

2020

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Get with the Pronoun

Heidi K. Brown*

The singular *they*: this four-letter word packs enough power to foster clarity, accuracy, inclusion, and respect in legal writing. English grammar traditionalists have argued that the use of *they* to refer to a singular antecedent is grammatically incorrect. Legal writing professors and law office supervisors have, for decades, corrected novice legal writers' use of the word *they* to refer to "the court" or "the company" or "the government." Those nouns are *it* in pronoun form, not *they*. Of course, that particular grammar correction for non-person nouns is still proper (and not disrespectful to anyone, or politically incorrect). The conversation got interesting when proponents of inclusive writing, and inclusive *legal* writing, began urging adoption of the singular *they* as an appropriate vehicle to refer to a person whose gender is either unknown or for whom the binary gender construct does not work. Grammarians persisted, "But the use of the singular *they* muddles sentences! It confuses readers! It erodes clarity!" Does it? Really?

This article proposes that good legal writers actually can *enhance* and *foster* clarity, accuracy, inclusion, and respect in pleadings, briefs, and judicial decisions through purposeful and intentional usage of the singular *they* (and other pronouns). Legal writers should use the singular *they* to refer to a person whose gender is unknown, who is non-binary, or whose gender should be anonymized for purposes of a legal matter, and then incorporate a concise and pointed explanation of the pronoun's usage—within the text itself or a well-placed footnote—to educate the unfamiliar (or possibly resistant) reader.

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Section I of this article notes changes underway in the United States toward recognizing individuals' pronoun usage¹ outside the historical *he/she* binary, and acknowledging the singular *they*. Many colleges, universities, and employers, in addition to service providers like Facebook, United Airlines, Lyft, and Netflix, already engage with non-binary gender identifiers. Likewise, law students, lawyers, clients, litigants, witnesses, and decisionmakers are using personal pronouns other than *he* or *she*. Legal writers and legal readers need to embrace and honor this new grammatical terrain, lest we let discomfort with one four-letter pronoun get in the way of doing the right thing for others.

Section II touches on how language impacts human relationships and can—and must—evolve as our society naturally forays into new frontiers. Section III surveys how and when well-respected American (non-legal) writing style guides embraced the singular *they*. Section IV describes how legal writing experts have transitioned from advising lawyers to write “conservatively” with regard to gender-neutral writing for fear of confusing readers, to a new approach of using straightforward footnotes or textual sentences to pointedly explain why the writer is using a particular pronoun. Section V provides a glimpse into the successes and challenges of inclusive writing movements in other countries and legal systems, highlighting language activists' arguments that gender-inclusive language helps remedy the grammatical “erasure” of marginalized citizens. Section VI offers examples of how American lawyers and judges have effectively used litigants' and witnesses' personal gender pronouns, including the singular *they*, in pleadings, briefs, and judicial decisions.

This article concludes with a call to action for legal writers to use the singular *they* in circumstances involving persons of unknown gender, who identify as non-binary, or whose identity should remain confidential, as a proactive tool to enhance clarity, accuracy, inclusion, and respect in legal documents. Lawyers and academics cannot cling to outdated grammar rules—simply based on tradition—and ignore necessary societal shifts, or we risk disrespecting and alienating clients, litigants, finders-of-fact, and decisionmakers. Instead, we can use individuals' personal pronouns with intention, and educate ourselves and our legal community in the process.

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¹ As many of us initially began engaging with gender-neutral pronouns, we might have heard or used the phrase “Preferred Gender Pronouns,” or “PGPs.” Advocates clarify that it is better to refer to an individual's pronouns as “Personal Gender Pronouns” instead of “Preferred Gender Pronouns.” The former is “the most inclusive phrasing as [it] doesn't insinuate respecting someone's pronouns is optional.” Sassafras Lowrey, *A Guide to Non-Binary Pronouns and Why They Matter*, HUFFINGTON POST, Nov. 8, 2017, https://www.huffpost.com/entry/non-binary-pronouns-why-they-matter_b_5a03107be4b0230facb8419a.

I. Pronoun Proliferation in the United States

While law often (understandably) takes time to catch up to societal change, as legal writers, we should actively ramp up our awareness about the growing use and acceptance of non-binary language across many facets of our American society. As Professor Laura Graham noted in her article, *Generation Z Goes to Law School: Teaching and Reaching Law Students in the Post-Millennial Generation*, “In 2017, law schools welcomed the first members of Generation Z to their halls.”² Generation Z students (born between 1995 and 2010)³ join the ranks of Millennials (born between 1980 and 1994) as our next generation of attorneys, judges, and corporate counsel clients; they are using and recognizing personal pronouns other than *he* or *she*. A 2016 J. Walter Thompson Intelligence survey reported that “56 percent of U.S. Gen Z’ers (13 to 20 years old) said they know someone who uses gender-neutral pronouns such as *they*, *them*, or *ze*.”⁴ On many American college and university campuses, “[s]haring one’s pronouns and asking for others’ pronouns when making introductions is a growing trend.”⁵ For example, at the University of Vermont, “students can choose from ‘he,’ ‘she,’ ‘they,’ and ‘ze,’ as well as ‘name only’—meaning they don’t want to be referred to by any third-person pronoun, only their name.”⁶

Influencers and players in our day-to-day cultural experiences are recognizing evolving gender norms and directly addressing individuals’ usage of gender-neutral pronouns and honorifics. In 2014, Facebook offered users the choice of *they/their* pronouns, in addition to *he* and *she*.⁷ In May 2019, the ride-share company, Lyft, added gender-neutral pronouns to rider profiles in its app, offering passengers a choice of “they/them/theirs, she/her/hers, he/him/his, my pronoun isn’t listed, prefer not to say.”⁸ The same year, a trade group, Airlines for America, announced that “[a]ir travelers who want to [do so] will soon be able to choose a gender option

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² Laura P. Graham, *Generation Z Goes to Law School: Teaching and Reaching Law Students in the Post-Millennial Generation*, 41 U. ARK. LITTLE ROCK L. REV. 29 (2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3271137 (abstract).

³ *Id.*

⁴ Sarah McKibben, *Creating a Gender-Inclusive Classroom*, 60 EDUC. UPDATE, no. 4, Apr. 2018. For a helpful guide to new pronouns such as “xe/ze/zim/zir/hir,” see *Resources on Personal Pronouns: How*, MYPRONOUNS.ORG, <https://www.myprouns.org/how> (last visited June 12, 2020).

⁵ Avinash Chak, *Beyond “He” and “She”: The Rise of Non-Binary Pronouns*, BBC NEWS MAG., Dec. 7, 2015, <https://www.bbc.com/news/magazine-34901704>.

⁶ *Id.*

⁷ Josh Constine & Jordan Crook, *Facebook Opens up LGBTQ-Friendly Gender Identity and Pronoun Options*, TECHCRUNCH, Feb. 13, 2014, <https://techcrunch.com/2014/02/13/facebook-gender-identity/>.

⁸ Megan Rose Dickey, *Lyft is Adding Gender-Neutral Pronouns to Its App*, TECHCRUNCH, May 29, 2019, <https://techcrunch.com/2019/05/29/lyft-is-adding-gender-neutral-pronouns-to-its-app/>.

other than ‘male’ or ‘female’ when buying their tickets.”⁹ The choices will be “male,” “female,” “undisclosed,” or “unspecified.”¹⁰ Further, “customers who do not identify with a gender will have the option of selecting ‘Mx.’ as a title.”¹¹ United Airlines led the way as the first airline in the United States to afford passengers non-binary gender options when booking flights.¹²

Some companies are including pronoun recognition as part of employees’ training for interaction with job applicants, clients, and customers. In 2019, financial services company TIAA issued guidelines “suggesting client-facing employees share their pronouns in introductions.”¹³ In the hiring process, Netflix recruiters share their pronouns in initial interviews and ask job applicants about their pronouns.¹⁴

Whether or not some legal writers feel ready to embrace new pronoun trends, these language shifts are happening all around us. The individuals we write about in our legal documents are living in and navigating a society in which gender-neutral pronouns are becoming the norm. We must catch up.

II. Language Can, and Should, “Reorient” and Evolve

Purdue University’s Online Writing Lab poignantly sums up the grammar debate regarding the singular *they*:

Why should we use this kind of language? Isn’t this incorrect grammar? In short, no. Grammar shifts and changes over time; for instance, the clunky *he* or *she* that a singular *they* replaces is actually a fairly recent introduction into the language. Singular *they* has been used for a long time and is used in most casual situations; you probably do it yourself

9 Zach Wichter, *U.S. Airlines to Offer New Gender Options for Non-Binary Passengers*, N.Y. TIMES, Feb. 15, 2019, <https://nyti.ms/2EcG7RL>.

10 *Id.*

11 *Id.* A website called www.lexico.com (a collaboration between Dictionary.com and Oxford University Press) mentions the honorific *Mx.* In its entry on the word “they,” the website first explains that “they” can be “used to refer to a person of unspecified gender,” and then notes that “[l]ike the gender-neutral honorific *Mx.*, the singular *they* is preferred by some individuals who identify as neither male nor female.” *Meaning of They in English*, LEXICO.COM, <https://www.lexico.com/definition/they> (last visited Apr. 12, 2020). Additionally, New York City’s Commission on Human Rights, which provides Legal Enforcement Guidance on Gender Identity/Gender Expression on its website, notes in a footnote that “[t]he gender-neutral title *Mx.* is pronounced ‘mæks’ (similar to ‘mex’) or ‘miks’ (similar to ‘mix’)” N.Y.C. Comm’n on Human Rights Legal Enforcement Guidance on Discrimination on the Basis of Gender Identity or Expression: Local Law No. 3; N.Y.C. Admin. Code § 8-102, 4 n.15 (Feb. 15, 2019), <https://www1.nyc.gov/assets/cchr/downloads/pdf/publications/2019.2.15%20Gender%20Guidance-February%202019%20FINAL.pdf>.

12 Samantha Schmidt, *United Becomes First U.S. Airline to Offer Non-Binary Gender Booking Options—Including “Mx.”*, WASH. POST, Mar. 22, 2019, <https://www.washingtonpost.com/dc-md-va/2019/03/22/united-becomes-first-us-airline-offer-non-binary-gender-booking-options-including-mx/>.

13 Jena McGregor, *How Employers are Preparing for a Gender Non-Binary World*, WASH. POST, July 7, 2019, <https://www.washingtonpost.com/business/2019/07/02/how-employers-are-preparing-gender-non-binary-world/>.

14 *Id.*

without realizing it. We are simply witnessing a reorientation of the rule, mostly with the intention of including more people in language.¹⁵

Language embodies human contact. It can forge connection, and it can inflict pain. Regardless of one's personal feelings about grammar rules, it is important to understand the detrimental impact of "misgendering" an individual when we speak and write. As the Human Rights Campaign Foundation explains, "The experience of being misgendered can be hurtful, angering, and even distracting." Thus, "[a] culture that readily asks [about] or provides pronouns is one committed to reducing the risk of disrespect or embarrassment for both parties"¹⁶ in a conversation.

Can one four-letter pronoun effect positive change in a profession like law, which is so steeped in history and rooted in tradition? As linguist Noam Chomsky said, "Language etches the grooves through which your thoughts must flow."¹⁷ Indeed, language is the vehicle through which we convert ideas to words, share them with others, and spark responses and reactions. In an "awareness-raising session" of the United Nations Economic and Social Commission for Western Asia, participants asserted that "[l]anguage not only reflects the way writers think; it also shapes the thinking of listeners or readers and influences their behaviour."¹⁸ Sam Dowd, a British didactics expert, echoed the principle that "language is the primary filter through which we perceive the world."¹⁹ Thus, "it's obvious that it affects how we relate to and make judgments about one another."²⁰ He emphasizes, "Until now, history has been written and told by men, to the detriment of others. Part of any attempt to create a society in which *all* people—regardless of gender, sexuality, or race—have equal opportunities and freedoms is to use language that no longer excludes

15 Purdue Online Writing Lab, *Gendered Pronouns & Singular "They,"* PURDUE UNIV., https://owl.purdue.edu/owl/general_writing/grammar/pronouns/gendered_pronouns_and_singular_they.html (last visited Apr. 3, 2020); *see also* Lesbian, Gay, Bisexual, Transgender, Queer Plus LGBTQ+ Resource Center, *Gender Pronouns*, UNIV. OF WIS.-MILWAUKEE, <https://uwm.edu/lgbtrc/support/gender-pronouns/> (last visited Apr. 3, 2020) ("And whatever the grammarians might argue, people have been using the singular 'they' for about the last 600 years").

16 *Talking About Pronouns in the Workplace*, HUMAN RIGHTS CAMPAIGN FOUND., <https://www.hrc.org/resources/talking-about-pronouns-in-the-workplace> (scroll down, then select download "Talking about Pronouns in the Workplace") (last visited Apr. 3, 2020); *see also Resources on Personal Pronouns: What are Personal Pronouns and Why Do They Matter?*, MYPRONOUNS.ORG, <https://www.myprouns.org/what-and-why> (last visited Apr. 3, 2020) ("[P]ronouns matter"; "Using someone's correct personal pronouns is a way to respect them and create an inclusive environment, just as using a person's name can be a way to respect them.").

17 Shona Whyte, *Thinking in Two Languages*, ON TEACHING LANGUAGES WITH TECHNOLOGY, <https://shonawhyte.wordpress.com/2016/10/07/thinking-in-two-languages/> (last visited Apr. 26, 2020) (noting that this quote is attributed to Noam Chomsky but that the source of the quote is unknown).

18 UNITED NATIONS, *GENDER-SENSITIVE LANGUAGE GUIDELINES 1* (2014), https://www.unescwa.org/sites/www.unescwa.org/files/page_attachments/1400199_0.pdf.

19 Adryan Corcione, *How to Use Gender-Neutral Words*, TEEN VOGUE, Aug. 27, 2018, <https://www.teenvogue.com/story/how-to-use-gender-neutral-words>.

