NOTES

More Than What Meets the Ear: Speech Transcription as a Barrier to Justice for African American Vernacular English Speakers

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INTRODUCTION

Language interpretation is an essential component of the American legal system. We pour over the text of the United States Constitution, analyzing its words in an attempt to capture the intent of the Framers with the hope that such scrutiny will lead to the most just result. Yet, we assign meaning to words and manipulate language without necessarily considering how the mechanics of language contribute to our understanding—for instance, how individual sound units alter the meaning of a particular phrase. For example, the phrases "take some cake" and "bake some cake" are identical except for just a single sound unit, yet the meanings of the phrases are quite different. Many of these meaning-bearing aspects of language become altered or eliminated when speech is transformed into writing.[1] Key players in the legal system—judges, lawyers, and court reporters—are part of a "literate culture in which knowledge is equated with 'facts and formations [that are] preserved in written records.'"[2] Their reverence of the written word as the authentic record leads these professionals to often view language through a prescriptive lens; that is, they assign meaning to language based on what they believe is the proper way of speaking. These beliefs are almost always influenced by the standard English dialect, or "mainstream English," which presents a problem when they are faced with dialects that do not conform to mainstream society's idea of "proper English."[3]

In June of 2019, a linguistic study, "Testifying While Black," addressed this particular dilemma as it applies to court reporters' transcriptions of African American Vernacular English.[4] African American Vernacular English ("AAVE"), also known as African American English or Black English, is "a dialect that is spoken casually between most Black Americans."[5] In order to assess knowledge of the dialect in Philadelphia, the linguists tasked court reporters with listening to colloquial speech with representative features of AAVE. The study returned startling results, both in the transcriptions of what the reporters thought they heard and their interpretation of phrases common to the dialect, demonstrating that the court reporters were certainly not achieving the ninety-five percent transcription accuracy required by court

1. *See* Anne Graffam Walker, *Language at Work in the Law: The Customs, Conventions and Appellate Consequences of Court Reporting*, *in* LANGUAGE IN THE JUDICIAL PROCESS 203 (Judith N. Levi & Anne Graffam Walker eds., 1990).

2. *Id.* at 209.

3. Rosina Lippi-Green, *Accent, Standard Language Ideology, and Discriminatory Pretext in the Courts*, 23 LANGUAGE SOC'Y 163, 166 (1994).

4. Taylor Jones et al., *Testifying While Black: An Experimental Study of Court Reporter Accuracy in Transcription of African American English*, 95 LANGUAGE e216, e217 (2019).

5. Sally Lee, *English in Black and White*, COLUM. MAG., 2017, at 62 (quoting John McWhorter on the definition of Black English).

reporting education programs.[6] Because it is indisputable that the American legal system gives significant weight to the written word, it is particularly concerning that those "facts and formations" that are preserved in the record could contain inaccuracies that have detrimental effects on a case.

A court reporter's failure to accurately transcribe African American Vernacular English can violate a person's right to due process under the Fifth and Fourteenth Amendments because such transcription errors deny a person the ability to have an adequate transcript for meaningful appellate review.[7] Additionally, these mistakes risk impeaching a witness's credibility and perpetuate implicit biases towards an already disadvantaged demographic.

Part I of this Note will provide an overview of African American Vernacular English and the history of prejudicial linguistic bias towards the dialect in the criminal justice system. Part II will discuss what court reporting entails and the significance of providing a verbatim record. Part III will demonstrate how transcription errors revealed in the "Testifying While Black" study may impact one's right to due process under the law, discussing cases in which language interpretation has been a point of contention and how misunderstandings are indicative of the larger issue of implicit language bias. Part IV will suggest potential solutions to transcription error caused by linguistic bias, such as mandatory implicit bias training in the courtroom, competency testing of common dialects, and more studies regarding minority languages and dialects in the judicial context.

I. OVERVIEW OF AAVE AND ITS RELATIONSHIP TO THE CRIMINAL JUSTICE SYSTEM

A. AAVE and the Criminal Justice System

Studies have continuously demonstrated that African Americans are more likely to be arrested, convicted, and subjected to longer incarceration than white offenders.[8] There are many systemic factors that contribute to the over-representation of African Americans in the criminal justice system, such as poverty and United States policies that are inherently unfavorable toward racial minorities.[9] Our country's history of overt racism has carried over into contemporary American society through implicit racial bias in policing, convicting, and sentencing.[10] These issues, in conjunction with unrepresentative juries and policies that disadvantage indigent defendants and People of Color generally, create an intricate web of issues that contribute to the complex relationship between AAVE and the criminal justice system.[11]

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6. Jones et al., *supra* note 4, at e217.

7. *See* Griffin v. Illinois, 351 U.S. 12, 18-19 (1956).

8. SENT'G PROJECT, *Report to the United Nations on Racial Disparities in the U.S. Criminal Justice System*, https://www.sentencingproject.org/publications/un-report-on-racial-disparities/ (last visited Jan. 21, 2021) [https://perma.cc/YM9L-3SJA].

9. *See id.*

10. *Id.*

11. *See* Jones et al., *supra* note 4, at e216.

AAVE is a dialect, meaning that it is a subset of the standard English variety.[12] Dialect is correlated with socioeconomic status, race, and education.[13] Race is correlated with socioeconomic status and lesser access to education, which prevents people from learning "classroom English."[14] Socioeconomic status and education are known to be connected to involvement in the criminal justice system;[15] thus, AAVE speakers are more likely to come into contact with the criminal justice system, which makes them especially vulnerable when it comes to mistranscription.

