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Leslie M. Rose

Golden Gate University School of Law, lrose@ggu.edu

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THE SUPREME COURT AND GENDER-NEUTRAL LANGUAGE: SETTING THE STANDARD OR LAGGING BEHIND?

LESLIE M. ROSE*

[T]he law lives through language and we must be very careful about the language we use.¹

INTRODUCTION

Law students learn the law and the language of the law from casebooks – casebooks filled with Supreme Court opinions. So, for example, when students begin Constitutional Law they will read Chief Justice John Marshall’s influential 1803 opinion in *Marbury v. Madison* and learn that:

The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. . . . [The] government of the United States has been emphatically termed a government of laws, and not of men.²

Continuing through the Constitutional Law text about 500 pages, law students will read *Lochner v. New York*, written 100 years after *Marbury*, and discover that:

In every case that comes before this court, therefore, [the] question necessarily arises: Is this a fair, reasonable and appropriate exercise of the [police power], or is it an unreasonable, unnecessary and arbitrary interference with the right of the individual to his personal liberty or to enter into those contracts in relation to labor which may seem to him appropriate or necessary for the support of himself and his family?³

Jump ahead another century to *Melendez-Diaz v. Massachusetts*,⁴ an important case from the 2008 Supreme Court Term,⁵ likely to appear in future

* Associate Professor and Director of Advanced Legal Writing Programs, Golden Gate University School of Law. Thank you to my wonderful research assistants Emma Herries, Michael Minkus, and Leah Pasterick; to Cliff Rechtschaffen, Eric Christiansen, and Deborah Mostaghel for their insightful comments; and to the Golden Gate Scholarship Support Group and the Association of Legal Writing Directors for providing forums in which I could share my ideas and receive encouragement.

1. Justice Anthony Kennedy, *The Supreme Court – Kennedy Interview Part 3*, http://www.lawprose.org/interviews/supreme_court.php (last visited on October 14, 2009).

2. KATHLEEN M. SULLIVAN & GERALD GUNTHER, *CONSTITUTIONAL LAW* 4 (15th ed. 2004).

3. *Id.* at 493.

4. 129 S. Ct. 2527, 2541 (2009) (holding that affidavits of forensics experts are “testimonial” and thus subject to the Confrontation Clause of the Sixth Amendment).

5. See Adam Liptak, *The Roberts Court, Tipped by Kennedy*, N.Y. TIMES, July 1, 2009, at A3.

casebooks. Here, students will be confronted with a description of a constitutional right framed in language that excludes women:

The defendant *always* has the burden of raising his Confrontation Clause objection; notice-and-demand statutes simply govern the *time* within which he must do so. . . . It is common to require a defendant to exercise his rights under the Compulsory Process Clause in advance of trial, announcing his intent to present certain witnesses. [Citations omitted.] There is no conceivable reason why he cannot similarly be compelled to exercise his Confrontation Clause rights before trial.⁶

What students learn from these opinions may not be limited to what the authors intended. They will learn that “male” is the norm,⁷ even in the world of law, and they might wonder if *Marbury* and *Lochner* were even intended to apply to women, since both cases predate female suffrage.⁸ *Marbury* and *Lochner* reflect their historical time in their use of masculine pronouns to refer to all people. However, today, when clarity and precision are paramount in legal writing, and more than half of today’s law students are women, the Supreme Court should be embracing gender-neutral language.

Most modern legal writing texts and style manuals recommend that writers use gender-neutral language.⁹ Gender-neutral language is achieved by avoiding the use of “gendered generics” (male or female nouns and pronouns used to refer to both men and women). For example, gender neutrality could be achieved by referring to “Members of Congress,” rather than “Congressmen,” and by changing a few words in the previous quotation from *Melendez-Diaz*: “The defendant *always* has [the] burden of raising a Confrontation Clause objection; statutes simply govern the *time* within which the [defendant] must do so.”¹⁰

As this article demonstrates, most members of the United States Supreme Court still use male-gendered generics regularly. This practice freezes the Court in the non-inclusive and imprecise writing style of *Marbury* and *Lochner* and perpetuates a style of communication that no longer suits the needs of modern practice.

Most of the advice on gender-neutral writing is directed at lawyers and law students; it emphasizes that this technique is part of good advocacy and effective communication with the reader – usually a judge.¹¹ This advice applies

6. *Melendez-Diaz*, 129 S. Ct. at 2541.

7. See CASEY MILLER & KATE SWIFT, *THE HANDBOOK OF NONSEXIST WRITING* 3 (1980) (“What standard English usage says about males, for example, is that they are the species. What it says about females is that they are a subspecies.”).

8. U.S. CONST. amend. XIX.

9. See *infra* Section II.B.

10. See *Melendez-Diaz*, 129 S. Ct. at 2541.

11. See, e.g., STEVEN STARK, *WRITING TO WIN* xiii (2000) (“I’ve tried to focus on the writing of lawyers, not judges.”); RICHARD WYDICK, *PLAIN ENGLISH FOR LAWYERS* 3 (5th ed. 2005); ANNE ENQUIST & LAUREL CURRIE OATES, *JUST WRITING: GRAMMAR, PUNCTUATION, AND STYLE FOR THE LEGAL WRITER* 1–2 (2d ed. 2005); ANTONIN SCALIA & BRYAN GARNER, *MAKING YOUR CASE: THE ART OF PERSUADING JUDGES* xxi–xxiv (2008).

equally to judges.¹² Despite these recommendations, the practice is not universal among legal writers.¹³ It can be hard to convince both new and experienced legal writers that the heightened consciousness and extra editing required to achieve gender neutrality is worth the effort when a similar effort is not reflected in their models – the appellate court opinions they read, particularly the opinions of the U.S. Supreme Court.

This article argues that the members of the Supreme Court should avoid the use of gendered generics because such language communicates subtle sexism, distracts the reader, and creates ambiguity.¹⁴ Whether considered through the prism of feminism, or through the lens of the modern legal writing movement's emphasis on clarity and reader reaction, the Court's continued use of male-gendered terms to refer to all people can no longer be seen as benign. As the most influential members of the legal profession, the justices should be setting the standard, creating a model for law students and lawyers. Unfortunately, most of the justices are not.¹⁵

This article analyzes the Court's use of gender-neutral language during the 2006, 2007, and 2008 Terms.¹⁶ This research shows that only one justice consistently uses gender-neutral language, that four justices consistently use generic male pronouns, and that the rest fall somewhere in between.

Part I of this article defines gender-neutral language, discusses alternatives to gendered generics, and summarizes the concerns of the critics of the gender-neutral language movement. Part II reviews the key developments in the modern history of the shift toward gender-neutral language, generally and in the legal arena. Part III explains why gender-neutral language in judicial opinions matters by reviewing relevant social science research on subtle sexism and placing judicial writing in the larger field of modern legal writing. Part IV presents and analyzes the results of research into the language used by the members of the Roberts Court. The article concludes that the members of the Court should and can increase their use of gender-neutral language without sacrificing style. The Supreme Court's influence on legal thinking is so

12. See, e.g., JOYCE J. GEORGE, JUDICIAL OPINION WRITING HANDBOOK 417–22 (5th ed. 2007); RUGGERO J. ALDISERT, OPINION WRITING 234–37 (1990).

13. See generally Pat K. Chew & Lauren K. Kelly-Chew, *Subtly Sexist Language*, 16 COLUM. J. GENDER & L. 643, 646 (2007) (reporting results of research showing that judges, lawyers, and legal scholars "continue to use male-gendered words.").

14. Several legal writing experts and scholars have identified similar reasons in support of gender-neutral language. See, e.g., ENQUIST & OATES, *supra* note 11, at 147 ("For legal writers, there are at least four good reasons for making the effort to use gender-neutral language: fairness, clarity, precision, and reader reaction."); Judith D. Fischer, *Framing Gender: Federal Appellate Judges' Choices About Gender-Neutral Language*, 43 U.S.F. L. REV. 473, 486–88 (2009) (noting that legal writers should use gender-neutral language because it is fairer, "more exact," and "it benefits the writer's cause.").

15. Wisconsin Supreme Court Justice Shirley Abrahamson has noted that, compared to the legal academy, "the courts are lagging behind," in the use of gender-neutral language. See Shirley S. Abrahamson, *Toward A Courtroom of One's Own: An Appellate Court Judge Looks at Gender Bias*, 61 U. CIN. L. REV. 1209, 1218 (1992-1993).

16. The 2008 Term refers to Supreme Court decisions issued between October 2008 and June 2009; the 2007 Term refers to decisions issued between October 2007 and June 2008; the 2006 Term refers to decisions issued between October 2006 and June 2007.

profound that its responsibility extends beyond reaching results to communicating those results as effectively as possible.

I. WHAT IS GENDER-NEUTRAL LANGUAGE?

A. Gender-Neutral Language Defined

In its broadest sense, gender-neutral language is achieved by avoiding “gendered generics,” which are masculine or feminine nouns and pronouns used to refer to both men and women.¹⁷ For example, gender neutrality could be achieved by referring to “police officers,” rather than “policemen,” or by changing a few words in the earlier quote from *Marbury v. Madison*: “The very essence of civil liberty certainly consists in the right of [all] individual[s] to claim the protection of the laws, whenever [they] receive[] an injury.”¹⁸

In discussing gender-neutral language, some authors focus exclusively on the avoidance of male generics.¹⁹ This makes sense because there are few examples, historically, of the inappropriate use of female generics.²⁰ Writers often refer to such language as “sexist.”²¹ The “sexist” label, however, may not be the best way to further the goal of linguistic change. While male-gendered generics may communicate “subtle sexism,” one should not assume that the writer is “sexist.”²² The use of such a negative term may have the unintended effect of unfairly labeling the writer and closing down discussion.²³

This article steps out of the paradigm of “sexist language” to frame the discussion in a way that focuses on the multiple reasons for legal writers,

17. See ANNE CURZAN, *GENDER SHIFTS IN THE HISTORY OF ENGLISH* 9 (2003). Curzan explains that she uses the term “gendered, an adjective derived from a verb,” because “*gender* effectively captures the ways in which scholars . . . have argued that gender is a kind of performance – sets of repeated behavior through which we create gendered selves and perpetuate gender categories.” In addition, the term “*gendered* serves as a convenient means of categorizing the set of linguistic forms that carry gender in a given language.” See also Chew & Kelley-Chew, *supra* note 13, at 644 (discussing “male-gendered generics”); Fischer, *supra* note 14, at 475–77 (discussing “false generics” and “the pseudo-generic masculine”).

18. See SULLIVAN & GUNTHER, *supra* note 2.

19. See, e.g., LINDA H. EDWARDS, *LEGAL WRITING AND ANALYSIS* 280 (2d ed. 2007) (“Gender-neutral language is language that avoids masculine nouns and pronouns for *general* reference.”); BRYAN A. GARNER, *THE REDBOOK, A MANUAL ON LEGAL STYLE* 315 (2d ed. 2006) (“*Gender-neutral language*. Masculine pronouns . . . should be avoided unless you’re writing only about men.”).

20. See Fischer, *supra* note 14, at 475–76 (noting that gender-biased language “is most often directed against women, and its negative effects are typically experienced by women.”).

21. See, e.g., HELENE S. SHAPO, MARILYN R. WALTER & ELIZABETH FAJANS, *WRITING AND ANALYSIS IN THE LAW* 244–46 (5th ed. 2008); MARY BARNARD RAY & JILL J. RAMSFIELD, *LEGAL WRITING: GETTING IT RIGHT AND GETTING IT WRITTEN* 382 (4th ed. 2005); Janet K. Swim, Robyn Mallett & Charles Stangor, *Understanding Subtle Sexism: Detection and Use of Sexist Language*, 51 *SEX ROLES* 117, 119 (2004); Janet B. Parks & Mary Ann Robertson, *Development and Validation of an Instrument to Measure Attitudes Toward Sexist/Nonsexist Language*, 42 *SEX ROLES* 415, 420 (2000).

22. See Chew & Kelley-Chew, *supra* note 13, at 655 (“[E]mpirical research offers substantial evidence that using male-gendered generics is a form of subtle sexism, even though the user does not necessarily have sexist intentions.”).

23. See CURZAN, *supra* note 17, at 5 (“The complexity of speech communities and the nature of most language changes makes clear the difficulty and undesirability in most cases of ‘assigning responsibility’ for particular changes to particular speakers, particularly at the conscious level.”).

including judges, to move toward a gender-neutral style, by examining the language and its merits in a broader context that includes, but goes beyond, sexism.²⁴ For purposes of this article, gender-neutral language is a more useful term,²⁵ one that may make the message more likely to be heard.²⁶ As Justice Ginsburg recently noted, “if you want to influence people, you want them to accept your suggestions, you don’t say, [‘]You don’t know how to use the English language[.’] . . . It will be welcomed much more if you have a gentle touch than if you are aggressive.”²⁷

B. Alternatives to Gendered Generics

The best course today is to eliminate sexist language while not resorting to ugly or awkward linguistic artifices. The purpose, of course, is to avoid distracting any variety of readers, from traditional grammarians to feminists.²⁸

Alternatives to the most common and most non-inclusive gendered nouns are readily available in writing manuals.²⁹ The Dictionary of Occupational Titles, made available on-line by the U.S. Department of Labor, provides many examples of job titles free from gender stereotyping, including “fisher” (fisherman), “worker” (workman), “appliance repairer” (repairman), and “salesperson” (salesman).³⁰

While avoidance of male-gendered pronouns is more challenging, a number of effective alternatives exist. These include using plural nouns and pronouns (“pluralizing”), repeating the noun, using an article instead of a pronoun, using the relative pronoun “who,” using paired pronouns (“he or she”), and recasting the sentence to avoid the need for a pronoun.³¹ The most

24. See *infra* Section III.

25. Katherine Durack has noted that in the field of technical writing, nonsexist language and gender-neutral language are not necessarily synonymous: “*nonsexist* language is language with a political agenda: ‘it works against sexism in society. While many gender-neutral terms are consistent with nonsexist usage, the two are not the same[.]’” Katherine T. Durack, *Authority and Audience-centered Writing Strategies: Sexism in 19th-century Sewing Machine Manuals, Technical Communication*, TECHNICAL COMMUNICATION 180, 193-94 (1998) (quoting F.W. FRANK & P.A. TREICHLER, eds., LANGUAGE, GENDER, AND PROFESSIONAL WRITING 18 (1989)).

26. See Judith Resnik, *Asking About Gender in Courts*, 21 SIGNS: JOURNAL OF WOMEN IN CULTURE & SOCIETY 952, 953 n.2 (1996) (noting that the first director of the National Judicial Education Program, which studied gender bias in the courts, “substituted the term gender bias for sexism after she discovered ‘in 1980 that judges attending the first judicial education programs on this topic were less resistant if the former term was used [citation omitted]”).

27. Emily Bazelon, *The Place of Women on the Court*, THE N.Y. TIMES MAGAZINE, July 12, 2009, at 25. Justice Ginsburg was responding to a question about her successful approach, as a litigator, “at influencing a male lawyer’s brief without making him feel that [she] had taken over the case.”

28. BRYAN A. GARNER, A DICTIONARY OF MODERN LEGAL USAGE 799 (2d ed. 1995).

29. See, e.g., ENQUIST & OATES, *supra* note 11, at 150-51; GARNER, *supra* note 19, at 316-17; EDWARDS, *supra* note 19, at 281; PUBLICATION MANUAL OF THE AMERICAN PSYCHOLOGICAL ASSOCIATION 71-72 (5th ed. 2001).

30. Dictionary of Occupational Titles, <http://www.occupationalinfo.org> (last visited October 14, 2009).

31. See, e.g., CURZAN, *supra* note 17, at 79 (noting that “Most current handbooks now recognize that generic *he* is sexist, advise avoiding it (often in no uncertain terms), and typically present three options for revising the construction: employ forms of *he or she*; make the sentence plural; or revise the entire construction to eliminate the need for a pronoun. Many grammars also note that using the

noticeable technique is paired pronouns; most style manuals recommend using more “invisible” techniques whenever possible.³²

A more controversial alternative that appears to be gaining popularity is the technique of alternating masculine and feminine pronouns. Some style manuals include this as one acceptable approach to avoiding the generic use of masculine pronouns.³³ A writer employing this technique might alternate between using male and female pronouns by book chapter, by page, or by actor.³⁴ Some members of the Court use this approach occasionally; Justices Ginsburg and Stevens use it frequently by, for example, using male-gendered pronouns when referring generally to criminal defendants and female-gendered pronouns when referring generally to judges.³⁵

While this technique may be appropriate in some contexts, it can be problematic in scientific and legal writing.³⁶ Alternating pronouns is not technically “gender neutral” and does not address the problems inherent in the use of gendered generics.³⁷ Several studies by social scientists have demonstrated that this technique is an ineffective method for avoiding generic masculine pronouns because readers perceived alternating pronouns to be just as gender-biased as masculine pronouns and rated the text as lower in overall quality than text with male-gendered generics.³⁸ In addition, the alternating

construction *he or she* can get awkward if used too often.”); ENQUIST & OATES, *supra* note 11, at 148–50; GARNER, *supra* note 19, at 315–16; SHAPO, WALTER & FAJANS, *supra* note 21, at 244–46; GARNER, *supra* note 28, at 800–01; EDWARD W. JESSEN, CALIFORNIA STYLE MANUAL, A HANDBOOK OF LEGAL STYLE FOR CALIFORNIA COURTS AND LAWYERS 174–75 (4th ed. 2000); PUBLICATION MANUAL OF THE AMERICAN PSYCHOLOGICAL ASSOCIATION, *supra* note 29, at 66–67, 70–73.

32. Bryan Garner is an advocate of what he calls “invisible gender neutrality.” See SCALIA & GARNER, *supra* note 11, at 116; THE CHICAGO MANUAL OF STYLE 233 (15th ed. 2003). Garner recommends only limited use of paired pronouns because it “sounds stilted” and can be “obnoxious” if overused. GARNER, *supra* note 19, at 316.

33. See, e.g., ENQUIST & OATES, *supra* note 11, at 149; WYDICK, *supra* note 11, at 75 (suggesting that a writer can use “she” to refer to judges in one paragraph, and “he” to refer to lawyers in the next, but warning that the technique “may look artificial”); THE AMERICAN HERITAGE BOOK OF ENGLISH USAGE, A PRACTICAL AND AUTHORITATIVE GUIDE TO CONTEMPORARY ENGLISH (1996) available at <http://www.bartleby.com/64/C005/014.html> (noting that the use of alternating pronouns “has been gaining acceptance” in academic journals and acknowledging that while the practice may seem “cumbersome,” “alternating between *he* and *she* can offer a balanced way of proceeding.”).