20 *Id.*

certain groups or creates unconscious bias.”²¹ Likewise, Dr. Charlotte Ross cautions that

we might hide behind the rules and norms of grammar, making sure our language is “correct” according to current dictionaries, and shrugging off the fact that language is cultural, and is often highly patriarchal, sexist, and binary in its conception of identities. What are the consequences of tolerating or even defending these linguistic norms? Well, these norms sanction some behaviours and stigmatise others; they lend authority to certain ideas and marginalize others; they validate some identities and silence or do violence to others.²²

Language and the law are inextricably intertwined. Our statutes, case law, and contractual promises are memorialized in words. We persuade judges and other decisionmakers through sentences and paragraphs. We communicate with clients and opposing counsel through nouns, verbs, pronouns, adverbs . . . and the occasional, regrettable, exclamation point. Attorney Stan Sarkisov and Carleigh Kude (an access and inclusion specialist in higher education) emphasize that “[l]anguage and laws reflect the values of society.”²³ The reflex use of a two-letter word like *he*—to refer to all genders—can reinforce historical power hierarchies. Sarkisov and Kude remind us that, “[s]ince the birth of our nation, less privileged Americans—specifically those who are excluded by the use of a default male singular third person pronoun—have fought for their promised enfranchisement.”²⁴

Instead of clinging to outdated terminology or rules because we do not like the way a new (to us)²⁵ grammatical structure sounds in a sentence, this is a prime opportunity to stop and take stock of the language we use daily as legal writers. As Sarkisov and Kude urge, if we do not “paus[e] to confront bias in our writing, there is ample opportunity for first impressions to double down on themselves: stereotyping gives way to confirmation biases; confirmation biases give way to subjective validation; subject[ive] validation manifests as prejudice, discrimination, and so on.”²⁶ The National Council of Teachers of English reiterates how language—

21 *Id.*

22 Charlotte Ross, *Qu@*ring the Italian Language*, QUEER ITALIA NETWORK (Jan. 12, 2017), <https://queeritalia.com/2017/01/12/queeringitalian/>.

23 Stan Sarkisov & Carleigh Kude, *Pronoun Power—The Standard for Gender Neutrality*, S.F. ATT’Y, Winter 2017, at 40.

24 *Id.*

25 As mentioned in note 15 (and discussed in more detail later in section III), the singular *they* has been used for centuries.

26 *Id.*

without reflection and consideration of necessary evolution and change—re-entrenches gender bias:

Language, which plays a central role in human cognition and behavior, is one of the most common mechanisms by which gender is constructed and reinforced. The words that people use to describe others or objects are often unintentionally but unquestionably based in implicit cultural biases, including biases that privilege the gender binary. We can see such bias reinforced in professional language use: in curriculum and pedagogy; in papers and publications; in handouts and other materials used in presentations; and in speaking in and beyond our classrooms.²⁷

Our language must, and can, change. There is ample precedent for such evolution.

The National Council of Teachers of English emphasizes that “[a]s both a product and an engine of human culture, language is inherently dynamic and ever-evolving.”²⁸ In fact, at “the intersection of language, gender, and equity, the English language has been in a period of active shift for several decades.”²⁹ Author, professor, and transgender activist, Jennifer Finney Boylan, reinforces the reality that

English has a long history of adapting to cultural change. That’s something we should celebrate, not lament. None of this happens swiftly, though. The honorific “Ms.,” first proposed in an issue of *The Sunday Republican* of Springfield, Mass., in 1901, was finally adopted by *The New York Times* in 1986.³⁰

Professor Finney also points out that “although the first use of ‘Mx.’ as an honorific for people wishing not to be identified by gender dates to 1977, Merriam Webster added it to its lexicon only last September.”³¹

While language activists in other countries and legal jurisdictions often face formidable obstacles in the form of powerful institutional guardians of language tradition, such as the Académie Française or the Royal Spanish Academy,³² American legal writers do not need to wait for a

27 NAT’L COUNCIL OF TEACHERS OF ENGLISH, STATEMENT ON GENDER AND LANGUAGE (Oct. 25, 2018), <https://ncte.org/statement/genderfairuseoflang/>.

28 *Id.*; see also Betty Birner, *Is English Changing?*, LINGUISTIC SOC’Y OF AM., <https://www.linguisticsociety.org/content/english-changing> (last visited Apr. 4, 2020) (“Language is always changing, evolving, and adapting to the needs of its users.”).

29 STATEMENT ON GENDER AND LANGUAGE, *supra* note 27.

30 Jennifer Finney Boylan, *That’s What Ze Said*, N.Y. TIMES, Jan. 9, 2018, <https://www.nytimes.com/2018/01/09/opinion/ze-xem-gender-pronouns.html>.

31 *Id.*

32 See, e.g., Levi C.R. Hord, *Bucking The Linguistic Binary: Gender Neutral Language in English, Swedish, French, and German*, 3 WESTERN PAPERS IN LINGUISTICS, no. 1, 2016, art. 4 at n.6 (“Swedish, French, and German have language

formal institutional sanction of change or to convince a “higher authority” of the propriety of this evolution. We hold enough power in our own pens and laptops to transform legal language. Levi C.R. Hord writes,

Rather than being decided by an authority, most languages are used according to shared public consensus, and new terms are not officially instated but are introduced into speech communities organically with the potential to become widespread. The power that the people have over the language becomes important as it links the acceptance of stigmatized language (including gender neutral language) to social rather than institutional change, making social attitudes significant not only as markers of progress but as targets for potential transformation. While many prescriptivists argue against gender neutral language as incorrect or ungrammatical, the consensus on whether or not its use is acceptable will come from the people who either choose to use it or not, and the prescriptivist viewpoint will become moot.³³

Instead of waiting for official sanction, legal writers have the power right now to choose to use the singular *they*, to acknowledge societal change and cultivate inclusion.

III. Prominent Non-Legal Writing Style Guides Have Embraced the Singular They

Well-known writing style manuals already have embraced the singular *they*. This section of this article tracks the chronological progression of this acceptance over the past five years.

In 2015, the *Washington Post* approved the use of the pronoun in singular form, expressly indicating its utility in referring “to people who identify as neither male nor female.”³⁴ In writing about the change, the late copy editor Bill Walsh explained that “[t]he only thing standing in the way of *they* has been the appearance of incorrectness—the lack of acceptance among educated readers.”³⁵ He shared, “What finally pushed me from acceptance to action on gender-neutral pronouns was the increasing visibility of gender-neutral people. The *Post* has run at least one profile of a person who identifies as neither male nor female and specifically requests

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authorities that dictate official rules and changes (the Swedish Academy, the Académie Française, and the Rat für deutsche Rechtschreibung). These entities influence the use of gender neutral language through the occasional official decree.”).

³³ *Id.* at 8.

³⁴ Benjamin Mullin, *The Washington Post Will Allow Singular “They,”* POYNTER, Dec. 1, 2015, <https://www.poynter.org/reporting-editing/2015/the-washington-post-will-allow-singular-they/>.

³⁵ Bill Walsh, *The Post Drops the “Mike”—and the Hyphen in “E-mail,”* WASH. POST, Dec. 4, 2015, https://www.washingtonpost.com/opinions/the-post-drops-the-mike—and-the-hyphen-in-e-mail/2015/12/04/ccd6e33a-98fa-11e5-8917-653b65c809eb_story.html.

they and the like instead of *he* or *she*.”³⁶ Walsh asserted, “simply allowing *they* for a gender-nonconforming person is a no-brainer.”³⁷

The same year, the American Dialect Society³⁸ selected the gender-neutral singular *they* as Word of the Year. The Society recognized *they* “for its emerging use as a pronoun to refer to a known person, often as a conscious choice by a person rejecting the traditional gender binary of *he* and *she*.”³⁹ For those of us who may have erroneously thought that the singular *they* is a new language development, the Society shared that “[t]he use of singular *they* builds on centuries of usage, appearing in the work of writers such as Chaucer, Shakespeare, and Jane Austen.”⁴⁰ The online dictionary, www.dictionary.com, also highlights how “Shakespeare, Swift, Shelley, Scott, and Dickens, as well as many other English and American writers, have used *they* and its related case forms to refer to singular antecedents.”⁴¹

In 2017, the *Chicago Manual of Style* announced that writers may “use *they* to refer to a specific, known person who does not identify with a gender-specific pronoun such as *he* or *she*.”⁴² At the time, the *Manual* reported that “[t]his usage is still not widespread either in speech or in writing, but Chicago accepts it even in formal writing.”⁴³ Also in 2017, the Associated Press authorized journalists to use the singular *they*, but indicated a preference for grammatical workarounds:

They/them/their is acceptable in limited cases as a singular and/or gender-neutral pronoun, when alternative wording is overly awkward or clumsy. However, rewording usually is possible and always is preferable. Clarity is a top priority; gender-neutral use of a singular *they* is unfamiliar to many readers. We do not use other gender-neutral pronouns such as *xe* or *ze*.⁴⁴

36 *Id.*

37 *Id.*

38 “Members in the 127-year-old organization include linguists, lexicographers, etymologists, grammarians, historians, researchers, writers, editors, students, and independent scholars.” 2015 *Word of the Year Is Singular “They,”* AM. DIALECT Soc’y (Jan. 8, 2016), <https://www.americandialect.org/2015-word-of-the-year-is-singular-they>.

39 *Id.*

40 *Id.*

41 *They*, DICTIONARY.COM, <https://www.dictionary.com/browse/they> (last visited Apr. 4, 2020) (emphasis added). Interestingly, the online version of the Merriam-Webster Dictionary notes that the word “*thon*” was a singular, gender-neutral pronoun in our unabridged dictionary. Until it wasn’t.” *We Added a Gender-Neutral Pronoun in 1934. Why Have so Few People Heard of It?*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/words-at-play/third-person-gender-neutral-pronoun-thon> (last visited Apr. 4, 2020).

42 Chicago Manual, *Chicago Style for the Singular They*, CMOS SHOP TALK (Apr. 3, 2017), <http://cmosshoptalk.com/2017/04/03/chicago-style-for-the-singular-they/>.

43 *Id.*

44 ASSOCIATED PRESS, THE ASSOCIATED PRESS STYLEBOOK 274 (2017).

The 2017 *AP Stylebook* suggested the (disconcerting) option of writing around the pronoun: “In stories about people who identify as neither male nor female or ask not to be referred to as *he/she/him/her*: Use the person’s name in place of a pronoun, or otherwise reword the sentence, whenever possible.”⁴⁵ Paula Froke, lead editor for the *AP Stylebook* stated, “Clarity is the top priority. Our concern was the readers out there. Many don’t understand that *they* can be used for a singular person.”⁴⁶

As *Wall Street Journal* columnist and linguist Ben Zimmer and *The Roanoke Times Reporter* Tiffany Stevens (who is non-binary and uses the singular *they* pronoun) pointed out, the AP’s stated preference for using a person’s last name or rewording sentences over using the singular *they* results in “un-pronouncing” a person.⁴⁷ This “pronoun avoidance” could be viewed as another form of “erasure.”⁴⁸ Zimmer calls this “a bit of a copout.”⁴⁹ Instead, Zimmer emphasizes that, to enhance clarity for readers, writers can expressly communicate the reason for using the pronoun; this will “help everyone get used to the idea that ‘they’ could refer to a singular person.”⁵⁰

The 2017 *AP Stylebook* indeed offered an option that did not involve “un-pronouncing” someone: “If *they/them/their* use is essential, explain in the text that the person prefers a gender-neutral pronoun. Be sure that the phrasing does not imply more than one person.”⁵¹ This phrasing remains the same in the 2019 version of the *AP Stylebook*.⁵²

In 2018, the Modern Language Association (MLA) Style Center included the following information on its website:

Writers who wish to use a non-gender-specific pronoun to refer to themselves may prefer *they* and *their* (or a neologism like *hir*). Likewise, writers should follow the personal pronoun choices of individuals they write about, if their preferences are known, and editors should respect those preferences. *They* may be used in a singular sense according to a person’s stated preference for it.⁵³

45 *Id.*

46 Gerri Berendzen, *AP Style for First Time Allows Use of They as Singular Pronoun*, ACES: THE SOC’Y FOR EDITING, Mar. 24, 2017, <https://aceseditors.org/news/2017/ap-style-for-first-time-allows-use-of-they-as-singular-pronoun/> (emphasis added).

47 Kristen Hare, *AP Style Change: Singular They Is Acceptable “in Limited Cases,”* POYNTER, Mar. 24, 2017, <https://www.poynter.org/reporting-editing/2017/ap-style-change-singular-they-is-acceptable-in-limited-cases/>.

48 *Id.*

49 *Id.*

50 *Id.*

51 ASSOCIATED PRESS, THE ASSOCIATED PRESS STYLEBOOK 274 (2017).

52 ASSOCIATED PRESS, THE ASSOCIATED PRESS STYLEBOOK 281 (2019).

53 MLA Style Center, *What Is the MLA’s Approach To the Singular They?*, MODERN LANGUAGE ASS’N, Oct. 3, 2018.

Notably, in 2019, the *New York Times* ran an article by journalist Sophie Haigney about a New-York based photographer named Elle Pérez.⁵⁴ Using both the singular *they* and the honorific *Mx.*, Haigney wrote, “Past work by Mx. Pérez, who uses the gender-neutral pronouns ‘they’ and ‘them,’ has explored the punk community in the Bronx, underground night life culture, gender identity and Latinx communities. (Latinx is a gender neutral alternative to Latino or Latina.)”⁵⁵

In late 2019, the seventh edition of the *Publication Manual of the American Psychological Association* also endorsed the use of the singular *they*.⁵⁶

IV. Legal Writing Experts Are Shifting How They Advise Lawyers About Using Gender-Neutral Language

Given the lively debate in legal writing circles right now over gender-neutral pronouns, it might surprise some of us to learn that at least two legal writers advocated for the use of the singular *they* over two decades ago. In 1995, Professor Robert D. Eagleson wrote an article entitled *A Singular Use of They*, published in the *Scribes Journal of Legal Writing*.⁵⁷ Providing historical context, Eagleson highlighted how “the use of *they* to refer to a singular noun is not an innovation of recent decades or even of this century”; excerpts in *The Oxford English Dictionary* evidenced the pronoun’s use at least as far back as the fourteenth century.⁵⁸ He further contended, “In adopting *they* with singular reference, we are simply following a long-established convention of the English language.”⁵⁹ A few years later, in 1998, Debora Schweikart took a similar stance and argued “that the legal profession should take a leading role in the development of fair speech by adopting accurate gender neutral pronouns for the singular third person.”⁶⁰ She suggested the singular *they*.⁶¹

54 Sophie Haigney, *Forced to Wait for a Ride? Might as Well Enjoy the Art*, N.Y. TIMES, Mar. 29, 2019, at C20.

55 *Id.* Further, on July 10, 2019, *New York Times* opinion writer Farhad Manjoo argued that “it’s time for *they*.” Farhad Manjoo, *It’s Time for “They,”* N.Y. TIMES, July 10, 2019, at A27.