B. Origins and Linguistic Features of AAVE

In order to understand the disparate effect that court transcription discrepancies have on AAVE speakers, it is also important to recognize the dialect's role in American history. Its origins can be attributed to slavery.[16] When enslaved Africans were brought to the United States, slave traders cruelly separated speakers of the same language in order to reduce the possibility of revolts.[17] This practice of social isolation resulted in slaves learning English on plantations from workers of English and Irish descent, who spoke with regional dialects, and then simplifying the dialects.[18] Post-World War I migration to cities where African American migrants faced segregated housing and White hostility toward racial mixing perpetuated the practice of social isolation, which contributed to the preservation of AAVE.[19]

Despite being rooted in American society for centuries, the dialect continues to be stigmatized and misunderstood by many non-linguists as a "lazy" or improper form of the standard English dialect;[20] however, AAVE is a variation of the standard dialect, and it is rule-governed with its own grammatical system that is distinct among multiple linguistic domains.[21] Societal misconceptions regarding grammar—shaped by "Standard Language Ideology"—undoubtedly underline court reporters' struggle with transcribing AAVE.[22] Where they struggle the most in their transcription is with the unique phonological and morpho-syntactic aspects of the dialect.[23]

Phonology is the component of grammar that investigates how sound and meaning are connected.[24] AAVE has phonological characteristics that differ from standard English. For instance, a common feature of AAVE phonology is "consonant cluster reduction word-finally," which depends on the vocal vibration of the final two

12. WILLIAM O'GRADY ET AL., CONTEMPORARY LINGUISTICS: AN INTRODUCTION 486 (6th ed. 2010).
13. Jones et al., *supra* note 4, at e222.
14. *Id.*
15. *Id.*
16. JOHN BAUGH, OUT OF THE MOUTHS OF SLAVES 73 (1999).
17. *Id.*
18. Lee, *supra* note 5, at 62.
19. *See* O'GRADY ET AL., *supra* note 12, at 499-500.
20. *See id.* at 509.
21. *See id.* at 487.
22. *See generally* Lippi-Green, *supra* note 3, at 166-67.
23. Jones et al., *supra* note 4, at e234, e240.
24. O'GRADY ET AL., *supra* note 12, at 59.

consonant sounds.[25] The rule applies only when the second element in a consonant cluster shares the same voice feature as the preceding consonant.[26] Voiced sounds are made by the vibration of the vocal cords, whereas voiceless sounds are not.[27] Thus, if the consonant cluster is comprised of two voiced consonants, like in the word "hand," the second consonant sound would be deleted and the word would be pronounced "han."[28] Likewise, if a word ends with a voiceless or unvoiced consonant cluster, like it does in the word "test," then the word would be pronounced "tes."[29]

In addition to the phonological differences between standard English and AAVE, the dialect also has distinct morphosyntactic features. Morphosyntax combines morphology, which is the part of grammar that concerns words and word formation, and syntax, which is the part of grammar that analyzes sentence structure.[30] Some common morphosyntactic features include the "stressed bín" (been), the use of "habitual be," and "copula deletion."[31] In AAVE, the "stressed bín" "denotes a state, condition or activity begun in the remote past and continued to the present"; however, speakers of standard English commonly—and mistakenly—assume that this is a deletion of the auxiliary verb *have* with the same meaning as the mainstream English *have/has been*.[32] For instance, the phrase "[s]he been married" means that she got married a long time ago and is still married, not that she is no longer married, as many non-AAVE speakers would assume.[33] While in some cases, the "stressed bín" may seem to function as a stand-in for an auxiliary verb, it does not have the syntactic behavior of an auxiliary.[34] Another common and commonly misunderstood feature of AAVE is the use of "habitual be," which expresses a constant or habitual state, not a momentary occurrence.[35] For example, "[t]he coffee be cold" means that the coffee is always cold.[36] In contrast, "copula deletion" of the auxiliary verbs *is* and *are* may be used as a temporary or one time occurrence. Thus, the phrase "[h]e tired out" means that he is tired out today or right now, and does not indicate a habitual state.[37] The fundamental lack of understanding regarding the grammatical structure of the dialect, along with mainstream cultural attitudes surrounding language and dialect, creates a variety of issues for already marginalized dialect speakers in insidious ways.

25. *Id.* at 509.
26. *Id.*
27. *Id.* at 20.
28. *Id.* at 509; Jill Gaulding, *Against Common Sense: Why Title VII Should Protect Speakers of Black English*, 31 U. MICH. J.L. REFORM 637, 667-68 (1998).
29. O'GRADY ET AL., *supra* note 12, at 509; Gaulding, *supra* note 28, at 667-68.
30. O'GRADY ET AL., *supra* note 12, at 155.
31. *Id.* at 510.
32. *Id.*
33. *Id.*
34. YALE GRAMMATICAL DIVERSITY PROJECT ENGLISH IN NORTH AMERICA, YALE UNIV., *Stressed* BIN (been), https://ygdp.yale.edu/phenomena/stressed-bin-been (last visited Jan. 21, 2021) [https://perma.cc/5D6S-RH74].
35. O'GRADY ET AL., *supra* note 12, at 510.
36. *Id.*
37. *Id.*

C. Linguistic Bias

There are plenty of occasions in the United States where defendants and witnesses speaking non-standard dialects are misunderstood and discredited as a result of prejudice.[38] The underlying force that drives such prejudice can be referred to as "Standard Language Ideology." Standard Language Ideology is "a bias toward an abstracted, idealized, homogeneous spoken language which is imposed from above, and which takes as its model the written language."[39] Biases are not always explicit, and they do not necessarily stem from a place of malice; nevertheless, implicit linguistic bias triggers social biases that are influenced by larger power constructs aimed at suppressing variation,[40] and are often indicative of negative assumptions about race and class.[41] Although linguistic bias is not the primary focus of this Note, it is worth noting the possible correlation between implicit linguistic bias and attitudes towards AAVE speakers, as well as Standard Language Ideology's impact on court reporters' transcriptions of the dialect.

