

By Tamila C. Jensen and David Gurnick

Showdown Over the Pronoun

“On this issue, our court has gone both ways”¹

SINCE WRITING BEGAN WITH the ancient Sumerians, the 15th Century invention of the printing press and, near in time, the advent of English-language dictionaries, languages have faced ever increasing tensions between standardization and change.^{2,3}

Standardization enables people to understand each other; that is to say, we speak the same language. Change means language evolves—allowing talk about the world as it exists in the present. But, at the same time, tensions also exist between the speech of different classes of people.

In England, after the conquest by William of Normandy in 1066, three languages prevailed: English, of course; French, introduced by William; and Latin, which became the dominant written language, particularly for English law.⁴

For the government, courtly and elite the official language was French, while the common people spoke the vernacular language, English.⁵

Vernacular—the language of the common people—has, over time, proven to be the kind of language most prone to change and most reflective of the real lives of the greatest numbers of people.

For example, after the breakup of the Roman Empire, the Italian peninsula was a hodgepodge of principalities and city states. So many dialects were in use that people in Florence could hardly understand people from the Kingdom of Naples.

In the 13th Century, along came the poet Dante Alighieri (1265–1326), who gave the world *The Divine Comedy*—*The Inferno*, *The Purgatorio*, *The Paradiso* and is often credited as the Father of Italian Literature, having written in the vernacular and standardizing Italian.^{6,7}

Two centuries later, Geoffrey Chaucer had a similar role choosing to write in vernacular English at a time when French and Latin were the more sophisticated languages spoken in England.

Tensions Made Evident

Chaucer and Dante exemplify the tensions between the elite and the common people.

In their times, only a handful of people were educated, and they wrote in Latin. Commoners spoke various dialects of the vernacular and were generally not literate. The structure by which uniformity is established, passed on and enforced—higher education—was totally absent.

And yet, it was with the rise of the vernacular that the world began to dramatically change politically, socially, spiritually, and economically.

With the invention of the printing press in the early 15th Century, books



Tamila C. Jensen is 2020-2021 President and **David Gurnick** is Assistant Vice President of the Los Angeles County Bar Association. Tamie and David are both Past Presidents of the San Fernando Valley Bar Association.

and other printed material became much more widely available than in earlier times when books had to be painstakingly transcribed by hand. Ideas, thus, spread ever more rapidly.

Jacques Barzun, in his book, *From Dawn to Decadence—500 Years of Western Cultural Life 1500 to the Present*, argues that the 95 Theses of Martin Luther (1517) had their profound effect because they were easily disseminated in common languages thanks to Gutenberg's movable type and to development of better quality paper and ink, giving a craftsmen the tools to produce new books and pamphlets quickly and disseminate them broadly.

Reading, writing, and the more critical thinking these skills engender, were forever no longer limited to the elite and clergy.

Tension between the standardization and change in language was discussed at length by the writer and student of languages, H. L. Mencken, in his three-volume work, *The American Language* (1919, 1921, 1923, 1936); *The American Language: Supplement One* (1945); and *The American Language Supplement Two* (1948).

Mencken addresses the tension between English as spoken in Britain and English as spoken in America, which was—and, perhaps, still is—considered by British intellectuals and American Brahmins as uncouth and even unintelligible. It moved rapidly away from the mother tongue, oddly enough and, to some extent, retained words and structures that had become archaic in the England of several centuries ago.

Explaining the American love of novelty and lack of conformity, Mencken wrote:

"They have acquired that character of restless men, that impatience of forms, that disdain of the dead hand, which now broadly marks them. Thus, the American on the linguistic side, likes to make his

language as he goes along, and not all the hard work of the schoolmarm can hold the business back.⁸

According to Mencken, the American is notable for his "revolt against conventional bonds and restraints" especially in common speech.⁹

To bolster his argument, in a later edition of his work, he devotes several pages to discussing pronouns then in common usage and shares with us this delightful poem, now curiously quaint:

Whatever is our ain't theim.

If it ain't hisn, then whosn is it?

I like thisn bettern thatn.

Let him and her say what is hisn
and hern,

Everyone should have what is
theirn.¹⁰

A Contemporary Challenge

This brings us to a contemporary challenge in the English language and particularly in the language of the law.

Our language lacks grammatical gender, with the exception of pronouns—English does not have a gender-neutral pronoun in general usage.¹¹

Historically, he was considered gender neutral in formal speech. But Americans long ago moved away from using he as gender neutral and adopted he/she.