34. See, e.g., JOAN AMES MAGAT, THE LAWYER’S EDITING MANUAL xi (2009) (“One currently popular convention is to vary the sex of the personage, signaling to the reader that it simply doesn’t matter whether he reads or she writes or vice versa; what matters is what’s read and what’s written, and how. That convention is as good as any other and is thus what I use here.”).

35. See *infra* Section IV.E.

36. See DEBORAH E. BOUCHOUX, ASPEN HANDBOOK FOR LEGAL WRITERS 24 (2d ed. 2009) (advising legal writers to avoid alternating pronouns to achieve gender neutrality, “especially in a single document, especially in a single paragraph or section. This attempt to be gender-inclusive is misguided and is disruptive to the flow of a project.”); GARNER, *supra* note 28, at 800 (warning that the technique is risky because “unintended connotations may invade the writing” and it might ultimately fail to achieve its intended goal).

37. See PUBLICATION MANUAL OF THE AMERICAN PSYCHOLOGICAL ASSOCIATION, *supra* note 29, at 67 (“Alternating between *he* and *she* also may be distracting and is not ideal; doing so implies that *he* or *she* can in fact be generic, which is not the case. Use of either pronoun unavoidably suggests that specific gender to the reader.”).

38. See Laura Madson & Jennifer Shoda, *Alternating Between Masculine and Feminine Pronouns: Does Essay Topic Affect Readers’ Perceptions?*, 54 SEX ROLES 275, 282 (Feb 2006); see also, Angela

technique may be “jarring to the reader” due to the difficulty in “maintain[ing] two mental images”; more cognitive resources are required when the words are used in isolation.³⁹ The authors of one study acknowledged that some writers might decide to risk using this technique to “motivate readers to think differently about sexism in language and in general.”⁴⁰

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).⁴¹ Although the use of *they* as a universal singular pronoun has deep historical roots,⁴² 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,⁴³ but law may be the last to adopt such a practice.⁴⁴

II. MODERN TRENDS IN GENDER-NEUTRAL LANGUAGE

A. General Trends

Attempts to modify gender-biased language date back to the 12th Century.⁴⁵ However, the modern feminist movement of the 1970s became the impetus for a renewed look at non-inclusive language, particularly concerning women.⁴⁶ Most notable and most successful was the adoption of the term “Ms.” as an alternative to “Miss” and “Mrs.,” which eliminated the practice of announcing a woman’s marital status through the title, something not communicated by “Mr.”⁴⁷

Mucchi-Faina, *Visible or influential? Language reforms and gender (in)equality*, 44 SOCIAL SCIENCE INFORMATION 189, 202 (2005) (discussing a 1999 study in which readers found an essay using alternating pronouns biased in favor of women and lower in quality compared to an essay in which paired pronouns were used).

39. Madson & Shoda, *supra* note 38, at 283.

40. *Id.* at 284.

41. See EDWARDS, *supra* note 19, at 282; GARNER, *supra* note 28, at 800.

42. See Patricia T. O’Conner & Stewart Kellerman, *All-Purpose Pronoun*, N.Y. TIMES MAGAZINE, July 26, 2009, at 14.

43. See, e.g., CURZAN, *supra* note 17, at 80–81 (predicting that formal written language will eventually adapt to what has become acceptable in spoken language, but acknowledging that it will take “considerable time” because of conservative traditions); CASEY MILLER & KATE SWIFT, THE HANDBOOK OF NONSEXIST WRITING 47–49, 58 (2d ed. 2001) (predicting the “inevitable” acceptance of “they” as a singular pronoun); GARNER, *supra* note 28, at 801 (noting that while the use of *they* as a singular pronoun is “becoming commonplace,” it still “sets many literate Americans’ teeth on edge,” which Garner sees as “an unfortunate setback to what promises to be the ultimate solution to the problem.”); THE OXFORD AMERICAN DICTIONARY AND LANGUAGE GUIDE 331 (1999) (noting that the use of “they” with indefinite pronouns like “everybody” is “standard in British English and informal US usage” and that it is a less awkward way to avoid the use of “his”).

44. See, e.g., ENQUIST & OATES, *supra* note 11, at 147 (noting that “the language of law” is “a bit slower to change than the language in other fields”).

45. See Mucchi-Faina, *supra* note 38, at 190.

46. *Id.* at 191.

47. See GARNER, *supra* note 28, at 802; MILLER & SWIFT, *supra* note 43, at 3 (noting the adoption of the term by the New York Times); Mucchi-Faina, *supra* note 38, at 191.

In 1975, the American Psychological Association published its first guidelines on nonsexist language.⁴⁸ Other academic and professional organizations including the American Philosophical Association,⁴⁹ the Modern Language Association, and the American Medical Association, followed suit in the 1980s by requiring authors to use gender-neutral language.⁵⁰

In 1980, Casey Miller and Kate Swift published their groundbreaking book, *The Handbook of Nonsexist Writing*, to help writers, editors and speakers “free their language from unconscious semantic bias,”⁵¹ and “to provide practical suggestions to speakers and writers already committed to equality as well as clarity in style.”⁵² They included a discussion of “the pronoun problem” and the unsuccessful attempts to create a new generic pronoun.⁵³

Around the same time that Miller and Swift were providing writers with alternatives to “man as a false generic,”⁵⁴ the authors of arguably the most popular book on writing were providing writers with numerous examples of male-gendered generics. In the 1979 edition of the *Elements of Style*, Strunk and White used generic nouns and pronouns throughout the book,⁵⁵ commenting in one section that “style not only reveals the spirit of the man but reveals his identity, as surely as would his fingerprints.”⁵⁶ By 2000, however, the fourth edition of the book acknowledged that “many writers” find generic masculine pronouns “limiting or offensive” and offered some alternatives.⁵⁷

48. See Mucchi-Faina, *supra* note 38, at 191. The current guidelines can be found in the PUBLICATION MANUAL OF THE AMERICAN PSYCHOLOGICAL ASSOCIATION 71–72 (5th ed. 2001).

49. The American Philosophical Association published its “Guidelines for Non-Sexist Use of Language” in 1986 to “reflect an organizational conviction that philosophers should take special care to avoid giving needless and unintended offense.” The Association recognized “the emotive force of words and . . . the ways in which language influences thought and behavior.” The Guidelines are available at <http://www.apaonline.org/publications/texts/nonsexist.aspx> (last visited June 20, 2009).

50. See Madson & Shoda, *supra* note 38, at 275.

51. MILLER & SWIFT, *supra* note 7, at 1.

52. *Id.* at 2.

53. *Id.* at 46 (summarizing proposals for generic pronouns including: “thon,” “co,” “e,” “tey,” “na,” and “per”). For a detailed history of the personal pronoun in Old and Middle English, see CURZAN, *supra* note 17, at 59–69, 189–94.

54. See *id.* at 13–18.

55. See, e.g., WILLIAM STRUNK JR. & E.B. WHITE, THE ELEMENTS OF STYLE 69 (3d ed. 1979) (“A writer is a gunner, sometimes waiting in his blind for something to come in, sometimes roaming the countryside hoping to scare something up. Like other gunners, he must cultivate patience; he may have to work many covers to bring down one partridge.”); *id.* at 83 (“[T]he writer will discover, in the course of his work, that the setting of a word is just as restrictive as the setting of a jewel.”); *id.* at 84 (“[S]tyle is the writer, and therefore what a man is, rather than what he knows, will at last determine his style.”).

56. *Id.* at 68.

57. STRUNK & WHITE, THE ELEMENTS OF STYLE 60 (4th ed. 2000) (“The use of *he* as a pronoun for nouns embracing both genders is a simple, practical convention rooted in the beginnings of English language. Currently, however, many writers find the use of the generic *he* or *his* to rename indefinite antecedents limiting or offensive.”). The text also notes that *he* or *she* can be awkward, *id.* at 60, and that the repeated use of plurals can result in “prose sounding general and diffuse.” *Id.* at 61. Finally, the authors fall back on the masculine generic: “No one need fear to use *he* if common sense supports it. If you think *she* is a handy substitute for *he*, try it and see what happens.” *Id.*

Also in 1979, the author of a paperback entitled *Write Right!* noted that “[t]he attention currently being given to sexism in our language is resulting in some wide swings of action and reaction. We have not yet settled down to a steady middle course wherein we drop the unnecessarily sexist expressions but at the same time avoid the extremes advocated by some.”⁵⁸ She welcomed the adoption of “Ms.” and “worker’s compensation,” but complained about “the flap over *person v. man*.”⁵⁹

By the mid-eighties, researchers who had reviewed three recently published American dictionaries reported a “trend toward nonsexism.”⁶⁰ The preface to the second edition of *Random House Webster’s Unabridged Dictionary* noted that the social and cultural movements of the seventies and eighties, including the women’s movement, had influenced “attitudes toward language and its use.”⁶¹ This influence was reflected in the authors’ efforts to “make the wording of the definitions and illustrative examples gender-neutral, and to point up, in relevant Usage Notes, current usage, choices, and attitudes regarding gender-neutral and gender-specific terms.”⁶²

In 1999, *The Oxford American Dictionary and Language Guide* placed the gender-specific definition for “man” first (“an adult human male, esp. as distinct from a woman or boy”) and the generic meaning (“human beings in general”) second.⁶³ The accompanying usage note acknowledged that “many consider” the second definition “offensive and sexist.”⁶⁴ The 2003 edition of *The Chicago Manual of Style* recommends the use of gender-neutral language and includes suggestions for achieving it, while acknowledging that “it takes thought and often some hard work.”⁶⁵

One of the most significant recent examples of the growing trend toward gender-neutral language can be found in Congress, where Representative Nancy Pelosi now wields the gavel as the first woman Speaker of the House.⁶⁶ On January 5, 2009, the United States House of Representatives updated its standing rules to reflect gender neutrality. For example, references to the word “chairman” have been changed to “chair” and male-gendered pronouns have been replaced by articles or by repetition of the antecedent noun.⁶⁷

58. JAN VENOLIA, *WRITE RIGHT! A DESK DRAWER DIGEST OF PUNCTUATION, GRAMMAR & STYLE* 66 (1979).

59. *Id.*

60. MILLER & SWIFT, *supra* note 43, at 2.

61. RANDOM HOUSE WEBSTER’S UNABRIDGED DICTIONARY vii (2d ed. 1999) (The second edition was originally published in 1987).

62. *Id.*

63. THE OXFORD AMERICAN DICTIONARY AND LANGUAGE GUIDE, *supra* note 43, at 602. In dictionaries, the “most frequently encountered meanings generally come before less common ones.” *Id.* at xviii.

64. *Id.*

65. THE CHICAGO MANUAL OF STYLE, *supra* note 32; *see also id.* at 157, 167.

66. *See* Congresswoman Nancy Pelosi, <http://www.house.gov/pelosi/biography/bio.html> (last visited October 14, 2009) (On January 4, 2007, Nancy Pelosi was elected Speaker of the United States House of Representatives.).

67. H.R. Res. 5, 111th Cong. (2009).

B. Trends in Legal Writing

While some style mavens were struggling with the changes in language, legal writers in 1979 could turn to Richard Wydick's *Plain English for Lawyers*, which introduced a section on "Sexism in Legal Writing" with the admonition that "[t]he time has passed when legal writers can pretend that the world is inhabited by males only."⁶⁸ Wydick then provided two pages of gender-neutral alternatives.⁶⁹

Today, most legal writing texts and manuals continue to recommend the use of gender-neutral language and list techniques to achieve it.⁷⁰ Although the authors agree on the general principles, some include the caveat that gender neutrality should be sacrificed if the result is awkward or distracting.⁷¹

Despite the failure of many law students, lawyers, and judges to follow the advice contained in these books,⁷² the legal world has seen some movement in the direction of gender-neutral writing. For example, the change from "reasonable man" to "reasonable person" as a legal standard is an obvious, notable change in legal terminology.⁷³ Numerous law journals now encourage authors to use gender-neutral language⁷⁴ and a number of states have made

68. RICHARD WYDICK, *PLAIN ENGLISH FOR LAWYERS* 59 (1979).

69. *Id.* at 60–61.

70. See, e.g., ENQUIST & OATES, *supra* note 11, at 148–52; GARNER, *supra* note 19, at 315–17; EDWARDS, *supra* note 19, at 281; SHAPO, WALTER & FAJANS, *supra* note 21, at 244–46 ("The legal profession has become increasingly sensitive to the use of sexist language. To avoid antagonizing colleagues and clients, it is important to use gender neutral language when you write."); RICHARD K. NEUMANN, JR., *LEGAL REASONING AND LEGAL WRITING* 233–35 (6th ed. 2009); MICHAEL D. MURRAY & CHRISTY H. DESANCTIS, *LEGAL RESEARCH AND WRITING* 174 (2005) ("There is no excuse for writing with sexist, male-dominated language in legal contexts.")

71. See, e.g., BOUCHOUX, *supra* note 36, at 25 ("[I]t is still acceptable to use *he* or *him* when changing the pronouns or rewriting the sentence would result in clumsy and distracting writing.")

72. See *supra* note 12.

73. See Chew & Kelly-Chew, *supra* note 13, at 672–74 (2007) (reviewing the history of the change from "reasonable man" to "reasonable person" in the legal community).

74. See, e.g., Brooklyn Journal of International Law, <http://www.brooklaw.edu/students/journals/bjilsubmission.php> ("The Journal encourages the use of gender-neutral language."); Capital University Law Review, <https://culsnet.law.capital.edu/LawReview/Submit.asp>; Columbia Law Review, <http://www.columbialawreview.org/information/submissions> ("The Review encourages the use of gender-neutral language."); Cornell Law Review, <http://www.lawschool.cornell.edu/research/cornell-law-review/Submissions.cfm> ("We encourage the use of gender-neutral language."); Gonzaga Law Review, http://www.law.gonzaga.edu/Academic-Program/Law-Reviews/gonzaga_law_review/default.asp ("It is the policy of the Gonzaga Law Review to support and further the use of gender-neutral language."); Loyola of Los Angeles Entertainment Law Review, <http://elr.lls.edu/submissions.html> ("As a matter of policy, the Journal encourages and promotes the use of gender-neutral writing."); Michigan State University Journal of Medicine and Law, <https://www.msu.edu/~msujml/submission.html> ("The use of gender-neutral language is preferred."); New York Law School Law Review, http://www.nyls.edu/academics/jd_programs/law_review/submissions_policy/ ("As a matter of policy, the New York Law School Law Review encourages the use of gender-neutral language."); Northwestern University Law Review, <http://www.law.northwestern.edu/lawreview/submissions.html>; Pennsylvania State Law Review, <http://www.dsl.psu.edu/journals/lawreview/submission.cfm>; Stetson University College of the Law, <http://justice.law.stetson.edu/lawrev/submittngarticles.asp> ("As a matter of policy, the Stetson Law Review encourages the use of gender-neutral and race-neutral language."); Southwestern Law School, <http://www.swlaw.edu/>

their jury instructions gender neutral.⁷⁵ In addition, many state court style manuals advise attorneys to use gender-neutral language.⁷⁶

academics/biederman/journal/articlesubmissions (“The writing should be appropriate for a law review article. To that end, authors should [sic] [u]se gender-neutral language.”); Villanova Law Review, http://www.law.villanova.edu/scholarlyresources/journals/lawreview/submitting_articles.asp (all websites last visited on October 14, 2009).

75. See, e.g., Cal. Rules of Court, Rule 2.1058 (2009), available at http://www.courtinfo.ca.gov/rules/index.cfm?title=two&linkid=rule2_1058 (“All instructions submitted to the jury must be written in gender-neutral language. If standard jury instructions (CALCRIM and CACI) are to be submitted to the jury, the court or, at the court’s request, counsel must recast the instructions as necessary to ensure that gender-neutral language is used in each instruction.”); State of Connecticut Judicial Branch, Criminal Jury Instructions (2001), available at <http://www.jud.ct.gov/JI/criminal/aboutedition.htm> (“The statutory language has been altered for gender neutrality.”); Maryland State Bar Association, Inc., Standing Committee on Pattern Jury Instructions, Maryland Criminal Pattern Jury Instructions (2006), available at <http://www.micpel.edu/Catalog/publications/tables%20of%20contents/Maryland%20Criminal%20Pattern%20Jury%20Instructions.htm> (“The instructions are gender neutral and should be presented to reflect the applicable gender.”); STATE BAR OF MICHIGAN, STATE BAR OF MICHIGAN TASK FORCE ON RACIAL/ETHNIC AND GENDER ISSUES IN THE COURTS AND THE LEGAL PROFESSION EXECUTIVE SUMMARY 8 (1997), available at <http://courts.michigan.gov/mji/webcast/alimony/execsummary.pdf> (“As a result of recommendations by the State Bar of Michigan Standing Committee on Standard Criminal Jury Instructions and the Michigan Supreme Court Standard Jury Instructions Committee, civil and criminal jury instructions were amended to adopt consistently gender neutral language in almost all provisions and commentary.”); NEW YORK STATE UNIFIED COURT SYSTEM, CRIMINAL JURY INSTRUCTIONS 2D (2001), available at <http://www.courts.state.ny.us/cji/0-TitlePage/History.htm> (“The statutory definitions and other portions of the charge have been made gender-neutral with statutory language altered as necessary.”).

