VOL. 6 NO. 2

SPRING 2023: UNENDING CONVERSATIONS

STETSON LAW REVIEW

THE UNENDING CONVERSATION: GUT RENOVATIONS AND NO-DEMO RENOS

Eun Hee Han, Tiffany Jeffers, and Susan McMahon[*]

I. INTRODUCTION

Gut Renovations made an extraordinary contribution to the conversation by showing how traditional legal rhetoric, especially syllogistic reasoning, perpetuates bias and injustice, and proposed looking to non-Western rhetorical forms as an alternative. In *The Unending Conversation*, Professor Kathy Stanchi praised *Gut Renovations*, but pointed out that perhaps the trouble with traditional legal rhetoric is not only the rhetorical structure we use to make our arguments, but also the "deeply biased body of law" on which our arguments are based.[1] Essential to both arguments is the idea that legal rules and the legal syllogism have great power to determine the outcomes of cases.

We see the problems and propose another solution. Yes, law is biased. And yes, the use of syllogistic reasoning, embodied in traditional legal rhetoric in the acronym IRAC, can further that inherent bias.[2] But IRAC and legal rules can be far less constraining and outcome determinative than they may appear. And if IRAC and rules are malleable—not fixed—they can be repurposed as instruments of change.

Sometimes a structural foundation is so faulty that the house must be torn down to the studs. But *other times* a house can be transformed through no-demo renos[3] by using the structure that exists to create something new and beautiful. This Essay argues that in addition to *Gut Renovations*' call to look to other forms of rhetoric to

---

 Eun Hee Han and Tiffany Jeffers are Associate Professors of Law, Legal Practice at Georgetown University Law Center. Susan McMahon is an Associate Clinical Professor of Law at Arizona State University Sandra Day O'Connor College of Law. The authors thank Mary Bowman, Erin Carroll, Amy Griffin, Sherri Lee Keene, Ellie Margolis, Anne E. Mullins, Rima Sirota, Johnathan Urquhart, Faith M. Gosselin and participants of the SEALS 2022 works-in-progress session for their feedback on this piece. The authors also thank Tyler Bates and Lily Li for excellent research assistance.

[1] Kathy Stanchi, *The Unending Conversation: Gut Renovations, Comparative Legal Rhetoric, and the Ongoing Critique of Deductive Legal Reasoning*, 5 STETSON L. REV. F. 1, 6 (2022).

[2] Elizabeth Berenguer, Lucy 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*] (describing traditional legal rhetoric as using "deductive reasoning in the form of a syllogism, illustrated by the well-known law school acronym IRAC" and originating from non-neutral classical Western rhetoric).

[3] *See infra* note 38.

de-bias our perspectives and our law, we also must envision ways to achieve change through the structures of traditional rhetoric. We need to reform traditional legal rhetoric not just from the outside in, but also from the inside out.

II. CATCHING UP ON THE CONVERSATION

Gut Renovations was a shot across the bow for legal writing professors, a welcome call to rethink some long-held assumptions and practices. Professors Elizabeth Berenguer, Lucy Jewel, and Teri A. McMurtry-Chubb identify traditional legal rhetoric itself, especially syllogistic reasoning as embodied in IRAC, as a problematic analytical framework that contributes to the continued oppression of marginalized groups in the U.S. legal system.[4] Because this model is drawn from the classical rhetoric of Plato, Aristotle, and Enlightenment thinkers—all of whom believed in hierarchy and contributed the marginalization of others—traditional legal rhetoric is inherently biased and steeped in inequality.[5]

The article questions why the classical syllogism is used by skills professors as a neutral organizational tool when traditional, deductive legal reasoning "forces the speaker to speak from one position and to use only one mode of knowledge production."[6] IRAC generates buy in by repeating concepts used by decision makers; these concepts develop into rules; formulated rules are then reused in syllogistic reasoning, ultimately allowing them to become "entrenched in our collective mindset."[7] These rules often favor the already powerful, and IRAC therefore serves to "reif[y] majoritarian norms and tends to ignore and silence minority voices."[8] Most problematically, the legal syllogism makes it seem as though all this work is the product of rational logic. IRAC thus "is doing the work of bias and exclusion largely behind the mask of neutrality and objectivity."[9]