Meanwhile, people are asking, sometimes insisting on being referred to according to their gender identity.¹²

The challenge was illustrated this year, in the decision quoted at the start of this article. In *U.S. v. Varner* the Court of Appeals for the Fifth Circuit faced a question of litigants, judges, court personnel and others using and potentially being required to use pronouns matching a litigant's gender identity.¹³

Changing and Evolving

English, like all living languages, is always changing, ever evolving.¹⁴

In light of today's active movements seeking social justice it has been noted that language is a mechanism "by which

gender is constructed and reinforced,” and that our words used to describe others or objects can be biased, now including binary gender bias.¹⁵

Recognizing this, contemporary writers and speakers often consider use of “they” to be an acceptable gender neutral pronoun, even when used to refer to a single individual.

Lack of a gender-neutral pronoun has been a source of increasing frustration for members of the LGBTQ community and others who are sensitive to such concerns.

The University of California San Francisco (UCSF) LGBTQ Resource Center lists the following pronouns as being in common usage:¹⁶

Subject	Object	Possessive	Possessive Pronoun	Reflexive
He	Him	His	His	Himself
"He studied"	"I called him"	"His pencil"	"That is his"	"He trusts himself"
She	Her	Her	Hers	Herself
"She studied"	"I called her"	"Her pencil"	"That is hers"	"She trusts herself"
They	Them	Their	Theirs	Themselves
"They studied"	"I called them"	"Their pencil"	"That is theirs"	"They trust themselves"
Ze (or Zia)	Her	Hir	Hirs	Hirself
"Ze studied" ("zee")	"I called hir" ("heer")	"Hir pencil"	"That is hirs"	"Ze trusts hirselt"

UCSF suggests including one’s preferred pronouns in their email and asking people which pronouns they prefer.¹⁷

At a recent Zoom conference, each person’s name appeared with their preferred pronoun stated.

In fact, the authors of this article have seen email with the lawyer’s signature presented as follows:[Attorney’s Name] Partner (Pronouns: he/ him/ his). This has potential to become an increasingly used, potentially standard practice.

The University of Southern California (USC) LGBTQ Center lists the following commonly used gender-neutral pronouns:

they, them, their, theirs, themselves, sie, hir, hir, hirs, hirselt zie, zir, zir, zirs, zirselt

so instead of...	you may use...	which is pronounced...
he/she	sie zie	see zie
him/her	hir zir	here like sir with a “z”
his/hers	hirs zirs	here’s like sirs with a “z”
himself/herself	hirselt zirselt	here-self like sir-self with a “z”

In 2014, Professor Marshall Thatcher of the University of South Dakota published an article proposing to create gender neutral third person pronouns.

In the article, Thatcher noted the workarounds that writers currently use to avoid using gender specific pronouns. These methods included repeating the noun rather than substituting a pronoun.

But, he found this method is not always ideal because it may lengthen the text and sound contrived, omitting the pronoun, using passive rather than active voice, pluralizing nouns so that plural rather than gender specific third person singular pronouns may be used, and achieving gender neutrality by using the word “one” as a generic referent rather than masculine pronouns.¹⁸

Professor Thatcher’s proposal is to adopt the following:


- ee—use as a gender neutral third person singular pronoun; this would substitute for he or she.
- eet—use as a gender neutral third person singular pronoun to refer to a person of unspecified sex or to an inanimate actor; he, she, or it.
- herim—use as a third person singular object of a sentence to use in place of her or him (such as, “an officer shall assist herim).
- hermit—use as a third person singular object of a sentence to refer to a person of unspecified sex or a non- human entity in place of him, her, or it.

- herimself—use as a third person singular reference to in place of herself or himself.
- herimself—use as a third person singular reference for a person of unspecified sex or a non-human entity, in place of herself, himself, or itself.
- hisers—use as a possessive pronoun in place of his or hers.
- hiser—use as a pronoun in place of his or her.
- hiserts—as a pronoun in place of his, her, or its.

Thatcher argues that incorporation into English of such new pronouns can be expected to achieve results comparable to the adoption into the language of the term Ms. in place of Mrs. and Miss and that adoption of these pronouns would end the clumsy or inaccurate workarounds that have

been adopted in writing to avoid gender specific pronouns.¹⁹

As Martin Luther King famously said, “the arc of the moral universe is long, but it bends toward justice.”²⁰

Today, it is increasingly recognized that ever-evolving language too, even at the granular level of our pronouns, can be a force for that justice. 

