, it is one of the central villains working to perpetuate bias in law.[4] In other words, no matter how much we critique legal doctrine, law will continue to be an ineffectual tool in the fight for social justice as long as we teach deductive reasoning, uncritically, as *the* way to reason in law.[5] This challenge to one of the most enduring orthodoxies of legal writing and rhetoric alone would make *Gut Renovations* worth reading and considering.

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[1] Deductive reasoning is the paradigm organization for construction of a legal analysis. Legal writing has multiple acronyms and names for variations on deductive reasoning, such as CREAC, CREXAC, CRUPAC and IRAC. For simplicity's sake, I refer to all of these as deductive reasoning in this essay. Tracy Turner, *Finding Consensus in Legal Writing Discourse Regarding Organizational Structure: A Review and Analysis of the Use of IRAC and Its Progenies*, 9 LEGAL COMM. & RHETORIC: JALWD 351, 352–57 (2012).

[2] Elizabeth Berenguer, Lucy A. Jewel & Teri A. McMurtry-Chubb, *Gut Renovations: Using Critical and Comparative Rhetoric to Remodel How the Law Addresses Privilege and Power*, 23 HARV. LATINX L. REV. 205, 205–07 (2020) [hereinafter "*Gut Renovations*"].

[3] *Id.* at 206–07.

[4] *Id.*

[5] *Id.* at 212 ("[B]ecause traditional legal rhetoric privileges elite positions and voices, it does not encourage a democratic or inclusive approach to legal meaning making; and . . . carries so much power, it has the capacity to reproduce and reinforce inequality.").

But *Gut Renovations* does more: it also makes a normative proposal for where to look for replacement reasoning styles. The article makes several suggestions for alternatives to Aristotelian deductive reasoning, including non-Western styles such as African diasporic reasoning and other non-Western rhetorical styles.[6] A related piece by Lucy Jewel, *Comparative Legal Rhetoric*, builds on that premise by exploring more deeply the alternative reasoning styles suggested in *Gut Renovations*.[7] Together, these two articles make bold, important arguments about legal writing pedagogy and the pre-eminence of certain types of Western rhetoric. The authors make a strong case that if we are teaching only deductive reasoning as the predominant or "correct" way to reason in law, then we are part of the law's inability to function as an engine for social progress.[8]

Gut Renovations and *Comparative Legal Rhetoric* are important to read for so many reasons. Indeed, I originally chose to write about *Gut Renovations* because I thought that, as with any challenge to orthodoxy, the article risked being rejected by skeptical lawyers and law professors who are used to doing things a certain way. In other words, I thought that the challenge would come from the defenders of the orthodoxy.[9] But then I saw that these pieces also suffered from the problems inherent in the hierarchy of legal education: that even the biggest challengers of legal orthodoxy might ignore or dismiss the pieces as being "just about legal writing."

So, while I want to explore what the two articles say about deductive reasoning and possible alternatives, I wanted the primary focus of this essay to be what the articles demonstrate about the consequences of the hierarchy among legal scholars and the ostracism of certain disciplines from important conversations.

In my view, the two articles reveal a sad irony: for years, legal scholars have been writing about the bias of law from a theoretical perspective, largely overlooking

[6] *Id.* at 226.

[7] Lucy A. Jewel, *Comparative Legal Rhetoric*, 110 KY. L.J. 1 (2021).

[8] *Gut Renovations*, *supra* note 2, at 212 ("Traditional legal rhetoric generally forces the speaker to speak from one position and to use only one mode of knowledge production . . . . Traditional legal rhetoric assumes the speaker's voice derives from a position of elite privilege.").

[9] Particularly in response to a critique of legal reasoning, it is *not* a legitimate response that the arguments of *Gut Renovations* should be rejected because deductive reasoning is, and has always been, "the way law is practiced." First, it isn't *the* (only) way law is practiced; some of the most influential briefs of the last fifty years show multiple alternatives to the basic syllogistic framework, particularly in cases where the goal was a seismic change in doctrine. *See, e.g.*, Linda H. Edwards, *Once Upon a Time in Law: Myth, Metaphor, and Authority*, 77 TENN. L. REV. 884 (2010) (analyzing several briefs, including the petitioner's brief in *Miranda v. Arizona,* that use organizations quite different from deductive reasoning). This is, in fact, a way in which *Gut Renovations* is not particularly novel. But *Gut Renovations* does raise the important question of why, given how many excellent briefs depart from the basic syllogistic framework, many of us still teach that framework exclusively.

pedagogy and legal writing.[10] As theoretical paper after theoretical paper critiquing the bias in law got published, law professors, including the largely overlooked skills and writing professors, were inculcating thousands of law students in a style of reasoning that directly undermined these theoretical arguments. The story told in *Gut Renovations* about deductive reasoning, its stranglehold on legal analysis and its key role in the perpetuation of hierarchical bias in law, can be seen as a story about the significant costs to the legal profession of the academy's marginalization of legal writing, skills, and pedagogy in America's law schools.

