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GUT RENOVATIONS, RUBRICS, AND THE REDUCTION OF BIAS IN STANDARD EDITED AMERICAN ENGLISH AND LEGAL WRITING

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Responding to *Gut Renovations: Using Critical and Comparative Rhetoric to Remodel How the Law Addresses Privilege and Power*

I. INTRODUCTION

In their article *Gut Renovations: Using Critical and Comparative Rhetoric to Remodel How the Law Addresses Privilege and Power*, ("the original *Gut Renovations*"), Professors Elizabeth Berenguer, Lucy Jewel, and Teri A. McMurtry-Chubb argue that the very substance of traditional legal rhetoric is "inherently biased, discriminatory, and founded upon a deep-seated belief in natural inequality."[1] In particular, they focus on deduction as housed in the syllogistic structure of IRAC.[2] Their position is that both the form and substance of that rhetorical apparatus are not neutral but, instead, based in and working to reinforce systems of racial, gender, and class inequity.[3] The root of their argument lies in their assessment that traditional legal rhetoric—"through its logocentrism, preordained process, and straight-line structure"[4]—requires the replication of its singular mode of "White-supremacist, patriarchal, and elitist"[5] meaning production.[6] In so doing, traditional legal rhetoric silences and excludes other alternate and non-traditional rhetorical

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[1] Elizabeth Berenguer et al., *Gut Renovations: Using Critical and Comparative Rhetoric to Remodel How the Law Addresses Privilege and Power*, 23 HARV. LATINX L. REV. 205, 206 (2020).

[2] *Id.*

[3] *Id.* at 207.

[4] *Id.* at 216.

[5] *Id.* at 207.

[6] *Id.* at 207, 216.

approaches.[7] Thus, Berenguer, Jewel and McMurtry-Chubb contend that if legal writing professors continue to teach deduction and IRAC as the only "correct" method for legal analysis, they are essentially perpetuating a homogenizing and exclusionary methodology that authorizes and represents only the voice and logic of elite privilege.[8]

Following the original *Gut Renovations*, a response piece entitled *Gut Renovations, Comparative Legal Rhetoric and the Ongoing Critique of Deductive Reasoning* ("Stanchi *Gut Renovations*") appeared in *The Unending Conversation*.[9] In that article, Professor Kathy Stanchi agrees with and lauds the major premises of the original *Gut Renovations*[10] but questions whether "bias [i]s a problem with deductive reasoning *per se* and not a problem with the law's substance."[11] Ultimately, Stanchi calls for a comparative scholarship in which not only legal writing and doctrinal scholars but also scholars from a multitude of other disciplines would collaborate to examine the deductive method and its potential to replicate and reinforce implicit cultural biases.[12]

In a second response piece, *Gut Renovations and No-Demo Renos ("No-Demo Renos")*, which also appeared in *The Unending Conversation*, Professors Eun Hee Han, Tiffany Jeffers, and Susan McMahon agree that the law and syllogistic reasoning in the IRAC structure are both biased.[13] Yet, through an analogy to "no-demo renos" (or the reuse of an existing structure to "create something new and beautiful"),[14] they propose that, in addition to including non-traditional forms of rhetoric to remove implicit bias from legal rhetoric and the law, change can also be created through legal rhetoric's existing structures.[15] Noting the indeterminacy of rules that are either too vague to be determinative or that offer multiple routes to a decision, the authors position IRAC as "an organizational tool with endless inputs rather than a set pathway from problem to conclusion."[16] As such, they champion IRAC as a means for increasing diversity in the law.[17]

All three of these articles are important and meaningful in their own right. This importance is illuminated through the conversation the articles create that allows them to enact their own arguments by including multiple voices and

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[7] *Id.* at 215–16.
[8] *Id.* at 212.
[9] Kathy Stanchi, *The Unending Conversation: Gut Renovations, Comparative Legal Rhetoric and the Ongoing Critique of Deductive Legal Reasoning*, 5 STETSON L. REV. F. 1 (2022).
[10] *Id.* at 1–2.
[11] *Id.* at 7.
[12] *Id.* at 7–8.
[13] Eun Hee Han et al., *The Unending Conversation: Gut Renovations and No-Demo Renos*, 6 STETSON L. REV. F. 1, 1 (2023).
[14] *Id.*
[15] *Id.* at 1–2.
[16] *Id.* at 5.
[17] *Id.*

questioning the inherited "knowledge" and "truths" upon which our profession and society stands. In that vein, I offer in this Article yet another perspective in this discussion and argue that, like deduction and IRAC, the very medium of legal writing itself—Standard Edited American English ("SEAE")—is also not neutral but, instead, a system that replicates and perpetuates implicit racial, gender, and class biases. Despite the fact that both the legal academy and profession operate almost exclusively in SEAE, the privilege that it and its users are afforded allows it to function as an unnamed but constant standard against which difference is marked as deficiency.

SEAE, therefore, exists as a paradox: it acts as the mark of quality for academic and legal writing, but it is rarely acknowledged and even more rarely taught in a deliberate or recursive manner. Like the authors of *No-Demo Renos*, however, I also contend that, in addition to making room for alternate and minoritized dialects of American English through code-meshing, professors can use rubrics to make explicit the structure of SEAE and their expectations for it in their students' writing. Students can then identify and meet those standards while professors prevent the implicit biases inherent in SEAE and writing assessments from affecting their grading processes.