II. COURT REPORTING AND THE SIGNIFICANCE OF THE VERBATIM RECORD

A. Court Reporter Duties and the Importance of an Accurate Record

In keeping up with the literate tradition that informs the American legal system, as well as society as a whole, court reporters are tasked with listening to the spoken word and converting it to a written record.[42] Often referred to as the "gatekeepers" of the record, they are present at court proceedings, depositions, and administrative hearings.[43] They bear the responsibility of ensuring that their transcripts are accurate and complete.[44] Court reporters are "most often licensed or certified to record proceedings using a stenotype machine" that uses phonetic code to capture speech.[45] Using this device, court reporters translate the code into a written text.[46] Other methods of transcription include voice writing and computer-aided transcription.[47] In addition to being able to use a stenographic machine capturing over two-hundred words-per-minute, court reporters must be proficient in understanding legal terminology and must have advanced knowledge of "spelling, punctuation, vocabulary and grammar skills."[48] Of course, their ability to master the English language in

38. John R. Rickford & Sharese King, *Language and Linguistics on Trial: Hearing Rachel Jeantel (and other vernacular speakers) in the Courtroom and Beyond*, 92 LANGUAGE 948, 950 (2016).

39. *See* Lippi-Green, *supra* note 3, at 166.

40. *Id.*

41. *See id.*; *see also* Laura Victorelli, *The Right to be Heard (And Understood): Impartiality and the Effect of Sociolinguistic Bias in the Courtroom*, 80 U. PITT. L. REV. 709, 711 (2019).

42. COURTREPORTEREDU.ORG, *Court Reporting Job Description*, https://www.courtreporteredu.org/court-reporter-job-description (last visited Jan. 21, 2021) [https://perma.cc/JK8E-7F3Y].

43. *Id.*

44. *Id.*

45. COURTREPORTEREDU.ORG, *What is Court Reporting?*, https://www.courtreporteredu.org/what-is-court-reporting (last visited Jan. 21, 2021) [https://perma.cc/Q4A6-9EML].

46. *Id.*

47. *Id.*

48. *Id.*

terms of spelling and grammar only applies to standard English. There is no requirement of proficiency in any non-standard dialects.[49]

Along with being able to meet the standard skillset required for the job, court reporters are bound by a code of ethics and law in performing their duties. The Federal Court Reporter Act mandates that "[e]ach session of the court and every other proceeding . . . shall be recorded verbatim by shorthand, mechanical means, electric sound recording, or any other method. . . ."[50] The statutory requirements are "mandatory, not permissive," meaning that "it is the duty of the court reporter to transcribe the argument, and it is the duty of the trial judge to see that the statutory requirements are met."[51] A transcript that is devoid of errors is significant for a variety of reasons. It is not unheard of for attorneys and judges to review the unofficial transcript to "make decisions regarding difficult motions, the admissibility of evidence, to review questions towards a witness, and to voice or rule on objections."[52] Likewise, at the court's discretion, juries also review the record during trial, as portions of the transcript might be read back to juries by the reporter, and "in certain circumstances, written copies of the transcripts are even provided for their review during deliberations."[53] When it comes to transcribing the events of a criminal trial, the court reporter's responsibility for ensuring a verbatim record is especially important for the purposes of appellate review because "one of the immutable rules of appellate law is that 'if it is not in the record, it did not happen.'"[54] The need for a full and accurate transcript is highlighted by the fact that "appellate courts have no independent means of obtaining knowledge of the cases brought to them for review."[55]

B. Transcribing Speech and Sanitizing Dialect

Converting oral speech to a written medium is bound to result in some discrepancies. After all, humans are imperfect. In the case of court reporting, discrepancies are not simply traceable to the "inherent differences" between the oral and written word, but are also influenced by a court reporter's cultural and professional beliefs regarding language.[56] Many transcription discrepancies are of the obvious sort, such as misidentified speakers, which are usually "handled at the local level" where judges and lawyers negotiate correcting the record.[57] However, discrepancies that are not

49. *See* Jones et al., *supra* note 4, at e217.

50. 28 U.S.C.A. § 753 (West).

51. Casalman v. Upchurch, 386 F.2d 813, 814 (5th Cir. 1968).

52. Keith A. Gorgos, *Lost in Transcription: Why the Video Record is Actually Verbatim*, 57 BUFF. L. REV. 1057, 1063 (2009).

53. *Id.* at 1064.

54. Charles Kagay, *On Appeals: If a Court Reporter Isn't There, Is It in the Record?*, RECORDER (Oct. 11, 2018), https://www.law.com/therecorder/2018/10/11/on-appeals-if-a-court-reporter-isnt-there-is-it-in-the-record [https://perma.cc/T7PR-BJZG].

55. Blythe Golay & Angela S. Haskins, *The Necessity of Trial Transcripts in Appellate Proceedings*, L.A. LAWYER (Sept. 2015), https://www.hbblaw.com/wp-content/uploads/2018/11/The-Necessity-of-Trial-Transcripts-in-Appellate-Proceedings-Los-Angeles-Lawyer.pdf [https://perma.cc/5X3N-EGYW].

56. *See* Walker, *supra* note 1, at 203.