76. See, e.g., ARKANSAS JUDICIARY, STYLE AND USAGE GUIDE 20 (2008), available at http://courts.state.ar.us/reporter_decisions/house_style_guide/jan2008_rev3.pdf (“Whenever possible, use gender-neutral language. This principle has been recognized legislatively, with the term ‘workers’ compensation’ replacing ‘workmen’s compensation.’ Analogously, use ‘firefighter’ instead of ‘fireman.’ When dealing with generic pronouns, unless the context specifically calls for gender distinction, use ‘he or she’ and ‘his or hers.’ The locution is obviously cumbersome, but it’s the best inclusive form available – until ‘their’ becomes an acceptable alternative in formal writing. Bryan A. Garner offers some helpful suggestions, such as using ‘one’ or ‘who,’ in *The Elements of Legal Style*, 7.17 (Oxford University Press, 1991).”); JESSEN, *supra* note 31, at 174–75 (“When writing in general terms, use gender-neutral language. (See Cal. Rules of Court, rule 989.) This requires awareness that not all judges, lawyers, parties or witnesses are male and avoidance of ‘he’ as a generic pronoun.”); COLORADO OFFICE OF LEGISLATIVE LEGAL SERVICE, COLORADO LEGISLATIVE DRAFTING MANUAL 11-5 to 11-10 (2008) http://www.state.co.us/gov_dir/leg_dir/olls/LDM/OLLS_Drafting_Manual.pdf; LEGISLATIVE COUNCIL, MAINE STATE LEGISLATURE, MAINE LEGISLATIVE DRAFTING MANUAL 83-89 (2004), <http://janus.state.me.us/legis/ros/manual/Draftman2004.pdf>; OFFICE OF THE REVISOR OF STATUTES, MINNESOTA RULES: DRAFTING MANUAL WITH STYLES AND FORMS 269 (2002) https://www.revisor.leg.state.mn.us/revisor/pubs/bill_drafting_manual/revisor_manual.pdf (“There are many ways to avoid gender-specific nouns like workman or man-hours. The revisor’s office has some standard substitutions developed for use during the gender project of 1986, which removed gender-specific language from the statutes. Other useful lists appear in *The Nonsexist Word Finder* by Rosalie Maggio.”); Oregon Appellate Courts, Style Manual 14-15 (2002), <http://www.publications.ojd.state.or.us/Style%20Manual%202002.pdf> (“Gender-neutral terms are preferred, and gender-based pronouns are avoided except when referring to a specific person. Use ‘he or she’ only when all other constructions fail.”); TEXAS LEGISLATIVE COUNSEL, TEXAS LEGISLATIVE COUNCIL DRAFTING MANUAL 103 (2008), <http://www.tlc.state.tx.us/legal/dm/draftingmanual.pdf> (“The use of masculine pronouns is subject to criticism as an example of sex bias, and for that reason gender-neutral language is preferred in drafts of legislative documents.”) (all websites last visited on April 8, 2009).

Two recent studies have specifically addressed the use of gender-neutral language in the legal profession. Pat Chew and Lauren Kelley-Chew evaluated the written work of judges, lawyers, and legal scholars by comparing the use of gendered nouns during the period between 2004 and 2006 with the period between 1994 and 1996.⁷⁷ They found a lack of “significant change” between the two periods,⁷⁸ but noted “a small but positive movement toward the use of gender-neutral words in the last decade” by judges and lawyers.⁷⁹ In contrast, Judith Fischer’s study of the use of gender-neutral language in federal appellate opinions demonstrated a “dramatic increase” in the use of gender-neutral language between 1965 and 2006.⁸⁰

C. Criticisms of Gender-Neutral Language

The movement toward gender-neutral language is not without detractors.⁸¹ Some critics believe that the issue is too trivial to warrant the effort required to change writing habits they see as rooted in tradition.⁸² For example, a 1998 study found that up to eighty percent of the students surveyed supported “changing some aspects of sexist language,” but up to fifty-three percent “were still resistant to changing at least parts of the language.” Their resistance was reportedly based on “the difficulty of change for the individual and the pervasive influence of perceived tradition in society.”⁸³

Critics in the legal writing world have expressed concern that the elimination of the masculine generic pronoun would have a negative impact on writing style and readability.⁸⁴ Justice Scalia, in particular, has opined that the elimination of “he” as a “traditional, generic, unisex reference to a human being” is both distracting and comes with “some stylistic cost.”⁸⁵

Others see any movement to change language that offends some group as “politically correct” and ultimately ineffective in achieving underlying societal

77. *Supra* note 13, at 659 (The authors searched Westlaw databases looking for the frequency of use of specific male-gendered generics (e.g. “congressman,” “businessman”) compared to the use of gender-neutral alternatives (e.g., “congressperson,” “businessperson”).).

78. *Id.* at 663.

79. *Id.* at 667.

80. Fischer, *supra* note 14, at 502 (The author searched a “large sample” for paired pronouns and studied a smaller sample in which complete opinions were reviewed and all uses of gender-biased and gender-neutral language were recorded.).

81. See, e.g., Janet B. Parks & Mary Ann Robertson, *Contemporary Arguments Against Nonsexist Language: Blaubergs (1980) Revisited*, 39 SEX ROLES 445 (1998); Chew & Kelly-Chew, *supra* note 13, at 669–72 (2007) (discussing obstacles to pervasive change).

82. See Parks & Robertson, *supra* note 81, at 447–48; Mucchi-Faina, *supra* note 38, at 193–94 (2005).

83. Parks & Robertson, *supra* note 81, at 459 (The authors surveyed undergraduates in sport management classes at a “midsize, politically-conservative university in the Midwest.”).

84. See, e.g., Cathy J. Jones, *Sexist Language: An Overview for Teachers and Librarians*, 82 LAW LIBRARY JOURNAL 673, 677-78 (Fall 1990) (responding to criticism that nonsexist language is awkward: “At first, using alternative language might seem awkward, but once one gets used to hearing nonsexist language, the use of, for example, only masculine pronouns is not only awkward, but deafening.”).

85. SCALIA & GARNER, *supra* note 11, at 119.

change.⁸⁶ For example, in the foreword to a new editing guide for lawyers, the author explained why she chose to use alternating pronouns throughout the book:

An aside about sexist pronouns: The fracas over how to avoid favoritism has gone on for some time, and, apart from such efficient (and perhaps ephemeral) unisex inventions as s/he or the constraining cop-out of using only plurals, it appears to remain unresolved. How to deal with the issue is, to my mind, a matter of taste; our choice of pronouns is not what enslaves women or keeps men oblivious to the offense of the omnipresent “he.”⁸⁷

The criticisms of gender-neutral language are encapsulated in a brief exchange between an author and the student editors of the Georgetown Law Journal. In 1994, the Journal published a letter from Steven Shavell, an article author who objected to the Journal’s policy against male-gendered generics.⁸⁸ Professor Shavell listed three objections to gender-neutral language he considered “obvious”: 1) the writing would be “stilted and unnatural, upsetting to our aesthetic sensibilities (which have been molded by use of the male pronoun forms in our language and literature)”; 2) the writer might not want to “be associated with” the “particular political connotation” that the use of gender-neutral language carries; and, most importantly, 3) freedom of expression would be compromised, resulting in “a flow of work that is reduced and distorted in content, and a situation rife with opportunity for abuse by those with censorial authority.”⁸⁹

As the editors pointed out in their response to Professor Shavell, the use of male-gendered generics is not neutral; it can communicate its own political connotations⁹⁰ and may indeed upset the “aesthetic sensibilities” of a significant portion of the audience.⁹¹ In fact, Professor Shavell need not have feared censorship; his article was published as he wished, with the inclusion of male-gendered generics.⁹² The Journal “encouraged” authors to use gender-neutral language; it did not mandate the practice.⁹³

As discussed above, a number of alternatives are available to writers who wish to avoid masculine generics. While these techniques take some thought,

86. See, e.g., Gertrude Block, *Writing Tips: Views on PC*, 18 PENNSYLVANIA LAWYER 58 (1996) “[A]fter more than two decades of the ‘de-sexing’ of our language, women are still paid less for similar jobs than men, are still under-represented in ‘power’ positions in both academia and in business. Sex discrimination has been dealt with more successfully by law than by language.” Block concludes that changes in attitude do not automatically result from changes in how we refer to people: “The burden rests on the speakers of the language to change their attitudes, not on the language itself.” See also CURZAN, *supra* note 17, at 182–84 (discussing the arguments against a ballot proposition that amended the Seattle City Charter “so that all exclusively male gender references would be replaced with gender-neutral references.”)

87. MAGAT, *supra* note 34, at xi.

88. Steven Shavell, *Comment*, 82 GEO. L.J. 1777, 1777–78 (1994).

89. *Id.*

90. *Comment: From the Editor*, 82 GEO. L.J. 1779, 1779 (1994). See *infra*, Section III.A.

91. Shavell, *supra* note 88, at 1777–78.

92. *Comment: From the Editor*, *supra* note 90, at 1779.

93. *Id.* Many law journals “encourage,” but do not require, authors to use gender-neutral language. See *supra* Section II.B.

they are no more difficult than the many adjustments writers must make in order to be understood.⁹⁴

As discussed in the next section, the use of gender-neutral language in legal writing can contribute to clarity and reduce distraction, if handled with care. While it is not the cure for sex discrimination, language can have a substantial impact on the reader. As Professor Cathy Jones has pointed out, this issue is more than trivial because communication is central to the legal profession and “[n]o profession is more reliant on precision in language than law.”⁹⁵

III. WHY GENDER-NEUTRAL LANGUAGE MATTERS

The greatest difficulty in planning any change in a language is demonstrating a need in order to gain the acceptance of the people who use that language.⁹⁶

The use of gendered generics can communicate subtle sexism, distract, and create ambiguity.⁹⁷ These problems are particularly an issue in judicial opinions because they are designed to be used; they communicate rules that must be understood and followed. For the Supreme Court, gender-neutral language is additionally important because its opinions are so widely read, and they act as models of legal writing for law students.

A. Gendered Generics Can Communicate Subtle Sexism

Language matters. The use of only male pronouns may imply a world populated solely by men, or that certain roles or spheres are reserved solely for men or for women. Women have long been excluded from the practice of law and the powerful positions within this discipline. . . . Against the backdrop of this history, the use of only male pronouns is not a neutral exercise; rather, it is a political choice.⁹⁸

The consistent use of male-gendered generics to represent all people can have a psychological impact on women by making them feel excluded and by reinforcing traditional gender stereotypes – even when that effect is not intended.⁹⁹ Social science research demonstrates that language is a social force

94. For example, in its “Guidelines to Reduce Bias in Language,” the American Psychological Association advises writers: “Just as you have learned to check what you write for spelling, grammar, and wordiness, practice reading over your work for bias.” *Supra* note 37, at 61–62.

95. Jones, *supra* note 84, at 675. *See also* Abrahamson, *supra* note 15, at 1216–17 (arguing that the use of male-gendered generics in the judicial system is “not a trivial matter” because “the law is such a verbal profession.”).

96. Janet A. Sniezek & Christine H. Jazwinski, *Gender Bias in English: In Search of Fair Language*, 16 JOURNAL OF APPLIED SOCIAL PSYCHOLOGY 660 (1986).

97. Some feminist language reformers believe that the primary, if not the only, reason for change is based on “political and ideological preferences” rather than on the reformed language being “more accurate, more precise”: “We should therefore be honest enough to defend our tampering not in terms of its purported linguistic merits, but in terms of its political utility for raising consciousness, denouncing sexism and empowering women.” CURZAN, *supra* note 17, at 187 (quoting DEBORAH CAMERON, FEMINISM AND LINGUISTIC THEORY 125 (2d ed. 1990)).

98. *From the Editor*, *supra* note 90, at 1779 (responding to Professor Steven Shavell’s complaint about the journal’s policy encouraging the use of gender-neutral language).

99. Chew & Kelly-Chew, *supra* note 13, at 650. *See also* Mucchi-Faina, *supra* note 38, at 208 (“Research also strongly confirmed that use of the masculine generic supports male-biased imagery,

that can have an impact on how women view themselves and are viewed by others. In particular, the “linguistic relativity hypothesis” claims that “culture and language are intertwined and that the words that people use affect the way they see both the world and their self-concept.”¹⁰⁰

Contrary to the argument that “he” includes all people, researchers have found that male-gendered words actually conjure male images.¹⁰¹ For example, a 1996 study showed that when an occupation’s title was male (“city councilman”), people were more likely to describe the “average person” in the occupation as male.¹⁰² In legal writing, while we might not find this male association objectionable when the antecedent is a generic criminal defendant,¹⁰³ it creates a problem when the antecedent is, for example, a federal district judge.¹⁰⁴

Other studies confirm that the use of masculine generics has negative effects.¹⁰⁵ For example, a 1986 study concluded that generic masculine terms, even when intended to refer to all people, operate in practice to apply only to males.¹⁰⁶ The authors of this study were concerned that their findings indicated that male-gendered generics could negatively impact women “during the recruitment and hiring process in a male-dominated organization” and deter them from entering certain fields.¹⁰⁷

These concepts are applicable to the legal field. For example, when the authors of Supreme Court opinions continually use male generics to refer to lawyers, legislators, judges, political candidates, and property owners,¹⁰⁸ the

favours overestimation of male presence in the context and leads to interpreting the personality of the target of an occupational title as more masculine.”)

100. Chew & Kelly-Chew, *supra* note 13, at 644 n.3. See also Sniezek & Jazwinski, *supra* note 96, at 659 (“Sex-biased language is perhaps a consequence as well as [a]cause of sex-biased culture.”) (citing BENJAMIN LEE WHORF, LANGUAGE, THOUGHT AND REALITY 252 (1956)). At least one researcher has concluded that linguistic-relativity is irrelevant: “[S]exist language should be changed simply because it is sexist.” Parks & Robertson, *supra* note 81, at 445–46 (citing M. Blaubergs, *An analysis of classic arguments against changing sexist language*, 3 WOMEN’S STUDIES INTERNATIONAL QUARTERLY 135–47 (1980)).

101. See, e.g., John Gastil, *Generic Pronouns and Sexist Language: The Oxymoronic Character of Masculine Generics*, 23 SEX ROLES 629, 638–40 (1990). Gastil asked male and female undergraduates to report images conjured by sentences that included the pronouns “he,” “he/she,” and “they.” The results showed that “he” was the least generic pronoun and that for men, “they” is more generic than “he/she”; Sniezek & Jazwinski, *supra* note 96, at 653, 659. See also Chew & Kelly-Chew, *supra* note 13, at 649–50 and studies cited therein.

102. Chew & Kelly-Chew, *supra* note 13, at 649–50. See Sniezek & Jazwinski, *supra* note 96, at 644–45 (“[T]he results of the few studies available provide some support for the hypothesis that generic masculine nouns and pronouns are, in fact, used to mean men, even though the grammatical form of a given sentence suggests the inclusion of women.”).

103. See, e.g., *Greenlaw v. United States*, 128 S. Ct. 2559, 2569 (2008) (“In a criminal prosecution, moreover, the defendant would appeal at his peril, with nothing to alert him that, on his own appeal, his sentence would be increased.”).

104. See, e.g., *Gall v. United States*, 128 S. Ct. 586, 594 (2007) (“[A] district judge must give serious consideration to the extent of any departure from the Guidelines and must explain his conclusion.”).

105. See Mucchi-Faina, *supra* note 38, at 205.

106. Sniezek & Jazwinski, *supra* note 96, at 659.

107. *Id.* at 660.

108. See examples cited in Section IV.

subtle sexism is that these are jobs usually held by men. The subtlety of such sexism does not prevent it from being harmful.¹⁰⁹

The harm of subtle sexism can be seen in the annual statistics compiled by the American Bar Association Commission on Women in the Profession, which show that, while the status of women in the legal profession has improved, equality remains elusive. The most recent studies show that women still lag behind in pay and status. While more than half of all law school graduates are women, these numbers are not reflected in the ranks of the judiciary, in Congress, in tenured professorships, or in law firm partnerships.¹¹⁰ In 2009, *The American Lawyer* magazine released a study demonstrating that “while the ranks of female partners have grown steadily, women still account, on average, for fewer than one in five big-firm partners.”¹¹¹ The numbers for women with elite academic credentials are not necessarily better. For example, during the 2006 Supreme Court Term, only seven out of thirty-seven law clerks were women.¹¹² In addition, the number of women whose work is published in the law journals of the top-ranked schools is disproportionately low.¹¹³

While there may not be a direct line of causation between the language used in court opinions and the disappointing statistics for women in the profession, language can be seen as a piece in a larger puzzle. For example, Chew and Kelley-Chew have concluded that the continued use of subtly sexist language in the legal community “effectively reinforces our acceptance of its debilitating messages about women,”¹¹⁴ which can result in “very real and damaging effects”:

Employers and clients may be less likely to see women as successful professionals assuming leadership roles. Faculty and classmates may be less likely to see women as worthy law students and future lawyers. Women themselves may begin to believe the underlying message that there is a mismatch between who they are and their chosen career path. Likewise, women may internalize the idea that they are not capable law students, lawyers, faculty or judges.¹¹⁵

Ultimately, as linguist Anne Curzan has noted, we do not know if “changing language eventually changes attitudes.” We do know, however, that

109. Chew & Kelly-Chew, *supra* note 13, at 653.

110. See, e.g., American Bar Association Commission on Women in the Profession, *A Current Glance at Women in the Law 2008*, available at <http://www.abanet.org/women/CurrentGlanceStatistics2008.pdf> (last visited October 14, 2009).

111. Emily Barker, *Stuck in the Middle*, THE AMERICAN LAWYER (June 2, 2009), available at <http://americanlawyer.com> (The study of 210 firms concluded that “the mean proportion of women at large firms has remained close to about one-third.”).

112. Linda Greenhouse, *Supreme Court Memo: Women Suddenly Scarce Among Justices’ Clerks*, N.Y. TIMES, Aug. 30, 2006 at A18. Justices Thomas, Souter, Alito, and Scalia hired no women clerks during this term; Justices Stevens, Roberts, and Kennedy each hired one; and Justices Breyer and Ginsburg each hired two.

113. This underrepresentation has been chronicled in a continuing series titled “Where Are the Women?” on the Feminist Law Professors blog. See <http://feministlawprofessors.com/?s=where+are+the+women%3F> (last visited October 14, 2009).

114. *Supra* note 13, at 675.

115. *Id.* at 676.

language can “reflect social structures and attitudes” and may indeed perpetuate them. Raising awareness “force[s] speakers to consider how their audience may perceive certain linguistic choices. And when speakers use less, for example, sexist language, then the language is arguably not perpetuating sexist attitudes.”¹¹⁶

B. Gendered Generics Can Distract the Reader

All writers, particularly legal writers, are taught to consider the audience. Modern writing texts, particularly those directed at law students, have refined this concept to focus on writing with the expectations and the needs of the reader as a guiding principle.¹¹⁷ A part of this theme is to strive to keep the reader focused on the writer’s intended message, rather than distracted by other matters. Thus, because some readers find gendered generics distracting,¹¹⁸ they should be avoided. As Bryan Garner has noted, “it is unacceptable to a great many reasonable readers to use the generic masculine pronoun,” and its use can cause the writer to lose credibility with some readers.¹¹⁹ Gender-neutral writing represents “an instance of adopting a convention to avoid distracting readers.”¹²⁰

A key part of modern legal writing courses is conveying to students the importance of professionalism—part of a larger trend that applies to legal education as a whole.¹²¹ Professionalism includes rigorous compliance with rules pertaining to format, style, and citation.¹²² Professional competence also includes sensitivity to cultural stereotypes and awareness of language that will be offensive, and therefore distracting, to some members of the writer’s audience.¹²³ For example, at Seattle University School of Law, Professors Lorraine Bannai and Anne Enquist teach their legal writing students to recognize “how bias may be embedded in language” because this skill “is

116. CURZAN, *supra* note 17, at 180.

117. See, e.g., GEORGE GOPEN, EXPECTATIONS: TEACHING WRITING FROM THE READER’S PERSPECTIVE xiv (2004) (explaining a pragmatic approach to writing that values communication over self-expression); EDWARDS, *supra* note 19, at 69–75 (advising law students to focus on the needs of the “law-trained readers” with whom they must communicate); MARY BETH BEAZLEY, A PRACTICAL GUIDE TO APPELLATE ADVOCACY 3–4 (2d ed. 2006) (urging law students to “produce a document that can be understood by a busy reader the first time through.”).