Gut Renovations acknowledges the legal syllogism[10] is not leaving the scene anytime soon but argues that we should look to other alternative rhetorical practices, like those found in the African, Asian, Indigenous, and Latin Diaspora, to "renovat[e] and remodel[]" traditional legal rhetoric.[11] For instance, while acknowledging that

---

[4] *Id.* at 206–07.
[5] *Id.* at 207–11.
[6] *Id.* at 212.
[7] *Id.* at 215.
[8] *Id.*
[9] Stanchi, *supra* note 1, at 5.
[10] We operate in this piece on the assumption that there are, in fact, valid and different forms of legal rhetoric. This assumption is supported by the perceived challenges faculty have faced in reading the writing of international LL.M. students. Despite the fact that many such students are qualified lawyers and jurists in their home countries, at times faculty have perceived their writing to show a "rhetoric and sequence of thought that may in fact 'violate the expectations of the native reader.'" Jill J. Ramsfield, *Is "Logic" Culturally Based? A Contrastive, International Approach to the U.S. Law Classroom*, 47 J. LEGAL ED. 157, 168 (1997) (quoting Robert B. Kaplan, *Cultural Thought Patterns in Inter-Cultural Education*, 16 LANGUAGE LEARNING 1, 4 (1966)). That these lawyers and jurists present their logic in a way that varies from U.S. norms suggests, to us, expertise in different rhetorical norms.
[11] *Gut Renovations*, *supra* note 4, at 223.

non-Western forms of rhetoric were also birthed in cultures infused with classism, sexism, and authoritarianism, Jewel shows how Navajo court decisions use an alternate rhetoric that is "focused on provision, care, and restoration" for poor and vulnerable people.[12] This form of rhetoric stands in contrast to the American system's focus on rights, reasonableness, rational basis, and ends/means.[13] By exposing students and practitioners to these kinds of alternatives, Berenguer, Jewel, and McMurtry-Chubb hope to "infuse [traditional legal rhetoric]—and sometimes replace it—with alternative rhetorical practices."[14]

This is essential, important work. Berenguer, Jewel, and McMurtry-Chubb are advocating for new visions of legal argument that break free from the past. They are doing the critical (critical in both the "important" sense and the "critical legal studies" sense) work of helping students envision a different legal order than the one that exists today.

But there is a risk. As Stanchi notes, the *Gut Renovations* critique may place blame on the syllogistic form when the problem is the law's substance and inputs: "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."[15] In Stanchi's view, IRAC is problematic because it furthers biased law.[16] Both critiques of IRAC assume a system of fixed rules, applied through traditional legal rhetorical tools, that lead inexorably to an outcome that favors the entrenched power structure.

This is where we hope to add to their contributions. We instead see legal rules and the legal syllogism not as immutable forces leading to fixed conclusions, but as malleable mechanisms for creating and organizing arguments. And that malleability provides the possibility of changing and evolving current laws, synthesizing new rules, and moving law in a more just and fair direction. Looked at in this way, traditional legal rhetoric may not be the problem; it could actually hold the seeds of a solution.