57. *Id.*

obvious might have a more influential impact because such discrepancies evade concern or correction.[58] Court reporters are supposed to be objective in their transcriptions; nevertheless, they are expected by their audiences to "clean up" any speech that is considered ungrammatical.[59] The expectation to clean up grammar leads to "sanitizing" dialects, by substituting words or phrases with their standard English equivalents, which introduces a subtle interpretive component to the profession.[60] Sanitation of dialect may be attributed to the court reporter judging speech "against a culturally acquired standard of correctness."[61] Such a standard of correctness is particularly troublesome when it comes to transcriptions of AAVE. Court reporters, who likely speak the standard variety of English, might regard certain AAVE words and phrases as ungrammatical and attempt to "clean them up" for purposes of readability. These modifications can inadvertently change AAVE speaker testimony so that it excludes temporal and grammatical aspects that the speaker wishes to convey.[62]

Standardized changes were evident in the trial of George Zimmerman, who shot and killed Trayvon Martin in 2012. The prosecution's key witness was Rachel Jeantel, Martin's friend and the last person to speak to Martin on the night that he was killed.[63] Jeantel, an African American teenager, testified at the trial for nearly six hours; however, her testimony was subjected to intense scrutiny and misunderstanding due to her use of AAVE, and as a result was widely discredited.[64]

The dialect divide carried over into the court reporter's transcription of Jeantel's testimony and changes to the temporal aspects of Jeantel's testimony were made apparent, for instance, by the court reporter's mis-transcription of Jeantel's use of "stressed bín." In defending her attentiveness during her conversation with Martin on the night he was killed, Jeantel responded to the defense by saying, "I was *been* paying attention," indicating that she was paying attention at the time of the phone call and is still paying attention.[65] However, the court reporter omitted the stressed bín, and transcribed the phrase as, "I was paying attention," which alters the meaning of Jeantel's phrase by stating that Jeantel was only paying attention at the time of the phone call, and ignoring Jeantel's attention at the present moment.[66] Although this particular transcription discrepancy likely did not have a significant impact on Jeantel's testimony, it demonstrates an instance of a court reporter using her discretion to change Jeantel's words to comply with standard English, and as a result, altering the speaker's intended meaning.

58. *Id.* at 204.
59. *Id.*
60. *Id.* at 219.
61. *Id.* at 217.
62. Grace Catherine Sullivan, Problematizing Minority Voices: Intertextuality and Ideology in Court Reporter's Representation of Rachel Jeantel's Voice in the State of Florida v. Zimmerman Murder Trial 200 (Feb. 17, 2017) (unpublished Ph.D. dissertation, Georgetown University) (on file with ProQuest).
63. Rickford & King, *supra* note 38, at 950.
64. *Id.*
65. Sullivan, *supra* note 62 (unpublished Ph.D. dissertation at 187).
66. *Id.*

Standardization of dialect is not the only issue that arises during the transition from the oral to orthographic. Because of the one-dimensional nature of the written word, meaning-bearing contextual components of speech, such as intonation, pitch, and emphasis, are not represented.[67] Of course there are orthographic devices, like punctuation, underlying, or capitalization, that offer some way to express paralinguistic features, such as intonation and emphasis; but when it comes to court reporting, expressive paralinguistic features in the record are frowned upon, as this is considered a type of interpretation.[68] Absent these expressive features, the appellate audience is left to rely on context for sorting out the transcript's meaning, but mistranscriptions exacerbate contextual obstacles. In the case of Rachel Jeantel, exacerbation of contextual obstacles was demonstrated when the defense attorney questioned Jeantel about her pre-trial deposition with the prosecutor, in which she said she heard someone say, "[g]et off!" over the phone during the altercation between Zimmerman and Martin. When asked, "[c]ould you tell who was saying that?" the transcript read, "I couldn't know Trayvon," and then "I couldn't hear Trayvon." Contextually, neither of these transcriptions makes semantic sense.[69] It is likely that Jeantel said, "I could an' it was Trayvon," according to a linguist who listened to a TV broadcast of the recording.[70] Unfortunately, the transcript's error, which contradicted what Jeantel said at trial, was used by the defense as a method to discredit her testimony.

III. DEFICIENCIES MAGNIFY THE RISK OF ERRONEOUS DEPRIVATION OF DUE PROCESS RIGHTS

A. Accurate Transcripts Are Necessary to Appellate Review

The sentiment that verbatim transcripts are integral to the appellate process has been reiterated in a variety of court cases and is consistent with due process rights under the Fifth and Fourteenth Amendments, which state that "[no] person shall be deprived of life, liberty, or property without due process of law."[71] *Griffin v. Illinois* solidified the rule that denying transcripts to an indigent defendant is an impediment to full appellate review and a violation of due process and equal protection, which demonstrates how important transcripts are to the pursuit of justice.[72] The Court's opinion expressed that transcripts were such a necessary component of the appeals process that forcing indigent defendants to pay for them was a deprivation of their rights to access the courts.[73] Although there is no constitutional right to an appeal, most states recognize a right for a criminal defendant to access an appeal.[74] If a state has created an appellate process for final adjudication of a defendant's guilt or

67. *See* Walker, *supra* note 1, at 208.

68. *See id.* at 219-20.

69. *See* Marguerite Rigdglioso, *Stanford Linguist Says Prejudice Toward African American Dialect Can Result in Unfair Rulings*, STANFORD REP. (Dec. 2, 2014), https://news.stanford.edu/news/2014/december/vernacular-trial-testimony-120214.html [https://perma.cc/PQ8S-T4N6].

70. *Id.* The dropped "d" in and is an example of consonant-cluster reduction word-finally.