118. See, e.g., Judith S. Kaye, *A Brief for Gender-Neutral Brief Writing*, N.Y.L.J., March 21, 1999, at 2.

119. THE CHICAGO MANUAL OF STYLE, *supra* note 32. The section on “Grammar and Usage” was authored by Bryan Garner, who advocates “invisible gender neutrality,” including composing a sentence in a way that “eliminate[s] the need for any personal pronoun at all,” *id.* at 157, replacing the personal pronoun with “its,” *id.* at 160, and replacing the pronoun with an article, *id.* at 167.

120. SCALIA & GARNER, *supra* note 11, at 116. Although Justice Scalia coauthored the book, he disagrees with Garner on this point. See *id.* at 119.

121. See WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 14 (2007) (“[P]rofessionalism needs to become more explicit and better diffused throughout legal preparation.”).

122. See Judith D. Fischer, *Bareheaded and Barefaced Counsel: Courts React to Unprofessionalism in Lawyers’ Papers*, 31 SUFFOLK U. L. REV. 1, 2–3, 20, 30–32 (1997) (discussing examples of unprofessional conduct, including poor style, citation errors, and breach of court rules).

123. See Lorraine Bannai & Anne Enquist, *(Un)Examined Assumptions and (Un)Intended Messages: Teaching Students to Recognize Bias in Legal Analysis and Language*, 27 SEATTLE UNIV. L. R. 1, 33 (2003).

simply part of being an effective lawyer."¹²⁴ This skill is also part of being an effective judge.¹²⁵

C. Gendered Generics Can Create Ambiguity

What many people find hardest to accept is that a word which used to mean one thing now means another, and that continuing to use it in its former sense – no matter how impeccable its etymological credentials – can only invite misunderstanding.¹²⁶

Clarity is one of the hallmarks of the plain English movement that informs much of modern legal writing education.¹²⁷ In addition to stressing clarity, legal writing manuals also emphasize precision.¹²⁸ The use of gendered generics in legal writing is neither clear nor precise. The use of the word “man,” for example, is ambiguous because it can be used to refer to a specific adult male or to human beings generally, both male and female.¹²⁹ When a writer uses the word generically, alone or as part of a compound (e.g., *chairman*, *salesman*), the reader may misinterpret the writer’s meaning.¹³⁰ As Miller and Swift have noted “[a]nyone who chooses to use *man* in its old, generic sense can claim centuries of precedent. But even centuries of precedent crumble if those on the receiving end hear a different meaning from the one intended.”¹³¹

The ambiguity created by the use of gendered generics can be particularly troublesome in judicial opinions. The reader may not always be able to determine if a particular passage refers generally to men and women, generally to all men, or specifically to a party in the case. A case in point is *Kennedy v. Louisiana*, in which the Court held that a Louisiana statute authorizing the death penalty for the rape of a child younger than twelve violated the Eighth

124. *Id.* at 39.

125. See generally Abrahamson, *supra* note 15.

126. MILLER & SWIFT, *supra* note 7, at 6–7.

127. See WYDICK, *supra* note 11, at 3–4; BRYAN GARNER, LEGAL WRITING IN PLAIN ENGLISH xiv (2001) (“You achieve plain English when you use the simplest, most straightforward way of expressing an idea.”).

128. See, e.g., CHARLES R. CALLEROS, LEGAL METHOD AND WRITING 265 (5th ed. 2006) (“[Y]ou must select the words and phrases that precisely convey your intended meaning.”).

129. See, e.g., RANDOM HOUSE WEBSTER’S UNABRIDGED DICTIONARY 1166 (1998) (“MAN 1. an adult male person, as distinguished from a boy or a woman. 2. a member of the species *Homo sapiens* or all the members of this species collectively, without regard to sex: *prehistoric man*. 3. the human individual as representing the species, without reference to sex; the human race; humankind: *Man hopes for peace, but prepares for war*. 4. a human being; person: *to give a man a chance*; *When the audience smelled the smoke, it was every man for himself*.”). *Id.* at 879 (HE: “1. the male person or animal being discussed or last mentioned; that male. 2. anyone (without reference to sex); that person: *He who hesitates is lost*.”).

130. See Snizek & Jazwinski, *supra* note 96, at 644 (“Just because speakers and writers use a masculine noun or pronoun generically does not imply that listeners and readers interpret it that way.”). See also RANDOM HOUSE WEBSTER’S UNABRIDGED DICTIONARY, *supra* note 129 (“Critics of the use of MAN as a generic maintain that it is sometimes ambiguous when the wider sense is intended.”); PUBLICATION MANUAL OF THE AMERICAN PSYCHOLOGICAL ASSOCIATION, *supra* note 29, at 66 (“The use of *man* as a generic noun or as an ending for an occupational title (e.g., *policeman*) can be ambiguous and may imply incorrectly that all persons in the group are male.”).

131. MILLER & SWIFT, *supra* note 43, at 25.

Amendment.¹³² In his majority opinion, Justice Kennedy alternated gendered pronouns, using a female generic for a rape victim and a male generic for a perpetrator:

[C]hild rape cases present heightened concerns because the central narrative and account of the crime often comes from the child herself. She and the accused are, in most instances, the only ones present when the crime was committed.¹³³

In most cases justice is not better served by terminating the life of the perpetrator rather than confining him and preserving the possibility that he and the system will find ways to allow him to understand the enormity of his offense.¹³⁴

Both statements are phrased in a way that implies they are meant to apply generally, rather than just specifically to this case. However, the language used gives the misleading impression that only female children are raped and only men can be perpetrators, or that the Louisiana statute at issue was drafted to limit its applicability in this way.¹³⁵

If gender-neutral writing were the norm, then a reader could assume more dependably that gendered nouns and pronouns had a specific purpose and meaning in an opinion. Justice Alito's dissent in *Kennedy* demonstrates that gender-neutral language can be both precise and powerful:

The Court today holds that the Eighth Amendment categorically prohibits the imposition of the death penalty for the crime of raping a child. This is so, according to the Court, no matter how young the child, no matter how many times the child is raped, no matter how many children the perpetrator rapes, no matter how sadistic the crime, no matter how much physical or psychological trauma is inflicted, and no matter how heinous the perpetrator's prior criminal record may be.¹³⁶

In this example, Alito used the gender-neutral technique of repeating the noun, instead of using a pronoun.

D. How a Judicial Opinion is Written Matters

[J]udges . . . are professional writers. . . . [W]hat we write is as important as what we decide. This is so because a judge's opinion performs as well as explains.¹³⁷

Most legal writing books are designed to help law students and attorneys communicate effectively and persuasively. Judges are also legal writers, and

132. *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2646 (2008).

133. *Id.* at 2663.

134. *Id.* at 2665.

135. The statute at issue was not limited by gender. It used the nouns "victim" and "offender" and included no pronouns. See La. Stat. Ann. § 14.42 (West 2007).

136. *Kennedy*, 128 S. Ct. at 2665 (Alito, J., dissenting).

137. ALDISERT, *supra* note 12, at v (1990).

they have an even greater responsibility to communicate effectively¹³⁸ because their opinions are more widely read and have greater impact than an individual memo, brief, or motion. Books and articles directed at judges, for the most part, advocate for gender-neutral language.¹³⁹

Judicial opinions, for better or for worse, provide law students with models of legal writing practices. "If judges write in a particular way, then students will take their cues from that style in crafting their own writing. . . . Because law students must learn a new way of thinking, they seek examples of what it means to think, speak, and write like a lawyer."¹⁴⁰

The most prominent institution in the legal community is the Supreme Court. Its opinions constitute the most widely read examples of legal writing. In recent interviews conducted by Bryan Garner, several justices acknowledged their responsibility to make their opinions accessible to a broader audience beyond the legal community.¹⁴¹ Ultimately, if the Supreme Court consistently used gender-neutral language in all its opinions, that usage would soon become the norm.¹⁴²

To avoid subtle sexism, distraction, and ambiguity, all legal writing should be gender neutral. The most influential members of the profession should set the standard. As the results below demonstrate, as a group, they do not.

IV. RESEARCH RESULTS

A. Method

To assess each justice's use of gender-neutral language, more than 105 cases were reviewed from the 2006, 2007, and 2008 terms.¹⁴³ By examining three different terms, this study attempted to get a sense of the patterns in the current

138. See generally Gerald Lebovits, Alifya V. Curtin & Lisa Solomon, *Ethical Opinion Writing*, 21 GEO. J. LEGAL ETHICS 237, 248 (2008) ("For judges, words are critical.").

139. See, e.g., GEORGE, *supra* note 12, at 417–22 (noting that certain nouns can exclude women and encouraging judges to use gender-neutral language alternatives, when available, for occupational titles, but finding fault with most of the alternatives to the gendered personal pronoun); ALDISERT, *supra* note 12, at 234–37 (reprinting several sections of the "Guidelines for Equal Treatment of the Sexes," developed by McGraw-Hill Book Company Publications in 1974; the complete guidelines are available at http://www.eric.ed.gov/ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/38/0b/b4.pdf).

140. Lebovits, Curtin & Solomon, *supra* note 138, at 254.

141. See The Supreme Court – Kennedy Interview, Part I (In his interview, Justice Kennedy noted that judges should be good writers "because they are widely read."). All members of the Roberts Court were interviewed except for Justice Souter. The videotaped interviews can be viewed at http://www.lawprose.org/interviews/supreme_court.php (last visited July 18, 2009). See also Thomas Interview, Part 1 (Justice Thomas commented that the Court's opinions should be "accessible to nonlawyers" because the Constitution is not a document for lawyers); Ginsburg Interview, Part 2 and Alito Interview, Part 1.

142. See Chew & Kelly-Chew, *supra* note 13, at 671–72.

143. The 2008 Term refers to Supreme Court decisions issued between October 2008 and June 2009; the 2007 Term refers to decisions issued between October 2007 and June 2008; the 2006 Term refers to decisions issued between October 2006 and June 2007. The 2006 Term was Justice Alito's first full term on the Court.

writing of each of the justices, and to balance out any change that might be influenced by a particular law clerk.¹⁴⁴

A minimum of fifteen opinions of each justice were examined, including majority, concurring, and dissenting opinions. For each justice, at least twelve opinions revealed something relevant about his or her use of language.¹⁴⁵ The study focused on the following factors: 1) the generic use of gender-specific pronouns; 2) the use of gendered nouns to describe an occupation or title that could be occupied by a man or a woman; and 3) the use of gender-neutral techniques, both obvious and subtle, to avoid both 1 and 2. Examples of gendered or gender-neutral language that were part of a direct quotation from another source were not included. All the justices retained gendered generics in such instances.¹⁴⁶

The examples provided are limited to general statements that were truly generic – meant to apply to all persons, male and female. Statements that were not clearly generic were not included.

This study provides examples in which justices have used gender-neutral techniques to demonstrate that writing in this way is doable and that the results are as readable, if not more readable, than a gender-specific version. Cases with multiple opinions provided opportunities to compare styles and to demonstrate that avoiding gendered generics can enhance effective communication.

B. Overview of Results

The Court as a whole presents a mixed picture. It does very well in some areas, particularly in the use of gendered nouns. It is setting the standard for the legal profession by using gender-neutral terms, for the most part, for

144. It is generally accepted that law clerks help the justices draft their opinions. See RICHARD A. POSNER, *HOW JUDGES THINK* 294 (2008); Todd C. Peppers & Christopher Zorn, *Law Clerk Influence on Supreme Court Decision Making: An Empirical Assessment*, 58 *DEPAUL LAW REV.* 51, 56-57 (2008). However, Judge Posner has acknowledged that, even though some judges may delegate opinion-writing, the law clerks prepare by reading prior opinions “and then model their own style on that of the opinions they read.” Richard Posner, *Judges’ Writing Styles (And Do They Matter?)*, 62 *U. CHI. L. REV.* 1421, 1425 (1995). Jeffrey Toobin has warned that “it is easy to overstate the importance of law clerks.” See JEFFREY TOOBIN, *THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT* 317 (2007).

145. A number of cases did not reveal any clear information about the use of gender-neutral language or gendered generics because the parties were corporations, businesses, or governments, and so the authors did not have occasion to use singular pronouns. See, e.g., *Florida Dept. of Revenue v. Piccadilly Cafeterias, Inc.*, 128 S. Ct. 2326 (2008) (interpreting stamp-tax exemption in the Bankruptcy Code); *Limtiaco v. Camacho*, 549 U.S. 483 (2007) (interpreting the meaning of “tax valuation” for the purpose of calculating Guam’s debt limitation); *Permanent Mission of India v. City of New York*, 551 U.S. 193 (2007) (determining applicability of Foreign Sovereign Immunities Act to tax lien on property used for diplomatic offices). See also Fischer, *supra* note 14, at 499 (acknowledging similar point in study of federal appellate opinions).

146. See GARNER, *supra* note 28, at 802–03 (“Statute of Limitations. Those committed to nonexistent usage ought to adopt a statute of limitations that goes something like this: in quoted matter dating from before 1980, passages containing bland sexism—such as the use of the generic *he* or of *chairman*—can be quoted in good conscience because in those days the notions of gender-inclusiveness were entirely different from today’s notions. Although it is quite fair to discuss cultural changes over time, it is unfair to criticize our predecessors for not conforming to present-day standards. How could they have done so? Therefore, using “[sic]” at every turn to point out old sexist phrases is at best an otiose exercise, at worst a historically irresponsible example of mean-spiritedness.”)

occupational titles and other nouns, and by avoiding the generic use of “man” alone or as a compound. For example, most justices consistently use the gender-neutral terms “drafter,”¹⁴⁷ “worker,”¹⁴⁸ and “Members of Congress,”¹⁴⁹ in place of their gendered counterparts, “draftsman,” “workman,” and “Congressman.”

One justice clearly sits on one end of the spectrum while one justice is solidly on the other. Justices Antonin Scalia and Samuel Alito, despite the similarities of their voting records,¹⁵⁰ present opposing bookends, between which the rest of the justices fall on a continuum of sorts. Most of the justices use gender-neutral language some of the time and gendered-generic language most of the time.

The discussion that follows is organized around the three justices with the most identifiable and consistent styles. Justice Alito leads the “setting the standard” category. He consistently uses gender-neutral language and consistently avoids gendered generics. Justice Scalia leads the “lagging behind” group. He rarely uses gender-neutral language, consistently uses male-gendered generics, and has publicly expressed his disdain for gender-neutral writing.¹⁵¹ Finally, Justice Ginsburg is “setting a different standard.” Her selective use of alternating pronouns exhibits a unique consciousness of gendered language that is not strictly gender neutral.

The remaining six justices are discussed in the category led by the justice to whom they are closest in their use of gender-neutral language, or based on the direction in which their writing style appears to be headed. Thus, Justices Kennedy and Thomas are setting the standard; Justices Roberts, Souter, and Breyer are lagging behind; and Justice Stevens is setting a different standard.¹⁵²

Aside from Justice Ginsburg’s status as the lone woman on the court (during the three terms studied), there is no clear explanation for specific justices’ use of language. Their writing styles cannot easily be explained by age (Alito and Roberts, the two youngest justices, both Baby Boomers, are in different categories), or by whether a particular justice is considered liberal or

147. See, e.g., *United States v. Hayes*, 129 S. Ct. 1079, 1089 (2009) (Ginsburg); *Medellin v. Texas*, 128 S. Ct. 1346, 1381 (2008) (Breyer, J., dissenting); *Hall St Assoc. v. Mattel, Inc.*, 128 S. Ct. 1396, 1406 (2008) (Souter); *Quanta Computer, Inc. v. LG Elect., Inc.*, 128 S. Ct. 2109, 2117–18 (2008) (Thomas).

148. See, e.g., *Ysursa v. Pocatello Educ. Ass’n*, 129 S. Ct. 1093, 1102 (2009) (Breyer, J., concurring & dissenting); *14 Penn Plaza v. Pyett*, 129 S. Ct. 1456, 1481, n.4 (2009) (Souter, J., dissenting); *Ky. Ret. Sys. v. EEOC*, 128 S. Ct. 2361, 2378 (2008) (Kennedy, J., dissenting).

149. See, e.g., *Fed. Election Comm’n v. Wisc. Rt. to Life*, 127 S. Ct. 2652, 2661 (2007) (Roberts); *Corley v. United States*, 129 S. Ct. 1558, 1567, n.5 (2009) (Souter); *id.* at 1575 (Alito, J., dissenting); *Boumediene v. Bush*, 128 S. Ct. 2229, 2243, 2276 (2008) (Kennedy); *Hein v. Freedom from Religion Found., Inc.*, 127 S. Ct. 2552, 2566 (2007) (Alito); *Zuni Public Sch. Dist. no. 89 v. Dep’t of Educ.*, 127 S. Ct. 1534, 1541 (2007) (Breyer); *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta*, 128 S. Ct. 761, 778–79 (2008) (Stevens, J., dissenting).

150. See End of Term Statistical Analysis – Oct. Term 2008 (June 30, 2009), available at <http://www.scotusblog.com/wp/wp-content/uploads/2009/07/summary-memo-final.pdf>, p. 4 (last visited July 13, 2009). The statistics from this term show that Justices Scalia and Alito voted together 87% of the time.

151. See SCALIA & GARNER, *supra* note 11, at 119.

152. In some respects, all the justices except Alito can be seen as “lagging behind” because they continue to use male-gendered generics. It seemed useful, however, to acknowledge that some are further along the path than others. Placing each justice in a category was not always an easy call and I recognize that some readers may disagree with my conclusions.

conservative.¹⁵³ Souter and Stevens, both considered liberal, are in different categories. Breyer and Ginsburg, both appointed by Democratic President Bill Clinton, are also in different categories.

When a particular justice employs what could be described as an obvious gender-neutral technique, by pairing or alternating pronouns, it seems reasonable to conclude that the writer intended to avoid gendered language. On the other hand, when a particular justice uses invisible techniques, by pluralizing or repeating the antecedent noun, or by eliminating the need for a pronoun, it is not apparent whether the writer chose particular words to be inclusive, or just to write clearly. However, the choices of Justices Alito, Scalia,¹⁵⁴ and Ginsburg are sufficiently consistent to support the conclusion that their language is not accidental.