In this essay, I will give a brief overview of substantive arguments in *Gut Renovations*, focusing first on the nature of the indictment of deductive reasoning. I then turn to the alternative styles recommended and discuss how we might evaluate whether the alternatives offered in the articles might work to combat bias and achieve greater justice in law. But ultimately, this essay is about how the legal academy's sidelining of skills and pedagogy scholars contributes to the perpetuation of bias in legal doctrine and how we can begin to heal that fissure and work together toward making the law more just.

II. WHAT'S WRONG WITH DEDUCTIVE REASONING ANYWAY?

Since the late 1970s, critical legal theorists have examined and exposed the ways in which legal doctrine is class, race, and gender biased.[11] Rhetoric and deductive reasoning were rarely a part of these conversations—even the ones that targeted pedagogy—largely because, in law, writing and clinical faculty who might have focused on these areas of study were mostly invisible to other legal academics and discouraged from doing scholarship.[12] Legal scholars working in the areas of rhetoric, language, and pedagogy were largely untenured faculty without access to all the accoutrements that make legal scholarship possible, such as summer grants,

[10] An exception here is Duncan Kennedy, for whom legal pedagogy was a main target in his book *Legal Education and the Reproduction of Hierarchy*. *See* DUNCAN KENNEDY, LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY (1983). But even here, the target is the doctrinal classroom and its obsession with rules. That's certainly a related problem, but here again, the voices of a strong legal writing discipline (which admittedly didn't exist as robustly in 1983) would have been invaluable. *Id.*

[11] *See, e.g.,* DERRICK A. BELL JR., RACE, RACISM AND AMERICAN LAW (3d ed. 1992); Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEG. FORUM 139, 139–40; Catharine MacKinnon, *Difference and Dominance: On Sex Discrimination*, *in* FEMINISM UNMODIFIED (Harv. 1987); Richard Delgado & Jean Stefancic, *Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systemic Social Ills?*, 77 CORNELL L. REV. 1258, 1259 (1992). This is just a smattering of the many early articles critiquing the biases inherent in legal doctrine.

[12] *Gut Renovations*, *supra* note 2, at 217 ("We even call the subjects we teach doctrine and privilege doctrinal professors over clinical and writing professors by excluding clinical and writing professors from the traditional tenure track and paying them lower salaries while simultaneously expecting them to do more work.").

research assistants, and mentors. They didn't have access to a budget for conferences or presentations and, because of their status, were rarely asked to participate in bigger theoretical discussions about law and bias. Heavy student loads and lack of time did not help either.

Even when an early group of legal writing scholars began to comment that doctrine was only one piece of the law's bias and that so-called "skills" courses could also be part of the problem, the voices of these scholars often went unheard.[13] When you occupy the lower echelon of the Legal Academy, you wouldn't usually be invited to the conferences where big theoretical issues of bias are discussed, and your work would often be dismissed or ignored by both faculty and student law review symposium editors. The early pieces struggled with the evolving role of legal writing pedagogy: were we meant to teach students in their first year only how to practice law as law was (largely) practiced, which would reproduce the biases inherent in the profession? Or, could we teach first-year students about law's bias and show them how law *could* or *should* be practiced, even if that was not how it largely *was* practiced? What was our role in the legal academy? As a young scholarly discipline in the 1990s, we were still figuring out our role in the academy (and perhaps still are).

While the idea that one cannot separate rhetoric and writing from substance has long been a foundation of much of legal writing scholarship, little of the critical theoretical scholarship took sharp aim at the bias of the rhetoric itself. As *Gut Renovations* points out, even legal writing scholars often accepted without deep consideration the premise that rhetoric itself is neutral—a tool that, depending on the substance it was employed to support, could be used for good or evil. The premise about the neutrality of deductive reasoning is a prime target of *Gut Renovations* and *Comparative Legal Rhetoric*.