71. U.S. CONST. amends. V, XIV.

72. Griffin v. Illinois, 351 U.S. 12, 19 (1956).

73. *See id.*

74. *See* NOAH R. FELDMAN & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW 828 (20th ed. 2019).

innocence, then the procedures for deciding an appeal "must comport with the demands of the Due Process and Equal Protection Clauses of the Constitution."[75] Where an appeal is granted, due process of the law affords a criminal defendant the right to a complete and accurate transcript for appellate review.[76]

In *United States v. Wilson*, the Ninth Circuit determined that the record provided was grossly inadequate and prevented the court from deciding whether or not the defendant had a fair trial.[77] Portions of the transcript were missing, reconstructed, or in dispute, and the court held that "the absence of an accurate and reliable record" was sufficient for it to conclude that the appeal had been impaired, violating the defendant's due process rights.[78] As the case suggests, it is not enough that the trial transcript be provided to the defendant, but the transcript should also be adequate for purposes of a meaningful appellate review. In *United States v. Charles*, the Eleventh Circuit maintained the necessity of an accurate trial transcript, providing that "[c]ourt reporters are required by statute to record verbatim court proceedings in their entirety."[79] The court expanded on court reporters' duties by articulating that "court reporters are afforded no discretion in the carrying out of this duty; they are to record, as accurately as possible, what transpires in court."[80] Here, the court held that the court reporter's failure to transcribe video- and audio-recorded evidence provided at trial did not warrant reversal because the recordings, as well as a supplemental record of their contents, were readily available for reconstruction of the official record.[81] However, electronic recordings are not available in every case, and as *Wilson* demonstrates, reconstructing the record in many cases will result in undue hardship for the defendant and will undermine the appellate process.

In cases where a defendant is represented by a different attorney on appeal, reconstructing an inaccurate record will be particularly burdensome because the lawyer was not present at trial and cannot attest to what happened. In *United States v. Green*, decided by the Fifth Circuit, the court acknowledged that "[a] criminal defendant has a right to a record on appeal, including a complete transcript of the proceedings at trial."[82] The court explained that if a defendant is represented by the same attorney on appeal, reversal is only required if the defendant shows that undue hardship or prejudice has resulted from a court reporter's failure to record.[83] If a defendant is represented by a different attorney on appeal, then the absence of a substantial and significant portion of the record may be sufficient for reversal.[84] While a new trial was not warranted due to the defendant's inability to actually identify

75. Evitts v. Lucey, 469 U.S. 387, 393 (1985).
76. United States v. Wilson, 16 F.3d 1027, 1031 (9th Cir. 1994) (quoting United States v. Carrillo, 902 F.2d 1405, 1409 (9th Cir. 1990)).
77. *Id.* at 1031.
78. *Id.*
79. United States v. Charles, 313 F.3d 1278, 1282 (11th Cir. 2002).
80. *Id.* at 1283.
81. *Id.* at 1282.
82. 293 F.3d 886, 893 (5th Cir. 2002).
83. *Id.*
84. *Id.* at 894.

discrepancies, the court in *Green* made clear that regardless of appellate outcome, a complete and accurate record is imperative to ensuring that the appeal is decided on the merits.[85]

Criminal appeals are meant to protect against erroneous deprivation of liberty and life.[86] But, where meaning becomes contorted due to mistranscription, or where words and phrases are not recorded due to misunderstanding speech, appellate counsel may not be able to argue and assign error to prevent such deprivation, which will prejudice the defendant. The gravity of having a complete and accurate transcript for appellate review also extends to situations where an appellate judge must consider whether the trial court's decision was reasonably supported by the evidence in addition to deciding a legal issue.[87] If court reporters, who are trained in speech recognition, are not properly understanding a witness, then juries, and to some extent judges, are likely not either.

Court reporter discrepancies were just recently called into question in February 2020, when a New York judge ordered an emergency hearing prior to the trial of siblings who were indicted for double homicide to address the surfacing of evidence of a transcription error from the grand jury hearing.[88] The official record showed the younger of the two suspects, and the prosecution's key witness, confessing that he "[s]hot the dude," but a revised transcript of the proceeding revealed that the brother said he "[s]hut the door."[89] Typically, grand jury proceedings do not allow for audio recording, so the written transcript is the only account of what happened at the hearing; however, in this case, the proceeding was accidentally captured on audio.[90] If it were not for the illegal recording, then there would be nothing on the record to confirm that the witness did not, in fact, confess to shooting someone. The prosecutor in that case argued that simply correcting the record sufficiently addressed the transcription mistakes, but the defense lawyer pointed out that this error, along with the additional, albeit less egregious errors, called into question the validity of the entire grand jury record, which is a source that judges rely on when making rulings and deciding appeals.[91] The defense's sentiment regarding transcription errors falls in line with the conclusions expressed in "Testifying While Black"—transcription errors do occur and can be prejudicial.

Although the above case was an especially egregious example of an inadequate transcript, there are circumstances where a transcription mistake that might seem relatively innocuous could actually be detrimental when the person reviewing the record is not aware of linguistic differences between a non-standard dialect and

85. *Id.* at 893-94.

86. Cassandra Burke Robertson, *The Right to Appeal*, 91 N.C. L. REV. 1219, 1229 (2013).

87. Gorgos, *supra* note 52, at 1065.

88. Douglass Dowty, *Lawyer: Illegal Recording Proves CNY Court Reporter Botched Confession in Double Murder*, SYRACUSE.COM (Feb. 24, 2020), https://www.syracuse.com/crime/2020/02/lawyer-illegal-recording-proves-cny-court-reporter-botched-confession-in-double-murder.html [https://perma.cc/37NU-LS36].

89. *Id.*

90. *Id.*

91. *Id.*

the mainstream variety. Considering that appellate review is widely recognized in American jurisprudence as a vital safeguard to protect against erroneous deprivation of due process interests, and considering that the Supreme Court has acknowledged in *Griffin* that transcripts are necessary to an appeal, why are courts willing to overlook transcription inaccuracies in the official record? To ignore such discrepancies in the transcript is to render the transcript and, by extension, the appellate process useless. Accuracy is at the core of appellate review and "underlies the error-correction of review,"[92] and this extends to the adequacy of court transcripts. As noted above, transcripts need to be adequate, not simply available, for appellate review. Adequacy includes accuracy, but as previously mentioned, transcription accuracy tends to be undermined where court reporters, acting on their own prescriptive sense of grammar, standardize and isolate words in order to create an aesthetically pleasing and readable transcript for the appellate audience.