C. Setting the Standard

1. Justice Samuel Alito

Born in 1950,¹⁵⁵ Justice Samuel Alito is one of the three members of the Baby Boom generation on the Court. His father was a high school English teacher; his mother an elementary school teacher.¹⁵⁶ He served in President Reagan's Department of Justice where, according to Jeffrey Toobin, he was "the official constitutional adviser to the president and the unofficial ideological command center."¹⁵⁷ President George H. W. Bush nominated him to the Third Circuit Court of Appeals in 1990 and President George W. Bush nominated him to the Supreme Court in 2006.¹⁵⁸ At the end of the 2008 Term, Adam Liptak wrote in the *New York Times* that Alito "may well now be the court's most conservative member."¹⁵⁹

Justice Alito avoids the use of gendered generics more consistently than any other member of the Court. He employs a variety of gender-neutral techniques, including repeating the noun,¹⁶⁰ pluralizing the noun,¹⁶¹ and using

153. See TOOBIN, *supra* note 144, at 327 (noting that Roberts, Alito, Scalia, and Thomas are considered "outspoken conservatives," Ginsburg, Stevens, Souter, and Breyer are considered liberals, "by contemporary standards," and that Kennedy is "in the middle").

154. Scalia's clear expression of his views about gender-neutral language, see SCALIA & GARNER, *supra* note 11, at 119, also supports the conclusion that his gendered writing style is intentional.

155. See The Justices of the Supreme Court, <http://www.supremecourtus.gov/about/biographiescurrent.pdf> (last visited October 14, 2009).

156. From Part I of an interview with Bryan Garner, available at http://www.lawprose.org/interviews/supreme_court.php (last visited July 16, 2009). In 2006-2007, Bryan Garner interviewed eight of the nine Justices about legal writing and advocacy.

157. TOOBIN, *supra* note 144, at 311.

158. See The Justices of the Supreme Court, <http://www.supremecourtus.gov/about/biographiescurrent.pdf>, (last visited October 14, 2009).

159. *Supra* note 5, at A1.

160. See, e.g., *Boyle v. United States*, 129 S. Ct. 2237, 2246 (2009) ("[P]roof that a defendant conspired to commit a RICO predicate offense . . . does not necessarily establish that the defendant participated in the affairs of an arson enterprise."); *Corley*, 129 S. Ct. at 1572 (Alito, J., dissenting); *Nken v. Holder*, 129 S. Ct. 1749, 1764 (2009) (Alito, J., dissenting) ("If the IJ enters an order of removal, that order becomes final when the alien's appeal to the Board of Immigration Appeals (Board) is unsuccessful or the alien declines to appeal to the Board."); *Davis v. Fed. Election*

paired pronouns,¹⁶² sometimes employing all three in one paragraph: “The principles of qualified immunity shield an officer from personal liability when an officer reasonably believes that his or her conduct complies with the law. Police officers are entitled to rely on existing lower court cases without facing personal liability for their actions.”¹⁶³

His consistent avoidance of gendered generics is notable in part for its marked contrast to other members of the Court. For example, in his dissenting opinion in *Gall v. United States*, Justice Alito employed several gender-neutral techniques to avoid the gender-specific pronouns used by his colleagues. In *Gall*, the Court held that the sentence imposed by the district court under the Federal Sentencing Guidelines was reasonable and that appellate courts should review all sentences under the Guidelines using an abuse of discretion standard.¹⁶⁴ In his majority opinion, Justice Stevens used male-gendered generics in general statements about district judges¹⁶⁵ and criminal defendants.¹⁶⁶ In his brief concurring opinion, Justice Scalia also used a male-gendered generic to refer generally to criminal defendants.¹⁶⁷

In contrast, Justice Alito pluralized the noun “judge,”¹⁶⁸ used paired pronouns,¹⁶⁹ and repeated the noun “defendant.”¹⁷⁰ Notably, the portion of the

Comm’n, 128 S. Ct. 2759, 2765 (2008) (“Federal law limits the amount of money that a candidate . . . and the candidate’s authorized committee may receive from an individual, as well as the amount that the candidate’s party may devote to coordinated campaign expenditures.”). In contrast, Justice Stevens used masculine-gendered generics throughout his separate opinion in *Davis*. See *id.* at 2778, 2780, 2781–82 (Stevens, J., concurring and dissenting); *Baze v. Rees*, 128 S. Ct. 1520, 1540 (2008) (Alito, J., concurring) (“[A]n inmate should be required to do more than simply offer the testimony of a few experts. . . . Instead, an inmate . . . should point to a well-established scientific consensus.”); *Hein*, 127 S. Ct. at 2563.

161. See, e.g., *Corley*, 129 S. Ct. at 1574 (Alito, J., dissenting) (“[A]rrestees, after receiving *Miranda* warnings, may waive their rights.”); *Crawford v. Metro. Gov’t of Nashville*, 129 S. Ct. 846, 855 (2009) (Alito, J., concurring) (“[W]hether the opposition clause shields employees who do not communicate their views to their employers through purposeful conduct is not before us in this case.”).

162. See, e.g., *Nken*, 129 S. Ct. at 1765 (Alito, J., dissenting) (“When an alien subject to a final order of removal seeks to bar executive officials from acting upon that order . . . , the alien is seeking to ‘enjoin’ his or her removal.”); *Wyeth v. Levine*, 129 S. Ct. 1187, 1225 (2009) (Alito, J., dissenting) (“[I]f . . . a medical professional chooses to use IV push, he or she is on notice”); *Crawford v. Metro Gov’t*, 129 S. Ct. at 854 (Alito, J., concurring) (“Suppose, for example, that an employee alleges that he or she expressed opposition while informally chatting with a co-worker”); *Greenlaw*, 128 S. Ct. at 2573 (Alito, J., dissenting).

163. *Pearson v. Callahan*, 129 S. Ct. 808, 823 (2009).

164. *Gall*, 128 S. Ct. at 591.

165. See, e.g., *id.* at 594 (“[A] district judge must give serious consideration to the extent of any departure from the Guidelines and must explain his conclusion.”).

166. *Id.* at 596 (“What percentage, if any, should be assigned to evidence that a defendant poses no future threat to society, or to evidence that innocent third parties are dependent on him?”).

167. *Id.* at 602–03 (Scalia, J., dissenting) (“The door therefore remains open for a defendant to demonstrate that his sentence . . . would not have been upheld.”).

168. *Id.* at 604 (Alito, J., dissenting) (“[I]f judges are obligated to do no more than consult the Guidelines before deciding upon the sentence that is, in their independent judgment, sufficient.”). He also used the term “district courts.” *Id.*

169. *Id.* at 608 (“If each judge is free to implement his or her personal views on such matters, sentencing disparities are inevitable.”).

170. *Id.* at 605 (“The Court has held that . . . a defendant has the right to have a jury, not a judge, find facts that increase the defendant’s authorized sentence.”).

Sentencing Guidelines analyzed in *Gall* includes the term “district court” rather than “judge,”¹⁷¹ providing a simple and clear alternative to avoid a gendered pronoun.

Justice Alito has used masculine gendered-generics. For example, dissenting in *Arizona v. Gant*, he used a masculine pronoun to refer to a “person who is taken from a vehicle.”¹⁷² In the remainder of his opinion, however, he avoided gendered generic pronouns by repeating the nouns “arrestee,”¹⁷³ “person,”¹⁷⁴ and “officer,”¹⁷⁵ and by pluralizing the noun “officer.”¹⁷⁶ He has also used the gendered noun “draftsmanship.”¹⁷⁷ These examples are, however, the exception, rather than the rule.

Justice Alito demonstrates that gender-neutral writing is possible and can be accomplished without a reduction in clarity or style.

2. Justice Anthony Kennedy

Justice Anthony Kennedy was born in 1936. Prior to his appointment to the Ninth Circuit Court of Appeals, he was in private practice and taught Constitutional Law. President Reagan nominated him to the Supreme Court in 1988.¹⁷⁸ Justice Kennedy is widely viewed as the most powerful member of the current Court because he is the lone swing vote, following Justice O’Connor’s departure.¹⁷⁹ In an interview with Bryan Garner, Justice Kennedy acknowledged that the justices are judged by what they write: “[W]e are legal writers, for better or worse.”¹⁸⁰

Justice Kennedy has shown a willingness to use gender-neutral language in a number of cases, mainly by using paired pronouns, which he has done frequently over the course of all three terms. Although he continues to use male-gendered generics, the frequency of his use of a gender-neutral technique

171. 18 U.S.C.A. § 3553 (2009).

172. *Arizona v. Gant*, 129 S. Ct. 1710, 1729 (2009) (Alito, J., dissenting) (“[S]urely it was well known in 1981 that a person who is taken from a vehicle, handcuffed, and placed in the back of a patrol car is unlikely to make it back into his own car to retrieve a weapon or destroy evidence.”).

173. *Id.* at 1730.

174. *Id.* at 1730–31.

175. *Id.* at 1731 (“[I]t is not easy to see why an officer should not be able to search when the officer has reason to believe that the vehicle in question possesses evidence of a crime.”).

176. *Id.* at 1730 (“The ability of arresting officers to secure arrestees before conducting a search – and their incentive to do so – are facts that can hardly have escaped the Court’s attention.”); see also *Greenlaw*, 128 S. Ct. at 2573 (Alito, J., dissenting), in which Alito used a masculine-gendered pronoun: “It is not unreasonable to consider an appealing party to be on notice as to such serious errors of law in his favor.” *Id.* at 2573, and paired pronouns: “When the Government files a notice of cross-appeal, the defendant is alerted to the possibility that his or her sentence may be increased.” *Id.*

177. *Chambers v. United States*, 129 S. Ct. 687, 694 (2009) (Alito, J., concurring) (“[O]nly Congress can rescue the federal courts from the mire into which ACCA’s draftsmanship and *Taylor*’s ‘categorical approach’ have pushed us.”).

178. The Justices of the Supreme Court, <http://www.supremecourtus.gov/about/biographiescurrent.pdf> (last visited October 14, 2009).

179. POSNER, *supra* note 144, at 310 (noting also that in the 2006–2007 terms, Kennedy was in the majority in all 24 of the Court’s 5–4 decisions). See also Liptak, *supra* note 5, at A1.

180. See The Supreme Court – Kennedy Interview, Part III, http://www.lawprose.org/interviews/supreme_court.php (last visited October 14, 2009).

demonstrates a consciousness that places him in the “setting the standard” category.

Justice Kennedy has used paired pronouns to refer to the following antecedents: “alien,”¹⁸¹ “government official,”¹⁸² “judge,”¹⁸³ “aider and abettor,”¹⁸⁴ “police officer or firefighter,”¹⁸⁵ “employee,”¹⁸⁶ “worker,”¹⁸⁷ “legislator,”¹⁸⁸ “officer,”¹⁸⁹ “DEA agent,”¹⁹⁰ “prisoner,”¹⁹¹ “party,”¹⁹² “parent,”¹⁹³ and “person of ordinary skill.”¹⁹⁴

He appeared to use alternating pronouns in *Kennedy v. Louisiana*, in which the Court held that the death penalty is unconstitutional in child rape cases. He used male-gendered generics to refer to the antecedents “perpetrator,”¹⁹⁵ and “offender,”¹⁹⁶ and used female-gendered generics to refer to the antecedent “child.”¹⁹⁷ As noted earlier, this technique may have created some ambiguity.¹⁹⁸

181. *Nken*, 129 S. Ct. at 1763 (Kennedy, J., concurring) (“Under the Court’s four-part standard, the alien must show both irreparable injury and a likelihood of success on the merits, in addition to establishing the interests of the parties and the public weigh in his or her favor.”).

182. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (“Absent vicarious liability, each Government official, his or her title notwithstanding, is only liable for his or her own misconduct.”); *see also id.* at 1953.

183. *Boumediene*, 128 S. Ct. at 2266 (“The statute accommodates the necessity for factfinding that will arise in some cases by allowing the appellate judge or Justice to transfer the case to a district court . . . , whose institutional capacity for factfinding is superior to his or her own.”).

184. *Stoneridge Inv. Partners*, 128 S. Ct. at 771 (“Petitioner’s view of primary liability makes any aider and abettor liable under § 10(b) if he or she committed a deceptive act.”).

185. *Ky. Ret. Sys.*, 128 S. Ct. at 2372 (2008) (Kennedy, J., dissenting) (“The young police officer or firefighter with a family is disabled in the heroic performance of his or her duty.”).

186. *Id.* at 2372 (“If the employee can no longer work as a result of a disability, however, he or she is entitled to receive disability retirement.”).

187. *Id.* at 2373.

188. *Ali v. Federal Bureau of Prisons*, 128 S. Ct. 831, 841 (2008) (Kennedy, J., dissenting) (“to prevent textual analysis from becoming so rarefied that it departs from how a legislator most likely understood the words when he or she voted for the law”).

189. *Id.* at 844 (“It takes this single last phrase to extend the statute so that it covers all detentions of property by any law enforcement officer in whatever capacity he or she acts.”); *see also id.* at 846-47.

190. *Id.* at 847-48 (“[T]he DEA agent would be covered by § 2680(c)’s exception to the exception because he or she would be acting in a traditional revenue capacity.”).

191. *Id.* at 849 (“Only if the prisoner is ‘dissatisfied with the final agency action’ may he or she file suit in an ‘appropriate U.S. District Court.’”).

192. *Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516, 522 (2007) (“[T]here is no question that a party may represent his or her own interests in federal court without the aid of counsel.”).

193. *Id.* at 527 (“Nothing in these interlocking provisions excludes a parent who has exercised his or her own rights from statutory protection.”); *see also id.* at 529, 532.

194. *KSR Int’l Co. v. Teleflex Inc.*, 127 S. Ct. 1727, 1742 (2007) (“[A] person of ordinary skill has good reason to pursue the known options within his or her technical grasp.”).

195. *Kennedy*, 128 S. Ct. at 2665 (“In most cases justice is not better served by terminating the life of the perpetrator rather than confining him and preserving the possibility that he and the system will find ways to allow him to understand the enormity of his offense.”).

196. *Id.* at 2662.

197. *Id.* at 2663 (“[C]hild rape cases present heightened concerns because the central narrative and account of the crime often comes from the child herself. She and the accused are, in most instances, the only ones present when the crime was committed.”).

198. *See supra* Section III.C.

The effectiveness of this style can be compared to Justice Alito's dissent in the case, in which he repeated the words "perpetrator" and "child" to great effect, rather than using pronouns.¹⁹⁹

He has also used the noun "man" to refer to people generally: "Just as no man is allowed to be a judge in his own cause, similar fears of bias can arise when - without the consent of the other parties - a man chooses the judge in his own cause."²⁰⁰ Although Kennedy did not use quotation marks here, he was referring back to a maxim from *The Federalist No. 10*, cited earlier in the case.²⁰¹ Conversely, in a voting rights case, he used the phrase "one-person, one-vote,"²⁰² rather than "one-man, one-vote," demonstrating that a writer need not adopt the outdated language of earlier cases. In an age discrimination case, Justice Kennedy used the gender-neutral occupational titles "police officer,"²⁰³ "firefighter,"²⁰⁴ and "worker,"²⁰⁵ but later in the case referred to "policemen and firefighters."²⁰⁶

Justice Kennedy has used other gender-neutral techniques, including pluralizing the noun and pronoun,²⁰⁷ and repeating the noun.²⁰⁸ He has also used male-gendered pronouns for the generic antecedents "judge,"²⁰⁹ "party,"²¹⁰ "alien,"²¹¹ "worker,"²¹² "criminal defendant,"²¹³ "prisoner,"²¹⁴ and "driver."²¹⁵

199. *Kennedy*, 128 S. Ct. at 2665 (Alito, J., dissenting) ("The Court today holds that the Eighth Amendment categorically prohibits the imposition of the death penalty for the crime of raping a child. This is so, according to the Court, no matter how young the child, no matter how many times the child is raped, no matter how many children the perpetrator rapes, no matter how sadistic the crime, no matter how much physical or psychological trauma is inflicted, and no matter how heinous the perpetrator's prior criminal record may be.").

200. *Caperton v. A.T. Massey Coal Co., Inc.*, 128 S. Ct. 2252, 2265 (2009).

201. *Id.* at 2259.

202. *Bartlett v. Strickland*, 129 S. Ct. 1231, 1239 (2009).

203. *Ky. Ret. Sys.*, 128 S. Ct. at 2372 (Kennedy, J., dissenting).

204. *Id.*

205. *Id.* at 2373, 2378.

206. *Id.* at 2378.

207. *Iqbal*, 129 S. Ct. at 1948 ("Government officials may not be held liable for the unconstitutional conduct of their subordinates."); *Hein*, 127 S. Ct. at 2573 (Kennedy, J., concurring) ("[M]embers of the Legislative and Executive Branches are not excused from making constitutional determinations in the regular course of their duties.").

208. *See, e.g., Iqbal*, 129 S. Ct. at 1948 ("[A] plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution."); *Negusie v. Holder*, 129 S. Ct. 1159, 1163 (2009) ("[A]n alien's motivation and intent are irrelevant to the issue whether an alien assisted in persecution.").

209. *Caperton*, 129 S. Ct. at 2259; *see also id.* at 2262 ("The Court asks not whether the judge is actually, subjectively biased, but whether the average judge in his position is 'likely' to be neutral."). In the same case, Kennedy also used the gender-neutral techniques of pluralizing and repeating the noun for the antecedent *judge*. *Id.* at 2263 ("[J]udges often explain the reasons for their conclusions and rulings.").

210. *Iqbal*, 129 S. Ct. at 1953 ("Rule 9 merely excuses a party from pleading discriminatory intent under an elevated pleading standard. It does not give him license to evade the less rigid - though still operative - strictures of Rule 8.").

211. *Negusie*, 129 S. Ct. at 1162 ("An alien who fears persecution in his homeland and seeks refugee status in this country is barred from obtaining that relief if he has persecuted others.").