II. IDENTIFYING THE INEVITABILITY OF SEAE IN WRITING ASSESSMENT

The authors of the original *Gut Renovations* identify traditional legal deduction and its concomitant formulaic structure of IRAC as non-neutral.[18] More specifically, the authors contend that IRAC's methodology sacrifices inclusivity to instead prioritize "elite positions and voices" and, thus, maintains a powerful ability to "reproduce and reinforce inequality."[19] In a section that both previous responses to the piece have quoted, the authors elaborate that "[t]raditional legal rhetoric generally forces the speaker to speak from one position and to use only one mode of knowledge production. In this manner, only certain meanings are allowed to surface. Traditional legal rhetoric assumes the speaker's voice derives from a position of elite privilege."[20] The original *Gut Renovations* authors identify that traditional rhetoric's ancient roots are embedded in its current form and those roots associate logic and verity with a privileged social status.[21]

Even more deliberately, the authors state, "[t]raditional legal rhetoric also incorrectly assumes that its rhetors are comfortable, wealthy, and in a dominant, unsubordinated position. This assumption is visible in U.S. legal culture, where

[18] Berenguer et al., *supra* note 1, at 207.
[19] *Id.* at 212.
[20] *Id.* at 212–13.
[21] *Id.* at 213.

lawyers have long been associated with the identity of the class-privileged, White, aristocratic man who practices law free from any material concern."[22] The original *Gut Renovations* further draws attention to the pervasiveness of legal rhetoric and its unique power to shape the law and, by extension, society, truth, and reality by replicating—and thereby reinforcing and entrenching—itself through precedent.[23] Through its origins and functionality, then, legal rhetoric maintains a homogeneity that resists outside influence and perspectives and is, therefore, far from neutral.

Similar to traditional legal rhetoric, SEAE also maintains a perceived neutrality that belies its inherent privileging and reinforcing of normative and dominant racial, gender, and economic categories. In her article, *The Inevitability of "Standard" English: Discursive Constructions of Standard Language Ideologies*, Professor Bethany Davila identifies the attributes of SEAE that allow it to function as not only seemingly neutral but also "inevitable in the writing classroom and curricula."[24] Davila's article recounts the methodology, findings, and implications of a study she conducted in which she provided a group of eighteen writing instructors at three universities with anonymous student papers from incoming first-year students and asked those instructors to provide comments and feedback on those texts.[25]

After the instructors assessed those works, Davila interviewed the instructors and asked questions about their comments, what they found most striking in the individual papers they graded, and where the papers strayed from their expectations

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[22] *Id.* To illustrate their point, the authors reference the University of Georgia's 1859 announcement that its new law school would provide "honorable employment" for young men who will cultivate the large slave plantations they will inherit from their fathers. *Id.*

[23] *Id.* at 214–16. Here, the authors offer the example of "Master and Servant" as the Westlaw Key Number category for employment law and argue that, despite its ancient origins with "hierarchy-loving" Aristotle, said category—in which the employer is the "Master" and the employee the "Servant"—continues to affect the perception and understanding of employment law. *Id.* at 215.

[24] Bethany Davila, *The Inevitability of "Standard" English: Discursive Constructions of Standard Language Ideologies*, 33 WRITTEN COMMC'N 127, 133 (2016) [hereinafter *The Inevitability of "Standard" English*].

[25] *Id.* at 131–32. Davila specifies that the universities were "public, research universities—two in the Midwest and one in the Southwest" and "[a]ll of the instructors—the only instructors to volunteer at each institution—were White; there were 10 females and 8 males; and they reported socioeconomic statuses ranging from working class to middle class." *Id.* at 131. She also states that 5 males and 4 females participated in the study and that she chose the first students who agreed to participate and belonged "within the racial categories of White, Hispanic (students used this race label when self-identifying), and African American." *Id.* The participating students also self-identified as belonging to backgrounds that ranged from upper-middle-class to working class. *Id.* Lastly, she includes that the directors of the writing center and writing program at one of the universities involved verified that the papers in her study represented the common range of writing at their institution. *Id.*

for student writing.[26] Notably, she also asked them to describe in detail the student-authors who they imagine wrote the papers.[27] Based on those instructors' feedback and interview responses, Davila identifies four attributes of SEAE that allow it to appear neutral: normalcy, naturalness, non-interference, and wide accessibility.[28] She is careful to note, however, that "[t]he representation of these categories as discrete is artificial and misleading. Instead, the categories overlap, work together, influence, and inform one another."[29]

That the instructors in her study did not recognize SEAE as a particular dialect of English prompted Davila to identify "normalcy" as the first of the attributes that allow SEAE to appear neutral.[30] Davila's findings show that the instructors identified SEAE as "normal" by noting both the presence or absence of particular dialects, vernaculars, or "foreign language problems" that varied from SEAE, which they did not perceive or identify as a dialect in itself.[31] By failing to perceive SEAE as a dialect and leaving it unnamed and unmarked, the instructors position it as a universal and invisible "normative center" that is identified only in contrast to "other" named and marked dialects.[32]

That lack of recognizing SEAE as a particular dialect of American English, Davila contends, also led the instructors to perceive it as "natural."[33] By "natural," Davila identifies that the instructors assumed on behalf of their student-authors a familiarity with the "conventions of the English language" or that they would have "an innate sense of language" and that the language in question was SEAE.[34] Moreover, the instructors consistently identified the presence of dialects other than SEAE as originating with non-White students whereas the absence of those dialects was attributed to White authorship.[35] The "naturalness" of SEAE further meant the instructors often distanced themselves from instances of non-standard usage by applying labels to it such as "puzzling" or "strange" that identify it as unnatural and lead to it being evaluated negatively.[36] The result, therefore, of the instructors failing to recognize and treat SEAE as a dialect of English in itself is the positioning of SEAE

[26] *Id.* at 132.
[27] *Id.*
[28] *Id.* at 133.
[29] *Id.*
[30] *Id.* at 133–34.
[31] *Id.* at 134–36.
[32] *Id.* at 136.
[33] *Id.*
[34] *Id.*
[35] *Id.* at 134–36. Davila does note that "two of the instructors from the southwestern university, a Hispanic-serving institution, defaulted to either a White *or* a Hispanic student when they encountered 'typical' writing." *Id.* at 135.
[36] *Id.* at 138.

as the untainted and unaligned source of and ideal for written English against which all variations (and, frankly, those who author them) are judged as lesser.