III. LEGAL REALISM AND THE INDETERMINACY OF RULES

"You can give any conclusion a logical form."[17] Oliver Wendell Holmes said this over a century ago, and it remains as true now as it was then. Holmes was the tip of the spear of the Legal Realists; these thinkers questioned whether abstract principles could decide cases and showed that precedent often did not provide specific rules that could govern novel fact situations.[18]

In the Realist view, judges came to decisions first then backfilled with the legal rules that justified those decisions. Because rules could be made to bend this way and that, and because judges had multiple rules, precedents, or methods that they could

[12] Lucy A. Jewel, *Comparative Legal Rhetoric*, 110 KY. L.J. 107, 159 (2022).
[13] *Id.* at 159–60.
[14] *Gut Renovations*, *supra* note 4, at 216.
[15] Stanchi, *supra* note 1, at 6.
[16] *Id.*
[17] Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 466 (1897).
[18] *See, e.g.*, Joseph William Singer, *Legal Realism Now*, 76 CALIF. L. REV. 465, 469–70 (1988).

pick from to justify their decision, the legal syllogism was not guiding the process. Judges reached decisions based on intuition, common sense, bias, politics, or some other basis, then crafted the written forms of the decisions to make it appear as though the rules drove the decision, when in actuality, the decision drove the rules.[19]

The Realists provided two different bases for their claim that judicial decisions are not reached solely through application of rules. First, many rules were simply too vague to be outcome determinative.[20] Second, to fill this gap between vague rules and conclusions, judges had multiple precedents, methods, or rules to choose from. Decision makers could pick whatever path best suited their outcome.[21] As a result, because rules themselves were not driving outcomes, something else, something unstated, was the actual impetus for the decision. The legal syllogism just provided window dressing for a decision made on other grounds.[22]

Almost any case can be deconstructed along these two lines. One example is *White City Shopping Center v. PR Restaurants*, a Massachusetts contract case that interpreted the term "sandwich" to exclude burritos.[23] First, the overarching rule of that case—that the unambiguous terms of a contract must be read in their ordinary, usual sense[24]—constrained the judge somewhat, but it did little work in answering the specific burrito question. For instance, likely all would agree that calling an airplane a "sandwich" falls outside the term's ordinary, usual sense. But in any relatively hard case, a case in which there is more than one plausible argument for how to interpret a term, "ordinary, usual sense" provides no answer. Fiery online debates have erupted over whether a hot dog is a sandwich, with different individuals finding different criteria (e.g., bread, filling, context, gut feeling) to be determinative.[25] Likewise, logic provides us with no way to determine whether a burrito qualifies as a sandwich in the "ordinary, usual sense." The rule itself does not definitively answer the question one way or the other and leaves space for the judge's gut sense about what is a sandwich and what is not to determine the outcome.

To fill this gap between the vague rule and conclusion in the contract's interpretation, the *White City* judge used a method frequently used in statutory interpretation: turning to a dictionary to interpret text. The judge identified the dictionary definition of "sandwich" as requiring "two thin pieces of bread," with "a thin layer . . . spread between them."[26] But here he runs afoul of the Realist's second critique, the choice-of-pathways critique. The judge gives no justification for the

---

[19] *See, e.g.*, Jerome Frank, *Why Not a Clinical-Lawyer School?*, 81 U. PENN. L. REV. 907, 910 (1933) (noting that numerous factors unacknowledged in judicial opinions result in legal decisions and stating, "[A]n opinion is not a decision").

[20] Singer, *supra* note 18, at 470.

[21] *Id.*

[22] *See* Frank, *supra* note 19.

[23] White City Shopping Ctr., L.P. v. PR Rests., L.L.C., No. 2006-196313, 2006 WL 3292641, at *1–2 (Mass. Super. Ct. Oct. 31, 2006).

[24] *Id.* at *3.

[25] *See, e.g.*, Kelly Vaughan, *Is a Hot Dog a Sandwich?: The Food52 Editorial Team Weighs In*, FOOD52 (Jul. 2, 2021), https://food52.com/blog/26365-are-hot-dogs-sandwiches.

[26] *White City Shopping Ctr.*, 2006 WL 3292641, at *5.

method he chose. Further, he gives no justification for the definition he chose, and acknowledged that the parties to the case had submitted many different definitions and "expert affidavits."[27] A glance at the same dictionary shows that alongside the "two pieces of bread" definition also sits the definition, "filling placed upon one slice . . . of bread or something that takes the place of bread," which could potentially include a burrito.[28] Thus, the rule is a choice, based on a series of choices. The judge's choice of one dictionary definition over another led to a definitive rule outlined in the opinion that dictated the outcome of the dispute.