212. *Ky. Ret. Sys.*, 128 S. Ct. at 2378 (2008) (Kennedy, J., dissenting) ("The hypothetical younger worker seems entitled to a boost only if one accepts that the younger worker had more productive

Overall, Justice Kennedy's opinions reveal a consciousness about gendered language and a willingness to write in a gender-neutral manner that is commendable. Nevertheless, he should consider varying the gender-neutral techniques he employs to avoid the negative reaction some readers have to the frequent use of paired pronouns.²¹⁶

3. Justice Clarence Thomas

Justice Clarence Thomas was born in 1948, grew up in poverty, and attended segregated schools in Pin Point, Georgia.²¹⁷ He served as Assistant Secretary for Civil Rights in the U.S. Department of Education and as Chair of the EEOC.²¹⁸ President George H.W. Bush nominated him to the District of Columbia Circuit Court of Appeals in 1990 and to the U.S. Supreme Court in 1991. He is the second African-American to serve on the Court.²¹⁹ Known for rarely asking questions at oral argument, he was considered the most conservative member of the Rehnquist Court.²²⁰ He told Bryan Garner that he admires "simplicity and clarity" in writing and believes that the Court's opinions should be "accessible to nonlawyers."²²¹

Placing Justice Thomas in the "setting the standard" category was a close call, because he continues to use gendered generics. He can be viewed as setting the standard based on his frequent use of a variety of gender-neutral writing techniques, including repeating the noun,²²² pluralizing the noun,²²³ using paired pronouns,²²⁴ and avoiding the use of a pronoun.²²⁵

years of work left in him."). In the same case, Kennedy also used paired pronouns with the antecedent *worker*. *Id.* at 2373.

213. *Carey v. Musladin*, 549 U.S. 70, 80 (2006) (Kennedy, J., concurring) ("The rule settled by these cases requires a court . . . to order a new trial when a defendant shows his conviction has been obtained in a trial tainted by an atmosphere of coercion or intimidation.").

214. *Panetti v. Quarterman*, 127 S. Ct. 2842, 2848 (2007) ("Prior findings of competency do not foreclose a prisoner from proving he is incompetent to be executed because of his present mental condition.").

215. *KSR Int'l Co.*, 127 S. Ct. at 1735 ("When the driver takes his foot off the pedal . . .").

216. *See, e.g.*, GARNER, *supra* note 19, at 316 (Garner recommends only limited use of paired pronouns because it "sounds stilted" and can be "obnoxious" if overused.).

217. *See* The Justices of the Supreme Court, <http://www.supremecourtus.gov/about/biographiescurrent.pdf> (last visited on October 14, 2009); TOOBIN, *supra* note 144, at 26; JAN CRAWFORD GREENBURG, SUPREME CONFLICT 327 (2008).

218. The Justices of the Supreme Court, <http://www.supremecourtus.gov/about/biographiescurrent.pdf> (last visited October 14, 2009).

219. *See* TOOBIN, *supra* note 144, at 26; GREENBURG, *supra* note 217, at 110.

220. TOOBIN, *supra* note 144, at 99, 103.

221. The Supreme Court – Thomas Interview, Part I, http://www.lawprose.org/interviews/supreme_court.php (last visited October 14, 2009).

222. *See, e.g.*, *Knowles v. Mirzayance*, 129 S. Ct. 1411, 1419 (2009) ("Finding that counsel is deficient by abandoning a defense where there is nothing to gain from that abandonment is equivalent to finding that counsel is deficient by declining to pursue a strategy where there is nothing to lose from pursuit of that strategy."); *Negusie*, 129 S. Ct. at 1185 (Thomas, J., dissenting); *Quanta Computer*, 128 S. Ct. at 2122.

223. *See, e.g.*, *Haywood v. Drown*, 129 S. Ct. 2108, 2132 (Thomas, J., dissenting) ("Congress did not grant § 1983 plaintiffs a 'right' to bring their claims in state court."); *Negusie*, 129 S. Ct. at 1180 (Thomas, J., dissenting) ("[F]or many individuals who (like petitioner) have both persecuted others and been persecuted, the scheme provides temporary refuge; they will receive deferral of removal

Justice Thomas has used male-gendered pronouns for the following generic antecedents: “defendant” (criminal),²²⁶ “alien,”²²⁷ “accomplice,”²²⁸ “officer,”²²⁹ and “participant” (in a 401(k) plan).²³⁰

For some opinions, no conclusions could be drawn, even when gendered language appeared at first glance. For example, in *14 Penn Plaza v. Pyett*, which interpreted an arbitration clause in union employees’ contracts, all three respondents were male, so Justice Thomas’ description of their jobs as “watchmen”²³¹ and “handyman”²³² did not meet the criteria for use of male-gendered generics. In addition, the briefs in that case used these terms,²³³ thus raising the possibility that their repetition might have added to the clarity of the opinion. Other occupational terms used in the case were gender neutral: “cleaners, porters, and doorpersons.”²³⁴

under the CAT if they will face torture upon their return to their home country.”); *Quanta Computer*, 128 S. Ct. at 2117–18.

224. *Negusie*, 129 S. Ct. at 1178, n.1 (Thomas, J., dissenting) (“‘Deferral of removal’ was created to accommodate Congress’ direction to exclude those who fall within the INA persecutor bar ‘[t]o the maximum extent consistent with the obligations of the United States under the [CAT]’ to not return an alien to a country in which he or she will be tortured.”).

225. *Carey*, 549 U.S. at 76 (“This Court has never addressed a claim that such private-actor courtroom conduct was so inherently prejudicial that it deprived a defendant of a fair trial.”). A lazier writer might have ended the sentence less concisely by adding a pronoun: “it deprived a defendant of his right to a fair trial.”; *Bowles v. Russell*, 127 S. Ct. 2360, 2363 (2007) (“According to 28 U.S.C. § 2107(a), parties must file notices of appeal within 30 days of the entry of the judgment being appealed.”). In contrast, a less gender-neutral version of this sentence might state that, “a party must file his notice of appeal.” See also *id.* at 2365 (“[A] petition for writ of certiorari must be filed within 90 days of the entry of the judgment to be reviewed.”).

226. See, e.g., *Knowles*, 129 S. Ct. at 1415–16 (“[A] defendant must show that he was incapable of knowing or understanding the nature of his act or of distinguishing right from wrong at the time of the offense.”); *id.* at 1419; *Jimenez v. Quarterman*, 129 S. Ct. 681, 686 (2009).

227. *Negusie*, 129 S. Ct. at 1184 (Thomas, J., dissenting) (“[T]he INA imposes a voluntariness requirement in a host of statutory provisions, see, e.g., 8 U.S.C. § 1158(c)(2)(D) (terminating asylum when alien has “voluntarily” availed himself of the protection of his country).”).

228. *Waddington v. Sarausad*, 129 S. Ct. 823, 829 (2009) (“[A]n accomplice who knows of one crime . . . is not guilty of a greater crime . . . if he has no knowledge of that greater crime.”); see also *id.* at 830, n.3.

229. *Ali*, 128 S. Ct. at 838, n.5 (“[T]hat argument is based on the assumption that an officer who assists in conducting a border search acts in a customs capacity even if he is not a customs officer and is not enforcing a customs law.”).

230. *LaRue v. DeWolff, Boberg & Associates, Inc.*, 128 S. Ct. 1020, 1029 (Thomas, J., concurring) (“[W]hen a participant sustains losses to his individual account as a result of a fiduciary breach, the plan’s aggregate assets are likewise diminished . . .”).

231. *14 Penn Plaza*, 129 S. Ct. at 1461.

232. *Id.* at 1462.

233. See Brief for Appellee-Respondent at 14, 28, 2008 WL 2774462 at *4 (July 14, 2008); *14 Penn Plaza v. Pyett*, No. 07-581 (2008).

234. *14 Penn Plaza*, 129 S. Ct. at 1461.

D. Lagging Behind

1. Justice Antonin Scalia

Justice Antonin Scalia was born in New Jersey in 1936.²³⁵ He taught at several law schools and served in the U.S. Department of Justice during the Nixon and Ford Administrations.²³⁶ He joined the District of Columbia Circuit Court of Appeals in 1982 and took his seat as the first Italian-American on the Supreme Court after his nomination by President Reagan in 1986.²³⁷ In 2008, the organization Scribes presented Scalia with a lifetime achievement award to recognize his skill as a legal writer. In his acceptance speech, he described “writing genius” as “the ability to place oneself in the shoes of the audience.”²³⁸

As the following quote demonstrates, Justice Scalia is a strong proponent of the generic male pronoun:

I find it incomprehensible that my esteemed coauthor, who has displayed the inventiveness of a DaVinci and the imagination of a Tolkien in devising circumlocutions that have purged from my contributions to this volume (at some stylistic cost) all use of “he” as the traditional, generic, unisex reference to a human being. . . . (Invisible, my eye. I’ll bet you can spot the places where force or simplicity has been sacrificed to second-best circumlocution. As for distraction: To those of us who believe that “he” means, and has always meant, “he or she” when not referring to a male antecedent, the ritual shunning of it to avoid giving offense to gender-neutralizers is . . . well, distracting.)²³⁹

Justice Scalia was responding to coauthor Bryan Garner’s insistence that their recent book on persuasive legal writing be drafted using gender-neutral language.²⁴⁰ Given this sentiment, it is not surprising that Justice Scalia is the most frequent and consistent user of male-gendered generics on the Court.

Justice Scalia has used male-gendered pronouns for the following generic antecedents: “criminal defendant,”²⁴¹ “capital convict,”²⁴² “arrestee,”²⁴³ “soldier,”²⁴⁴ “alien,”²⁴⁵ “persecutor,”²⁴⁶ “plaintiff,”²⁴⁷ “voter,”²⁴⁸ “trustee,”²⁴⁹ “a

235. See The Justices of the Supreme Court, <http://www.supremecourtus.gov/about/biographiescurrent.pdf> (last visited October 14, 2009).

236. See TOOBIN, *supra* note 144, at 200.

237. See The Justices of the Supreme Court, <http://www.supremecourtus.gov/about/biographiescurrent.pdf> (last visited October 14, 2009); TOOBIN, *supra* note 144, at 18.

238. A video of Justice Scalia’s remarks is available at <http://www.scribes.org>.

239. SCALIA & GARNER, *supra* note 11, at 119. The parenthetical comment is an aside directed at Garner’s advocacy of “invisible gender neutrality.” *Id.* at 116–17.

240. See *id.* at 116–17.

241. See, e.g., *Montejo v. Louisiana*, 129 S. Ct. 2079, 2081, 2083 (2009); *Gall*, 128 S. Ct. at 602–03 (Scalia, J., concurring).

242. *Harbison v. Bell*, 129 S. Ct. 1481, 1498 (2009) (Scalia, J., dissenting and concurring).

243. *Arizona v. Gant*, 129 S. Ct. 1710, 1724 (2009) (Scalia, J., concurring).

244. *Negusie*, 129 S. Ct. at 1169 (Scalia, J., concurring) (“[T]here is no historical support for the duress defense when a soldier follows a military order he knows to be unlawful.”).

245. *Id.* at 1170.

246. *Id.* at 1169.

247. *Summers v. Earth Island Institute*, 129 S. Ct. 1142, 1149 (2009) (“To seek injunctive relief, a plaintiff must show that he is under threat of suffering ‘injury in fact’ that is concrete and particularized.”).

person executed for a crime,"²⁵⁰ "child,"²⁵¹ "nonmember" (of a public-sector union),²⁵² (congressional) "representative,"²⁵³ "candidate,"²⁵⁴ "speaker,"²⁵⁵ "public official,"²⁵⁶ "judge,"²⁵⁷ "taxpayer,"²⁵⁸ "plaintiff,"²⁵⁹ "eyewitness,"²⁶⁰ "analyst,"²⁶¹ and "one."²⁶²

He has also used male-gendered nouns generically. For example, in *FCC v. Fox Television*,²⁶³ in which the court examined the agency's enforcement policies over the use of indecent language, Justice Scalia discussed Congress' influence over government agencies, and noted the importance of "committee chairmanships."²⁶⁴ Later in this opinion, he referred to the "yeomen of the airwaves."²⁶⁵ He has also used the gendered terms "draftsmanship"²⁶⁶ and "countrymen in arms."²⁶⁷ Interestingly, in *District of Columbia v. Heller*,²⁶⁸ the

248. *Crawford v. Marion County*, 128 S. Ct. 1610, 1626 (2008) (Scalia, J., concurring) ("A voter complaining about such a law's effect on him has no valid equal-protection claim.").

249. *Metro. Life Ins. Co. v. Glenn*, 128 S. Ct. 2343, 2359 (2008) (Scalia, J., dissenting) ("A trustee abuses his discretion by acting dishonestly when, for example, he accepts bribes.").

250. *Baze*, 128 S. Ct. at 1554 (Scalia, J., concurring) ("[H]e lacks a single example of a person executed for a crime he did not commit in the current American system.").

251. *Winkelman*, 550 U.S. at 538 (Scalia, J., concurring and dissenting) ("The right to a free appropriate public education obviously inheres in the child, for it is he who receives the education.").

252. *Davenport v. Washington Educ. Ass'n*, 127 S. Ct. 2372, 2377–80 (2007) ("[A] nonmember must shoulder the burden of objecting before a union can be barred from spending his fees . . .").

253. *Wisc. Rt. To Life*, 127 S. Ct. at 2674–75 (Scalia, J., concurring) ("Well, in the United States (making due allowance for the fact that we have elected representatives instead of a king) it is a crime, at least if the speaker is a union or a corporation . . . and if the representative is identified by name within a certain period before a primary or congressional election in which he is running.").

254. *Id.* at 2677.

255. *Id.* at 2681 ("In this critical area of political discourse, the speaker cannot be compelled to risk felony prosecution with no more assurance of impunity than his prediction that what he says will be found susceptible of some 'reasonable interpretation other than as an appeal to vote for or against a specific candidate.'").

256. *Id.* at 2683.

257. *Rita v. United States*, 127 S. Ct. 2456, 2477 (2007) (Scalia, J., dissenting).

258. *Hein*, 127 S. Ct. at 2574.

259. *Id.* ("[T]his conceptualizing of injury in fact in purely mental terms conflicts squarely with the familiar proposition that a plaintiff lacks a concrete and particularized injury when his only complaint is the generalized grievance that the law is being violated.").

260. *Melendez-Diaz*, 129 S. Ct. at 2536–37 ("Like the eyewitness who has fabricated his account to the police, the analyst who provides false results may, under oath in open court, reconsider his false testimony.").

261. *Id.*

262. *Hein*, 127 S. Ct. at 2584 (Scalia, J., concurring) ("And of course the case has engendered no reliance interests, not only because one does not arrange his affairs with an eye to standing, but also because there is no relying on the random and irrational.").

263. 129 S. Ct. 1800 (2009).

264. *Id.* at 1817.

265. *Id.* at 1819.

266. *Harbison*, 129 S. Ct. at 1497 (Scalia, J., dissenting and concurring) ("In a statute that is such a paragon of shoddy draftsmanship . . .").

267. *Boumediene*, 128 S. Ct. at 2294 (Scalia, J., dissenting) ("Last week, 13 of our countrymen in arms were killed."). It is, of course, possible that Scalia confirmed the gender of those killed that week to ensure the accuracy of this statement.

2007 Term's landmark Second Amendment case, he used both the gender-neutral "militia members"²⁶⁹ and the male-gendered "militiamen."²⁷⁰ This study revealed few examples in which Justice Scalia used gender-neutral writing techniques.²⁷¹

Justice Scalia may need to work harder to place himself in the "shoes of the audience." Scribes, the organization that recognized Scalia for his writing, seeks to promote legal writing that is "clear, succinct, and forceful" and to discourage writing that is "archaic, turgid, obscure, and needlessly dull."²⁷² While few would argue Scalia's writing is dull, his continued use of male-gendered generics is certainly archaic.

In *Making Your Case*, Justice Scalia and his coauthor Bryan Garner urge legal writers seeking to persuade to "value clarity above all other elements of style" because "it ensures you'll be understood."²⁷³ They make the further point that writing with clarity, even at the potential cost of "elegance of style" in some instances, will prevent an opponent from mischaracterizing and distorting the writer's meaning.²⁷⁴ Scalia's use of male-gendered generics contradicts his statements about the importance of clarity.

2. Chief Justice John Roberts

Chief Justice John Roberts was born in 1955, making him the youngest member of the Court. In 1980, he served as a law clerk to Supreme Court Justice William Rehnquist. During the Reagan Administration, he served as Special Assistant to the U.S. Attorney General and Associate Counsel in the White House Counsel's Office.²⁷⁵ During this period, he reportedly opposed affirmative action and "dismissed 'the purported gender gap' between men and women in income."²⁷⁶ He was the Principal Deputy Solicitor General during the presidency of George H.W. Bush and served on the District of Columbia Circuit Court of Appeals before President George W. Bush nominated him to be Chief Justice in 2005.²⁷⁷ In an article published near the end of Roberts' fourth term on the Court, Jeffrey Toobin described the Chief Justice as a "doctrinaire

268. 128 S. Ct. 2783 (2008).

269. *Id.* at 2792.

270. *Id.* ("Petitioners point to militia laws of the founding period that required militia members to 'keep' arms. . . . 'Keep arms' was simply a common way of referring to possessing arms, for militiamen and everyone else.")

271. In one case, he pluralized the noun and the pronoun. See *Fox Television Stations*, 129 S. Ct at 1813 ("Here it suffices to know that children mimic the behavior they observe – or at least the behavior that is presented to them as normal and appropriate."); see also *id.* at 1818.

272. See Scribes, American Society of Legal Writers, <http://www.scribes.org> (last visited October 14, 2009).

273. SCALIA & GARNER, *supra* note 11, at 107–08.

274. *Id.*

275. See The Justices of the Supreme Court, <http://www.supremecourtus.gov/about/biographiescurrent.pdf> (last visited October 14, 2009).

276. TOOBIN, *supra* note 144, at 280.

277. See The Justices of the Supreme Court, <http://www.supremecourtus.gov/about/biographiescurrent.pdf> (last visited October 14, 2009).

conservative” who “has served the interests, and reflected the values, of the contemporary Republican Party.”²⁷⁸

Like Justice Scalia, the Chief Justice is a frequent user of male-gendered pronouns in rule statements and when speaking generally about both men and women. He has used male-gendered pronouns with the following antecedents: “alien,”²⁷⁹ “judge,”²⁸⁰ “defendant” (criminal),²⁸¹ “supporter” (of a judge),²⁸² “party,”²⁸³ “litigant,”²⁸⁴ “public employee,”²⁸⁵ “officer,”²⁸⁶ “plaintiff,”²⁸⁷ “condemned prisoner,”²⁸⁸ “prudent investor,”²⁸⁹ “individual,”²⁹⁰ “nonmember” (of a tribe),²⁹¹ and in one case, “prisoner” and “inmate.”²⁹²

In several cases, the Chief Justice has avoided gendered generics by pluralizing the noun²⁹³ and repeating the noun instead of using a singular pronoun.²⁹⁴ In one instance, he used paired pronouns to refer, generally, to a

278. Jeffrey Toobin, *No More Mr. Nice Guy*, THE NEW YORKER, May 25, 2009, at 44.

279. *Nken*, 129 S. Ct. at 1762; compare Justice Kennedy’s concurrence, using “his or her,” *id.* at 1749, and Justice Alito’s dissent, using “his or her,” *id.* at 1765, and repeating the noun, *id.* at 1768.