56 Chelsea Lee, *Welcome, Singular “They,”* APA STYLE (Oct. 31, 2019), <https://apastyle.apa.org/blog/singular-they>.

57 Robert D. Eagleson, *A Singular Use of They*, 5 SCRIBES J. LEGAL WRITING 87 (1994–1995).

58 *Id.* at 89.

59 *Id.*

60 Debora Schweikart, *The Gender Neutral Pronoun Redefined*, 20 WOMEN’S RTS. L. REP. 1, 1 (1998).

61 *Id.* at 8.

Notwithstanding these forward-thinking recommendations over two decades ago, it has taken our profession a while to consider how the singular *they* could work seamlessly in actual day-to-day practice. Initially in this context, some scholars and experts counseled legal writers to write “conservatively” for fear of confusing readers. Recently, however, legal writing experts have suggested using straightforward textual sentences or footnotes to directly explain to readers why the writer intentionally employed a particular pronoun. These are easy solutions that can enhance awareness of societal change, accuracy in the way we refer to litigants, and respect for and inclusion of others.

Let’s gain context by reviewing some of the guidance our legal writing community has exchanged over the past twenty years about gender-neutral writing. These examples are not intended as *critique* from a position of hindsight, but instead as *perspective* on the evolution of this conversation and efforts at awareness-raising among legal writers over the past two decades.

In 2002, a judge wrote, “No singular can be *they*,” in an article about gender-neutral writing.⁶² Five years later, the judge advised colleagues in a *New York State Bar Journal* article about ethical judicial opinion writing, stating that “[s]ome states—New York included—require that opinions be gender neutral.”⁶³ The 2007 article did not address gender-neutral pronouns.

In 2009, in writing about federal appellate judges’ use of gender-neutral language in opinions, a law professor described the principle of “reader expectation theory.”⁶⁴ This theory posits “that writers communicate more effectively if they use linguistic structures that readers expect. Linguistic quirks cause readers to stumble, breaking their concentration.”⁶⁵ While the professor advocated that legal writers should use gender-neutral language, she also emphasized that “the legal writer’s purpose is usually not to shock but to explain or persuade. A dramatic departure from expectations may divert legal readers from the writer’s intended message.”⁶⁶ If we strictly apply this approach today, though, we prioritize concerns about potential reader distraction ahead of a legal writer’s potential role in helping effect societal change (while, of course, vigorously representing the client’s interests). So long as the legal writer and the client talk through the potential risks and then agree on a writing

62 Gerald Lebovits, *He Said—She Said: Gender-Neutral Writing*, N.Y. ST. B. ASS’N J., Feb. 2002, at 55.

63 Gerald Lebovits, *Ethical Judicial Writing—Part III*, N.Y. ST. B. ASS’N J., Feb. 2007, at 64.

64 Judith Fischer, *Framing Gender: Federal Appellate Judges’ Choices About Gender-Neutral Language*, 43 U.S.F. L. REV. 473, 489 (2009).

65 *Id.* (internal citations omitted).

66 *Id.* at 490.

strategy, a good piece of legal writing can respectfully yet firmly educate a reader who might be unfamiliar with a particular grammatical structure. We do this all the time with odd legal phrases or technical terminology; can't we also do it with a four-letter pronoun? A clear and concise explanation of its use at the outset, and perhaps a reminder later in the piece if necessary, can connect the reader more closely to the narrative, and ease potential qualms. The use of gender-neutral pronouns need not be "a dramatic departure"⁶⁷ from a reader's expectations if handled gracefully by the legal writer. Indeed, as the professor noted in a subsequent article a few years later, "Gender-*biased* language can distract the reader."⁶⁸ We will see examples of this in section VI.E. below.

In 2010, another law professor wrote about the Supreme Court's use of gender-neutral language.⁶⁹ She relayed how "[m]ost modern legal writing texts and style manuals recommend that writers use gender-neutral language."⁷⁰ However, with regard to the singular *they*, she described the consensus at the time as follows:

Several alternatives are not recommended or accepted in the world of formal legal writing, including the use of the word *they* as a singular pronoun and "slash constructions" (s/he, he/she). Although the use of *they* as a universal singular pronoun has deep historical roots, such use is not currently considered grammatical because it poses a problem of subject-verb agreement. While the singular *they* might slip by in speech, in formal writing it is more likely to be noticed and frowned upon. Ultimately, it may become an accepted gender-neutral pronoun for use with both singular and plural antecedents, but law may be the last to adopt such a practice.⁷¹

In 2013, another professor wrote an article for the *Idaho Advocate* counseling legal writers against using the singular *they*.⁷² Similar to the foregoing authors, she advised, "While this is perfectly acceptable in casual speech, it is not yet acceptable in formal writing. I suspect this is changing but for now do not use *they* as a singular pronoun in your writing."⁷³ In a footnote, however, the professor flagged the *New Oxford American*

67 *Id.*

68 Judith D. Fischer, *The Supreme Court and Gender-Neutral Language: Splitting La Difference*, 33 WOMEN'S RTS. L. REP. 218, 223 (2012) (emphasis added).

69 Leslie Rose, *The Supreme Court and Gender-Neutral Language: Setting the Standard or Lagging Behind?*, 17 DUKE J. GENDER L. & POL'Y 81 (2010).

70 *Id.* at 82.

71 *Id.* at 87.

72 Tenielle Fordyce-Ruff, *Problems with Pronouns Part III: Gender-Linked Pronouns*, THE ADVOC., June/July 2013, at 48.

73 *Id.*

Dictionary's position that "using *they* as a singular pronoun is becoming more acceptable" and may be preferable "to *he* in some instances."⁷⁴

A year later, another professor highlighted the growing awareness and acceptance of gender-neutral pronouns. He emphasized that, "[l]ike all living languages, the English language is an evolving work in progress. One aspect of the evolutionary process is that new words are coined and added to an existing vocabulary so as to meet emerging linguistic needs."⁷⁵ Citing Sweden's adoption of a new gender-neutral pronoun (discussed later in section V. of this article), he argued that "[t]he simplest way to avoid application of the masculine rule and related objectionable linguistic usages in drafting legislation and other legal rules is to adopt several new referent-inclusive pronouns."⁷⁶ He suggested new pronouns like *ee*, *eet*, and *herim*.⁷⁷

Still, as of five years ago, other legal writing scholars remained hesitant to encourage lawyers to use gender-neutral pronouns, reiterating the perceived dangers of "reader distraction." In 2015, a professor cautioned that "[l]anguage that may distract, annoy, or possibly inflame the reader is language that any practitioner representing a client, and writing with a specific objective, should avoid at all times."⁷⁸ She emphasized that, of course, "[g]ender-biased language can cast [a] shadow over the writer's purpose."⁷⁹ Nonetheless, with regard to gender-neutral pronouns, she warned, "Progressive though they may be, these nonspecific pronouns are still avant-garde to most people and are likely to distract and startle. They also may be perceived as malapropos gender activism and could alienate readers."⁸⁰

The same year, the *Idaho Advocate* author mentioned above wrote a follow-up piece, reporting that "[t]he language of the law is moving toward gender-and bias-free word choices, but not as fast as other disciplines."⁸¹ She mentioned in a footnote that "[u]sing *they* as a singular pronoun is becoming commonplace and accepted. Many legal readers, however, are still jarred by its usage."⁸²

74 *Id.* at 49 n.3 (emphasis added).

75 C. Marshall Thatcher, *What is "Eet"? A Proposal to Add a Series of Referent-Inclusive Third Person Singular Pronouns and Possessive Adjectives to the English Language for Use in Legal Drafting*, 59 S.D. L. REV. 79, 79 (2014).

76 *Id.* at 87.

77 *Id.* at 83–84.

78 Eunice Park, *How to Use Gender-Neutral Language in Legal Writing*, CAL. LAW., Aug. 2015, <http://legacy.callawyer.com/2015/08/how-to-use-gender-neutral-language-in-legal-writing/>.

79 *Id.*

80 *Id.*

81 Tenielle Fordyce-Ruff, *Fairness, Clarity, Precision, and Reaction: Gender-Free and Bias-Free Word Choice*, THE ADVOC., Aug. 2015, at 52.

82 *Id.* at 52 n.2 (citing BRYAN GARNER, GARNER ON LANGUAGE AND WRITING 244 (2009)).

In a similar vein, in 2016, another professor wrote an article about the singular *they* for the *Kansas Bar Association Journal*.⁸³ She emphasized that attorneys should “be conservative when we write because we usually write on another person’s behalf, for an audience that may not be receptive to freewheeling language choices. That context imposes a duty of care that probably keeps the practicing bar away from the cutting edge of a grammar shift.”⁸⁴ She counseled legal writers that “[w]hen we write for our clients it’s not a great idea to be on the grammar advance guard.”⁸⁵ Looking ahead though, she predicted, “Perhaps one day, singular *they* will seem as natural and correct as the universal *he* once did.”⁸⁶ At the time, like others before her, she refrained from nudging legal writers to forge that path.

Later in 2016, an article in the *Vermont Bar Journal* called on legal writers to embrace change and address the “hole in our language.”⁸⁷ The author couched gender-neutral pronouns as one solution to a language gap, stating, “Many members of the transgender and genderqueer communities do not feel comfortable with gendered pronouns like he or she. We need a gender-neutral pronoun to reflect this new reality.”⁸⁸ The author also illuminated the bigger societal picture: “Gender-neutral pronouns benefit the trans and gender-queer communities, but they also have a broader salutary effect. They blur or erase gender lines and therefore lead to greater equality.”⁸⁹ Thus, he urged, “Using gender-neutral pronouns disrupts and threatens male privilege by redefining gender roles through language.”⁹⁰

Shortly thereafter, in January 2017, a professor published an article about the singular *they* and the lesser known *ze* pronoun.⁹¹ She conveyed that “[a] new change is upon us to include persons who consider themselves gender neutral. Using ‘ze’ or the singular *they* as pronouns is gaining popularity and acceptance.”⁹² Like others before her, she advised legal writers “to write conservatively, that is, to follow the traditional rules of grammar. A brief-writer does not want his or her style to interfere with

83 Joyce Rosenberg, *A Singular Understanding of “They,”* J. KAN. B. ASS’N, Apr. 2016, at 20.

84 *Id.*

85 *Id.*

86 *Id.* at 21.

87 Greg Johnson, *Welcome to Our Gender-Neutral Future*, VT. B.J., Fall 2016, at 36.

88 *Id.*

89 *Id.* at 37.

90 *Id.*

91 Kathleen Dillon Narko, *They and Ze: The Power of Pronouns*, CBA REC., Jan. 2017, at 48.

92 *Id.*

a judge's reading of the brief."⁹³ Looking ahead, however, she indicated, "My advice may be different in the not-too-distant future. A generational change is afoot."⁹⁴

The same year, Sarkisov and Kude wrote an article for the San Francisco Bar Association, acknowledging that "modern legal writers might experience discomfort, or uncertainty, in practicing gender neutral writing. *They* as third person singular might seem too informal or initially awkward."⁹⁵ However, Sarkisov and Kude urged legal writers not to let awkwardness stand in the way of necessary change. They reassured writers that "hesitation will inevitably ease with continued usage and increasing exposure to others' usage."⁹⁶ They offered nine grammatical options for cultivating gender neutrality, but ultimately suggested Option 10: "[B]ecause language is living and changing, and the choices we make to be unbiased in our words diminish the biases passed onto future generations reading those words—[begin] to use *they*."⁹⁷ Sarkisov and Kude encouraged, "It is through writing that change is effected, and effective change is reflected through writing. At the least, legal writing should be more progressive than the DMV."⁹⁸

Even more recently, in 2018, a professor wrote an *Arizona Attorney* article asserting, "*They* is now a singular gender-neutral pronoun. Maybe we should accept it and move on with our lives."⁹⁹ She reminded readers that, "[i]n fact, for centuries people have used *they* and *them* to describe an individual whose identity, and thus gender, is unknown or irrelevant. Chaucer did it in *The Canterbury Tales*. Emily Dickinson did it in personal correspondence. Shakespeare did it in his plays and poetry."¹⁰⁰ The professor acknowledged that legal professionals "are notoriously late adopters, especially when it comes to linguistic change."¹⁰¹ This is because

93 *Id.* at 51.

94 *Id.* at 52.

95 Sarkisov & Kude, *supra* note 23, at 42.

96 *Id.* at 42–43.

97 *Id.* at 43.

98 *Id.* Regarding the Department of Motor Vehicles, on May 29, 2019, the *New York Times* reported that "nine state motor vehicles bureaus have recently added the 'X' [non-binary gender] option to driver's licenses without involving the legislature. Several other jurisdictions, including New York City, Oregon, New Jersey and New Mexico, have also begun to allow people to change the gender on their birth certificate to 'X' [instead of male or female]." Amy Harmon, *Which Box Do You Check? Some States Are Offering a Nonbinary Option*, N.Y. TIMES, May 29, 2019, <https://nyti.ms/2Wc7F49l>; see also Sarkisov & Kude, *supra* note 23, at 42 ("In October 2017, Governor Jerry Brown signed SB179 into law, offering a gender-neutral option on state documents for those who do not identify as male/female."); Brief of Amici Curiae States of California, Colorado, Maine, Minnesota, Nevada, New Jersey, Oregon, Vermont and Washington in Support of Appellee, *Zzyym v. Pompeo*, 2019 WL 2171322, at *3 nn.1–4 (10th Cir. May 15, 2019) (No. 18-1453).