Davila further identifies the attribute of "non-interference" as aiding in the perception of SEAE as neutral by ascribing to SEAE the unique characteristic of being able to improve but not impede a text's ability to convey its intended meaning.[37] The instructors in the study positioned SEAE as "non-interfering" by consistently relying on the metaphor of "clarity" to present SEAE as a "translucent container for ideas" that conveys but does not obstruct meaning.[38] Davila states that all but one of the instructors referred to "clear writing" or "clarity of ideas" at least once, and often more, during the interviews.[39] She also notes that those same instructors identified non-standard usage and phrasings as an impediment to meaning and labelled them with terms such as "muddy" or "fuzzy" that emphasize their lack of "clarity."[40] Those references to clarity again position SEAE as neutral yet simultaneously superior to non-standard dialects by ascribing to it the ability to enhance but not interfere with the production of meaning that is clouded by other non-standard dialects.[41] Furthermore, the instructors reliance on the metaphor of clarity essentially establishes an abstraction as the standard for and guide to achieving understandable—and therefore acceptable—academic prose. That abstractions are, by definition, generalities open to various interpretation means that the students capable of achieving that standard are likely the ones who—based on similar life experiences and privileges—understand that abstraction in the same manner as their instructor.

The final attribute Davila identifies as lending to SEAE an appearance of neutrality is its wide accessibility.[42] Davila identifies wide accessibility specifically in the way the instructors repeatedly considered SEAE as "basic" and expected their students to have had previous opportunities to learn its grammar, usage, and structure through prior schooling or reading practices.[43] Involved with the belief that students should have learned SEAE prior to college were presumptions regarding those students' economic class and the quality of education associated with it.[44] Yet, even among the instructors who recognized the varying quality of their students' prior

[37] *Id.* at 138–39.
[38] *Id.* at 138.
[39] *Id.*
[40] *Id.* at 139.
[41] *Id.* at 138–39.
[42] *Id.* at 139.
[43] *Id.* at 140.
[44] *Id.* at 142.

education, an understanding persisted that one could develop an "ear" for the conventions of SEAE by reading it.[45]

Again, the instructors' understanding of SEAE as being widely accessible permitted them not to teach its grammar and usage or simply identify where their students' writing strayed from SEAE's conventions. The instructors relied on this

[45] *Id.* at 141–42. To this point, George Yule writes in *The Study of Language* that language acquisition for a native speaker "requires interaction with other language-users in order to bring the general language capacity into contact with a particular language." GEORGE YULE, THE STUDY OF LANGUAGE 209 (8th ed. 2023). He does identify that "a child who does not hear or is not allowed to use language will learn no language" and "the particular language a child learns is not genetically inherited, but is acquired in a particular language-using environment." *Id.* According to Yule, then, listening to or reading a language does help one acquire that language or dialect, but the primary method by which one acquires proficiency in their first language is through membership in an environment that uses and allows that person to interact in a particular language or dialect. Thus, the degree to which the members of one's environment interact in a language or dialect—such as SEAE—will determine the level at which one acquires and can communicate in that language or dialect. For many students, however, learning and writing in SEAE may be more akin to second-language acquisition. On that topic, Yule writes:

> There is something of an enigma in this situation, since there is apparently no other system of "knowledge" that we can learn better at two or three years of age than at thirteen or thirty, but most people find it hard to become as effective at communicating in a foreign or second language (L2) as they are in their first language (L1).

Id. at 229.

For students who do not come from environments that interact in a particular language, the ability to do so proves difficult, and despite the best efforts of those students, they may never become fluent in that language. Again, reading and speaking in that second language may help the student develop a proficiency in it, but Yule identifies that the most recent and effective means for second-language acquisition is through "communicative approaches" that stress the "functions of language (what it is used for)." *Id.* at 233.

Similar to first-language acquisition, the communicative method creates opportunities for the learner to speak and interact in that second language. One of the main features of that method is "negotiated input," which is "L2 material that the learner can acquire in interaction through requests for clarification while active attention is being focused on what is said." *Id.* at 235. In other words, negotiated input creates ample opportunity for the learner to interact with others in that second language and receive immediate feedback or "input" while also producing "comprehensible output in meaningful interaction." *Id.* Students for whom SEAE functions as second language, therefore, will not develop in their use of that dialect without focused and repeated opportunities to express themselves in it and receive immediate feedback on that interaction.

baseline for three reasons. First, the students should already know SEAE rules.[46] Second, SEAE is so basic that those students should be able to learn its conventions independently.[47] Third, "it wasn't their job as writing instructors to do the teaching."[48] Notably, the instructors also admitted to being annoyed or angered at having to teach grammar and usage and admitted that they cover those topics quickly and do so only once per semester.[49]

The understanding of SEAE as widely accessible further allows for the belief that it operates as an equalizer because everyone has the opportunity to learn and employ it with little effort.[50] Davila argues that such a perspective perpetuates the myth of meritocracy that positions success as a result only of effort—and not unearned privilege—and is, therefore, fair.[51] She states, "[i]f everyone begins at the same starting line, standardness, like success, is both an individual accomplishment based on effort and an individual's responsibility. This perspective effectively works to blame the victim for the inequality."[52] Thus, because SEAE is the preferred dialect of privileged American culture and the members of that culture acquire that dialect with the relative ease of a first language, the instructors in Davila's studies assume everyone can acquire SEAE fluency with the same ease as them and, therefore, consider the deliberate teaching of that dialect unnecessary.[53]

In addition to the ways the perceived neutrality of SEAE reinforces and perpetuates the privilege of certain demographics, the extent to which students are proficient in or struggle with SEAE may further lead readers to make assumptions about the writer's identity. In a separate study discussed in the article *Indexicality and "Standard" Edited American English: Examining the Link Between Conceptions of Standardness and Perceived Authorial Identity*, Davila focuses more on the formal features of SEAE that determined how instructors envisioned a text's author, and she begins that discussion with the textual signals of class.[54] As in the study above, these instructors also consistently linked adherence to the conventions of SEAE with a wealth that would allow students to attend a well-resourced (and suburban)[55] high