280. *Caperton*, 129 S. Ct. at 2268 (Roberts, C.J., dissenting) (“[A] judge may not preside over a case in which he has a ‘direct, personal, substantial pecuniary interest.’”); see also *id.* at 2269.

281. *Id.* at 2268 (“[A] defendant’s due process rights are violated when he is tried before a judge who is ‘paid for his service only when he convicts the defendant.’”).

282. *Id.* at 2270.

283. *Id.*

284. *Id.* at 2271 (“Does a litigant waive his due process claim if he waits until after decision to raise it?”).

285. *Ysursa*, 129 S. Ct. at 1096 (“Under Idaho law, a public employee may elect to have a portion of his wages deducted by his employer and remitted to his union.”).

286. *Herring v. United States*, 129 S. Ct. 695, 703 (2009) (“These circumstances frequently include a particular officer’s knowledge and experience, . . . but not his subjective intent[.].”).

287. *Winter v. Natural Resources Defense Council*, 129 S. Ct. 365, 374 (2009) (“A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits.”).

288. *Baze*, 128 S. Ct. at 1537.

289. *Knight v. Commissioner of Internal Revenue*, 128 S. Ct. 782, 790-91 (2008) (“[T]he standard looks to what a prudent investor with the same investment objectives handling his own affairs would do.”).

290. *Id.* at 787 (“The fact that an individual could not do something is one reason he would not.”).

291. *Plains Commerce Bank v. Long Family Land and Cattle Co.*, 128 S. Ct. 2709, 2724 (2008) (“[T]hose laws and regulations may be fairly imposed on nonmembers only if the nonmember has consented, either expressly or by his actions.”).

292. *Jones v. Bock*, 549 U.S. 199, 203-07 (2007) (“These rules require a prisoner to allege and demonstrate exhaustion in his complaint.”).

293. See, e.g., *Dean*, 129 S. Ct. at 1855 (“[I]t is not unusual to punish individuals for the unintended consequences of their unlawful acts.”); compare Stevens dissent, using “he” for generic defendant. *Id.* at 1859; *Hinck v. United States*, 550 U.S. 501, 509-10 (2007) (“[T]axpayers with comparatively fewer resources are more likely to contest their assessed deficiency before first paying it.”).

294. See, e.g., *Dean*, 129 S. Ct. at 1855 (“The felony-murder rule is a familiar example: If a defendant commits an unintended homicide while committing another felony, the defendant can be convicted of murder.”); *Wisc. Rt. to Life*, 127 S. Ct. at 2660 (“It encompasses any broadcast, cable, or satellite communication that refers to a candidate for federal office and that is aired within 30 days of a federal primary election or 60 days of a federal general election in the jurisdiction in which that candidate is running for office.”).

congressional representative.²⁹⁵ He has also used gender-neutral nouns, including “Members of Congress,” “Representative,”²⁹⁶ “legislators,”²⁹⁷ “reasonable people,”²⁹⁸ and “framers” (of the Constitution).²⁹⁹

In his interview with Bryan Garner, Roberts noted that for lawyers, “language is the central tool of our trade,” that words are the “building blocks of the law,” and that if judges are not “fastidious with language” the effectiveness and clarity of the law may be diminished. He acknowledged that, “we can all do better” in this regard.³⁰⁰ When it comes to gender-neutral language, Justice Roberts could indeed do better.

3. Justice David Souter

Justice David Souter was born in 1939. His home is in New Hampshire, where he has served as Attorney General, and as an Associate Justice of both the Superior Court and the Supreme Court. In 1990, shortly after he joined the First District Court of Appeals, President George H.W. Bush nominated him to the Supreme Court.³⁰¹

Although some hoped that Souter’s replacement of Justice Brennan would allow conservatives to “firmly take ideological control of the Court,”³⁰² he soon became “one of its most liberal.”³⁰³

Justice Souter is the only Supreme Court justice who did not sit for an interview with Bryan Garner.³⁰⁴ In May 2009, he announced that he would retire from the Court at the end of the term.³⁰⁵ He has been replaced by Sonia Sotomayor of the Second Circuit Court of Appeals, the first Latina and the third woman to serve on the Supreme Court.³⁰⁶

Justice Souter has been a fairly consistent user of male-gendered generic pronouns. He has used them to refer to the following generic antecedents: “accomplice,”³⁰⁷ “juror,”³⁰⁸ “supervisor,”³⁰⁹ “employer,”³¹⁰ “plaintiff,”³¹¹

295. *Wisc. Rt. to Life*, 127 S. Ct. at 2668 (“[A]n ad run at that time may succeed in getting more constituents to contact the Representative while he or she is back home.”).

296. *Id.*

297. *Hayes*, 129 S. Ct. at 1092 (Roberts, C.J., dissenting).

298. *Baze*, 128 S. Ct. at 1537.

299. *Medellin*, 128 S. Ct. at 1362.

300. See The Supreme Court – Roberts Interview, Part I, http://www.lawprose.org/interviews/supreme_court.php (last visited October 14, 2009).

301. See The Justices of the Supreme Court, <http://www.supremecourtus.gov/about/biographiescurrent.pdf> (last visited October 14, 2009).

302. GREENBURG, *supra* note 217, at 88.

303. *Id.* at 107.

304. See The Supreme Court, http://www.lawprose.org/interviews/supreme_court.php (last visited October 14, 2009).

305. Peter Baker & Jeff Zeleny, *Souter Said to Be Leaving Court in June*, N.Y. TIMES, May 1, 2009, at A1.

306. Charlie Savage, *Sotomayor, After a Pair of Oaths, Officially Joins the Nation’s Highest Court*, N.Y. TIMES, Aug. 9, 2009, at A10.

307. *Waddington*, 129 S. Ct. at 836 (Souter, J., dissenting) (“[I]n 1998, the State Court of Appeals set out the principles on which it understood accomplice liability in Washington to be premised. It did not say that the accomplice must understand that he is aiding in the commission of the same offense the principal has in mind.”).

“veteran,”³¹² “claimant,”³¹³ “arrested person,”³¹⁴ “officer,”³¹⁵ “defendant” (criminal),³¹⁶ “litigant,”³¹⁷ “person,”³¹⁸ “passenger,”³¹⁹ “occupant” (of a car),³²⁰ “reader or listener” (of a political ad),³²¹ and “party.”³²² He also used the term “fleeing man” to illustrate an example.³²³

308. *Id.* at 838 (Souter, J., dissenting) (“Even a juror with a preternatural grasp of the statutory subtlety would have lost his grip after listening to the prosecutor’s closing argument.”).

309. *Iqbal*, 129 S. Ct. at 1957 (Souter, J., dissenting) (“The nature of a supervisory liability theory is that the supervisor may be liable, under certain conditions, for the wrongdoing of his subordinates.”).

310. *Id.* at 1958.

311. *Bartlett*, 129 S. Ct. at 1252 (Souter, J., dissenting) (“[A] § 2 plaintiff must also be able to place himself in a reasonably compact district that could have been drawn to improve upon the plan actually selected.”); *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1969, n.8 (2007) (“[W]hen a complaint adequately states a claim, it may not be dismissed based on a district court’s assessment that the plaintiff will fail to find evidentiary support for his allegations or prove his claim to the satisfaction of the factfinder.”).

312. *Shinseki v. Sanders*, 129 S. Ct. 1696, 1708–09 (2009) (Souter, J., dissenting) (“[W]hen the Department of Veterans Affairs (VA) fails to notify a veteran of the information needed to support his benefit claim, . . . must the veteran prove the error harmful?”).

313. *Id.* at 1709 (Souter, J., dissenting) (“The VA differs from virtually every other agency in being itself obliged to help the claimant develop his claim.”).

314. *Corley*, 129 S. Ct. at 1562 (“[A]n arrested person’s confession is admissible if given after an unreasonable delay in bringing him before a judge.”).

315. *Id.* at 1562 (“The common law obliged an arresting officer to bring his prisoner before a magistrate as soon as he reasonably could.”); *Brendlin v. California*, 127 S. Ct. 2400, 2407 (2007) (“It is also reasonable for passengers to expect that a police officer at the scene of a crime, arrest, or investigation will not let people move around in ways that could jeopardize his safety.”).

316. *See, e.g., Corley*, 129 S. Ct. at 1568 (“Thus would many a Rule of Evidence be overridden in case after case: a defendant’s self-incriminating statement to his lawyer would be admissible despite his insistence on attorney-client privilege.”); *Rita*, 127 S. Ct. at 2485 (Souter, J., dissenting) (“For if judicial factfinding necessary for an enhanced sentencing range were held to be adequate in the face of a defendant’s objection, a defendant’s right to have a jury standing between himself and the power of the government to curtail his liberty would take on a previously unsuspected modesty.”).

317. *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2618 (2008) (“[A] litigant could add new constitutional claims as he went along, simply because he had ‘consistently argued’ that a challenged regulation was unconstitutional.”).

318. *Watson v. United States*, 128 S. Ct. 579, 586 (2007) (“Given ordinary meaning and the conventions of English, we hold that a person does not ‘use’ a firearm . . . when he receives it in trade for drugs.”); *see also id.* at 581–83.

319. *Brendlin*, 127 S. Ct. at 2407 (“[T]he passenger will expect to be subject to some scrutiny, and his attempt to leave the scene would be so obviously likely to prompt an objection from the officer that no passenger would feel free to leave in the first place.”).

320. *Id.* at 2409 (“[F]or a specific occupant of the car to be seized he must be the motivating target of an officer’s show of authority.”); *see also id.* at 2410 (“But an occupant of a car who knows that he is stuck in traffic because another car has been pulled over . . . would not perceive a show of authority as directed at him or his car.”).

321. *Wisc. Rt. To Life*, 127 S. Ct. at 2693 (Souter, J., dissenting) (“An issue ad is an advertisement on a political subject urging the reader or listener to let a politician know what he thinks.”).

322. *Bowles*, 127 S. Ct. at 2369 (Souter, J., dissenting) (“[W]e did not actually treat [time limits] as beyond exemption to the point of shrugging at the inequity of penalizing a party for relying on what a federal judge had said to him.”).

323. *Brendlin*, 127 S. Ct. at 2409 (“But what may amount to submission depends on what a person was doing before the show of authority: a fleeing man is not seized until he is physically overpowered.”).

In *Exxon Shipping, Co. v. Baker*,³²⁴ he used male-gendered maritime terms, including “helmsman,”³²⁵ “fishermen,”³²⁶ and “shipmaster.”³²⁷ In the same case, he used the universally adopted gender-neutral term “reasonable people.”³²⁸ He has also employed other gender-neutral nouns like “framers,”³²⁹ and “drafters.”³³⁰ In his dissent in *Crawford v. Marion County*, he used male-gendered pronouns for the antecedents “plaintiff,”³³¹ “an individual who impersonates another at the polls,”³³² and “imposter,”³³³ but alternated pronouns for the antecedent “voter.”³³⁴

In two cases from the 2008 Term, Justice Souter used female-gendered generics. In *Crawford v. Metropolitan Government of Nashville*, the Court interpreted the anti-retaliation provision of Title VII in the context of a sexual harassment complaint. The petitioner was a woman.³³⁵ In the following passages, Souter appears to be speaking generally, rather than specifically about Ms. Crawford:

[N]othing in the statute requires a freakish rule protecting an employee who reports discrimination on her own initiative but not one who reports the same discrimination in the same words when her boss asks a question.³³⁶

The appeals court’s rule would thus create a real dilemma. . . . If the employee reported discrimination in response to the enquiries, the employer might well be free to penalize her for speaking up. But if she kept quiet about the discrimination and later filed a Title VII claim, the employer might well escape liability.³³⁷

Justice Souter did not use masculine-gendered generics in this opinion, except when quoting the relevant language of Title VII, which uses masculine pronouns to refer to both “employer” and “employees.”³³⁸

324. 128 S. Ct. 2605 (2008).

325. *Id.* at 2612.

326. *Id.* at 2613.

327. *Id.* at 2615.

328. *Id.* at 2627.

329. *Dep’t of Revenue of Ky. v. Davis*, 128 S. Ct. 1801, 1808 (2008).

330. *Hall St. Assocs.*, 128 S. Ct. at 1406, n.7.

331. 128 S. Ct. 1610, 1634 (2008) (Souter, J., dissenting) (“[I]t would greatly aid a plaintiff to establish his claims beyond mathematical doubt.”).

332. *Id.* at 1637 (Souter, J., dissenting).

333. *Id.* at 1638 (Souter, J., dissenting) (“If an imposter gets caught, he is subject to severe criminal penalties.”).

334. *Compare id.* at 1637 (Souter, J., dissenting) (“And even [if] the State’s interest in deterring a voter from showing up at the polls and claiming to be someone he is not must, in turn, be discounted . . .”), *with id.* at 1641, n. 33 (“The voter is not required to make a second trip to have her provisional ballot counted.”). *See also id.* at 1631, n.19 (“To vote by provisional ballot, an individual must . . . sign an affidavit affirming that she is ‘indigent.’”). *Id.* at 1633, n.24 (“[T]he Constitution protects an individual’s ability to vote, not merely his decision to do so.”).

335. *See* 129 S. Ct. 846, 849 (2009).

336. *Id.* at 851.

337. *Id.* at 852.

338. *See id.* at 850.

In the second case, the Court interpreted ERISA's antialienation provision. The designated beneficiary in the case was a woman.³³⁹ Justice Souter alternated feminine and masculine pronouns to refer to a generic beneficiary. His use of male-gendered pronouns is easily identifiable as generic:

The court relied on Fifth Circuit precedent establishing that a beneficiary can waive his rights to the proceeds of an ERISA plan.³⁴⁰

Although the beneficiary of a spendthrift trust traditionally lacked the means to transfer his beneficial interest to anyone else, he did have the power to disclaim prior to accepting it, so long as the disclaimer made no attempt to direct the interest to a beneficiary in his stead.³⁴¹

[T]he general principle that a designated spendthrift can disclaim his trust interest magnifies the improbability that a statute writ with an eye on the old law would effectively force a beneficiary to take an interest willy-nilly.³⁴²

Similarly, he appears to have used feminine pronouns in the context of general statements, although both examples are within paragraphs that specifically address the argument of the female respondent:

DuPont argues that Liv's waiver would have been an invalid disclaimer at common law because it was given for consideration in the divorce settlement. But the authorities DuPont cites fail to support the proposition that a beneficiary's otherwise valid disclaimer was invalid at common law because she received consideration.³⁴³

DuPont's argument rests on a false premise. In fact, a beneficiary seeking only to relinquish her right to benefits cannot do this by a QDRO.³⁴⁴

4. Justice Stephen Breyer

Justice Stephen Breyer was born in 1938 in San Francisco.³⁴⁵ After graduating from Harvard Law School, he clerked for Supreme Court Justice Arthur Goldberg, worked as a Special Assistant to the Assistant U.S. Attorney General for Antitrust, as an Assistant Special Prosecutor of the Watergate Special Prosecution Force, and as Chief Counsel to the Senate Judiciary Committee.³⁴⁶ He also taught at Harvard in both the Law School and the Kennedy School of Government.³⁴⁷ He served on the First Circuit Court of Appeals from 1980 to 1994, when President Bill Clinton nominated him to the

339. *Kennedy v. Plan Adm'r for DuPont Sav. and Inv. Plan*, 129 S. Ct. 865, 869 (2009).

340. *Id.*

341. *Id.* at 871–72.

342. *Id.* at 872. Souter also used a masculine pronoun for the generic antecedent “plan participant”: “The point is that by giving a plan participant a clear set of instructions for making his own instructions clear, ERISA forecloses any justification for enquiries into nice expressions of intent.” *Id.* at 875.

343. *Id.* at 872, n.6.

344. *Id.* at 873.

345. *See* The Justices of the Supreme Court, <http://www.supremecourtus.gov/about/biographiescurrent.pdf> (last visited October 14, 2009).

346. *Id.*

347. *Id.*

Supreme Court.³⁴⁸ He is considered part of the liberal wing of the Roberts Court.³⁴⁹ Judge Richard Posner has described him as the “most pragmatic” member of the Roberts Court.³⁵⁰ Bryan Garner has noted that Justice Breyer’s writing, according to “scholars,” is “known for its clarity.”³⁵¹

Justice Breyer fits in the “lagging behind” category because he frequently uses male-gendered generics. For example, he has used male-gendered generics for the antecedents “administrator,”³⁵² “holder of a future interest,”³⁵³ “landowner,”³⁵⁴ “individual who fails to report” (to prison),³⁵⁵ “trustee,”³⁵⁶ “employee,”³⁵⁷ “disabled worker,”³⁵⁸ “offender,”³⁵⁹ “resident,”³⁶⁰ “officer,”³⁶¹ “voter,”³⁶² “individual,”³⁶³ “aider and abettor,”³⁶⁴ and “judge.”³⁶⁵

348. *Id.*

349. TOOBIN, *supra* note 144, at 327.

350. POSNER, *supra* note 144, at 320.

351. *See* The Supreme Court – Breyer Interview Part 2, http://www.lawprose.org/interviews/supreme_court.php (last visited October 14, 2009).

352. *Fox Television Stations*, 129 S. Ct. at 1830–31 (Breyer, J., dissenting) (“An (imaginary) administrator explaining why he chose a policy that requires driving on the right-side.”).

353. *Summers*, 129 S. Ct. at 1156 (Breyer, J., dissenting) (“Would courts deny *standing* to a holder of a future interest in property who complains that a life tenant’s waste of the land will almost inevitably hurt the value of his interest—though he will have no personal interest for several years into the future?”).

354. *Id.* (“Would courts deny *standing* to a landowner who complains that a neighbor’s upstream dam constitutes a nuisance—even if the harm to his downstream property . . . will not occur for several years?”).

355. *Chambers*, 129 S. Ct. at 692 (“[A]n individual who fails to report would seem unlikely . . . to call attention to his whereabouts.”).

356. *Metro. Life Ins. Co.*, 128 S. Ct. at 2350 (“Trust law continues to apply a deferential standard of review . . . , while at the same time requiring the reviewing judge to take account of the conflict when determining whether the trustee . . . has abused his discretion.”).

357. *Ky. Ret. Sys.*, 128 S. Ct. at 2367–68 (“[E]very such employee, when hired, is promised disability retirement benefits should he become disabled prior to the time that he is eligible for normal retirement benefits.”).

358. *Id.* at 2368 (“[T]he whole purpose of the disability rules is, as Kentucky claims, to treat a disabled worker as though he had become disabled after, rather than before, he had become eligible for normal retirement benefits.”); *see also id.* at 2369.