99 Susie Salmon, *Them!*, ARIZ. ATT'Y, Oct. 2018, at 10.

100 *Id.*

101 *Id.*

“we don’t want our audience to think that our use of the singular *they* indicates a carelessness about noun/pronoun agreement or ignorance of grammar rules in general. But much like the common law, the English language evolves.”¹⁰² She offered legal writers a simple solution: “[O]f course, if an individual communicates a desire to be addressed and described using a particular set of pronouns, respect that wish. And if you’re concerned about confusion, you can always drop a footnote explaining the reasons behind your pronoun usage to your audience.”¹⁰³

An attorney gave similar advice in a 2018 article in the *Minnesota Lawyer*.¹⁰⁴ She articulated three potential uses for the pronoun *they*: “(1) the familiar gender-neutral plural (‘the students should bring their backpacks’); (2) the reaffirmed gender neutral singular (‘each student should bring their backpack’); and (3) the shiny new non-binary singular (‘Davon will bring their backpack.’).”¹⁰⁵ She posed the question, “What’s a writer to do? How about what a good writer always does: accurately reflect the facts while respecting both our readers and the people we write about.”¹⁰⁶ Like other authors mentioned above, the attorney advised legal writers to be change-makers for inclusion and transparency:

Recognize that you are on the frontiers of inclusion, and help your reader join you there. When introducing someone who uses a pronoun other than “he” or “she,” try dropping in an early footnote or a parenthetical note that “X uses the pronoun *they*.”¹⁰⁷

In 2019, another attorney writing about her prior experience as a judicial clerk for an Oregon Supreme Court Justice modeled how to use the singular *they* with assertion, transparency, and clarity.¹⁰⁸ After her first use of the pronoun in her essay, she inserted a footnote stating, “I have adopted the singular ‘they’ for this essay because it is both more inclusive and more flexible.”¹⁰⁹ She also mentioned, “I understand that [the Justice for whom I clerked] has come to accept the singular ‘they.’”¹¹⁰ The same year, two professors wrote an article about the singular *they* for the

102 *Id.*

103 *Id.*

104 Karin Ciano, *Legal Writing Notebook: What’s Up with the Singular “They” These Days?*, MINN. LAW., May 7, 2018.

105 *Id.*

106 *Id.*

107 *Id.*

108 Nora Coon, *The Landau Look: A Clerk’s-Eye View*, 97 OR. L. REV. 569 (2019).

109 *Id.* at 569 n.2.

110 *Id.*

Michigan Bar Journal.¹¹¹ They indicated that “[t]he flexibility gained is in avoiding the clumsy *he* or *she*, capturing collective nouns with increased comfort, and respecting those who prefer a gender-neutral pronoun.”¹¹² Ultimately, they advised, “Attorneys, as wordsmiths, should embrace these changes.”¹¹³

Finally, in a recent post on the Appellate Advocacy Blog, a professor relayed how a mindful use of the singular *they* is a “grammatical, rhetorical, and ethical choice” in legal writing.¹¹⁴ She asserted that when we use the gender-inclusive pronoun, we are “sending a message about [our] attitude toward [our] professional role as an officer of the court who is responsible for the fair administration of the judicial system, a system that must treat all participants without bias or discrimination.”¹¹⁵

The words of the foregoing professors, attorneys, and judges over the past twenty years illustrate the care that legal writers take in making sure our written work touches our audiences. The evolution of the conversation also shows that we, as a legal writing community, must constantly grow—to make sure our work includes more voices and narrates their stories. We cannot remain stuck in dated grammar rules or engage in a form of self-censorship in an effort to avoid distracting, annoying, inflaming, or alienating legal readers and meanwhile marginalize members of our society. Instead, we can give our legal readers more credit than that. With transparent, helpful, and concise explanations, our readers (like us) can adjust. We can thoughtfully explain to readers *why* we have made particular pronoun choices in our legal writing—just as we often need to clarify our use of peculiar legal phrases or puzzling technical terms—and then move on to our substantive narrative and content.

V. Putting Our Singular They in Broader Context

Legal writers and readers who might initially be resistant to, or unfamiliar with, the singular *they*, or feel that the legal profession is not quite ready for this grammatical shift, might benefit from greater context. This section describes the efforts afoot in some American jurisdictions to incorporate gender-neutral language into legislation and government

111 Brad Charles & Thomas Myers, *Evolving They*, MICH. B. J., June 2019, at 38.

112 *Id.*

113 *Id.*

114 Kirsten K. Davis, *He, She, or They: Thinking Rhetorically About Gender and Personal Pronouns*, APPELLATE ADVOCACY BLOG (Sept. 5, 2019), https://lawprofessors.typepad.com/appellate_advocacy/2019/09/he-she-or-they-thinking-rhetorically-about-gender-and-personal-pronouns.html (citing Tom Cobb, *Embracing the Singular “They,”* NW LAW., May 2019, at 12).

115 *Id.*

documents. This section of the article further situates our discussion of gender-neutral pronouns in a global framework, by chronicling the successes and challenges of inclusive writing movements in other countries and legal systems. Language activists advocate that gender-inclusive language helps remedy the grammatical erasure of marginalized citizens. Overall, linguistic changes indeed take time, even more so in languages like French, Spanish, and Italian in which—unlike in English—nouns and adjectives historically have assumed either masculine or feminine genders. Nonetheless, as the following examples illustrate, change is possible, and it is happening all around us.

A. Gender-Neutral Language Initiatives in American Legal Jurisdictions

Many jurisdictions in the United States have launched initiatives to incorporate and use gender-neutral language in legislation. Some states even have proposed measures to amend their constitutions to incorporate gender-neutral language.¹¹⁶

According to the National Conference of State Legislatures, as of 2013, “[a]bout half of the states have moved toward using gender-neutral language in their official documents.”¹¹⁷ However, simply doing a “find-and-replace,” scanning the state codes for the word *he* and adding *she* obviously is not going to be enough.¹¹⁸ This is especially true now that many states are recognizing a “third gender option” on ID cards and birth certificates.¹¹⁹

Some California lawmakers have expressly acknowledged the need to consider how pronoun usage in legislation affects nonbinary and transgender citizens. In 2018, California’s Assembly Concurrent Resolution No. 260 proposed a measure to “encourage the Legislature to engage in a coordinated effort to revise existing statutes and introduce new legislation

116 See *Utah Gender-Neutral Constitutional Language Amendment*, BALLOTEDIA, [https://ballotpedia.org/Utah_Gender-Neutral_Constitutional_Language_Amendment_\(2020\)](https://ballotpedia.org/Utah_Gender-Neutral_Constitutional_Language_Amendment_(2020)) (last visited Apr. 5, 2020) (mentioning a proposed measure in Utah; successful measures in New York, Maine, Maryland, and California; unsuccessful measures in Nebraska, New Hampshire, Wisconsin); see also Associated Press, *Some State Constitutions Are Going Gender-Neutral*, N.Y. TIMES, May 22, 2003, at A18 (mentioning measures in Rhode Island and Michigan).

117 Katy Steinmetz, *Down the Manhole: State Officials Grapple with Gender-Neutral Language*, TIME, Feb. 5, 2013, <https://swampland.time.com/2013/02/05/down-the-manhole-state-officials-grapple-with-gender-neutral-language>. For example, Colorado’s Executive Committee of Legislative Council “directed that gender-neutral language be used for all legislative measures.” *Excerpt on Gender-Neutral Drafting from Colorado Legislative Drafting Manual*, NAT’L CONF. OF STATE LEGISLATURES, <https://www.ncsl.org/Portals/1/Documents/lsss/ExcerptGender-NeutralDraftingCO.pdf> (last visited Apr. 5, 2020). Additionally, since 2013, Washington, D.C. “has made great strides in ensuring the use of gender neutral language in laws, with changes to more than 3500 section[s] of the state code.” Avani Bansal & Vandita Morarka, *Gender, Language and the Law*, LIVE LAW, Sept. 7, 2017, <https://www.livelaw.in/gender-language-law/>.

118 Steinmetz, *supra* note 117.

119 See *supra* note 98.

with inclusive language by using gender-neutral pronouns or reusing nouns to avoid the use of gendered pronouns.”¹²⁰ In the recitals to the resolution, the drafters explained that “[t]he use of the pronouns ‘he’ or ‘she’ for individuals is not inclusive of all transgender people, nonbinary people who may not ascribe to a particular or fixed gender, or people who otherwise use different pronouns.”¹²¹ The measure also mentioned that “[c]ertain writing style guides, including the Chicago Manual of Style and the Associated Press stylebook, have recently accepted the use of ‘they’ as a singular pronoun in certain cases.”¹²² The California resolution passed.¹²³

At least two jurisdictions have enacted laws imposing penalties for an entity’s intentional failure to honor an individual’s identified pronouns. For example, the New York City Commission on Human Rights provides Legal Enforcement Guidance on Gender Identity/Gender Expression. It explains individual pronoun usage as follows: “Most people and many transgender people use female or male pronouns and titles. Some transgender, non-binary, and gender non-conforming people use pronouns other than he/him/his or she/her/hers, such as they/them/theirs or ze/hir.”¹²⁴ The Commission’s website—which describes various aspects of the New York City Human Rights Law—indicates that the law “requires employers and covered entities to use the name, pronouns, and title (e.g., Ms./Mrs./Mx.) with which a person self-identifies, regardless of the person’s sex assigned at birth, anatomy, gender, medical history, appearance, or the sex indicated on the person’s identification.”¹²⁵ The website notes that “[t]he Commission can impose civil penalties up to \$125,000 for violations, and up to \$250,000 for violations that are the result of willful, wanton, or malicious conduct.”¹²⁶ Similarly, a California statute that went into effect on January 1, 2018, states that “it shall be unlawful for a long-term care facility or facility staff to . . . willfully and

120 Assemb. Con. Res. 260, 2017–2018 Reg. Sess. (Cal. 2018).

121 *Id.*

122 *Id.*

123 *Id.*

124 See N.Y.C. Comm’n on Human Rights, *supra* note 11, at 4 n.15.

125 *Id.* Covered entities include employers and providers of public accommodations and housing. *Id.*

126 *Id.* In 2017, Canada’s Senate passed Bill C-16 which “prohibits discrimination against transgender Canadians and affords them protection against hate crimes.” Phil Heidenreich, *Senate Passes Bill C-16 Which Defends Transgender Rights*, GLOBAL NEWS, June 16, 2017, <https://globalnews.ca/news/3532824/senate-passes-bill-c-16-which-defends-transgender-rights/>. A media battle ensued over whether this bill criminalized a refusal to use an individual’s personal pronouns, with opponents to the bill arguing that it violates the right to freedom of expression. As Professor Brenda Cossman explains in her article, *Gender Identity, Gender Pronouns, and Freedom of Expression: Bill C-16 and the Traction of Specious Legal Claims*, 68 U. TORONTO L.J. 37 (2018), “there is nothing in Bill C-16 that would risk criminalizing the misuse of gender pronouns.” *Id.* at 46. Further, “to the extent that Bill C-16 might protect trans and gender non-binary individuals from harassment through the misuse of pronouns, it would not be a violation of freedom of expression.” *Id.*

repeatedly fail to use a resident's preferred name or pronouns after being clearly informed of the preferred name or pronouns."¹²⁷

Thus, in these contexts in New York and California at least, grammar rules are not a valid justification for declining to employ the singular they to refer to an individual who uses that pronoun.

B. Gender-Fair Language Movements in International Jurisdictions

The call for gender-inclusive language is gaining traction in many parts of the world. Language advocates in numerous other countries have launched movements toward “inclusive writing” or “gender-fair writing”—with the initial goal of reducing or eliminating the masculine bias. Modernizing well-entrenched language traditions, especially in European languages in which nouns are either masculine or feminine (unlike English), is obviously not an easy endeavor. Advocates have proposed various ways of changing languages to achieve the goal of including women, noting,

Gender-fair language (GFL) aims at reducing gender stereotyping and discrimination. Two principle strategies have been employed to make languages gender-fair and to treat women and men symmetrically: neutralization and feminization. Neutralization is achieved, for example, by replacing male-masculine forms (policeman) with gender-unmarked forms (police officer), whereas feminization relies on the use of feminine forms to make female referents visible.¹²⁸

One example of feminization is converting “professore” in Italian to “professoressa,” to refer to a female professor. Feminization of words might not always be the ideal solution. Language experts report, for instance, that “[t]he Italian feminine suffix -essa, for example, has a slightly derogatory connotation.”¹²⁹

A vivid example of a language's ability to shift toward gender inclusion is Sweden's formal adoption of a new gender-neutral pronoun—*hen*. This word, referred to as a “neologism” (a “newly coined word or expression”),¹³⁰ “is used to refer to a person without revealing their gender—either because it is unknown, because the person is trans-

127 Cal. Health & Safety Code § 1439.51(a)(5) (2018).

128 Sabine Sczesny, Magda Formanowicz & Franziska Moser, *Can Gender-Fair Language Reduce Gender Stereotyping and Discrimination?*, 7 FRONTIERS IN PSYCHOLOGY, art. 25 (Feb. 2016) (abstract).

129 *Id.* at 3.

130 *Id.*

gender, or the speaker or writer deems the gender to be superfluous information.”¹³¹ Swedish language experts remind us that “[t]he word ‘hen’ was coined in the 1960s when the ubiquitous use of ‘han’ (he) became politically incorrect.”¹³² Linguists sought a way around “the clumsy ‘han/hon’ (s/he) construction.”¹³³ *Hen* “resurfaced around 2000, when the country’s small transgender community latched onto it, and its use has taken off in the past few years. It can now be found in official texts, court rulings, media texts and books.”¹³⁴ The word “appeared in 2012 in a children’s book where it served as an alternative to the gender-marked pronouns ‘she’ (*hon*) and ‘he’ (*han*).”¹³⁵

Sweden’s *hen* serves as a good model for the concept that language can adapt to, and effect, societal change. In fact, the country’s language academy, established in 1785, was set up “with the aim to adapt the Swedish languages to changing cultural and societal influences.”¹³⁶ To test the impact of the new pronoun *hen*, researchers conducted a study in which they asked 2,000 native Swedes to associate a stick figure with a pronoun; the participants chose *hen* more than the traditional *hon* or *han*.¹³⁷ Reportedly, “[t]his study suggests that new words can lead to new ideas in society.”¹³⁸ In 2018, the World Economic Forum ranked Sweden as one of the top three gender-equal countries in the world.¹³⁹ Interestingly, Sweden’s neighbor—Norway—rejected a proposal in parliament to adopt its own “third gender” personal pronoun.¹⁴⁰

131 AFP in Stockholm, *Sweden Adds Gender-Neutral Pronoun To Dictionary*, THE GUARDIAN, Mar. 24, 2015, <https://www.theguardian.com/world/2015/mar/24/sweden-adds-gender-neutral-pronoun-to-dictionary>.