Gut Renovations ask why so many of us who teach rhetoric and writing have long assumed deductive reasoning is the "right" way to reason and have, largely uncritically, taught it to our students as the "right" way. Why do we believe this is the "right" way? Is it *really* the best way to reason? In seeking to answer these questions about whether deductive reasoning is neutral and the "best" way to reason,

[13] Kathryn Stanchi, *Resistance is Futile*, 103 DICKINSON L. REV. 7, 55 (1998); *see also* Lorraine Bannai & Anne Enquist, *(Un)examined Assumptions and (Un)intended Messages: Teaching Students to Recognize Bias in Legal Analysis and Language*, 27 SEATTLE U. L. REV. 1, 2–3 (2003); Mairi N. Morrison, *May It Please Whose Court?: How Moot Court Perpetuates Gender Bias in the "Real World" of Practice*, 6 UCLA WOMEN'S L.J. 49, 83 (1995); Sheilah Vance & Pamela Edwards, *Teaching Social Justice Through Legal Writing*, 7 LEGAL WRITING: J. LEGAL WRITING INST. 63 (2001). There's no way to prove, of course, that the ideas in these articles were unheard. But if I look at the usual ways to measure scholarly impact, including citation counts, inclusion of the ideas in major national conferences beyond those devoted to legal writing, and scholarly engagement with the ideas outside of the legal writing discipline, I feel fairly comfortable making the assertion here.

the two articles explore the ugly underbelly of Aristotelian reasoning, why it became "the" way to reason in the West, and why it is so problematic.

In short, *Gut Renovations* argues that because Aristotle's theories have their roots in elitism and hierarchy, Aristotelian reasoning became infected with bias.[14] The reasoning and rhetorical structure itself, wholly apart from the substance, is biased. They argue that "traditional legal rhetoric generally forces the speaker to speak from one position and to use only one mode of knowledge production" and has the "immense, and sometimes toxic, power to generate collective buy-in for which ideas should structure our social world."[15] They also argue that the insidious quality of deductive reasoning is that it *looks* objective. So deductive reasoning is doing the work of bias and exclusion largely behind the mask of neutrality and objectivity.

That deductive reasoning looks objective but may not be is a key point of *Gut Renovations* and presents so many natural bridges to the already-existing theoretical critiques of legal doctrine. This means that rhetoric and legal writing scholars have an opportunity (or perhaps burden) to build these bridges and entice other scholars to travel them with us. That is the meta-message of *Gut Renovations*: the deconstruction of the embedded biases of legal doctrine will only be truly possible if we all talk to each other and work together.

As just one example, the idea in *Gut Renovations* that deductive reasoning looks neutral but is actually a particular perspective that is so powerful it has come to be accepted as objective is a point of natural overlap between the rhetoricians and the critical scholars focusing on doctrinal-based theory.[16] One of the ways to engage (or get the attention of) those theoretical scholars would be to explicitly reference them in the articles and/or discuss how the critical legal theories already out there interact with the arguments about rhetoric. And then go one step further: send those scholars your work.

This is a small step (and a comparatively risk-free one—everyone likes to be cited). The overture may be ignored. But think of the synergy that could be realized through collaboration, presenting together at conferences, and writing together. In some ways, we (legal scholars generally) are doing the scholarship version of parallel play, in large part because of the hierarchical structure of the legal academy. Legal scholars from all disciplines should engage with the rhetoricians (and vice versa) on the question of exactly *what* the "infection" of deductive reasoning looks like, how it works, and how it co-acts with legal doctrine.

But I recommend even riskier strategies than just citing big-name scholars and reaching out to them with your work. We—meaning legal writing and rhetoric scholars—are going to have to stick our necks out a bit more and risk being rejected.

[14] *Gut Renovations*, *supra* note 2, at 207.
[15] *Id.* at 212, 215.
[16] In the area of law and feminism, Catharine MacKinnon is probably the scholar best known for her takedown of the objectivity of legal doctrine. *See* MacKinnon, *supra* note 11. But there are many other scholars who have argued similarly.

That means engaging with people who might dismiss our work. But no one will play with us if we stay in our own sandbox. In the important area addressed by *Gut Renovations*, this also means engaging with your critics. Understand that I do not think this is the job of the authors of *Gut Renovations* only. It is the job of every legal writing scholar to read these important pieces, engage with them in our own scholarship, and amplify them so that they are heard by those who may inhabit areas of the legal academy that are outside our comfort zone.

For example, taking as a given that Aristotle's elitist, racist and misogynist beliefs infected his philosophy, legal writing scholars need to show even the most hardened skeptics exactly *how* these beliefs manifest in deductive reasoning. In other words, we need to take *Gut Renovations* and run with it. One tantalizing example *Gut Renovations* outlines is the Westlaw key number categorization of employment law as "Master and Servant," a clear example of the class bias inherent in the law.[17] That example shows starkly how hierarchical bias infects not only the substantive law, but the tools of legal research and analysis. What other examples are there? *Gut Renovations* could be read as a call for legal writing scholars to take up the gauntlet. Like many of the best pieces of legal writing scholarship, *Gut Renovations* provides rich soil for others to plant in.