[46] *The Inevitability of "Standard" English*, *supra* note 24, at 140.
[47] *Id.* at 140–42.
[48] *Id.* at 142.
[49] *Id.* at 142.
[50] *Id.* at 139–40.
[51] *Id.* at 142.
[52] *Id.*
[53] *Id.*
[54] Bethany Davila, *Indexicality and "Standard" Edited American English: Examining the Link Between Conceptions of Standardness and Perceived Authorial Identity*, 29 WRITTEN COMMC'N 180, 180 (2012) [hereinafter *Indexicality and "Standard" Edited American English*].
[55] Davila notes that certain descriptions used by the instructors—such as "inner city" and "urban"—signaled both the class and race of the student-author. *Id.* at 190.

school, and, conversely, those who strayed from SEAE in their writing or who wielded its conventions unconvincingly were identified as likely coming from lower socioeconomic backgrounds.[56] The formal features of SEAE that the instructors identified as signaling wealth were tone, diction, and grammar.[57] More specifically, the instructors associated a confident tone with upper-class students and an uncertain tone as consistent with lower-class students.[58]

In terms of diction, the instructors paid attention to the vocabulary and syntax of the student writing and linked "awkward" constructions or "overwriting" with students from a lower economic status attempting to "mimic an academic register."[59] For grammar, the instructors generally associated adherence to the conventions of SEAE with upper-class students and deviations from that norm, such as issues with verb tenses and "complex punctuation, things like colons" with lower-class students.[60] As Davila's previous study indicated, then, the instructors in this study attributed a student's ability to adhere confidently to the conventions of SEAE with the particular privilege of a wealth that would allow those students to live in an area and attend a school that operates in SEAE even if it does not expressly teach it.[61] Yet, unlike the instructors in the previous study who viewed SEAE as so natural and normal that their students would have an innate sense of it and it being so widely accessible that it did not require teaching, these instructors directly linked one's ability to use SEAE with the ability to afford exposure to it.[62]

Along with class, Davila also examines which of SEAE's formal features led the instructors to perceive their student-authors' race and gender.[63] When asked about the student-author's race, the instructors referred to many of the same features they identified as signaling class and positioned White students as coming from wealthier backgrounds that allowed them to attend wealthier high schools that offered a better education[64] and thereby created better writers.[65] Davila does

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[56] *Id.* at 188–90.
[57] *Id.* at 190.
[58] *Id.*
[59] *Id.*
[60] *Id.* at 189.
[61] *Id.* at 188–90.
[62] *Compare The Inevitability of "Standard" English*, *supra* note 24, at 140–42 *with Indexicality and "Standard" Edited American English*, *supra* note 54, at 188–90.
[63] *Indexicality and "Standard" Edited American English*, *supra* note 54, at 188–90.
[64] Davila acknowledges as an important factor that the instructors in her study teach at two schools that are located within a relative proximity (one an hour outside and the other within) of a "large, predominantly African American city with a failing school district." *Id.* at 191. That location then likely influenced the instructors' identifications of the students as only either White or Black and their subsequent linking of those races with both class and quality of education. *Id.* at 191–92.
[65] *Id.* at 191.

expressly draw attention to the fact that not once did an instructor associate a positive formal writing feature as an indicator of Black authorship.[66] Interestingly, the instructors did not correlate any grammatical or usage features with gender. Rather, they relied on "intuition" and stereotypes, such as assuming female authors identified less with the essay's subject of football or that female authors were less assertive and more likely to hedge and make use of narratives and circular logic.[67]

Davila's study further revealed that when the instructors identified writing with an author from a privileged position of being White, middle-to-upper class, or male, those instructors were likely to excuse errors as mistakes and oversights.[68] For students from the non-privileged positions of Black, lower class, or female, however, the instructors were likely to designate similar errors as a lack of knowledge or ability.[69] Thus, the instructors' internalized correlation of a well-written SEAE text with the markers of privilege was so entrenched that it actually allowed those instructors to implicitly determine which errors were and were not meaningful.[70] And when the instructors could not point to any specific grammatical or structural issues to determine authorial identity, they simply attributed the text's negative characteristics to underprivileged authorship.[71]

SEAE's inherent privileging of dominant social groups extends beyond the classroom and into the legal workplace as well. In a study similar to those that Davila conducted but located specifically in a legal context, the consulting firm, Nextions, and its Lead Researcher, Dr. Arin N. Reeves, examined the effects of confirmation bias on lawyers' assessment of legal writing based on the author's race.[72] Their paper, *Written in Black & White: Exploring Confirmation Bias in Racialized Perceptions of Writing Skills*, details how Dr. Reeves and the Nextions team drafted a memo from "a hypothetical third year litigation associate" that contained "22 different errors, 7 of which were minor spelling/grammar errors, 6 of which were substantive technical writing errors, 5 of which were errors in fact, and 4 of which were errors in the analysis of the facts in the Discussion and Conclusion sections."[73] The team then

[66] *Id.* at 192.
[67] *Id.* at 194.
[68] *Id.* at 197-98.
[69] *Id.*
[70] *Id.*
[71] *Id.*
[72] *See* Arin N. Reeves, *Written in Black and White: Exploring Confirmation Bias in Racialized Perceptions of Writing Skills*, NEXTIONS (Apr. 1, 2014), https://nextions.com/wp-content/uploads/2022/06/2014-04-01-14-Written-in-Black-and-White-Yellow-Paper-Series-ANR-Differences-Based-on-Race-Implicit-Bias-Bias-Breakers-Effective-Recruiting-and-Hiring-.pdf.
[73] *Id.*

electronically distributed the memo to sixty law-firm partners as part of a "writing analysis study" designed to assess the "writing competencies of young attorneys."[74]

