

PRONOUN

POWER

THE STANDARD FOR
GENDER NEUTRALITY

Stan Sarkisov, Carleigh Kude

Language and laws reflect the values of society—and we are a nation of equals.¹ Unlike codified equality, human hearts and minds are not so orderly. As receivers of information, our myriad cognitive biases allow us to process the data we consume.² Our biases have also been institutionalized, written into the language of our nation's founding legal documents. The Founding Fathers (or men) made sure to accommodate a certain class of privilege: their own. Racial and gender bias are sewn into our star-spangled sense as a country. Luckily, our Constitution is a living body of laws, capable of evolution.³ Since 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.



Our common history has reinforced racial and gender bias over time, instilling judgment into our collective perception.⁴ Using gender-neutral pronouns (and avoiding other unnecessary and discriminatory adjectives as “information”) is a step toward deconstructing these biases. This is crucial because the more we employ bias, the more bias is ingrained in our readers; this is a feedback loop. Without pausing 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; subjective validation manifests as prejudice, discrimination, and so on.⁵ As critical thinkers, we know that these biases exist and so we ask ourselves whether they are disproportionately at play in our own messaging. Our communication must pass the test of scrutiny—is our writing conveying information, or is it conveying bias?

When we first interact with information, every word carries with it our cumulative understanding of that word. For example:

- ▶ Defendant was thirty minutes late to *their* deposition.
- ▶ Defendant was their minutes late to *her* deposition.

Both sentences provide relevant information: tardiness. One sentence provides irrelevant information and an opportunity for bias: the defendant is a *her*. The listener’s/reader’s understanding of gender norms provides opportunity to fill in the reason for the tardiness. Defendant’s gender bears no relevance to their tardiness (we would not identify defendant’s race, looks, age, or other characteristics, because they are irrelevant to defendant’s tardiness). Knowing that we carry the power of evoking inference with our words, we can wield this as power. We can either practice gender

neutrality in our communication to mitigate the chance of prejudice, or use subject gendering (he, she) to encourage the listeners'/readers' comprehension of gender norms and accompanying biases to color their understanding.

A more loaded example:

- ▶ Plaintiff is suing for wrongful termination from *her* position at Kaiser.
- ▶ Plaintiff is suing for wrongful termination from *their* position at Kaiser.

Subject gendering provides no relevance (is one gender more likely to warrant termination?) but does present room to corrupt an objective review of plaintiff's case: is plaintiff a doctor or a nurse? Was plaintiff's performance naturally likely to decline because of familial responsibilities? What does plaintiff earn?

Interpretation of the Constitution provides law-abiding citizens protocol on allowable discrimination. Gender discrimination has to pass an intermediate level of scrutiny so that the proponent of the discrimination has to establish an "exceedingly persuasive justification" for sex-based classification to be valid.⁶ Allowing gender bias requires an "important objective" and the discriminatory means must be substantially employed to achieve the important objective.⁷ In California, gender discrimination is scrutinized at a heightened standard. To pass, the discrimination must advance an important interest, the discriminatory intrusion must significantly further that interest, and the intrusion must be necessary to further that interest.⁸ Our daily use of gender pronouns fails this test because we continue to impart bias when no purpose (important or not) exists.

This can change. For centuries, the English language included a "pretty modern system of natural-gender pronouns and no more grammatical gender (or case) on the nouns."⁹ *He* referred to male subjects, *she* to female subjects, and *they* was a perfectly acceptable gender-neutral singular pronoun for unknown or generalized single subjects. In the

eighteenth century, grammarians began recommending *he* as a gender-nonspecific pronoun, and style books began adopting this as the rule.

Gender neutrality became a forefront issue in the feminist movement in the 1970s.¹⁰ Prominent writers called for the use of gender neutrality in writing, suggested new, nongendered singular third party pronouns, and a modern language movement was born.¹¹ The evolution of language, however, does not ease all social ills: an ongoing national debate about gender identity persists (to such a degree that bathrooms are now an issue). Gender neutrality is even dictionary sanctioned. The American Dialect Society selected *they* as a singular pronoun as its 2015 Word of the Year. Modern writing now embraces *they* as a nonbinary pronoun—not only in situations where the person's gender is unknown. In October 2017 Governor Jerry Brown signed SB 179 into law, offering a gender-neutral option on state documents for those who do not identify as male/female. Gender nonbinary ID cards will be available for Californians in 2019.