All of us—not just the authors of *Gut Renovations*—should be thinking about how to amplify these ideas and fortify them by engaging with the naysayers. For example, *Gut Renovations*' argument that deductive reasoning was employed successfully to justify some of the most unjust laws, including slavery, Jim Crow, and the subjugation of women, is a bold one. This premise is true, but the assertion alone may not be enough to convince the doubters.[18] Even I (a very sympathetic reader) wondered whether those unjust laws could have been (and perhaps have been in other cultures) easily legitimized *without* the syllogism, using other forms of reasoning. The assumption that rhetoric is neutral is an issue *Gut Renovations* addresses directly, but the example of slavery and Jim Crow would be more effective with a counterexample of how those terribly unjust laws would have been harder with a different model of reasoning.[19]

Worth exploring too is whether the syllogism is itself biased or whether it is serving as the handmaiden of a deeply biased body of law. This would be a fascinating conversation to have among rhetoric and doctrinal theorists. I know that I grappled with my own view of the syllogism as mostly a neutral vehicle through which the bias

[17] *Gut Renovations*, *supra* note 2, at 215.
[18] *Id.* at 210–11.
[19] *Id.* And, of course, advocates have used deductive reasoning, admittedly often in conjunction with other persuasive techniques, to achieve social justice results in some (maybe many?) cases. My take is that *Gut Renovations* does not argue that the bias of deductive reasoning is all-encompassing, so it is not surprising that it could be used in some cases to promote social justice. Rather, the authors argue that the bias with which deductive reasoning is infected makes social justice significantly more difficult—though not impossible—to achieve. *Id.* at 231–32.

of the doctrine is perpetuated. Even as someone who accepts and supports the interdependence of substance and rhetoric, it is hard for me to see bias as a problem with deductive reasoning *per se* and not a problem with the law's substance. Is it that deductive reasoning thwarts change in the law because of the emphasis on stating "the rule"? In deductive reasoning, the rule statement is paramount. And the insistence on a clear and emphatic statement of "the rule" so early in the reasoning process leaves little room for "this is what the law should be." It certainly tends to keep law stagnant and forces legal change to be excruciatingly incremental. It also presumes that something we can call "*the* rule" actually exists.

Questioning the existence of "the rule" is another example of overlap with scholars focused on critical legal theory. As is the argument in *Gut Renovations* that deductive reasoning forces "the speaker to speak from one position," which echoes the feminist critiques of the law's neutrality and objectivity.[20] Imagine the conversation if the key feminist and race critics of neutrality were engaged with the question of whether the problem is doctrine or rhetoric or some combination of the two.

Professors Berengeur, Jewel, and McMurtry-Chubb have laid out a difficult task for legal scholars, and it is a task that truly calls for a multitude of voices. As just one example, Leslie Culver's masterful take-down of IRAC in her piece *(Un)Wicked Analytical Frameworks and the Cry for Identity*, helped me see some of the problems inherent in the syllogism.[21] Professor Culver describes a slightly different (though equally valid) problem with IRAC. For her, IRAC's over-simplicity makes no room for voices other than the white voice already valued in law's rules, making IRAC a "trope for whiteness."[22] Reading these pieces together made me hungry for a symposium where a diverse group of scholars, including but not limited to rhetoric scholars, collaborated on their critiques of law's bias. As delighted as I am to have *Gut Renovations* included in an "unending conversation" about rhetoric, and certainly its ideas should be discussed widely in our discipline, I want its ideas to break through the boundary separating legal writing scholarship from theoretical scholarship on doctrinal bias. And it is a testament to the piece that, along with

[20] *Gut Renovations*, supra note 2, at 212.

[21] Leslie Patrice Culver, *(Un)Wicked Analytical Frameworks and the Cry for Identity*, 21 NEV. L.J. 655 (2021).

[22] *Id.* at 693–94. Professor Culver writes: "IRAC feigns a monolithic representation of analytical depth . . . . As a result, the more complex and inclusive analysis became the add-on, the Other." *Id.* at 667. In other words, IRAC *looks like* real analysis, but in reality is wildly over-simplified. This oversimplification crowds out deeper, more complex reasoning and analysis—the kind of reasoning that includes voices marginalized by legal doctrine. Again, Professor Culver notes:

> We proclaim as law schools to train students in the art of critical thinking, in rhetoric, policy, social justice awareness . . . . Yet we hand them a tool that truncates supposed intellectual engagement down to a shallow formula and remarkably wonder why they view legal writing as foreign, inauthentic, and void of lived human experiences.