Those sixty partners represented twenty-two different law firms and, of the partners, "23 were women, 37 were men, 21 were racial/ethnic minorities, and 39 were Caucasian."[75] "[A]ll . . . partners received the same memo [written by Thomas Meyer, a third-year associate and graduate from NYU Law School], half the partners received a memo that stated . . . [Mr. Meyer] was African American while the other half received a memo that stated . . . [Mr. Meyer] was Caucasian."[76] The partners were instructed to "edit the memo for all factual, technical and substantive errors" and "to rate the overall quality of the memo from a 1 to 5, with '1' indicating the memo was extremely poorly written and '5' extremely well written."[77] Of the sixty partners who received the memo, fifty-three completed the assessment, and twenty-four of those fifty-three partners assessed the memo the "African American" Thomas Meyer wrote.[78] In contrast, twenty-nine partners assessed the memo the "Caucasian" Thomas Meyer wrote.[79]

The study's findings illustrate how SEAE's privileging of dominant groups perpetuates a confirmation bias on the readers' part in which "commonly held racially-based perceptions about writing ability … unconsciously impact [one's] ability to objectively evaluate a lawyer's writing."[80] Or, in other words, "We see more errors when we expect to see errors, and we see fewer errors when we do not expect to see errors."[81] On the five-point scale used to assess its overall quality, the exact same memo received an average score of 3.2 when attributed to the "African American" Thomas Meyer and an average score of 4.1 when attributed to the "Caucasian" Thomas Meyer.[82] The "Caucasian" Meyer received positive feedback such as "generally a good writer," "has potential," and "good analytical skills," whereas the "African American" Meyer received negative feedback such as "needs lots of work," "can't believe he went to NYU," and "average at best."[83] Regarding the specific errors in the memo, the participating partners found an average of 2.9 of the seven total spelling and grammar errors in the "Caucasian" Meyer's memo and an average 5.8—or exactly double the amount—of the same total spelling and grammar

[74] *Id.*
[75] *Id.*
[76] *Id.*
[77] *Id.*
[78] *Id.*
[79] *Id.*
[80] *Id.*
[81] *Id.*
[82] *Id.*
[83] *Id.*

errors in the "African American" Meyer's memo.[84] Even though the Nextions team did not ask for edits or comments regarding the formatting of the memo, they received eleven comments pertaining to the "Caucasian" Meyer's memo and almost triple that amount—a total of twenty-nine comments—pertaining to the "African American" Meyer's memo.[85] Ultimately, the results of their study led the Nextions team to conclude "that commonly held perceptions are biased against African Americans and in favor of Caucasians…. in ways that impact what we see as we evaluate legal writing."[86]

Objective analysis of others' writing, therefore, may not actually be possible. The Nextions study illustrates that implicit bias accompanies writing analysis when the author's identity and cultural background is known or can be surmised. Yet Davila's studies also demonstrate that, even when analyzing anonymous writing, the assessors assume the identity of the text's author by implicitly associating its positive characteristics with privileged cultural demographics and its negative characteristics with underprivileged demographics. And once those assessors determine the identity of a text's author, they cannot help but read that text through the lens of their implicit biases.

Even though legal writing scholarship has begun interrogating its practices to account for and dismantle their potentially exclusionary rhetorical patterns such as IRAC, the impact of those efforts will be lessened if the structures upon which they are built and of which they are composed—the "writing" portion of "legal writing"—and the access to and assessment of those very structures continue to produce the same exclusionary results. Davila's studies evidence that SEAE, like IRAC, is not an inherently neutral tool but, rather, a particular dialect against which difference is marked as deficiency. Notably, her studies also illustrate that undergraduate writing courses often operate on the assumption that their students already know and therefore can effectively write in SEAE. As such, writing instructors tend to offer only infrequent and perfunctory reviews of and instruction on that topic and are potentially agitated or annoyed at having to do so. This situation creates a cascading effect in which each educational level—and, subsequently, the professional world that follows—expects that the one prior provided their students and employees with an understanding of and ability to adhere to the conventions of SEAE when, in reality, that instruction may never have been adequately provided or provided at all. Thus, as the poet Gertrude Stein might recognize, "there is no there there"[87] without privilege for many students and professionals when it comes to the training that

[84] *Id.* The partners also found an average of 4.1 of the six total technical writing errors and 3.2 of the five total errors in facts in the "Caucasian" Meyer's work compared to the 4.9 and 3.9 averages in the same categories for the "African American" Meyer. *Id.*
[85] *Id.*
[86] *Id.*
[87] GERTRUDE STEIN, EVERYBODY'S AUTOBIOGRAPHY 251 (Virago Press 1985) (1937).

would allow them to produce a text—let alone simultaneously convey an effective legal argument—in SEAE that will not perpetuate biases or be subjected to those of its readers.

Interestingly, Professor Vershawn Ashanti Young[88] offers an inclusive alternative to the strict employment of SEAE in academic and professional settings. More specifically, he takes exception in his article *Should Writers Use They Own English* with the "standardness" of SEAE because "what we call standard English is part of a common language system that include Black English and any other so-called variety of English."[89] As such, he instead advocates for and employs in his article a system that he refers to as "code meshing," which he explains is "multidialectalism and pluralingualism in one speech act, in one paper. . . . Code meshing blend dialects, international languages, local idioms, chat-room lingo, and the rhetorical styles of various ethnic and cultural groups in both formal and informal speech acts."[90] He further contends that code meshing is already being used within and outside traditional SEAE venues, asserting "[c]ode meshing be everywhere. It be used by all types of people" and "[t]he BIG divide between vernacular and standard, formal and informal, be eroding, if it ain't already faded."[91] As a result, Young contends that writing professors need to "teach how language functions within and from various cultural perspectives. And we should teach what it take to understand, listen, and write in multiple dialects simultaneously."[92]