B. Readability Undercuts Accuracy

The conflict between capturing a verbatim record and readability is consistent with the conclusions drawn from "Testifying While Black." As the study points out, court reporters who were tested often changed the meaning of what was actually said in the AAVE samples the linguists played.[93] For instance, the phrase "I was wondering when you *tryna* go," which means, "I was wondering when you *intend* to go," was transcribed as, "I was wondering when you *try and go*."[94] The actual phrase expresses a question of intent, whereas the court reporter transformed the phrase into a question of attempt. Here, the change seems rather harmless, but in a different context, an expression of intending or wanting to do something, rather than actively attempting to do something, could have much different consequences. In attempting to standardize the word *tryna*, a common lexical feature of AAVE, the court reporter completely altered the meaning of the sentence, offering a concrete example of how standardization can modify meaning.

This attempt at forced conformity with standard English was demonstrated in other instances where court reporters inserted or deleted material in order to make sense of an utterance they did not understand. The phrase, "[h]e don't be in this neighborhood," was transcribed as, "[h]e don't want to be in this neighborhood."[95] The former phrase using the "habitual be" expresses a common state, meaning that he is not usually in this neighborhood. The transcription changes the meaning of the original phrase completely by modifying the "habitual be" into the verb *to be*, as well as adding the word *want*, which indicates that the subject of the sentence *is* in this neighborhood but he doesn't want to be here. It is conceivable that the transcription could be taken by a witness at a deposition and used at trial to discredit the witness's conflicting testimony about what he or she actually said, as was the case with Rachel Jeantel in the *Zimmerman* trial. This type of transcription error also reflects the issue

92. *See* Robertson, *supra* note 86, at 1275.
93. *See* Jones, *supra* note 4, at e241.
94. *Id.*
95. *Id.*

of a court reporter's bias, because as the study points out, the trend of interpreting the "habitual be" as a mis-conjugation of *to be* is a reflection of the negative attitudes towards AAVE that are popular among the general public.[96]

A more serious example of a faulty transcription dramatically changing the meaning of a phrase is where the sentence "[h]e be done gone to bed when I be getting off work," was transcribed as "[h]e is going to bed when I get off work."[97] The original sentence means "[u]sually, he has already gone to bed when I get off work," but the transcription indicates that "he" goes to bed when, or after, the speaker gets off work.[98] As the linguists suggest, this type of discrepancy "could make or break an alibi," and such a mistranscription during a deposition could be used at trial to impeach a witness.[99] If these transcriptions are indicative of the way court reporters transcribe AAVE testimony at trial, then the appellate audience receives a very different story from the one actually told. Where one such mistake presents itself in the transcript, there are likely going to be more. It is difficult to imagine appellate judges could make a determination based on a transcript riddled with errors and meaning-changing mistakes.

C. Misunderstandings of AAVE Do Arise on Appeal

It is not merely hypothetical that misunderstandings of AAVE could arise on appeal. AAVE has been a point of contention between appellate judges. In *United States v. Arnold*, the majority and the dissent went back and forth on the temporal aspect of the phrase "[h]e finna shoot me," for the purposes of determining whether the statement that the witness made to a 911 operator was admissible as nontestimonial evidence.[100] "Finna" means "fixing to." The dissenting judge argued that the lack of the auxiliary verb *is,* which is an example of copula deletion,[101] indicated that the declarant was not under a present physical threat; therefore, the evidence should be inadmissible.[102] Copula deletion in AAVE only occurs in present tense.[103] The majority correctly determined that the statement indicated a present threat, but one could foresee a situation where such a misunderstanding regarding the dialect could lead to the opposite conclusion. It is entirely possible that a court reporter could make a mistake by attempting to "clean up" the language and insert an improper auxiliary verb (*is* or *was*) to the transcript, which would change the temporal meaning of the phrase thereby affecting its admissibility.

Sometimes misunderstandings of AAVE prohibit a person from even making it to the appellate level. This was the case in 2017, when the Supreme Court of Louisiana denied *certiorari* to a Louisiana man who sought to suppress his incriminating

96. *Id.*
97. *Id.* at e240.
98. *Id.*
99. *Id.*
100. 486 F.3d 177, 192-93 (6th Cir. 2007).
101. *See* O'GRADY, *supra* note 12, at 510.
102. *Arnold*, 486 F.3d at 210 (Moore, J., dissenting).
103. Jones et al., *supra* note 4, at e223.

statements regarding his alleged sexual misconduct with a juvenile.[104] During the police interrogation, he said "If y'all, this is how I feel, if y'all think I did it, I know that I didn't do it so why don't you just give me a lawyer dawg, cause this is not what's up."[105] The basis for the petition was that this statement was an invocation of the suspect's right to counsel and the officers' failure to cease the interview and obtain a lawyer for the suspect violated his constitutional rights.[106] In an opinion concurring with the majority's denial of the writ, a judge reasoned that "the defendant's ambiguous and equivocal reference to a 'lawyer dog' [did] not constitute an invocation of counsel that [warranted] termination of the interview."[107] The word "dawg" meaning man or buddy, is commonly used in AAVE, and its meaning is commonly understood by many Americans in mainstream culture.[108] It is clear from the judge's explicit mention of the term "lawyer dog" that his inferred ambiguity lies solely with the term itself, and not the surrounding text, which would provide a more plausible argument for ambiguity. It is also conceivable that the phrase's ambiguity stems from the transcript itself due to a missing comma between the words "lawyer" and "dog."[109] Whether the court's denial of the petition was due to a faulty transcript, the court's willful ignorance in maintaining the ambiguity of the phrase, or genuine semantic confusion, this case makes clear that AAVE speakers are not being afforded equitable support in the legal system. Misunderstandings of the dialect infringe on a defendant's access to an appeal, and transcription errors intensify the possibility that a defendant's due process rights are ignored.[110]