People use language, and language is a reflection of the people who use it. Change is easier for some than others. It is reasonable to acknowledge 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. However, hesitation

**OUR COMMON HISTORY HAS
REINFORCED RACIAL AND GENDER
BIAS OVER TIME, INSTILLING
JUDGMENT INTO OUR COLLECTIVE
PERCEPTION.**

**OUR COMMUNICATION MUST PASS
THE TEST OF SCRUTINY—IS OUR
WRITING CONVEYING INFORMATION,
OR IS IT CONVEYING BIAS?**

will inevitably ease with continued usage and increasing exposure to others' usage.

In the meantime, you can employ the nine techniques for achieving gender neutrality where appropriate: (1) omitting the pronoun; (2) repeating the pronoun; (3) using a plural antecedent; (4) using an article instead of a pronoun; (5) using the neutral singular pronoun *one*; (6) using the relative pronoun *who*; (7) using the imperative mood; (8) using *he* or *she* (sparingly); (9) or revising the clause.¹² Or—a tenth option—because 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—beginning to use *they*. 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.

Stan Sarkisov has practiced family law since graduating from the University of San Francisco School of Law. Stan joined the Levine Family Law Group as an associate attorney in 2016, and enjoys working with clients seeking a streamlined solution or a tailored result through complex litigation or negotiation.

Carleigh A. Kude, M.P.A., is an access and inclusion specialist in higher education with 12 years of experience in policy, advocacy, and program planning. She is currently the Disability Advisor in the Office of Accessible Education, Stanford University.

Notes

1. "All men are created equal" is written in the US Declaration of Independence. In 1776 some men were actually more equal than others. Our society has progressed to understand men to mean not just land-holding men, and not just slave-holding men, but actually all men. But our society is gendered (meaning we classify things—even rights—by gender). It was not until 1920 that women became equal in their right to vote—some women. Native Americans only became equals in 1924, when the Snyder Act bestowed upon them their unalienable and full rights of citizenship. African Americans, and especially women, were still fighting for the right to vote in the 1960s.
2. "A Memory Processes Model for Judgment of Likelihood" (1999) by Michael R. P. Dougherty, Charles F. Gettys, and Eve E. Ogden: <http://www.damlab.umd.edu/PDF%20articles/Dougherty,Gettys&Ogden,1999.pdf>
3. Thomas Jefferson wrote in 1816: "But I know also, that laws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths disclosed, and manners and opinions change with the change of circumstances, institutions must advance also, and keep pace with the times."
4. For racial examples: The Homestead Act of 1862, sundown towns, the Home Owners' Loan Corporation's redline maps. For gender examples: the glass ceiling, the election of Donald Trump.
5. "Cognitive Bias Cheat Sheet. Because Thinking Is Hard" (09/01/2016) by Buster Benson: <https://betterhumans.coach.me/cognitive-bias-cheat-sheet-55a472476b18>
6. *Mississippi University for Women v. Hogan* (1982) 458 U.S. 718.
7. *Wengler v. Druggists Mut. Inc.* (1980) 446 U.S. 142.
8. *Witt v. Department of the Air Force* (2008) 527 F.3d 806.
9. "A Linguist on the Story of Gendered Pronouns" (07/2014) by Gretchen McCulloch: <http://the-toast.net/2014/06/02/a-linguist-gendered-pronouns/>
10. Gloria Steinem, feminist, journalist, and founder of *Ms. Magazine*, earned national attention when in 1969 she published her article, "After Black Power, Women's Liberation." See also "Gender Became Very Limiting" (01/2017) in *National Geographic Magazine*: <http://www.nationalgeographic.com/magazine/2017/01/3-questions-gloria-steinem/>
11. In their book *Words and Women*, writers Casey Miller and Kate Swift brought to light the harm of using male pronouns as the default epicene. They noticed, and could not ignore, "the way English is used to make the simplest points can either acknowledge women's full humanity or relegate the female half of the species to secondary status." <http://scholar.lib.vt.edu/ejournals/old-WILLA/fall94/h2-isele.html>
12. The Chicago Manual of Style Online, Sixteenth Edition's nine techniques for writing with gender neutrality: http://www.chicagomanualofstyle.org/16/ch05/ch05_sec225.html?sessionId=a9361ddd-ba3c-4c78-9896-a875bdfb3aaf