132 *Id.*

133 *Id.*

134 *Id.*

135 Szczesny, *supra* note 128, at 3; see also Adam Rogers, *Actually, Gender-Neutral Pronouns Can Change a Culture*, WIRED, Aug. 15, 2019, <https://www.wired.com/story/actually-gender-neutral-pronouns-can-change-a-culture/> (“In 2012 Jesper Lundquist wrote a children’s book, *Kivi and the Monster Dog*, that referred to the main character with, as others had proposed, the neologized pronoun *hen*”).

136 Rick Noack, *Sweden Is About to Add a Gender-Neutral Pronoun To Its Official Dictionary*, WASH. POST, Apr. 1, 2015, <https://www.washingtonpost.com/news/worldviews/wp/2015/04/01/sweden-is-about-to-add-a-gender-neutral-pronoun-to-its-official-dictionary/>.

137 Ivan de Luce, *Sweden Recently Introduced a Gender-Neutral Pronoun. Psychologists Say It’s Already Changing the Way People Think*, BUS. INSIDER, Aug. 19, 2019, https://www.businessinsider.com/sweden-has-non-gendered-pronoun-changing-the-way-people-think-2019-8?utm_source=hearst&utm_medium=referral&utm_content=allverticals.

138 *Id.*

139 WORLD ECONOMIC FORUM, THE GLOBAL GENDER GAP REPORT 2018 (Dec. 17, 2018), http://www3.weforum.org/docs/WEF_GGGR_2018.pdf.

140 AFP, *Norway Parliament Turns down Third Gender “Hen,”* THE LOCAL NO, Feb. 28, 2017, <https://www.thelocal.no/20170228/norway-parliament-says-no-to-third-hen-gender>. Norway is ranked #2 (just ahead of Sweden) in the World Economic Forum’s Global Gender Gap Report. See *The Global Gender Gap Report 2018*, *supra* note 139. Figure 1 of this report shows that the “top seven countries in the rankings have closed at least 80% of the gap. Among them, the top four are Nordic countries (Iceland, Norway, Sweden and Finland).” *Id.* at 7–8.

Numerous international agencies, governments, and academic institutions have issued guidelines to assist citizens and members of academic communities in raising awareness about, and adopting, gender-inclusive language. Many of these pamphlets and guidebooks explain how *gendered* language reinforces male privilege, and why gender-inclusive language benefits society. For example, UNESCO (the United Nations Educational, Scientific, and Cultural Organization) issued Guidelines for Gender-Neutral Language in 1999. UNESCO created the guidelines “to deal with a growing concern that language does in fact influence thought and that the continuous usage of sexist language would, in effect, create representations that imply that women are inferior to men.”¹⁴¹ UNESCO aspired “to transform behavior and attitudes that legitimize and perpetuate the moral and social exclusion of women’ under the premise that current language usage was ‘exclusionist to women and girls.’”¹⁴² Later, in May 2008, the European Parliament promulgated a guideline on gender-neutral language “for all of the community’s working languages.”¹⁴³ The document asserts “that language has an influencing effect on behavior and perceptions.”¹⁴⁴

The Australian Government offers a Guide to Accessibility and Inclusivity that encourages the use of “inclusive language and terms.”¹⁴⁵ It advises writers to recraft sentences “to avoid using gender-specific singular pronouns (he/she, her/his, her/him).”¹⁴⁶ Tasmania’s Department of Education also issued Guidelines for Inclusive Language, noting that “[h]istorically in the English-speaking world, language usage has privileged men and often rendered women invisible or inferior.”¹⁴⁷ The Guidelines instruct, “In language terms, the most inclusive strategy is to avoid references to a person’s gender except where it is pertinent to the discussion. This often involves seeking gender neutrality when using terms and pronouns.”¹⁴⁸ The Victorian Government in Australia explains in its

141 Franziska Moser, Sayaka Sato, Tania Chiarini, Karolina Dmitrow-Devold & Elisabeth Kuhn, *Comparative Analysis of Existing Guidelines for Gender-Fair Language Within the ITN LCG Network*, LANGUAGE COGNITION GENDER, MARIE CURIE INITIAL TRAINING NETWORK, Mar. 2011, at 9 (internal citations omitted).

142 *Id.*

143 *Id.* at 10.

144 *Id.*

145 *Accessibility and Inclusivity*, AUSTRALIAN GOVERNMENT, <http://guides.service.gov.au/content-guide/accessibility-inclusivity/> (last visited Apr. 12, 2020).

146 *Id.*

147 TASMANIAN GOVERNMENT DEPARTMENT OF EDUCATION, *INCLUSIVE LANGUAGE GUIDELINES 6* (Dec. 23, 2019), <https://documentcentre.education.tas.gov.au/Documents/Guidelines-for-Inclusive-Language.pdf>.

148 *Id.* Similarly, the University of Calgary in Canada issued an Inclusive Language Guide, emphasizing that “[i]nclusive communication avoids use of words or expressions that exclude specific groups of people or are no longer acceptable.” The Guide espouses a forward-thinking viewpoint: “The language associated with gender, disabilities, age, class, size, Indigenous Peoples, racial, ethnic and religious identity can be sensitive and is always changing as societal views change and groups choose to redefine their own identities.” The Guide defines “inclusion” as “[t]he process of creating a culture and

Inclusive Language Guide, “Language has the power to empower individuals and strengthen relationships.”¹⁴⁹ The Guide states that “[i]nclusive language ensures everyone is treated with respect as such language is free from words or tones that reflect prejudice, discrimination or stereotypes.”¹⁵⁰ Regarding pronouns, the Guide indicates that “[s]ome people prefer to be described with their first name only or a non-binary pronoun such as ‘they’ rather than a gendered pronoun. Others prefer no pronoun at all. Also be aware that some gender neutral pronouns exist, such as ‘zie’ and ‘hir.’”¹⁵¹ Likewise, the Canadian Translation Bureau “published a linguistic recommendation on gender inclusivity in correspondence.”¹⁵² It explains how “[s]omeone who doesn’t identify with the masculine or feminine gender is referred to as having a non-binary gender identity.”¹⁵³

In 2014, the German federal justice ministry required all state bodies to use “‘gender-neutral’ formulations in their paperwork.”¹⁵⁴ Thereafter, in 2017, Germany’s highest court “found that having only two genders for official purposes was unconstitutional.”¹⁵⁵ The court endorsed “creating a third gender category for people born with ambiguous sexual traits and those who do not identify as either male or female, or even dispensing with gender altogether in public documents.”¹⁵⁶ The ruling required German authorities “to change thousands of laws and draw up new rules for issuing passports and birth certificates.”¹⁵⁷

Australia’s capital city of Canberra now issues birth certificates that include a nonbinary gender designation.¹⁵⁸ Likewise, the province of Ontario, Canada began allowing citizens to provide alternative gender and sex information on government identification applications and forms. Instead of the traditional male/female binary option, individuals can

environment that recognizes, appreciates, and effectively utilizes the talents, skills, and perspectives of every individual.”
UNIV. OF CALGARY, INCLUSIVE LANGUAGE GUIDE (June 2017), <https://observatori382866246.files.wordpress.com/2019/02/inclusive-language-guide-june-13-2017.pdf>.

¹⁴⁹ VICTORIAN GOV’T, LGBTQI+ INCLUSIVE LANGUAGE GUIDE (Aug. 11, 2016) (copy on file with author).

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² Josephine Versace, *Making Letters and Emails Gender-Inclusive*, LANGUAGE PORTAL OF CANADA (Feb. 5, 2018), <https://www.noslangues-ourlanguages.gc.ca/en/blogue-blog/inclusifs-gender-inclusive-eng>.

¹⁵³ *Id.*

¹⁵⁴ Philip Oltermann, *Germans Try to Get Their Tongues around Gender-Neutral Language*, THE GUARDIAN, Mar. 24, 2014, <https://www.theguardian.com/world/2014/mar/24/germans-get-tongues-around-gender-neutral-language>.

¹⁵⁵ Madhvi Raman, *Will a New Law Forever Change the German Language?*, SMITHSONIAN MAG., Feb. 28, 2018, <https://www.smithsonianmag.com/arts-culture/will-new-law-forever-change-german-language-180968289/>.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ Ariel Jao, *Gender “X”: Ontario Issues Its First “Nonbinary” Birth Certificate*, NBC NEWS, May 9, 2018, <https://www.nbcnews.com/feature/nbc-out/gender-x-ontario-issues-its-first-ever-non-binary-birth-n872676>.

choose “x” “which includes Trans, Non-Binary, Two-Spirit, and Binary people who don’t want to disclose their gender identity.”¹⁵⁹ In May 2018, Ontario issued its first “nonbinary” birth certificate.¹⁶⁰ The Canadian provinces of Northwest Territories, Newfoundland, and Labrador also adopted nonbinary birth certificate policies.¹⁶¹ In a unanimous vote in 2019, the Icelandic Parliament passed a new gender identity law, permitting individuals who identify as non-binary to “change their legal gender at the national registry using the new third gender option of ‘x.’”¹⁶²

Some governments are even reevaluating gendered language in their national anthems. In 2012, Austria changed its national anthem, replacing the lyrics “home to great sons” with “home to great daughters and sons,” and “fraternal choirs” with “jubilant choirs.”¹⁶³ In January 2018, Canada revised its national anthem to be gender-inclusive. The original language stated, “O Canada! Our home and native land! True patriot love in all thy sons command.”¹⁶⁴ The new language deletes the words “thy sons” and replaces the phrasing with “in all of us command.”¹⁶⁵ Obviously, this change did not happen overnight: “The vote was the culmination of the work of numerous women who had been calling for the change for almost 40 years.”¹⁶⁶ Advocates in Germany have proposed changing the language in the national anthem from “fatherland” to “homeland” and altering the word “brotherly” to “courageously.” This proposal has not yet been successful.¹⁶⁷

As the foregoing examples illustrate, movements toward inclusive language are having global reach.

159 *Gender and Sex Information on Government IDs and Forms*, GOV’T OF ONTARIO, <https://www.ontario.ca/page/consultation-gender-and-sex-information-government-ids-and-forms> (last updated Feb. 7, 2020).

160 Jao, *supra* note 158.

161 *Id.*

162 Vic Parsons, *Iceland Adds Third Gender Option and Strengthens Trans Rights in Unanimous Vote*, PINK NEWS, June 25, 2019, <https://www.pinknews.co.uk/2019/06/25/iceland-third-gender-trans-rights/>.

163 Leonid Bershidsky, *Why Germany Won’t Have a Gender-Neutral Anthem*, BLOOMBERG, Mar. 7, 2018, 11:00 PM PST, <https://www.bloomberg.com/opinion/articles/2018-03-07/gender-neutral-national-anthems-are-the-future-but-timing-is-everything> (explaining that Austria kept the word “Fatherland” in its anthem).

164 *The Women Who Fought to Make Canada’s National Anthem Gender-Neutral*, BBC, Feb. 9, 2018, www.bbc.com/news/stories-42977303.

165 *Id.*

166 *Id.*

167 In March 2018, “German Chancellor Angela Merkel . . . rejected a ‘gender sensitive’ move by a government commissioner on equality who called for the removal of the word ‘Fatherland’ from the country’s national anthem.” Benjamin Fearnow, *Merkel Dismisses German Official’s “Gender -Neutral” National Anthem Proposal*, NEWSWEEK, Mar. 5, 2018, 2:19 PM EST, <https://www.newsweek.com/german-national-anthem-kristin-rose-mohring-feminist-sexist-fatherland-831152>; see also AFP, *Row over German Anthem Erupts Amid Nationalism Debate*, FRANCE 24, May 10, 2019, <https://www.france24.com/en/20190510-row-over-german-anthem-erupts-amid-nationalism-debate>.

C. La Résistance

Despite the many advancements mentioned above, strong resistance to gender-neutral language and the “inclusive writing” movement persists. For example, prominent linguists and language institutions in France and Spain have outright opposed the inclusive language movement.

French nouns (and their corresponding pronouns and adjectives) are either masculine or feminine. French “has no neutral grammatical gender.”¹⁶⁸ Further, there is a deep-rooted grammatical hierarchy, or patriarchy: “French students are taught that ‘the masculine dominates over the feminine.’”¹⁶⁹ Applying this rule, if a writer or speaker were describing—in French—a gathering of 500 lawyers, 499 female and one male, the writer or speaker would use the *masculine* form of the word for “lawyers”: *les avocats* (instead of *les avocates et l’avocat*). Critics of this historical and traditional grammar rule argue that “[c]ertain linguistic constructions . . . efface women from being seen in various personal and professional capacities.”¹⁷⁰

Proponents of the inclusive language movement in France have advocated for *neutralization* and *feminization*. One creative option is a proposed “grammatical tool that consists of adding a ‘median-period’ at the end of masculine nouns, followed by the feminine ending, thus indicating both gendered versions of every noun (like *musicien.ne.s*, which would read as ‘male musicians and female musicians’).”¹⁷¹ The median periods also are referred to as “middots” or “interpuncts.” In response to the movement, Microsoft Word released an inclusive French writing option in 2016, which helps writers construct the median periods or “middots.”¹⁷² The following year, in 2017, a French publishing company called Hatier released an “inclusive” textbook for third grade children “based on the 2015 recommendations of the High Council for Gender

168 Annabelle Timsit, *The Push to Make French Gender-Neutral: Can Changing the Structure of a Language Improve Women's Status in Society?*, THE ATLANTIC, Nov. 24, 2017, <https://www.theatlantic.com/international/archive/2017/11/inclusive-writing-france-feminism/545048/>.