Young specifically recognizes how the wide-ranging expectation that students should already know how to write confidently in SEAE has led even writing courses to share their focus with other subjects such as rhetoric, literature, or a sociopolitical topic. He argues that "writing" courses need to teach writing.[93] Addressing that exact point, he writes, "teachers of writin courses need to spend a lot of time dealin straight with writin, not only with topics of war, gender, race, and peace."[94] He continues, "I have observed too many syllabi that cover the rhetoric of the feminist movement, which is cool, but don't spend no time on effective sentence construction, the development of prose style, the conventions of argumentation, and the conventions of

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[88] Professor Young notably holds both a J.D. from Mitchell Hamline College of Law and a Ph.D. from University of Illinois at Chicago. *Vershawn Young Biography*, UNIV. OF WATERLOO, https://uwaterloo.ca/english/profiles/vershawn-young (last visited Sept. 14, 2024).

[89] Vershawn Ashanti Young, *Should Writers Use They Own English?*, *in* WRITING CENTERS AND THE NEW RACISM: A CALL FOR SUSTAINABLE DIALOGUE AND CHANGE 61, 62–63 (Laura Greenfield & Karen Rowan eds., 2011).

[90] *Id.* at 67.

[91] *Id.* at 69, 71.

[92] *Id.* at 65.

[93] *Id.* at 62.

[94] *Id.*

public discourse."[95] He goes on to acknowledge that even code meshing "do include teaching some punctuation rules, attention to meaning and word choice, and various kinds of sentence structures and some standard English."[96]

Young's article, then, bears witness to Davila's findings and my experience that the direct teaching of the structures and rules of grammar is essential to any form of effective communication regardless of dialect, but many of those professors and instructors under whose purview the teaching of that material falls assume on behalf of their students a prior familiarity with and knowledge of that material and do not teach it. Simply saying "they should've learned that already" and washing one's hands of the matter does nothing to address the problem and neither does simply identifying the errors in our students' writing or correcting those errors for our students without explaining to them how the writing itself drifted from our expectations, how it affected our understanding of that text, and how they can address those formal issues moving forward.

Of course, undergraduate or even graduate English or Composition courses like those Young discusses have a much different focus and are of an altogether different discipline than Legal Writing courses, but they do overlap with legal writing based on the medium in which they operate: SEAE. Despite these courses relying almost exclusively on SEAE, they treat it as an invisible and unnamed "normative center"[97] with which their students should already be familiar and capable of confidently producing. As such, those "writing" courses turn their attention to the subject matter that text conveys rather than offering explicit instruction on how to construct the text itself.

I agree with Young that code meshing is already a common practice, that the English language contains multiple dialects, and that no one dialect is superior to another. I further agree that "we all should learn everybody's dialect, at least as many as we can, and be open to the mix of them in oral and written communication."[98] Like the authors' view on traditional legal rhetoric in *No-Demo Renos*, however, I believe that we need to reform SEAE "not just from the outside in, but also from the inside out."[99] I also believe the way we accomplish that reformation is by making clear that SEAE is a particular dialect of English and the one in which law school, the legal profession, and the law itself have historically operated. We can then identify the features of SEAE for our students so that it no longer functions as an invisible and unnamed writing criteria and so those students understand the concrete and definable standards by which their writing will be assessed and are capable of meeting them.

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[95] *Id.*
[96] *Id.* at 71.
[97] *The Inevitability of "Standard" English*, *supra* note 24, at 136.
[98] Young, *supra* note 75, at 89.
[99] Eun Hee Han et al.*, supra* note 13, at 2.

I understand that the substance of the law and legal analysis are complex and, law school courses are likely already stretched thin in their attempts to cover the scope of their content. Thus, in the following section, I identify how professors who expect SEAE in their students' writing can make those standards explicit in concrete writing rubrics that will not distract from their course's content but will help their students meet those standards while also preventing the effects of bias within those professors' own assessment processes.

III. SPECIFYING STANDARDS WITH WRITING RUBRICS

Specific and standardized rubrics can diminish and subvert SEAE's privileging of dominant groups and the biases that come along with writing assessment. For example, Professor David M. Quinn recounts the findings of a study in which he randomly assigned 1,549 teachers who work between preschool and 12th grade with the same writing sample purportedly written by either a Black or White second-grade student.[100] Those teachers then graded that sample, first, without and then, second, with a clearly defined rubric.[101] Sixty-nine percent of the teachers were White, and fifty-four percent taught at a predominantly White school.[102] For the study, the teachers were asked to assess the student's personal narrative about his weekend and rate it on a grade-level scale with seven options from weak to strong performance: "far below grade level, below grade level, and slightly below grade level; at grade level; or slightly above grade level, above grade level, and far above grade level. Performance criteria were not explicitly defined."[103] When the teachers completed that task, they were then provided with a rubric that clearly defined the grading criteria for "how well the writer recounts an event."[104] "The rubric included four possible ratings, from weak to strong: fails to recount an event, attempts to recount an event, recounts an event with some detail, or provides a well-elaborated recount of an event."[105] Both assessments were delivered online, and once the teachers moved to the second assessment and received the rubric, they were not provided with a means to return to the previous assessment they conducted without that rubric.