Moreover, the judge supports the exclusion of burritos from the category of sandwich not just with the dictionary definition, but also fills the gap between the "ordinary, usual" meaning rule and its conclusion with "common sense."[29] Relying on such an intuitive leap, with the judge more or less announcing it is his gut feeling that burritos are not sandwiches, also supports the conclusion that the overall rule, and even the dictionary definition, are not driving the result. Instead, the judge's intuition about burritos as not-sandwiches likely came first, followed by the legal justifications for that decision. Neutral, impartial logic was not driving the outcome.

The use of common sense as a justification for the decision raises thorny questions about the role of bias in the outcome. The question of whether burritos are sandwiches is one tinged with ethnicity, with sandwiches perceived as being either "European" or neutral and burritos classed as "Mexican."[30] Resorting to "common sense" in such a case invites bias into the decision but disguises it with the sheen of logic and neutrality.

Thus, in some ways, the *White City* case demonstrates the *Gut Renovations*' authors' key point: the logical form is often used to further biased understandings under the mask of objectivity. But at the same time, the Realist critique of *White City* demonstrates that the case did not have to turn out the way it did. The judge just as easily could have reached the opposite conclusion, either by using "common sense" to find that a burrito qualifies under the "ordinary, usual" meaning of sandwich or by using a dictionary definition (like "filling placed on one slice of bread") that leads to that conclusion.

Thus, if rules are indeterminate—if they are either too vague to lead to conclusions or if there is a multiplicity of pathways from rule to conclusion with no principled way to choose amongst them—then it becomes infinitely easier to wriggle free from them. And if that is the case, then IRAC need not condemn us to repeating the same biased mistakes, again and again. We can instead use IRAC to breathe life into new visions of rules that shift law, that move it forward making it fairer and more just. We can see it as an organizational tool with endless inputs rather than a set pathway from problem to conclusion.

---

[27] *Id.* at *3 n.3.
[28] *Sandwich*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE (2002).
[29] *White City Shopping Ctr.*, 2006 WL 3292641, at *5.
[30] Marjorie Florestal, *Is a Burrito a Sandwich?: Exploring Race, Class, and Culture in Contracts*, 14 MICH. J. RACE & L. 1, 9 (2008) (arguing that burritos are perceived as Mexican, while sandwiches are perceived as race-neutral).

In doing so, we would be responding to another of Holmes' calls: "[I]f the training of lawyers led them habitually to consider more definitely and explicitly the social advantage on which the rule they lay down must be justified, they sometimes would hesitate where now they are confident, and see that really they were taking sides upon debatable and often burning questions."[31] Essentially, rather than teaching lawyers in training that their role as an advocate is to mine case opinions for definitive pre-set rules, they would be made more aware that the law takes sides. They would be provided with the tools and techniques to critique the who, when, how, and why of these sides, empowering them to be more intentional and strategic in their advocacy.

IV. FROM RIGID STRUCTURES TO MALLEABILITY

Mari Matsuda noted the hallmarks of the best progressive lawyers: one who is able to stand outside the courtroom doors and say "this procedure is a farce" and then stand inside the courtroom and say "this is a nation of laws, laws recognizing fundamental values of rights, equality and personhood," and even do both on the same day.[32]

Gut Renovations has given us the gift of identifying the former as true, by arguing that the syllogism has historically been used to maintain white supremacy, patriarchy, and oppressive ideologies that are consistently reinforced and replicated by U.S. precedent. This is outside-in reform, which looks at the system's infrastructure, the things we take for granted, and says, "We can do better."

We propose the outside-in reform must be paired with inside-out reform, reform that works within the infrastructure as it exists, that aims to take those ambiguous ideas of "rights, equality, and personhood" and make them real. Doing both sides of this work would allow students and law professors to embody what Matsuda idealized.