169 *Id.*

170 James McAuley, *Gatekeepers Say Gender-Neutral Pronouns Pose “Deadly Danger” for the French Language*, WASH. POST, Oct. 27, 2017, 10:24 EDT, <https://www.washingtonpost.com/news/worldviews/wp/2017/10/27/is-making-french-less-sexist-a-threat-to-the-language-the-academie-francaise-says-oui/>; see also Mary Aviles, *In Spanish, Inclusive Language Can Be at Odds with Grammar Rules*, GLOBAL VOICES, Dec. 30, 2015, 17:04 GMT, <https://globalvoices.org/2015/12/30/in-spanish-inclusive-language-can-be-at-odds-with-grammar-rules/> (Martyn Davies trans.) (“Feminist linguists maintain that this forced inclusion of the feminine within the masculine is a form of exclusion from the language. Being contained and invisible within masculine nouns forces women to ask themselves the same question thousands of times throughout their lives: ‘Are they speaking about me?’ whilst men never experience this.” (quoting Sandra Russo)).

171 Timsit, *supra* note 168.

172 *Id.*

Equality, which had outlined 10 ways to make the French language more gender-neutral.”¹⁷³ This caused an “uproar.”¹⁷⁴

The foregoing suggestions and developments sparked spirited debate—some might even say, alarm—in France.¹⁷⁵ Perhaps the most staunch critic has been L’Académie Française itself, the established “council for matters pertaining to the French language.”¹⁷⁶ The Academy has declared the French language to be “in mortal danger” as a result of this movement.¹⁷⁷ French Prime Minister Edouard Philippe wrote “to ministers describing the masculine form as a neutral term applicable to women, and demanding that ministries avoid inclusive writing, to boost ‘intelligibility and clarity.’”¹⁷⁸ In 2017, he banned “gender equal words from government texts,” reiterating that “state administrations must comply with grammatical and syntactic rules, especially for reasons of intelligibility and clarity.”¹⁷⁹ Still, inclusive language advocates in France have achieved some forward momentum. In early 2019, the Académie Française approved “feminization” of job titles.¹⁸⁰

A similar quarrel is underway in Spain. The Spanish language enforces the same masculine-dominant grammar rule as the French: “All nouns in Spanish are either masculine or feminine, and according to the language’s rule, the masculine form trumps the feminine when describing a group of people containing members of both genders.”¹⁸¹ Like French advocates’ inventive middots, creative Spanish speakers

173 *Id.*

174 *Id.*

175 Agence France-Presse, *No More Middots: French PM Clamps down on Gender-Neutral Language*, THE GUARDIAN, Nov. 21, 2017, 11:32 EST, <https://www.theguardian.com/world/2017/nov/21/no-more-middots-french-pm-clamps-down-on-gender-neutral-language> (“Moves to end the linguistic dominance of the masculine over the feminine have sparked impassioned debate in France.”).

176 Timsit, *supra* note 168.

177 *Id.*; see also Ben McPortland, *French PM Bans Ministers from Using Female-Friendly Writing*, THE LOCAL FR, Nov. 21, 2017, <https://www.thelocal.fr/2017/11/21/french-pm-bans-gender-equal-writing-from-official-texts> (“[T]he Académie said [inclusive writing] puts the French language ‘in mortal danger for which our nation will be accountable to future generations.’”); McAuley, *supra* note 170 (observing that the Académie Française has “issued a fiery condemnation of what in France is known as ‘inclusive writing’”).

178 Alasdair Sandford, *France Steps Back from Gender-Neutral Language*, EURONEWS, Nov. 21, 2017, <https://www.euronews.com/2017/11/21/french-prime-minister-says-non-to-gender-neutral-language> (discussing 2015 guidelines by the Haut Conseil à l’égalité entre les femmes et les hommes).

179 McPortland, *supra* note 177.

180 *Official Guardians of French Language Approve “Feminisation” of Work Titles*, FRANCE 24, Feb. 28, 2019, <https://www.france24.com/en/20190228-french-language-academie-francaise-feminisation-professions>; Jon Henley, *Académie Française Allows Feminisation of Job Titles*, THE GUARDIAN, Mar. 1, 2019, 13:43 EST, <https://www.theguardian.com/world/2019/mar/01/academie-francaise-allows-feminisation-of-job-titles>.

181 See Aviles, *supra* note 170.

are moving away from this rule and toward what they consider to be more inclusive language. Instead of saying “todos” (the masculine plural form of “everyone”), they’ll use “todos y todas” or even “tod@s” with the *at sign* symbolizing both the “a” and “o” ending in one character.¹⁸²

Like L’Académie Française, Spain’s highest language authority—The Royal Spanish Academy (Real Academia Española (RAE))—has resisted such changes.¹⁸³ Linguist Ignacio Bosque has stated, “[T]he generic use of the masculine when both sexes are present is firmly established in the grammatical system of Spanish, and it does not make sense ‘to force linguistic structures.’”¹⁸⁴ (This begs the question: Isn’t that what the traditionalists are doing? Forcing an *outdated* linguistic structure?) Others question the use of the @ sign as “not linguistic [or] pronounceable.”¹⁸⁵

In South America, specifically in Argentina, teenagers are championing a gender-inclusive language movement, substituting a gender-neutral “e” for the masculine “o” or the feminine “a” at the end of nouns.¹⁸⁶ For example, instead of “los soldados” (soldiers), one eighteen-year-old used the word “*les soldades*” at a student government rally, sparking controversy.¹⁸⁷

Italy’s *resistenza* to gender-neutral language seems less vocal but still present. An Italian astrophysics scholar, Dr. Marina Orio, reported that “[d]espite the fact that the Italian government has issued guidelines for the use of more gender-neutral language in public institutions like universities and research institutes, these guidelines are blatantly disregarded.”¹⁸⁸

Of course, it is important to recognize, as Levi C.R. Hord points out, that “grammatically gendered languages” like French, Spanish, and Italian might have a harder time than other languages transitioning to gender inclusive writing, “having less linguistic ‘room’ for subversion and innovation due to strict grammatical structures and agreement requirements.”¹⁸⁹ Nonetheless, languages like Swedish and English—not subject to the same masculine/feminine grammar binary—could lead the way in carving out new vocabulary and grammatical constructs. Our four-letter English pronoun *they* could be a transformative example.

182 *Id.* (emphasis added).

183 *Id.*

184 *Id.*

185 *Id.*

186 Samantha Schmidt, *A Language for All*, WASH. POST, Dec. 5, 2019, <https://www.washingtonpost.com/dc-md-vi/2019/12/05/teens-argentina-are-leading-charge-gender-neutral-language/?arc404=true/>.

187 *Id.*

188 Marina Orio, *Fighting for Gender-Fair Language at the National Institute of Astrophysics of Italy*, GENDER/SEXUALITY/ITALY, no. 4 (2017), <http://www.gendersexualityitaly.com/26-fighting-for-gender-fair-language-at-the-national-institute-of-astrophysics-of-italy> (abstract).

VI. Legal Writers Can Use the Singular They to Foster Clarity, Accuracy, Inclusion, and Respect

American legal writers who remain hesitant or resistant toward the singular they might benefit from seeing it in action, used effectively as a tool of clarity, accuracy, inclusion, and respect.

A. Parties Have Directly Addressed Personal Pronouns in Court Pleadings to Foster Clarity and Respect Parties' Pronoun Usage

In the past several years, some litigants and their counsel have directly identified individuals' personal pronouns in pleadings to clarify the use of the singular they within the document. For example, in 2015, in *Zzyym v. Kerry*, a party filed a complaint for declaratory, injunctive, and other relief in a federal district court in Colorado.¹⁹⁰ The complaint contended that the United States Department of State had deprived an intersex citizen of a passport because the applicant's gender identity was neither male nor female, yet the passport application required a gender designation. In a footnote situated in Paragraph 19 of the complaint, the litigant explained the intentional use of the singular *they* within the pleading: "As an intersex person who does not identify as either male or female, Dana uses the singular 'they,' 'them,' and 'their' third-person gender neutral pronouns."¹⁹¹ Footnotes are a simple tool that legal writers can use to clarify the intentional use of the singular *they* in a document filed with the court.

Likewise, in a 2018 federal case related to arrests by the Louisiana State Police during a protest in Baton Rouge after Alton Sterling's shooting death, the plaintiffs filed a second amended complaint.¹⁹² Numbered paragraphs of the complaint identified each plaintiff along with their associated pronouns. For example, one paragraph indicated that "Plaintiff Samantha Nichols goes by 'Sami' and uses the pronoun 'they.'"¹⁹³ The drafter then inserted a footnote, highlighting that *they* "is generally used as a pronoun for people who identify as neither male nor female," and citing an article from BBC News.¹⁹⁴ This pleading demonstrates how a legal writer can use a simple textual sentence (rather than a footnote) to inform the reader about the intentional use of the singular *they*.¹⁹⁵

189 Hord, *supra* note 32, at 22.

190 Complaint, *Zzyym v. Kerry*, 2015 WL 6449495 (D. Colo. Oct. 25, 2015) (No. 1:15-CV-2362).

191 *Id.* ¶ 19 n.1.

192 Complaint, *Imani v. City of Baton Rouge*, 2018 WL 2948772 (M.D. La. Jan. 2, 2018) (No. 17-CV-00439).

193 *Id.* ¶ 23.

194 *Id.* at n.4.

195 See also Complaint ¶ 53, *Sinnok v. State*, 2018 WL 7458981 (Alaska Super. Ct. Aug. 24, 2018) (No. 3AN-17-09910) (indicating, in a numbered paragraph in the complaint, that "Plaintiff Margaret 'Sebastian' or 'Seb' Kurlaud is an eighteen-year-old permanent resident of Juneau, Alaska where they moved when they were three. Seb attends college in Massachusetts. Seb identifies as transgender, nonbinary, and prefers the pronoun 'they' and its derivations.>").

Interestingly, the Louisiana State Police filed a motion to strike the plaintiffs' complaint on several grounds.¹⁹⁶ In the motion, the police-defendants asserted that the plaintiffs' inclusion of pronoun designations in the pleading was improper, as the Federal Rules require "that no such allegations be made, especially here, where the case has no sexual component whatsoever."¹⁹⁷ In an opposition brief, the plaintiffs countered that they had followed typical conventions for drafting pleadings, including describing each plaintiff.¹⁹⁸ They further explained that identifying individual pronouns in this instance was "both a courtesy to the [litigants] and necessary for clarity, because it indicates that elsewhere in the complaint the word 'they' may be used as a *singular* rather than plural pronoun."¹⁹⁹ This explanation is exactly the type of directive that addresses the pronoun issue head-on and educates a possibly unfamiliar reader about non-binary pronoun usage by members of our communities. The plaintiffs reiterated that "[t]here is a growing understanding in our legal system that a person should be referred to by the pronoun that they use," citing three published cases in which courts specifically acknowledged litigants' personal pronouns.²⁰⁰ The plaintiffs also referenced two 2017 letters from the Clerk of the United States Supreme Court "rebuking litigants who refused to use the established pronoun of a party in a case caption."²⁰¹ Ultimately, the court denied the police-defendants' motion to strike the portions of the complaint that mentioned the pronouns.

These examples illustrate how a legal writer can clearly and concisely signpost intentional pronoun usage (and show courtesy to litigants) without "shocking" or "distracting" the reader.²⁰²

196 Defendants' Memorandum Supporting their Fed. R. Civ. P. 12(f) Motion to Strike, *Imani*, 2018 WL 2948634 (Jan. 22, 2018).

197 *Id.*

198 Plaintiffs' Opposition to Louisiana State Police Defendants' Motion to Strike Plaintiffs' Complaint, *Imani*, 2018 WL 2948640 (Feb. 5, 2018).

199 *Id.*

200 *Id.* (citing *Cuoco v. Moritsugu*, 222 F.3d 99, 103 n.1 (2d Cir. 2000) (involving a pre-trial detainee who the court described as "a preoperative male to female transsexual"; "We therefore refer to the plaintiff using female pronouns."); *Nelson v. City of Madison Heights*, 845 F.3d 695, 697 n.1 (6th Cir. 2017) ("While irrelevant to this case, Hilliard was a transgender woman whose legal name was Henry Lee Hilliard. All references to Hilliard will use female pronouns."); *Farmer v. Perrill*, 275 F.3d 958, 959 n.1 (10th Cir. 2001) (explaining that the case involved "Dee Farmer ('Farmer'), a transsexual prison inmate"; "Although a biological male, Farmer considers herself to be female and uses the feminine pronoun in referring to herself. In deference to her wishes, this opinion will do the same.")).

201 Plaintiffs' Opposition to Louisiana State Police Defendants' Motion to Strike Plaintiffs' Complaint, *Imani*, 2018 WL 2948640 n.9 (referring to a case, *Gloucester County School Board v. G.G.*, in which the Clerk admonished brief-writers for referring to the opposing party as "her" instead of "his" in the caption of the case).

202 Further, in a 2018 case involving election law, one party introduced both the honorific *Mx.* and the singular *they* to refer to one of several plaintiffs. First Amended Petition ¶ 21, *Priorities USA v. State*, 2018 WL 6030963 (Mo. Cir. Ct. Aug. 3, 2018) (No. 18AC-CC00226) (indicating, in a numbered paragraph, that "Plaintiff Ri Jayden Patrick is a 31-year-old resident of St. Louis, Missouri. Mx. Patrick is a transgender individual and prefers the pronouns 'they/them.'").

B. Legal Writers Also Have Provided Pronoun Clarity Through Well-Placed Footnotes in Briefs

In addition to pleadings, litigants have inserted simple and straightforward footnotes to provide clarity regarding the use of individuals' pronouns in the text of briefs. Notably, back in 1980, an appellant filing a reply brief with the United States Supreme Court identified the party's pronoun in a footnote, stating, "Plaintiff, although anatomically male, has stated in briefs that she prefers use of the feminine pronoun."²⁰³

In 2018, the law firm of Gibson, Dunn & Crutcher, LLP filed an *amicus curiae* brief on behalf of The Trevor Project in a case challenging the legality of Donald Trump's transgender military ban.²⁰⁴ The brief focused on the harm inflicted by the ban upon the transgender population. As context and support for the rights and desires of members of the transgender community to serve in the military, the brief-writer wrote, "During a conversation between a transgender youth and a Trevor Project counselor, one individual explained that they had dreamed of joining the military since childhood, as they believed it was their only path to an affordable college education."²⁰⁵ In the middle of the sentence, after the first appearance of the pronoun *they*, the brief-writer inserted a footnote, and explained, "Where appropriate, this brief uses 'they' and 'their' as singular, gender-neutral pronouns."²⁰⁶

In the *Zzyym v. Kerry* case mentioned above in section VI.A.'s discussion of pleadings, the plaintiff later filed a brief in support of the petition for declaratory, injunctive, and other relief, and in opposition to the State Department's motion for judgment.²⁰⁷ The first page of the brief explained that "Zzyym was born intersex, with ambiguous genitalia, and their gender identity—the innate sense of being male, female, both, or neither—is neither male nor female."²⁰⁸ The brief-writer placed a footnote directly after the first reference to the pronoun *their*. The footnote read, "As an intersex person who does not identify as either male or female,

203 Appellant's Reply Brief, *Miller v. Zbaraz*, 1980 WL 339698, at *4 n.1 (U.S. April 18, 1980) (No. 79-5); see also *Amici Curiae* Brief of ACLU Foundation, *Rodgers v. State*, 2017 WL 3421341, at *1 n.1 (Fla. July 31, 2017) (No. 17-1050) (noting, in a brief filed on behalf of a Florida prisoner diagnosed with gender dysphoria, that, "[f]or the majority of her life, Appellant Jeremiah Rodgers has been 'cruelly imprisoned within a body incompatible with her true gender'; further explaining, in a footnote after the phrase 'her life,' that the brief uses 'the gender pronouns of 'she/her' consistent with [the Appellant's] gender identity, which is female").