Miscomprehension of AAVE finds other ways to seep into the court transcript. As "Testifying While Black" indicated, there were many instances where the court reporters tested either left stenotype "untranslates" in their transcription, invented their own vocabulary, or wrote nonsensical or ungrammatical sentences.[111] For instance, the phrase "Mark sister friend been got married," was transcribed as "[w]allets is the friend big."[112] Not only does the transcription fail to convey the intended meaning in AAVE, but it makes no sense in standard English. The study also pointed out that the tested court reporters were allotted unlimited time to revisit and correct their transcriptions, but many elected to forgo additional review.[113]

104. State v. Demesme, 228 So. 3d 1206, 1206 (La. 2017).

105. *See* Mark Joseph Stern, *Suspect Asks for "a Lawyer Dawg." Judge Says He Asked for "a Lawyer Dog"*, SLATE (Oct. 31, 2017), https://slate.com/news-and-politics/2017/10/suspect-asks-for-a-lawyer-dawg-judge-says-he-asked-for-a-lawyer-dog.html [https://perma.cc/5AC4-SRVV].

106. *See id.*

107. *Demesme*, 228 So. 3d at 1206-07.

108. *See* Nylah Burton, *"When They See Us" Shows How Black Slang was Criminalized for the Central Park 5 & Still is Today*, BUSTLE (Jun. 12, 2019), https://www.bustle.com/p/when-they-see-us-shows-how-black-slang-was-criminalized-for-the-central-park-5-it-still-is-today-17998485 [https://perma.cc/NP4Y-3X3J].

109. *See* Ed Krayewski, *He Said He Wanted a 'Lawyer [,] Dog'; The Court Ruled That Was Too Vague*, REASON (Oct. 30, 2017), https://reason.com/2017/10/30/he-said-he-wanted-a-lawyer-dog-the-court/ [https://perma.cc/D4WD-3N63].

110. *See* Jordana Rosenfeld, *In the Legal System, Talking White Is a Precursor to Justice—and That's Wrong*, NATION (Jan. 29, 2018), https://www.thenation.com/article/archive/in-the-legal-system-talking-white-is-a-precursor-to-justice-and-thats-wrong/.

111. *See* Jones et al., *supra* note 4, at e233.

112. *Id.* at e234.

Failing to take time to correct their clearly nonsensical transcriptions seems to suggest that, at best, the court reporters were apathetic to AAVE speakers' needs. If these transcriptions were made at a trial, it would be nearly impossible to construct an official coherent transcript that would be useful for counsel to identify issues to raise on appeal. In cases with AAVE, where many mistakes are likely to fall under the radar, it is imperative that the system safeguards against such mistakes becoming part of the official record and potentially impairing a defendant's due process rights. "Given the value of these rights, even a small risk of erroneous deprivation is troubling."[114] Overlooking or minimizing such transcription errors undermines the integrity of the judicial system and the fundamental fairness associated with due process, and it suggests to the linguistically disadvantaged that their voices do not matter.

IV. POTENTIAL SOLUTIONS

A. AAVE Interpreters

A possible solution to ensuring that AAVE speakers are being understood in the courtroom is to implement AAVE interpreters. Although the United States has recognized a need for AAVE translators or interpreters for assisting with police investigations, such a need has yet to be recognized for assisting witnesses, defendants, or court reporters in the courtroom.[115] Currently, the Federal Court Interpreters Act only applies to parties or witnesses who "speak only or primarily a language other than English," and does not extend to dialect speakers.[116] In theory, implementing dialect interpreters might seem like an easy fix to a pervasive problem; however, such an implementation has many drawbacks. In addition to the practical obstacles, such as cost and identifying qualified interpreters, there is concern that some AAVE speakers might find the appointment of an interpreter demeaning.[117] Using court interpreters for AAVE speakers risks undermining the legitimacy of the dialect and reinforcing negative stereotypes that AAVE is just standard English with defects.[118] Moreover, the same translation issues that are present with interpreting foreign languages would pertain to the AAVE scenario, where the words captured on the record will be those of the interpreter and not necessarily the AAVE speaking witness or defendant.[119] Even though the use of AAVE interpreters might offer a temporary benefit, it does not get us much closer to eliminating the systemic issues that give rise to negative attitudes towards non-standard dialects.

113. *Id.* at e233.

114. Robertson, *supra* note 86, at 1243.

115. Rickford & King, *supra* note 38, at 955. There have been instances where a judge has extended the need for an interpreter to English Creoles. *Id.* at 981.

116. *See* 28 U.S.C.A. § 1827 (d)(1)(A) (West); *see also* Rickford & King, *supra* note 38, at 955.

117. *See* Rickford & King, *supra* note 38, at 981.

118. *See* Jones et al., *supra* note 4, at e245.