The results of Quinn's study illustrate that "[w]hen teachers used a grading rubric with specific criteria, racial bias all but disappeared."[106] Specifically, Quinn notes that, without the rubric, thirty-five percent of the teachers rated the White

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[100] David M. Quinn, *How to Reduce Racial Bias in Grading: New Research Supports a Simple, Low-Cost Teaching Tool*, 21 EDUC. NEXT 72, 72–74 (2021).
[101] *Id.* at 74–75.
[102] *Id.* at 74.
[103] *Id.* at 74–75.
[104] *Id.* at 75.
[105] *Id.*
[106] *Id.* at 72.

student's writing "at grade level" or above, whereas only thirty percent rated the Black student's writing at the same levels.[107] When the teachers were provided with the rubric that listed specific grading criteria, however, thirty-seven percent rated both the White and Black students' writing as being at or above grade level.[108]

In breaking down the teachers' assessments by the teachers' gender, the study found that the female teachers without a rubric were seven percent less likely to grade the Black student's writing as being on grade level than they were the White student's writing.[109] For the male teachers, though, the percentage difference was "small and not statistically relevant."[110] With the rubric, the percentage of female teachers who rated the White student's writing higher than that of the Black student dropped to three percent.[111]

As regards the teachers' race, White teachers without a rubric were eight percent less likely to grade the Black student's writing as being at or above grade level than they were the White student's writing.[112] Comparatively, teachers of color showed no evidence of evaluation bias.[113] With the rubric, the percentage of White teachers who rated the White student's writing higher than that of the Black student decreased to 0.6%.[114]

Ultimately, Quinn concludes that when teachers assess writing according to "a rubric that orients grading decisions to a limited number of specific, demonstrable criteria," those teachers do not demonstrate bias in their assessments.[115] Yet, when teachers assess writing "along a vaguer spectrum of performance, based on meeting 'grade-level' standards," they demonstrate bias that favors White students.[116]

Although not directly addressing the inherent biases connected with SEAE and its assessment, a fair amount of legal scholarship does devote itself to championing the use of clearly defined rubrics in law school.[117] Most significantly, Professor Sophie M. Sparrow, in her article *Describing the Ball: Improve Teaching by Using Rubrics—*

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[107] *Id.* at 76.
[108] *Id.*
[109] *Id.*
[110] *Id.*
[111] *Id.* at 77.
[112] *Id.* at 76.
[113] *Id.*
[114] *Id.* at 77.
[115] *Id.* at 78.
[116] *Id.*
[117] *See generally* Brenda D. Gibson, *Grading Rubrics: Their Creation and Their Many Benefits to Professors and Students*, 38 N.C. CENT. L. REV. 41 (2015); Karen J. Sneddon, *Armed with More Than a Red Pen: A Novice Grader's Journey to Success with Rubrics*, 14 PERSP. 28 (2005); Beverly Petersen Jennison, *Saving the LRW Professor: Using Rubrics in the Teaching of Legal Writing to Assist in Grading Writing Assignments by Section and Provide More Effective Assessment in Less Time*, 80 UMKC L. REV. 350 (2011).

Explicit Grading Criteria, outlines a methodology for developing rubrics and discusses how they enhance teaching and learning while also easing the burden on professors.[118] She defines rubrics as "sets of detailed written criteria used to assess student performance,"[119] and she explains that "a rubric takes 'one thing' such as a paper, exam, or other assessment, and identifies its complex characteristics."[120]

Pointing toward how rubrics can reduce implicit biases during the grading process, Sparrow states, "[a] rubric helps us with identifying course goals by providing a structure in which to specify these goals and allocate priorities among them. Teaching to these goals, and then evaluating students based on a rubric also helps us be more consistent in evaluating students on what we have taught."[121] Then, after identifying the key point that "[o]ften we teach one thing and then evaluate students on another,"[122] Sparrow offers the following example:

> [I]n a traditional law school course, students spend thirteen or fourteen weeks reading cases, and hours in class *orally* answering questions and considering hypotheticals. Often the hypotheticals are directed at the particular class topic, not an accumulation of the material that has been studied over the course of the semester. Then, in a three or four hour final, students are asked to put the course together and analyze a set of facts and its relation to many different areas of the course *in writing*. Many students have not had the experience of doing this before, and have not received feedback on a practice attempt. This seems unreasonable, but most law professors regularly evaluate students this way.[123]

While Sparrow's example concerns itself with more than the way law school professors assess student writing, it does deliberately emphasize a key point: the primary means of assessment in law school occur in writing, yet the standards for that writing are rarely delineated in a specific manner and even more rarely explicitly taught. [124] As a result, those exams and the professors grading them assess not only the students' understanding of the course material but also the students' ability to express that understanding in SEAE, which, as this paper has attempted to identify,

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[118] Sophie M. Sparrow, *Describing the Ball: Improve Teaching by Using Rubrics—Explicit Grading Criteria*, 2004 MICH. ST. L. REV. 1, 6, 10–11 (2004).
[119] *Id.* at 7.
[120] *Id.* at 14.
[121] *Id.* at 19.
[122] *Id.*
[123] *Id.*
[124] *Id.*

privileges and reinforces dominant and normative racial, gender, and economic categories.

To create greater equity in legal writing and its assessment, law professors should work to identify the specific standards they will use to assess or expect to see in their students' writing. Quinn's study discussed above illustrates the impact that rubrics with "a limited number of specific, demonstrable criteria" can have in preventing implicit bias in writing assessment.[125] Sparrow also highlights the importance of specificity in rubrics when she asserts, "[h]aving specific grading criteria would help students prioritize their learning and spend more time mastering the material we judge important, rather than trying to second-guess what we want on a graded event."[126] The problem, however, is that while rubrics that provide discernible criteria regarding their course content or even the process or methodology by which students should analyze or apply that content have become increasingly present in the law school curriculum, those same rubrics often fail to particularize the criteria that the professor will use to assess quality of writing in a written response.

Once again, the reason for that lack of specificity regarding the methods of writing assessment is the prevailing perception of SEAE as "normal, natural, non-interfering, and widely accessible"[127] that allows it to function as not only seemingly neutral but also "inevitable in the writing classroom and curricula."[128] If something is inevitable, why focus upon or spend time teaching it? As such, even the most well-meaning of law school rubrics that include specifications for writing within their criteria still default to mostly abstract standards, such as requiring the text be "well written" or that it "uses proper grammar and punctuation throughout." While those vague criteria at least acknowledge the textual vehicle students and lawyers predominantly use to convey their understanding and application of the law, they still—as the above studies illustrate—presuppose and perpetuate both the invisibility and inevitability of SEAE while also inviting the implicit biases of graders who otherwise strive for equity in their classroom.