204 Brief of *Amicus Curiae* The Trevor Project in Support of Plaintiffs-Appellees and Affirmance, *Doe v. Trump*, 2018 WL 5619822 (D.C. Cir. Oct. 29, 2018) (No. 18-5257).

205 *Id.* at *19.

206 *Id.* at *19 n.33; see also Brief of *Amicus Curiae* The Trevor Project in Support of Appellees, *Karnoski v. Trump*, 2018 WL 3382851, at *18 n.30 (W.D. Wash. July 2, 2018) (No. 18-35347).

207 Plaintiff's Opening Brief in Support of Declaratory, Injunctive, and Other Relief and Opposition to Defendant's Motion for Judgment, *Zzyym v. Kerry*, 2016 WL 1660095 (D. Colo. April 22, 2016) (No. 1:15-CV-02362).

208 *Id.* at *1.

Zzyym uses the singular ‘they,’ ‘them,’ and ‘their’ third-person gender-neutral pronouns.”²⁰⁹ For the reader’s reference, the brief quoted a 2016 Economist article titled *Singular They*.²¹⁰

One litigant took an extra procedural step to educate the court and opposing counsel about the use of the singular *they*, and to remind the parties to use it. In *Sai v. Pekoske*,²¹¹ a *pro se* petitioner named “Sai” filed a “letter re courtesy pronoun usage.” Sai relayed how, “[i]n its orders and opinions, this Court has referred to Petitioner with male references.” Sai explained to the court and opposing counsel that

Petitioner identifies as agender, not male, and has carefully avoided gendered language to refer to themselves. Petitioner respectfully requests, as a courtesy, that this court (and [the Transportation Safety Administration (TSA)]) use gender-neutral references to refer to Petitioner. Petitioner’s preference is singular “they,” but any gender-neutral language is fine (e.g. “Sai,” “Petitioner,” “zie,” gender-avoidant grammatical structure, etc.).²¹²

The litigant mentioned in a footnote how “[t]he use of singular ‘they’ dates to Shakespeare, and centuries earlier,” citing *Hamlet, A Comedy of Errors*, the Rolls of Parliament, and the Wycliffe Bible.²¹³

In a different case in which the same litigant, Sai, filed a motion to intervene, counsel for TSA filed a brief in opposition to the motion.²¹⁴ TSA’s brief-writer inserted a footnote after the first mention of Sai’s name in the court filing, stating

“Sai” has been presented as the proposed intervenor’s full legal name. Sai has indicated a preference for being referred to without any titular prefix (e.g. “Mr.”), and has further indicated a slight preference for the use of gender neutral pronouns (e.g. “they” rather than “he”).²¹⁵

209 *Id.* at *1 n.2.

210 *Id.* (citing R.L.G., *Why 2015’s Word of The Year Is Rather Singular*, THE ECONOMIST, Jan. 15, 2016, <http://www.economist.com/blogs/prospero/2016/01/johnson-singular-they>); see also Brief of Amicus Curiae Intersex & Genderqueer Recognition Project in Support of Plaintiff-Appellee, Zzyym v. Pompeo, 2019 WL 2171323, at *6 n.10 (10th Cir. May 15, 2019) (No. 18:1453) (incorporating a footnote after the use of *their* in the brief’s text, explaining, “[t]hough not all nonbinary people do, [the Intersex and Genderqueer Recognition Project’s] constituent storytellers all use singular ‘they/them/their’ pronouns,” further noting that “[s]ingular ‘they’ pronouns have been used since the 14th century,” citing the Oxford English Dictionary).

211 Letter re courtesy pronoun usage, *Sai v. Pekoske*, No. 15-2356 (1st Cir. Sept. 30, 2017).

212 *Id.*

213 *Id.* at n.1.

214 Response in Opposition to Motion to Intervene, *Cohen v. Transp. Sec. Admin.*, 2016 WL 8347304 (W.D. Tenn. Sept. 30, 2016) (No. 2:16-CV-2529).

215 *Id.* at n.1.

TSA indicated that counsel would honor the proposed intervenor's preference and use the singular *they*.²¹⁶

The foregoing examples illustrate the simplicity of explaining the use of the singular *they* either in a footnote or directly in the text of a brief, to foster precision and courtesy.²¹⁷

C. Judges Also Have Expressly Addressed Pronouns in Court Orders to Enhance Clarity and Respect Individuals' Pronoun Usage

Judges have directly discussed pronouns in their court orders, underscoring intent in word choice and respecting litigants' personal pronoun usage.²¹⁸ For example, in the aforementioned case involving Sai's motion to intervene, the court issued an order denying the motion.²¹⁹ In the first sentence, the order stated, "Before the court is individual third-party proposed intervenor Sai's motion to intervene . . ."²²⁰ The court inserted a footnote immediately after Sai's name, explaining that "[t]he proposed intervenor has indicated that 'Sai' is their full legal name. Because Sai has stated a slight preference for gender-neutral pronouns, the court will refer to the proposed intervenor as 'Sai,' 'the proposed intervenor' or 'they.'"²²¹

In yet another case involving Sai, in an order granting in part and denying in part TSA's motion for summary judgment, the court stated that the suit involved "six [Freedom of Information Act] and Privacy Act requests for records that Plaintiff, whose full name is Sai, sent to the TSA in 2013."²²² In an accompanying footnote, the court noted that "Sai has

216 *Id.*

217 Brief writers also have used footnotes to explain the honorific *Mx.* See, e.g., Response Brief of Plaintiffs-Appellees, *Free the Nipple—Fort Collins v. City of Fort Collins*, 2017 WL 4054217 (10th Cir. Sept. 11, 2017) (No. 17-1103) (referring to one of the Plaintiffs-Appellees as "Mx. Hoagland," and then including a footnote directly after the sentence stating, "The honorific *Mx.* is a gender-neutral title utilized in connection with non-binary individuals."). In an *amicus curiae* brief filed in the United States Supreme Court by LGBTQ law students, recent law graduates, lawyers, judges, and law professors in an employment discrimination matter, an appendix listed the signatories; many used the honorific *Mx.* See *Amicus Curiae* Brief in Support of the Employee, *Bostock v. Clayton County*, 2019 WL 3060837 (U.S. July 3, 2019) (Nos. 17-1618, 17-1623, 18-107) (noting that "Mx. Brown identifies as transgender and queer," "Mx. Baines identifies as gay and queer," "Mx. Goldman identifies as queer," "Mx. Steiner identifies as non-binary and queer," "Mx. Baitech identifies as gay").

218 Some judges even have placed signs in their courtrooms communicating their commitment to using gender-inclusive terms. See *Sierra Trojan, Winnebago Co. Courtroom Using Gender Inclusive Terms*, FOX 11 NEWS, Aug. 21, 2019, <https://fox11online.com/news/local/oshkosh-courtroom-using-gender-inclusive-terms> (discussing a notice pinned to the wall of Wisconsin Circuit Court Judge Teresa Basiliere's courtroom stating, "It is common in a formal courtroom for the judge to use terms of Mr. and Ms. If a litigant or defendant has a preference for the court to use a gender-neutral term of Mx., please advise the judge or court staff").

219 *Cohen*, 2016 WL 9450440.

220 *Id.* at *1.

221 *Id.* at *1 n.1.

222 *Sai v. Transp. Sec. Admin.*, 315 F. Supp. 3d 218, 229 (D.D.C. 2018).

indicated a preference not to be referenced using gender pronouns, and, in this amended opinion, the Court has endeavored to respect that request.”²²³

In *Tardif v. City of New York*,²²⁴ a protester in the 2012 Occupy Wall Street movement filed a lawsuit against New York City and several police officers, asserting excessive force and deliberate indifference to serious medical needs during an arrest. The protester filed a multi-issue motion *in limine*, in which, among other things, she moved to require both parties to refer to her witness “formerly known as James Amico, as Mari Tade Storm Summers, and to use the pronouns ‘she,’ ‘her,’ and ‘hers’ when identifying or addressing Ms. Summers at trial.”²²⁵ The plaintiff requested the parties to use the same pronouns for another witness “formerly known as Tony Zilka, and now known as Mandy Quinn.”²²⁶ The defendants did not contest this portion of the motion *in limine*, so the court denied the request as moot. Still, the court took the time to acknowledge the pronoun request in its order. The court used *Ms.* to refer to both witnesses when addressing the defendants’ “concern that the use of masculine pronouns or names may be necessary for clarity when referring to the 2012 events that are the subject of this suit, for example if Ms. Summers and Ms. Quinn are asked to identify themselves in video footage of the events.”²²⁷ The court emphasized, “As a general matter, the parties are required to use witness[es]’ preferred pronouns and names.”²²⁸ Ultimately, the court urged the parties to “use great caution and limit any use of witnesses’ 2012 names to those that are necessary to avoid confusion.”²²⁹

223 *Id.* at 229 n.1.

224 344 F. Supp. 3d 579 (S.D.N.Y. 2018).

225 *Id.* at 606.

226 *Id.*

227 *Id.*

228 *Id.* at 606–07.

229 *Id.* at 607; see also *Crowder v. Castillo*, No. 1:16-CV-00851, 2016 WL 6599797, at *2 n.2 (E.D. Cal. Nov. 7, 2016) (noting on the second page of a magistrate judge’s order screening an Eighth Amendment case to determine whether it stated a cognizable claim, that “Plaintiff is [a] transgender person,” and then including a footnote stating, “Plaintiff does not state the gender he or she identifies with or a preferred pronoun to be identified with. Based on plaintiff’s incarceration in a men’s prison, the Court assumes that plaintiff is a transgender woman, i.e., a person whose female gender identity is different from the male gender assigned to her at birth, and the Court therefore uses female pronouns here.”); *Pryor v. S.F. City & County*, No. C-12-02696, 2013 WL 12199455 (N.D. Cal. Sept. 19, 2013) (providing context for the court’s use of the *she* pronoun, describing the defendant as an “African-American male-to-female transgender person,” and referring to the defendant as *she* starting from the second sentence of the order); *In re Boone*, 924 N.W. 2d 44, 45 (Minn. Ct. App. 2019) (noting, in the first sentence of an opinion ruling on a petition for a name change, that “Appellant Bradley Stephen Boone appeals from the district court’s denial of her name-change application,” then including a footnote immediately after the word *her*, stating, “At oral argument, counsel for Boone indicated that Boone uses she/her pronouns. We will therefore refer to Boone using her preferred pronouns.”); *In the Matter of Outman*, 19 N.Y.S.3d 678, 681 n.1 (N.Y. Sup. Ct. 2015) (referring to an inmate seeking review and vacatur of the denial of her grievance in which she requested special housing on account of her diagnosis of gender dysphoria, and indicating in a footnote that it would “honor petitioner’s preference to be referred to by the female pronoun.”).

Likewise, in a federal case in Florida addressing voting rights and early voting on school campuses,²³⁰ the court issued an order granting students' and several voting rights organizations' motion for a preliminary injunction. In describing the burden certain citizens had to bear in order to vote, the court stated, "Mary 'Jaime' Roy does not own a car and is dependent on Gainesville's public transportation system. In one municipal election, they had to travel on two buses from their home to their voting location, which took between 40 and 60 minutes each way."²³¹ After the phrase "public transportation system," the court inserted a footnote explaining, "Plaintiff Roy identifies as gender-queer and prefers the use of the gender-neutral pronoun 'they.'"²³²

Further, in a federal case pending in New York, the court adjudicated the issue of "whether [a] plaintiff who identifies as gender queer and trans-masculine, may sue their former employer under a pseudonym."²³³ In the first sentence of the court's order disallowing the use of the pseudonym, the court indicated that "Plaintiff Jaime Doe identifies as genderqueer and trans-masculine, with preferred pronouns of 'they,' 'their,' and 'theirs.'"²³⁴

The foregoing judges model the ease of directly and concisely explaining the intentional use of pronouns—either in a footnote or directly in the text of judicial opinions.²³⁵

D. Courts Have Used Pronouns with Intention When Seeking to Protect the Identity of a Party or Witness

In addition to using certain pronouns out of *respect* for litigants, courts have implemented particular pronouns in an intentional effort to protect the identity of a party or witness. For example, in a case filed in a California state court, an evidentiary question arose as to whether a school district could divulge the contents of two letters from a confidential personnel file relating to an investigation into a teacher's actions

230 *League of Women Voters of Fla., Inc. v. Detzner*, 314 F. Supp. 3d 1205 (N.D. Fla. 2018).

231 *Id.* at 1211.

232 *Id.* at 1211 n.4.

233 *Doe v. Fedcap Rehab. Servs., Inc.*, No. 17-CV-8220, 2018 WL 2021588 (S.D.N.Y. April 27, 2018).

234 *Id.* at *1.