119. *Id.*

B. Implicit Language Bias Training

Developing awareness of linguistic barriers to justice through implicit bias training is another method of remedying the issues pertaining to mistranscription. Many of the court reporters who participated in the study expressed negative attitudes towards AAVE.[120] For example, one reporter's paraphrases of mundane examples of AAVE speech frequently assumed criminality.[121] Such attitudes are due in large part to mainstream society's overall assumption that AAVE is just a broken way of speaking standard English, and court reporters, like most people, cannot simply check their implicit biases at the door. Being a part of the literate culture that informs society and trained to transcribe standard speech, court reporters' transcriptions are going to be influenced by their own cultural and linguistic experiences.[122] Preventing unconscious language bias from translating to behavior can be accomplished through the same kind of training regarding gender and racial bias, but the onus to combat unconscious bias should not rest solely on court reporters—attorneys, jurors, and even judges should also undergo such training. Of course, addressing bias requires introspection on the part of the individual by becoming aware of one's implicit bias and doubting one's own objectivity.[123]

Implicit bias training is already being conducted nationwide for federal and state public defenders, prosecutors, and judges in order for these parties to reflect on how their own biases may influence their decision-making.[124] At the institutional level, efforts are also underway to reduce implicit biases.[125] For instance, a San Francisco public defender's employees fill out checklists that require them to answer questions about how they would have handled matters differently if their client was a different race or of a different social background, which enables them to reflect on the way implicit bias may influence their work.[126] This type of training could extend to court reporters, calling on them to contemplate the ways in which their unconscious biases regarding language, race, and socioeconomic status might translate to their transcriptions. Such training would diminish their possibly negative attitudes about the speaker whose words they are transcribing and would enable them to reconsider imposing their prescriptive standard-based grammar rules on transcriptions of AAVE.

C. Mandatory Training and Competency Testing of Non-Standard Dialects

Perhaps an easier solution to help reduce transcription errors of AAVE is for court reporter certification programs to integrate mandatory dialect training into their curriculum.[127] Incorporation could be accomplished by introducing court reporters to

120. *Id.* at e242.
121. *Id.*
122. *See* Walker, *supra* note 1, at 238.
123. *See* L. Song Richardson, *Systemic Triage: Implicit Racial Bias in the Criminal Courtroom*, 126 YALE L. J. 862, 888 (2017).
124. *Id.*
125. *Id.* at 891.
126. *Id.*

basic elements of dialects they are likely to encounter in their geographic areas. In places where AAVE is widely used, court reporters should be taught basic grammatical rules and cultural and social aspects of the dialect, and be evaluated by the same standards used to test court reporters' competency in standard English, legal and medical jargon, and speech.[128] Such an approach can be implemented gradually, through collaboration with linguists and other related professionals, with the overall goal being ninety-five percent accuracy of AAVE transcription.[129]

Of course, such a plan would not require each court reporter to become fluently bidialectal, but it would allow for the court reporters to have enough knowledge to recognize common features of other widely spoken dialects in order to enhance the accuracy of their transcriptions. Additionally, training in non-standard dialects would bring even more esteem to an already prestigious and important profession and would affirm human court reporting as the best and most effective transcription method in the face of technological advancements and assertions that technology should begin to replace court reporters. Overall, this method would be a positive step forward not only for AAVE speakers, but also for the court reporting profession.

D. More Interdisciplinary Legal and Linguistic Research

The past few decades have produced minimal research about the intersection between linguistics and court reporting[130] and less research regarding transcription errors and dialect.[131] In order to better understand the ways in which language can be a barrier to justice and equality, more legal scholarship and collaboration with linguists is needed. The "Testifying While Black" study offers unprecedented insight into the world of court reporting and the impact that linguistic bias and miscomprehension has on transcriptions of AAVE; but Philadelphia is certainly not the only city where mistranscription of the dialect is occurring, and AAVE is likely not the only dialect that is affected. The study mentions Appalachian English and Chicano English as dialects that would benefit from similar research.[132] In order to better understand the issue, it is important for those in the legal community to recognize that Standard Language Ideology does influence their perceptions of dialect speakers and use such recognition to better assess the ways in which ideology impairs non-standard dialect users' rights to due process. Linguists have a wealth of knowledge and the legal system would benefit from utilizing this knowledge through consultation and collaboration.[133]

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127. Jones et al., *supra* note 4, at e245.
128. *Id.*
129. *See id.*
130. *See* Sullivan, *supra* note 62 (unpublished Ph.D. dissertation at 208).
131. *See* Jones et al., *supra* note 4, at e217.
132. *Id.* at e246.
133. *See generally* Roger W. Shuy, *Language and the American Courtroom*, 1 LANGUAGE & LINGUISTICS COMPASS 100, 102-03 (2007); *see also* ROSINA LIPPI-GREEN, ENGLISH WITH AN ACCENT: LANGUAGE, IDEOLOGY, AND DISCRIMINATION IN THE UNITED STATES 172-73 (2nd ed. 2011).

CONCLUSION

For the few cases that have been brought to light regarding the intersection of AAVE and court transcription errors in the legal system, there are many more that have gone unnoticed. The Constitution affords citizens the right to due process before they are deprived of their life, liberty, and property. In criminal cases, where the risk of such deprivation is high, a defendant has the right to accurate transcripts. These transcripts are necessary for assuring that defendants are being granted due process of the law through access to meaningful appellate review. Where court reporters are failing to accurately transcribe AAVE in meaning-altering ways, then any subsequent appeal is not "meaningful" and due process rights are violated. The United States legal system is meant to be built on foundations of fairness and is meant to ascertain truth, but if court reporters are capturing a distorted version of the truth based on their miscomprehension of the dialect, then juries and judges are as well. In order to assure that the notions of fairness and equality are being afforded to all people in the country, we must acknowledge that linguistic disadvantages stand as a blockade to justice for many, mistranscriptions can distort meaning of AAVE and infringe on speakers' access to appellate review and exercise of their due process rights, and Standard Language Ideology plays a significant role in the misrepresentation of non-standard dialects. We must take steps within the legal environment to remedy and prevent negative effects associated with these transcription errors.