We propose introducing malleability into each step of the current syllogistic structure of legal rhetoric to help students realize this new version of the lawyer's role, just as engineers and architects build malleability into earthquake-resistant buildings. If the framework of traditional, Western legal rhetoric is IRAC, the first step for students is to question the framing itself of a legal issue—the "I" in IRAC. Does an issue's framing seem to exclude or include? Are there biases inherent in the language used to frame an issue?

The second step is for students to question the assumptions that feed into legal rules. Historically, we have given students the impression that legal rules are fixed and neutral, with unquestionable origins stemming from black letter law. Even when we teach students the process of rule synthesis, we work hard to ensure that the newly developed rule is an accurate portrayal of the rules derived from the sources used. However, because IRAC provides an opportunity for the crafter to create the

[31] Holmes, *supra* note 17, at 468.

[32] Mari Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 11 WOMEN'S RIGHTS L. RPTR. 7, 8 (1989).

foundations for their own story, we should aspire to upend the instruction that law is fixed and begin instructing students about the malleability of the inputs that make up the "rules."

As scholars such as Professors Linda Berger, Leslie Culver, Danielle Tully, and Amy Griffin have noted, legal analysis can include more than simply plucking rules out of authorities and applying them to new facts.[33] It includes rule formation—choosing which of many rules to apply (identification) or crafting a new one based on a melding of the precedents (synthesis). It can include invoking sources other than precedents or statutes to support arguments for shifts in doctrine. Knowing that the inputs to these rules are malleable and sometimes dependent on social, economic, educational, or cultural factors would allow students (or future lawyers) greater authority to make choices about them. For example, "bread" can be understood in some cultures to be leavened, and in others, including some indigenous communities, not. The fillings that would typically be surrounded by the bread could be vastly different; the judge in *White City* specified a savory filling, excluding the now-classic American PB&J, the more recently popular fruit sando that originated from Japan, and many more examples.

In addition, knowing that there are competing rules, or counter-rules, just as every canon of construction has a competing canon,[34] would cement the idea that rule selection really is a choice. A clear example of this from *White City* is the judge's selection of one definition of a sandwich versus another.

Going through this rule formation process would help students assess whether the "rule" that they derive from opinions or statutes is biased or unbiased, inclusive or exclusive, good or bad, right or wrong. Engaging in a broader exploration of rule inputs would weave in doctrinal critique: a questioning of legal ethics, morality, and racial, social, or economic hierarchy. It may even diminish the strength of the "rules," so students can honestly assess them as norms and not unquestionable rules that leave some people on the outside.[35] Students can then begin to critically analyze those

---

[33] *See, e.g.*, Leslie Patrice Culver, *(Un)*Wicked *Analytical Frameworks and the Cry for Identity*, 21 NEV. L.J. 655, 671–72 (2021); L. Danielle Tully, *The Cultural (Re)Turn: The Case for Teaching Culturally Responsive Lawyering*, 16 STAN. J. C.R. & C.L. 201, 238–39 (2020*; see also* Amy Griffin, *Dethroning the Hierarchy of Authority*, 97 OR. L. REV. 51, 55, 89, 93–94 (2018) (arguing for a reimagining of the concept of "legal authority" as a continuum of weight, which "forces a shift away from the formalist thinking encouraged by hierarchy and instead encourages close evaluation of the purpose and value of each source of information"); Linda Berger, *Studying and Teaching "Law as Rhetoric": A Place to Stand*, 16 J. LEG. WRITING INST. 3, 11 (2010) [hereinafter *Law as Rhetoric*] ("Looking into how reality is constructed makes it possible for the lawyer to shape arguments about individual circumstances that depart from the accepted narratives and existing frameworks.").

[34] Karl N. Llewellyn, *Remarks on the Theory of Appellate Decisions and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 401 (1950) (acknowledging "there are two opposing canons on almost every point" when engaging in statutory construction).