235 *See also* *People v. Binns*, No. B282506, 2018 WL 3490852, at *1 n.1 (Cal. Ct. App. July 20, 2018) (including a footnote after the first reference to the defendant's name in an order affirming the jury's conviction of a defendant, stating "Binns is male and identifies as a woman. We refer to her by her preferred pronoun."); *Miller v. State*, No. 62-CR-11-3803, 2013 WL 6795618, at *1 n.1 (Minn. Dist. Ct. Jan. 29, 2013) (explaining, in an order ruling on a petition for post-conviction relief, that the victim "D.M.B. is a female transitioning to a male and identifies as a male," and further acknowledging in a footnote, "Because D.M.B. preferred to be addressed as a male, the Court will respect this preference and use male pronouns in its order."); *Arledge v. Peoples Servs., Inc.*, No. 02-CVS-1569, 2002 WL 1591690, at *1 n.1 (N.C. Apr. 18, 2002) (explaining, in an employment case, that, based on the plaintiff's announcement of her transsexualism and change of name from "Bob" Arledge to "Barbara" Arledge, the court would use "feminine pronouns to refer to Plaintiff Barbara Arledge in this Order," and further clarifying that "[s]uch usage does not imply a finding of fact or conclusion of law concerning Plaintiff's sex or gender").

as a girls' volleyball coach.²³⁶ In an order finding that disclosure of the letters would violate the teacher's privacy interests, the court used the singular *they* when reciting facts about the coach: "Doe is a high school teacher in [Chino Valley Unified School District (CVUSD)] and a member of [Associated Chino Teachers]. During their two-decade career with CVUSD, they have never received any warnings or disciplines related to their assignment as a classroom teacher."²³⁷ To explain the use of *they* throughout the order, the court dropped a footnote after *their* in the foregoing sentence, stating "In order to protect the identity of Doe, we will use the gender-neutral pronoun 'they.'"²³⁸ Notably, the court mentioned that the proper conjugation of the verb *to be* when used with the singular *they* is *they are* (rather than *they is*).²³⁹

A court *perhaps could* have opted to use the singular gender-neutral *they* but instead chose *he* in a situation in which the pronoun choice of an individual involved in the case was unclear. The court did, however, acknowledge the principle of an individual's identification with particular pronouns. In this federal case involving drug and firearm charges, a defendant filed a motion to suppress evidence of marijuana and an illegal gun found in a search of a home.²⁴⁰ A detective's affidavit, based on information provided by a confidential informant, supported the search warrant.²⁴¹ In a footnote, the court explained its choice of pronoun when referring to the informant: "To maintain the informant's confidentiality, the affidavit did not state one way or another whether [the individual's] preferred gender pronoun was 'he' or 'she.' For readability purposes we will refer to [the informant] as 'he.'"²⁴²

In recent news, the matter of the whistleblower complaint about White House dealings with Ukraine exemplifies another situation in which the singular *they* can help protect a person's identity in communications. In a question-and-answer session before the House Intelligence Committee, the acting director of national intelligence, Joseph

236 Associated Chino Teachers v. Chino Valley Unified Sch. Dist., 30 Cal. App. 5th 530 (2018).

237 *Id.* at 535.

238 *Id.* at 535 n.2.

239 *Id.*

240 United States v. Graf, 784 F.3d 1 (1st Cir. 2015).

241 *Id.* at 2.

242 *Id.* at 3 n.1. The court in Commonwealth v. Hoard, 82 Va. Cir. 335 (Va. Cir. Court 2011), mentioned the *he/she* binary as a possible language remedy (without venturing into singular *they* territory) when noting the outdated use of male referents in the Virginia Constitution. The court acknowledged a defendant's right in the text of the Virginia Constitution to "call for evidence in *his* favor." *Id.* at *3 (emphasis added). The court mentioned in a footnote that "[t]he Constitution uses the grammatically correct, but politically incorrect, pronoun, but the Court is disinclined to edit or amplify the language of that basic document with the otherwise obligatory 'he/she.'" *Id.* at *3 n.7.

Maguire, used the word *his* to refer to the whistleblower.²⁴³ Committee chairperson Adam Schiff countered with the singular *they*. News outlets used *they* in headlines when referring to the individual.²⁴⁴ In writing about the Committee session and the pronoun's role in protecting a person's anonymity, columnist Ben Zimmer explained, "If the singular *they* came to be more widely embraced as an acceptable grammatical choice, then there would be no need for any verbal gymnastics in cases like the whistleblower's, where a person's gender may be at least temporarily unclear."²⁴⁵

These scenarios demonstrate how the singular *they* can be useful to preserve an individual's privacy, safety, and reputation, even if the person in question uses male or female pronouns (rather than gender-neutral pronouns) in daily life.

E. Lawyers and Judges Can Look Disrespectful, Sloppy, or Foolish if They Choose to Ignore a Litigant's Personal Gender Pronouns

Two recent cases illustrate the upsetting reality that lawyers and judges who either ignore or outright refuse to use a litigant's personal gender pronouns reinforce systemic exclusion of marginalized members of our society.

A case in which a party ignored a litigant's personal gender pronouns made headlines in a news article entitled, *Supreme Court Notebook: Gender pronouns part of LGBT fight*.²⁴⁶ In 2013, a litigant named Aimee Stephens was fired from her job as a funeral director and embalmer when she announced her transition from male to female. Her subsequent lawsuit progressed to the United States Supreme Court. The ruling of the United States Circuit Court of Appeals for the Sixth Circuit in favor of Stephens, holding that "workplace discrimination against transgender people is illegal under federal civil rights law," used *she/her* pronouns.²⁴⁷ In its opinion, the Sixth Circuit indicated, "We refer to Stephens using female pronouns, in accordance with the preference she has expressed."²⁴⁸ Numerous Supreme Court briefs filed in support of Stephens also used *she/her* pronouns "to refer to the transgender woman."²⁴⁹

243 Ben Zimmer, *How Maguire Accidentally Made the Case for Singular "They,"* THE ATLANTIC, Sept. 27, 2019, <https://www.theatlantic.com/entertainment/archive/2019/09/joseph-maguire-testimony-supports-use-singular-they/598969/>.

244 *Id.*

245 *Id.*

246 Mark Sherman & Jessica Gresko, *Supreme Court Notebook: Gender Pronouns Part of LGBT Fight*, AP NEWS, Aug. 20, 2019, <https://www.apnews.com/cd658b2da9da44989ab585db559e4058>.

247 *Id.*

248 EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560, 566 n.1 (6th Cir. 2018).

249 Sherman & Gresko, *supra* note 246.

In contrast, in over 110 pages pressing the Supreme Court to roll back the Sixth Circuit’s decision, “the Trump administration and the Michigan funeral home where Stephens worked avoid gender pronouns, repeatedly using Stephens’ name.”²⁵⁰ The Justice Department’s Supreme Court brief used language like the following instead of using Stephens’ pronouns:

Respondent *Stephens* was employed by Harris Homes from 2007 to 2013—first as an apprentice, and later as a funeral director and embalmer. *Stephens* “was born biologically male,” with the name William Anthony Beasley Stephens, and *Stephens* presented as a male when *Stephens* began working for Harris Homes and for more than five years thereafter. *Stephens* now identifies as a transgender woman and uses the name Aimee Stephens.²⁵¹

Intentionally repeating a person’s name in each sentence to avoid honoring a transgender individual’s personal pronouns seems much more jarring than simply using *she* or *her*. As such, this raises concerns along the lines of those discussed by legal writing experts in section IV above about potentially distracting readers with “new” language choices.

In 2020, an opinion issued by the United States Circuit Court for the Fifth Circuit also failed to honor a litigant’s personal pronouns. On January 15, 2020, Judge Stuart Kyle Duncan wrote an opinion in an appeal by a federal prisoner named Norman Varner.²⁵² The prisoner sought to change the name on her judgment of confinement to “Kathrine Nicole Jett.”²⁵³ The prisoner also requested to be referred to, by the appellate court, with female pronouns. Rejecting the litigant’s pronoun request, Judge Duncan used *he/his/him* pronouns throughout the opinion. The judge stated, “no authority supports the proposition that we may require litigants, judges, court personnel, or anyone else to refer to gender-dysphoric litigants with pronouns matching their subjective gender identity.”²⁵⁴ He mentioned that “courts that have followed this ‘convention’ . . . have done so purely as a courtesy to parties.”²⁵⁵

Isn’t *courtesy* a fundamental ideal we should reasonably expect from judges toward *all* litigants, especially in the midst of the civility crisis in

250 *Id.*

251 Brief for the Federal Respondent Supporting Reversal, R.G. & G.R. Harris Funeral Homes, Inc., v. EEOC, 2019 WL 3942898, at *4 (U.S. Aug. 16, 2019) (No. 18-107) (emphasis added).

252 United States v. Varner, No. 19-40016 (5th Cir. Jan. 15, 2020). The Honorable Stuart Kyle Duncan, The Honorable Jerry E. Smith, and The Honorable James L. Dennis presided. As indicated below, Judge Dennis dissented.

253 *Id.*

254 *Id.* at 6.

255 *Id.* at 7.

which we currently live in our country? As Judge James L. Dennis wrote in his “respectful[] but emphatic[]”²⁵⁶ dissenting opinion, “many courts and judges adhere to such requests out of respect for the litigant’s dignity.”²⁵⁷ As the journalist Ruth Marcus put it, “Even in an uncivil, unyielding era, all of us—certainly federal judges endowed with enormous power and lifetime tenure—should be able to summon the grace to grant her simple request to be described that way.”²⁵⁸

In a much less political and much less publicized case involving an insurance coverage dispute pending in a federal court in California, the insurance company filed a notice of motion and accompanying motion for summary judgment, referring to the opposing party in the brief by *he* pronouns and *Mr.*²⁵⁹ The insurer’s brief included a quote from the insured’s website: “for the past few years they have been making a brand of stripped down machine techno.”²⁶⁰ The insurance company’s brief-writer inserted a footnote after the quoted use of *they*, indicating that the insured “identifies as ‘non-binary’ and prefers the pronoun ‘they/them.’”²⁶¹ This discrepancy begs the question: why not use the insured’s pronouns in the rest of the brief?

As the foregoing examples show, some lawyers and judges remain intent on refusing to use the personal pronouns of particular individuals in our society. Let’s urge these members of our profession to pause to consider, and educate themselves about, the destructive emotional impact these slights have on the already marginalized individuals involved. Hopefully, by looking to the examples in sections VI.A.-D. of lawyers and judges who exhibited civility and respect towards litigants—without their cases imploding in grammatical confusion—resisters might soon embrace dignified change.

VII. Conclusion

Overall, it’s time for legal writers to get with the pronoun. First, let’s enhance our awareness of the pronouns that individuals in our communities use—locally, nationally, and even globally. Let’s then incorporate

256 *Id.* at 17 (Dennis, J., dissenting).

257 *Id.* at 15 (Dennis, J., dissenting).

258 Ruth Marcus, *We’re at War over Gender Pronouns. Can’t We All Just Show Some Respect?*, WASH. POST, Jan. 19, 2020, 7:59 EST, https://www.washingtonpost.com/opinions/a-judge-said-calling-a-transgender-woman-her-would-show-bias-oh-please/2020/01/19/7d3a9f3c-3965-11ea-bb7b-265f4554af6d_story.html.

259 American Bankers Insurance Company of Florida’s Notice of Motion and Motion for Summary Judgment, American Bankers Ins. Co. of Fla. v. Butler, 2018 WL 6585599 (N.D. Cal. June 28, 2018) (No. 3:18-CV-019 73-WHA).

260 *Id.* at 4.

261 *Id.* at 4 n.1.

the pronouns used by our clients, witnesses, and other actors in our cases into our legal communications, pleadings, briefs, and judicial opinions. If this feels uncomfortable at first, let's pause and examine why. As journalist and author Monica Hesse wrote about readers bemoaning the singular *they*, "the grammar excuse seems to be a convenient fig leaf, and what it's covering is these letter writers' own prejudice."²⁶² She urged, "We're not really talking about grammar. We're talking about the willingness for all of us to feel a little uncomfortable on our universal, bumbling quest toward compassion and humanity."²⁶³

For writers worried about confusing or distracting the reader, we can explain the intentional use of particular pronouns or honorifics like *Mx.* in concise and straightforward textual sentences or footnotes after our first use of the word in a document. In lengthy legal documents, we might remind the reader about the intentional use of the pronoun midway through the text, if needed. If we are concerned about clarity in pronouns' references to antecedents, we can consider rephrasing sentences but in a way that does not "un-pronoun" a person in a disrespectful way.

Judges could consider following Judge Teresa Basiliere's example²⁶⁴ and cultivate a courtroom culture which expressly honors gender-inclusive language. Steps could include (1) informing litigants and their attorneys about the procedure for notifying the court of a party's personal pronouns and choice of honorifics like Mr., Ms., or Mx.; (2) incorporating requirements in local court rules or Case Management Orders for parties to exchange and then use identified pronouns and honorifics in oral and written communications; and (3) holding lawyers accountable if they fail to honor identified pronouns and honorifics in oral and written communications. Judges can set an example by using parties' and witnesses' pronouns in the courtroom and in judicial opinions, like the examples in section VI.C. above.

Lawyers can foster conversations with clients about pronoun usage and discuss how to proactively enhance clarity, accuracy, inclusion, and courtesy in legal documents. Legal writing professors can train our new generation of legal writers in this regard through designing assignments in which law students must incorporate litigants' pronouns and honorifics into pleadings, memoranda, briefs, and other communications, in a clear and considerate way.

262 Monica Hesse, *A Grammar Nerd Gently Dismantles Those Arguments for Rejecting the New "They,"* WASH. POST, Sept. 20, 2019, 10:40 am EDT, https://www.washingtonpost.com/lifestyle/style/a-grammar-nerd-gently-dismantles-your-arguments-for-rejecting-the-new-they/2019/09/20/95f87260-da56-11e9-a688-303693fb4b0b_story.html.

263 *Id.*

264 See Trojan, *supra* note 218.

Instead of assuming our readers will be confused, distracted, or annoyed by a gender pronoun, the singular *they*, or a new word altogether, let's have more faith in our readers' ability to grasp and follow our content. Every day, lawyers and judges write about complex material that is unfamiliar to our audiences; we explain and define odd terms of art, strange vocabulary, and peculiar rules, and then we lead the reader through analyses that use those same concepts and principles. We can do the same with pronouns and honorifics.

In the end, that's the beauty of legal writing: so much power packed into each word we select to communicate our clients' narratives. Let's choose respectfully and wisely.

LC&R
JALWD