¹ *U.S. v. Varner*, 948 F.3d 250, 255 (5th Cir. 2020).

² See e.g., Rickie Sonpal, *Old Dictionaries and New Textualists* 71 *Fordham L. Rev.* 2177, 2181 (2003) (describing earliest English dictionaries in 1400s and 1500s).

³ See e.g., Wayne M. Senner (editor) *The Origins of Writing* (U. of Nebraska Press 1989) p.6 (noting Sumerians were the inventors of true writing).

⁴ David Mellinkoff *The Language of the Law* (Lit. le Brown & Co. 1963) 71, 95.

⁵ See, Britt Hanson, *A (Mostly) Succinct History of English Legal Language* 48 *Ariz. Attorney* 28, 32 (2012). (noting that judges and lawyers spoke the language of the court and nobility: Norman French).

⁶ See discussion in John M. Stefano III, *On Literature as Legal Authority* 49 *Ariz. L.R.* 521, 527, 527n.38 (2007).

⁷ See e.g., Asher Salah, *A Matter of Quotation: Dante and the Literary Identity of Jews in Italy* (chapter in *The Italia Judaica Jubilee Conference* (Shlomo Simonsohn and Joseph Shatzmiller, editors, Leiden: Boston: Brill, 2013) 168 (noting, Dante is considered to be the spiritual father of literature written in Italian vernacular).

⁸ H.L. Mencken, *The American Language* (Alfred A. Knopf, 1919) p. 22.

⁹ H.L. Mencken, *The American Language* 4th Edition (Alfred A. Knopf, 1962) p. 95.

¹⁰ H.L. Mencken, *The American Language*, Supplement Two (Alfred A. Knopf, 1948) p. 36.

¹¹ 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 *S.Dak. L. Rev.* (2014) (“Like all living languages, the English language is an evolving work in progress.”).

¹² See e.g., *Privacy Matters v. U.S. Dept. of Education*, 2016 WL 6436658, at *1 n.1 (D. Minn., 2016) (Plainiffs’ court filings referred to defendant Doe as male and used masculine pronouns, but did not ask Court to adopt that pronoun usage. Doe referred to herself as female, used feminine pronouns and asked Court to do the same. Court granted Doe’s request, referring to her as female and using feminine pronouns in referring to her.)

¹³ *U.S. v. Varner*, supra note 1 at 254-255. Illustrative of a time of transition, the Court noted courts sometimes do and sometimes do not use parties’ preferred pronouns; and the Fifth Circuit “has gone both ways.” *Id.*

¹⁴ Thatcher, supra note 7 at 79 (“Like all living languages, the English language is an evolving work in progress.”); see also e.g., Rudi Keller, *On Language Change, The Invisible Hand in Language* (Routledge, 1994) 3 (“Languages are always changing. Twenty generations separate us from Chaucer. If we could board a time machine and visit him in the year 1390, we would have great difficulties in making ourselves understood – even roughly.”) and 4 (“we find in newspapers printed about 40 years ago a wide range of expressions that would be inappropriate nowadays in a similar context”).

¹⁵ Heidi K. Brown, *Get With the Pronoun*, 17 *Legal Communications & Rhetoric* 61, 67 (Fall 2020) (quoting Nat’l Council of Teachers of English, *Statement on Gender and Language* (Oct. 25, 2018), <https://ncte.org/statement/genderfairuseoflang/>).

¹⁶ See website of University of California Lesbian, Gay, Bisexual, Transgender Resource Center, <https://lgbt.ucsf.edu/pronounsmatter> (last visited Nov. 21, 2020).

¹⁷ *Id.*

¹⁸ Thatcher, supra note 11 at 81.

¹⁹ Thatcher, supra note 11 at 87.

²⁰ See e.g., *Shelby County, Ala. v. Holder*, 570 U.S. 529, 581 (2013) (Ginsburg, dissenting).

SAN FERNANDO VALLEY BAR ASSOCIATION

Virtual Holiday Party

TUESDAY
DECEMBER 15 • 5:30 PM

Entertainment Provided by
Comedian Melanie Baldonado
(May Contain Adult Language!)

Party is Free for Current SFVBA Members!
Optional Charcuterie Board Available
\$30 • Order by December 8

Holiday Giving

MEND

<https://mendpoverty.org/get-involved/donate>

Haven Hills, Domestic Abuse Treatment Center

<https://havenhills.org/en/ways-to-give-back/>

RSVP events@sfvba.org