Id. at 678.

Comparative Legal Rhetoric, I believe that the ideas have the power to contribute to that boundary breaking.

A collaboration would mean that legal rhetoricians would fully enter—and enhance and expand upon—the longstanding theoretical conversation about the biases masked by so-called "neutral rules" and show how those theoretical principles work in the rhetorical process of law. The arguments in *Gut Renovations* could function as a bridge between rhetoric and that decades-old theoretical conversation and make the case that rhetoric and theory must work together if social justice in law is to be achieved.

III. THE SOLUTIONS

Gut Renovations makes bold arguments about how to overcome the bias of deductive reasoning, though they (like Professor Culver) stop short of calling for law professors to throw deductive reasoning "out the window wholesale."[23] *Gut Renovations* and *Comparative Legal Rhetoric* offer several potential alternatives to deductive reasoning, including non-Western rhetorics such as Indigenous, African, Latinx, and Asian diasporic reasoning and alternatives such as Quaker reasoning and restorative justice.

This is a fascinating, bold idea that *Gut Renovations* touches on but is more deeply explored in *Comparative Legal Rhetoric*. *Comparative Legal Rhetoric* not only dives into the alternative rhetorics and what they have to offer but acknowledges the tendency to "Other" or "fetishize" non-Western rhetoric.[24] That piece also should be praised for recognizing that any discussion of Western versus alternative rhetoric "walk[s] a kind of tightrope" because "borrowing" from other cultures can reproduce, in a rhetorical context, the process of colonization.[25] Finally, *Comparative Legal Rhetoric* honestly interrogates both the positives and negatives of the alternatives offered, including pointing out that non-Western reasoning styles can *also be* biased. For example, while they may not derive from societies with the Western form of racial bias, some of them do derive from very patriarchal, authoritarian, or queer-unfriendly societies.[26]

The alternatives discussed in the two papers provide yet another massive plot of untilled soil. I would love for scholars to take up the challenge of these articles and explore how these alternative reasoning styles might work if applied in real cases, especially cases that raise intersectional concerns. What would, say, the brief in a case like *Roper v. Simmons* (death penalty for juveniles) or *Atkins v. Virginia* (death

[23] *Gut Renovations*, supra note 2, at 212.
[24] *Comparative Legal Rhetoric*, *supra* note 7, at 15.
[25] *Id.* at 5, 13, 15 ("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.'").
[26] *Id.* at 13–15.

penalty for the intellectually disabled) look like with one of these alternatives? What about a brief in *Nwoye v. United States*, in which a woman Nigerian immigrant was forced to commit a crime by her abusive partner?

So here is my call to arms. I propose a project in which scholars rewrite briefs, or even judicial decisions, using the rhetoric alternatives proposed in *Comparative Legal Rhetoric*. What better way to show the legal community the advantages of incorporating alternative styles of rhetoric? This would show legal scholars and lawyers working for social justice how to use rhetoric to work more wholistic change into the law. Or it may show some lawyers or scholars that they are already using these alternative rhetoric styles. In other words, perhaps these "alternative" rhetoric styles are not really alternative—but rather have been colonized by lawyers and scholars without credit.

IV. CONCLUSION

Scholars, including legal writing scholars, have been telling us for decades that law has a problem with stagnation and inability to redress injustice and bias. Law, both in its practice and substance, is plagued by hierarchy of the most biased kind. But in the decades since the rise of critical legal theory in law schools, little has changed. Certainly, incremental steps have been taken with regard to some of the more blatant problems—*Lawrence v. Texas*, *Whole Women's Health v. Hellerstadt*, *Grutter v. Bollinger*.[27] But these cases are in many ways exceptions to the general rule that law fiercely protects white supremacist, misogynist, homophobic, and classist status quo.

The paradox that legal change is difficult and time consuming, while at the same time tenuous when it does finally happen, turned this essay into a clarion call for engagement and collaboration among legal scholars. For legal writing and rhetoric scholars, that means building as many bridges between disciplines as we can—cite to others if their work is related, send your work to those outside your discipline, reach out to those scholars who have been writing about critical legal theory, and propose collaborations on writing or speaking. If *Gut Renovations* means anything, it means that we can only fight bias in the law if we all work together. And we can only do that if we can see, clearly, how rhetoric and legal doctrine work together to prop up a broken system.

[27] Whole Women's Health v. Hellerstedt, 136 St. Ct. 2292 (2016); Lawrence v. Texas, 539 U.S, 558 (2003); Grutter v. Bolinger, 123 S.Ct. 2325 (2003) (all moving forward issues relating to women's reproductive rights, sexual orientation and privacy, and race).