[35] Our proposal would further embrace the proposal to incorporate critical theory into the first year of law school, which Kathy Stanchi proposed decades ago, in *Resistance is Futile*, 103 DICKINSON L. REV. 1, 55 (1998). And this model of re-framing rules as norms owes a debt to Linda Berger in *Law as Rhetoric*, *supra* note 33, at 8–10 (discussing how rhetoric stands between formalism and realism "by acknowledging that the law is often being interpreted and that interpretations are often contestable"

historical norms and assess which inputs to incorporate as they're synthesizing new norms. They would be equipped to use an array of inputs to create effective syllogisms leading not only towards more just outcomes in individual cases, but also more inclusive new norms.

Students can also be encouraged to incorporate other inputs into the application of the rule—the "A" of IRAC. Some of the strongest advocacy in written briefs and judicial opinions, for example, addresses policy considerations.[36] Thus, policy considerations are currently accepted as contributing to a thorough analysis of the law. We propose that the following should also gain acceptance: data, lived experiences, narratives of those harmed or marginalized by a rule, and use of the Indigenous, Latinx, African, and Asian Diasporic rhetorical frameworks identified by Berenguer, Jewel, and McMurtry-Chubb. Ultimately, we should show students that neither rules nor application are predetermined, fixed, or set in stone. Lawyers make choices about what inputs to base their rules upon and how to apply them; judges do the same in their decisions.

We teach students about this malleability, to be sure; Mel Weresh has argued convincingly that it is one of the "threshold concepts" in law.[37] But we often teach the malleability in the context of achieving client goals (e.g., when writing a brief) or finding the "best" rule or the "best" analogy (e.g., when predicting the outcome to a case in a memo). Rarely are students told that analytical techniques such as issue identification, rule formation, and application can be tools for shifting law onto a more just, more fair, less biased place. Our process frees students to question the precedent not only as a litigation strategy in persuasive writing, but in the way a claim is initiated and its lifecycle between lawyer, client, and courts.

V. CONCLUSION

We have always taught students what it means to "think like a lawyer." *Gut Renovations* demolished the idea that traditional legal rhetoric, as taught to students, is neutral and apolitical and proposed that it should be refurbished with non-Western rhetorical frameworks. We agree, but also propose a no-demo reno option: renovating law from the inside out.

The goal of our proposed process is for students to understand that they can make choices about the law. They can determine what inputs to include or exclude, and what factors to consider. We do not need to impose our beliefs here, but making clear that the issue framing is a *choice*, that the rule is a *choice*, that the application is a *choice*, gives students agency over IRAC. They can bend IRAC to their will, using it in their quest to birth a new legal order into being, just as litigators arguing for school

---

and that rules may not constrain judges, but the "rhetorical process itself," including the norms and customs of judging and law practice, does).

[36] *See* Ellie Margolis, *Closing the Floodgates: Making Persuasive Policy Arguments in Appellate Briefs,* 62 MONT. L. REV. 59, 60 (2001).

[37] Melissa H. Weresh, *Stargate: Malleability as a Threshold Concept in Legal Education*, 63 J. LEGAL EDUC. 689, 689–90 (2014).

desegregation, marriage equality, or abortion rights have done. A no-demo reno[38] creates a foundation for the notion that a duty of lawyers is to make choices about what the law can and will be.

[38] *See generally No Demo Reno* (Home and Garden Television Network). This home renovation show focuses on the completion of home-design remodeling projects. The hosts explain to home owners that projects requiring extensive demolitions can be time-consuming and costly. Most home-owners want updates and remodels for a lower price and quick turn-around. This popular reality show is based on the premise that homeowners can achieve beautiful results by making high quality, low-cost changes without moving walls or demolishing the foundation—so too here. Our essay provides students and lawyers a framework to engage in a process that remodels rule formation and rule application providing immediate results without tearing down western rhetorical frameworks.