As a counter to those abstract writing criteria, I propose that law school professors concretize and delineate in their rubrics the specific qualities they seek in "well-written" texts. More specifically, I urge law professors (and, frankly, any and all professors who either assess their students' writing or use writing to assess their students' understanding of their course material) to recognize and distinguish the many discrete structural elements of a written text. For instance, rubrics should distinguish between paragraph and sentence structure and identify the preferred

[125] Quinn, *supra* note 100, at 78.
[126] Sparrow, *supra* note 118, at 37.
[127] *The Inevitability of "Standard" English*, *supra* note 24, at 127.
[128] *Id.* at 133.

structures for each. For paragraphs, professors should explicitly state if they seek an IRAC, CRAC, or some other form for exam answers, and they should further delineate the subsections identified by those initialisms. For standard body paragraphs, I default to a PEAS structure that asks students to provide a "Point" or topic sentence, "Evidence" of that point or topic, "Analysis" of that evidence, and, finally, a "So What?" statement that details how that point or topic contributes to the overall focus or argument of that text.

For sentence-level concerns, one should also distinguish between grammar and punctuation. In terms of grammar, I ask students, for example, to produce primarily linear or "straight," active-voiced sentences that have a clear subject and verb that agree in tense and number and are sequenced in that order and as close together as possible at the beginning of the sentence. I also urge my students to employ for their lists an appropriate parallel structure in which each verb, clause, and phrase in that list builds from the same root word and matches in tense and structure. As regards to punctuation, I ask my students to use commas to distinguish introductory, embedded, and nonrestrictive phrases and clauses from independent clauses. I also ask them to use a comma and a coordinating conjunction to link independent clauses in compound sentences. While the examples above are certainly not an exhaustive list of the writing criteria I include in my rubrics that concern writing assessment, they do, I hope, illustrate how professors can articulate the specific criteria they expect in written work, which—even if that expectation is that one's students write in SEAE—allows those students to identify and meet those standards.

Along with including specific writing criteria in their rubrics, I also urge professors to scaffold those criteria across multiple revisions and submissions. Scaffolding one's writing criteria so their students construct their text in stages allows those students to establish and refine the macrostructures of their text, such as the sequencing and structure of sections and paragraphs, before addressing sentence-level concerns, such as punctuation and grammar. In that way, professors allow students to focus on refining one particular structural element at a time, which, in turn, allows those professors to focus their feedback and assessment so as to not overwhelm either the student or themselves during that process. That practice also helps students employ a revision process that prioritizes macro over micro or foundational over superficial textual structures so those students establish the overall contours of their text and argument before addressing its details. Such a practice also helps students avoid during the revision process the addressing of micro concerns prior to the macro concerns that, when addressed, may very well undo much of that prior work on the micro level. The scaffolding of criteria, therefore, reduces the implicit biases associated with and helps our students write in SEAE because that approach forces both the professors and their students to prioritize and limit the feedback on a particular assignment. That process, in turn, holds each student—

regardless of ability in and familiarity with SEAE—accountable for the same manageable amount of work on each assignment.

Finally, I contend that the more we can agree upon and standardize writing criteria within our individual courses and across the curriculum, the more our students will repeatedly be able to meet those standards and gain a transferrable skill in the process. Too often, each faculty member has their own set of writing criteria and stylistic preferences they look for in their students' writing. Even though those criteria and preferences may make sense to that professor and for their course content, they require students to both learn and meet a different individualized and selective standard for each course in which they are enrolled.

I recognize that students must write for their audience, but they will be better prepared to do so if they are familiar with and proficient in a single approach that they can adjust to each individual audience's preferences than they would be by attempting to learn and memorize a new standard or pattern for each audience for whom they write. Such individualized standards do not teach our students how to adjust their writing to their audience. Rather, those standards teach our students only how to write for us as an individual audience, which, first, is not a transferable skill and, second, rewards those students privileged enough to have previously acquired a solid foundation in SEAE. By agreeing as a faculty on what "well-written" means and applying that standard across the curriculum, every student—regardless of privilege—will gain a stable and repeatable understanding of the common expectations of SEAE and be capable of adjusting that understanding based on the individual preferences of a particular audience.

IV. CONCLUSION

To be truly equitable and inclusive in our classrooms, we each need to provide our students with every skill we will use to assess them in that class. Legal writing and law school in general (as well as the legal profession itself) involve and depend on writing skills. In fact, the vast majority of assessments in law school involve writing. I understand that the law itself takes precedence in law school, but if our students' understanding of and arguments regarding that law occur in writing, then we need to provide those students with clear guidelines for how to express that understanding and those arguments in a written text that meets our standards for it. And that responsibility does not fall on just one department or one course or series of courses; it falls on all of us.

SEAE is only one of the many and varied dialects of English, but its perceived neutrality both masks and perpetuates its exclusionary nature that rewards and reinforces privilege. It, however, does operate according to a set of rules that rubrics should identify and courses should teach. Again, I agree that SEAE needs to be reformed from both the outside and the inside, and I hope this article identifies why

that reform is needed and the techniques that can spark reform from the inside. Most importantly, I hope it also provides a call to action that such an internal reformation begins with not overlooking the "writing" component of "legal writing," or of any aspect of legal studies for that matter, and that said reformation includes not presuming our students enter law school or our courses with the skills necessary to meet our expectations for their writing. Finally, such a reformation will transpire only by allowing our expectations to evolve and include difference and by taking it upon each of ourselves to make sure all of our students—regardless of privilege level—can and know how to reach the standards we have for and expect in their writing.