359. *See, e.g., Begay v. United States*, 128 S. Ct. 1581, 1587 (2008) (“[A]n offender’s criminal history is relevant to the question whether he is a career criminal, or, more precisely, to the kind or degree of danger the offender would pose were he to possess a gun.”); *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007) (“[A]n offender . . . may show that the statute was so applied in his own case.”).

360. *Heller*, 128 S. Ct. at 2863 (Breyer, J., dissenting) (“The District’s law does prevent a resident from keeping a loaded handgun in his home.”); *see also id.* at 2864.

361. *Id.* at 2864 (Breyer, J., dissenting) (“[T]he ban’s very objective is to reduce significantly the number of handguns in the District, say, for example, by allowing a law enforcement officer immediately to assume that *any* handgun he sees is an *illegal* handgun.”).

362. *Crawford*, 128 S. Ct. at 1644 (Breyer, J., dissenting) (“[A] . . . voter who lacks photo ID may cast a provisional ballot . . . that will be counted if the State determines that his signature matches the one on his voter registration forms.”).

363. *Medellin*, 128 S. Ct. at 1385 (Breyer, J., dissenting) (“The Convention provision is about an individual’s ‘rights,’ namely, his right upon being arrested to be informed of his separate right to contact his nation’s consul.”).

364. *Duenas-Alvarez*, 549 U.S. at 190 (“California defines ‘aiding and abetting’ such that an aider and abettor is criminally responsible . . . for the crime he intends.”).

Justice Breyer has employed both gender-neutral techniques and gendered generics in the same case. For example, in *Shinseki v. Sanders*, a case about veterans' benefits in which the veterans seeking disability benefits were a man and a woman, Breyer used paired pronouns for the generic antecedent "veteran."³⁶⁶ In the next paragraph he used the gender-neutral techniques of pairing pronouns and repeating the noun, then reverted to using a masculine-gendered generic:

Repeating these statutory requirements in its regulations, the VA has said it will provide a claimant with a letter that tells the claimant (1) what further information is necessary to substantiate his or her claim; (2) what portions of that information the VA will obtain for the claimant; and (3) what portions the claimant must obtain. 38 CFR § 3.159(b) (2008). At the time of the decisions below, the regulations also required the VA to tell the claimant (4) that he may submit any other relevant information that he has available.³⁶⁷

In the remainder of his opinion, Justice Breyer continued to use male-gendered pronouns for the antecedents "veteran,"³⁶⁸ "claimant,"³⁶⁹ "party,"³⁷⁰ and "individual,"³⁷¹ returning to paired pronouns at the end of the opinion to acknowledge the "special solicitude" Congress has for veterans.³⁷²

Similarly, Justice Breyer's opinion in *Van De Kamp v. Goldstein*, which extended absolute prosecutorial immunity to several claims asserted under 42 U.S.C. § 1983, also presents a mixed picture. He used several gender-neutral writing techniques, including repeating the noun "prosecutor":

We have held that absolute immunity does not apply when a prosecutor gives advice to police during a criminal investigation, . . . when the prosecutor makes statements to the press, . . . or when a prosecutor acts as a complaining witness in support of a warrant application.³⁷³

365. *Rita*, 127 S. Ct. at 2468 ("The statute does call for the judge to 'state' his 'reasons.'"); see also *id.* at 2465, 2468–69. In his concurrence in this case, Justice Stevens used a feminine-gendered generic for the antecedent "judge." *Id.* at 2473 (Stevens, J., concurring).

366. *Sanders*, 129 S. Ct. at 1700 ("The Veterans Claims Assistance Act of 2000 requires the VA to help a veteran develop his or her benefits claim.").

367. *Id.* at 1700–01.

368. *Id.* at 1701 ("[E]rrors of Types Two, Three, or Four (*i.e.*, a failure to explain just who . . . must provide the needed material or to tell the veteran that he may submit any other evidence available) do not have the 'natural effect' of harming the claimant. In these latter instances, the claimant must show how the error caused harm, . . . by stating . . . 'what evidence' he would have provided.").

369. *Id.*

370. *Id.* at 1706 ("The party seeking to reverse the result of a civil proceeding will likely be in a position at least as good as . . . the opposing party to explain how he has been hurt by an error.").

371. *Id.* ("In criminal cases the Government seeks to deprive an individual of his liberty, thereby providing a good reason to require the Government to explain why an error should not upset the trial court's determination.").

372. *Id.* at 1707 ("A veteran, after all, has performed an especially important service for the Nation, often at the risk of his or her own life. . . . [T]he VA has a statutory duty to help the veteran develop his or her benefits claim."). In his dissenting opinion, Justice Souter used masculine-gendered generics throughout. See *id.* at 1708–09 (Souter, J., dissenting).

373. 129 S. Ct. 855, 861 (2009).

He also alternated gendered generic pronouns for the antecedent “prosecutor”:

The “public trust of the prosecutor’s office would suffer” were the prosecutor to have in mind his “own potential” damages “liability” when making prosecutorial decisions—as he might well were he subject to § 1983 liability.³⁷⁴

The only difference we can find between *Imbler* and our hypothetical case lies in the fact that, in our hypothetical case, a prosecutorial supervisor or colleague might himself be liable for damages *instead of* the trial prosecutor.³⁷⁵

A trial prosecutor would remain immune, even for *intentionally* failing to turn over, say *Giglio* material; but her supervisor might be liable for *negligent* training or supervision.³⁷⁶

Later in the case, Breyer used both a male pronoun and paired pronouns for the antecedent “plaintiff”:

We recognize, as Chief Judge Hand pointed out, that sometimes such immunity deprives a plaintiff of compensation that he undoubtedly merits; but the impediments to the fair, efficient functioning of a prosecutorial office that liability could create lead us to find that *Imbler* must apply here.³⁷⁷

Consequently, where a § 1983 plaintiff claims that a prosecutor’s management of a trial-related information system is responsible for a constitutional error at his or her particular trial, the prosecutor responsible for the system enjoys absolute immunity just as would the prosecutor who handled the particular trial itself.³⁷⁸

In other cases, Justice Breyer also used the gender-neutral techniques of pluralizing the noun and the pronoun,³⁷⁹ repeating the noun,³⁸⁰ and using paired pronouns.³⁸¹

The overall picture presented by these opinions is one of inconsistency. Justice Breyer appears comfortable with a variety of gender-neutral techniques; it should therefore require minimal effort for him to decrease his use of male-gendered generics.

374. *Id.* at 860.

375. *Id.* at 862.

376. *Id.* at 863.

377. *Id.* at 864.

378. *Id.*

379. *See, e.g., Fox Television Stations*, 129 S. Ct. at 1839 (Breyer, J., dissenting) (“Nor was the FCC ever unaware . . . that children’s surroundings influence their behavior.”); *Morse v. Frederick*, 127 S. Ct. 2618, 2642 (2007) (Breyer, J., concurring) (“[T]he law *prohibited* judges from passing on constitutional questions, only that it did not *require* them to do so.”).

380. *Summers*, 129 S. Ct. at 1155 (Breyer, J., dissenting) (“It recognizes, as this Court has held, that a plaintiff has constitutional standing if the plaintiff demonstrates . . .”); *Medellin*, 128 S. Ct. at 1386 (Breyer, J., dissenting) (“[I]f the arbitrator decides that the word ‘grain’ does include rye, the arbitrator will then . . . read the relevant provision.”).

381. *Crawford*, 128 S. Ct. at 1644 (Breyer, J., dissenting) (“[A]n Indiana nondriver . . . will find it difficult and expensive to travel to the Bureau of Motor Vehicles, particularly if he or she resides in one of the . . . counties lacking a public transportation system.”).

E. Setting a Different Standard

1. Justice Ruth Bader Ginsburg

Born in Brooklyn, New York, in 1933, Ruth Bader Ginsburg attended Harvard Law School and received an LL.B. from Columbia Law School.³⁸² After clerking for a federal district court judge, she taught at both Rutgers and Columbia Law Schools,³⁸³ becoming the first woman to receive tenure at Columbia.³⁸⁴ In 1971, she helped to start the Women's Rights Project of the ACLU and was that organization's general counsel for seven years.³⁸⁵ In 1980, she joined the D.C. Circuit Court of Appeals, where she served until 1993, when President Clinton nominated her to the Supreme Court.³⁸⁶

Considered one of the best writers on the Court, Justice Ginsburg has acknowledged that she works hard at the craft and produces "innumerable drafts" before she is satisfied.³⁸⁷ Her goal is to write an opinion so that no one will have to read a sentence twice to understand its meaning.³⁸⁸ Jeffrey Toobin has written that she is "free of illusions about the supposedly apolitical nature of judging."³⁸⁹ During the three terms reviewed for this study, she was the lone woman on the Court.³⁹⁰

Justice Ginsburg does not easily fit into either of the two previous categories. While she cannot be described as "lagging behind," she is not setting the standard described earlier in this article because she does not consistently use gender-neutral language in the strictest sense.

Justice Ginsburg most easily fits into the alternating pronouns model: she uses both male and female generics. But she does not alternate male and female generic pronouns within an opinion, in the manner described in Part II. The most consistent pattern in her writing is to assign particular generics to particular actors throughout all her opinions, most noticeably by using female pronouns to refer generically to judges and to plaintiffs in civil cases, and by using male pronouns to refer to criminal defendants and prisoners.

For example, Justice Ginsburg has used female-gendered pronouns to refer to the generic antecedents "judge,"³⁹¹ "nonparty,"³⁹² "person,"³⁹³ "party,"³⁹⁴

382. See The Justices of the Supreme Court, <http://www.supremecourtus.gov/about/biographiescurrent.pdf> (last visited October 14, 2009).

383. *Id.*

384. *Bazon, supra* note 27, at 25.

385. See The Justices of the Supreme Court, <http://www.supremecourtus.gov/about/biographiescurrent.pdf> (last visited October 14, 2009).

386. *Id.*

387. See The Supreme Court – Ginsburg Interview Part 1, http://www.lawprose.org/interviews/supreme_court.php (last visited October 14, 2009).

388. *Id.*

389. TOOBIN, *supra* note 144, at 329.

390. *Bazon, supra* note 27, at 24.

391. See, e.g., *Oregon v. Ice*, 129 S. Ct. 711, 715 (2009) ("If the offenses *do* arise from the same course of conduct, the judge may still impose consecutive sentences if she finds either."); *Cunningham v. California*, 549 U.S. 270, 282 (2007) ("The Reform Act permitted but did not require a judge to exceed that standard range if she found 'substantial and compelling reasons justifying an exceptional sentence.'"). Compare *id.* at 306–07 (Alito, J., dissenting) ("[T]he California system . . .

“plaintiff,”³⁹⁵ “juror,”³⁹⁶ and “litigant.”³⁹⁷ She has used male-gendered pronouns to refer to the generic antecedents “defendant” (criminal),³⁹⁸ “inmate,”³⁹⁹ “executioner,”⁴⁰⁰ “employee,”⁴⁰¹ and “the Attorney General.”⁴⁰² She has also

recognizes that a sentencing judge must have the ability to look at *all* the relevant facts—even those outside the trial record and jury verdict—in exercising his or her discretion.”).

392. *Taylor v. Sturgell*, 128 S. Ct. 2161, 2174 (2008) (“Our decisions recognizing that a nonparty may be bound by a judgment if she was adequately represented by a party to the earlier suit thus provide no support for the D.C. Circuit’s broad theory of virtual representation.”).

393. *Id.* at 2173 (“[I]n some circumstances, a person may be bound by a judgment if she was adequately represented by a party to the proceeding yielding that judgment.”).

394. *Id.* at 2176 (“A party’s representation of a nonparty is ‘adequate’ for preclusion purposes only if . . . : (1) the interests of the nonparty and her representative are aligned, . . . and (2) either the party understood herself to be acting in a representative capacity or the original court took care to protect the interests of the nonparty.”).

395. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 127 S. Ct. 2499, 2513 (2007) (“[U]nder our construction of the ‘strong inference’ standard, a plaintiff is not forced to plead more than she would be required to prove at trial. A plaintiff alleging fraud in a § 10(b) action, we hold today, must plead facts rendering an inference of scienter *at least as likely as* any plausible opposing inference. At trial, she must then prove her case by a ‘preponderance of the evidence.’ Stated otherwise, she must demonstrate that it is *more likely* than not that the defendant acted with scienter.”). The plaintiff in this case was not a woman. Earlier in the case, Justice Ginsburg used paired pronouns for the same antecedent: “to proceed beyond the pleading stage, the plaintiff must allege as to each defendant facts sufficient to demonstrate a culpable state of mind regarding his or her violations.” *Id.* at 2511, n.6.

396. *Rivera v. Illinois*, 129 S. Ct. 1446, 1454 (2009) (“We reject the notion that a juror is constitutionally disqualified whenever she is aware that a party has challenged her. Were the rule otherwise, a party could circumvent *Batson* by insisting in open court that a trial court dismiss a juror even though the party’s peremptory challenge was discriminatory. Or a party could obtain a juror’s dismissal simply by making in her presence a baseless for-cause challenge.”). Although the challenged juror in this case was a woman, the quoted language is a broader statement about peremptory challenges in general, applicable to both male and female jurors.

397. *Vaden v. Discover Bank*, 129 S. Ct. 1262, 1277, n.17 (2009) (“When a litigant files a state-law claim in state court, and her opponent parries with a federal counterclaim, the action is not removable to federal court.”). Although Vaden is a woman, it was she, not “her opponent,” who filed a counterclaim. This supports the interpretation of this sentence as a general statement, meant to apply to male and female litigants.

398. *See, e.g., Vermont v. Brillon*, 129 S. Ct. 1283, 1291 (2009) (“the relationship between a defendant and the public defender representing him”); *Greenlaw*, 128 S. Ct. at 2569 (“Thus a defendant who appeals but faces no cross-appeal can proceed anticipating that the appellate court will not enlarge his sentence.”). *Compare id.* at 2573 (Alito, J., dissenting) (“When the Government files a notice of cross-appeal, the defendant is alerted to the possibility that his or her sentence may be increased.”).

399. *Baze*, 128 S. Ct. at 1571 (Ginsburg, J., dissenting) (“In California, a member of the IV team brushes the inmate’s eyelashes, speaks to him, and shakes him.”).

400. *Id.* at 1572 (“[T]hus the executioner’s training may lead him to push the drugs too fast.”).

401. *Osborn v. Haley*, 549 U.S. 225, 248 (2007) (“[I]t would make scant sense to read the Act as leaving an employee charged with an intentional tort to fend for himself when he denies wrongdoing and asserts he ‘engaged only in proper behavior occurring wholly within the scope of his office or employment.’”). In this example (and in others), the choice of pronoun may have been influenced by a desire to be consistent with the quoted language. An alternative approach would be to pluralize the noun and pronouns, and to replace the word his with [their] in the quotation. Earlier in the same case, Justice Ginsburg used paired pronouns for a similar antecedent: “[T]he Act grants the Attorney General authority to certify that a federal employee named defendant in a tort action was acting within the scope of his or her employment at the time in question.” *Id.* at 240–41.

used the gender-neutral techniques of pairing pronouns,⁴⁰³ pluralizing the noun and the pronoun,⁴⁰⁴ repeating the noun,⁴⁰⁵ and eliminating the need for a pronoun.⁴⁰⁶

In *Taylor v. Sturgell*, Justice Ginsburg alternated the pronouns for the same antecedent within the same paragraph:

Fourth, a nonparty is bound by a judgment if she “assume[d] control” over the litigation in which that judgment was rendered. [Citations omitted] . Because such a person has had “the opportunity to present proofs and argument,” he has already “had his day in court” even though he was not a formal party to the litigation. [Citation omitted]⁴⁰⁷

By alternating pronouns in a way that assigns a gender to particular generic actors, Justice Ginsburg may be engaging in her own subtle form of “linguistic disruption,” an overtly feminist approach “to change norms of language use.”⁴⁰⁸ This approach seems to strive for gender equality, rather than gender neutrality. Anne Curzan has identified this as a question of import for feminist linguists: “whether we are striving to make the language ‘gender equal’ when we are referring to both men and women, or whether we are striving to make gender less salient if we are referring to both men and women.”⁴⁰⁹ By referring to judges and litigants with female-gendered generics, Justice Ginsburg may be attempting to equalize the long history of judges and litigants being generically male.⁴¹⁰ The larger issue is whether a technique that “actively

402. *Id.* at 241–42 (“The Act’s distinction between removed cases in which the Attorney General issues a scope-of-employment certification, and those in which he does not, leads us to conclude that Congress gave district courts no authority to return cases to state courts on the ground that the Attorney General’s certification was unwarranted.”). In this example, Justice Ginsburg appears to be speaking generally, interpreting the Westfall Act, rather than referring to the acts of the particular Attorney General serving at the time.

403. *See, e.g., Arizona v. Johnson*, 129 S. Ct. 781, 788 (2009) (“[A]s stated in *Brendlin*, a traffic stop of a car communicates to a reasonable passenger that he or she is not free to terminate the encounter with the police and move about at will.”); *Osborn*, 549 U.S. at 240–41 (“[D]efendant in a tort action was acting within the scope of his or her employment.”); *Tellabs, Inc.*, 127 S. Ct. at 2511, n.6 (“[P]laintiff must allege as to each defendant facts . . . regarding his or her violations.”); *Lawrence v. Florida*, 549 U.S. 327, 342 (2007) (Ginsburg, J., dissenting) (“Tolling in the context here involved also protects a litigant’s ability to pursue his or her federal claims.”); *id.* (“Only by expeditiously filing for federal habeas relief will a prisoner ensure that the limitation period does not run before we have disposed of his or her petition for certiorari.”).

404. *See, e.g., Brillon*, 129 S. Ct. at 1292 (“We see no justification for treating defendants’ speedy-trial claims differently based on whether their counsel is privately retained or publicly assigned.”).

405. *Id.* at 1293 (“[D]efense counsel are properly attributed to the defendant, even where counsel is assigned.”).

406. *Vaden*, 129 S. Ct. at 1276 (“Artful dodges by a §4 petitioner should not divert us from recognizing the actual dimensions of that controversy.”). Here, Ginsburg used “that” in place of a pronoun.

407. 128 S. Ct. 2161, 2173 (2008).

408. *See* CURZAN, *supra* note 17, at 186–87.

409. *Id.* at 188.

410. *See* MURRAY & DESANCTIS, *supra* note 70, at 174 (“There is no excuse for writing with sexist, male-dominated language in legal contexts” because “[a]ll judges, clients, and attorneys are not men.” To “avoid sexist language,” the authors “use feminine pronouns in reference to lawyers, judges, and clients as often as we feel comfortable doing so.”).

challenges sexism in society” interferes with the sometimes competing goal of clarity in judicial opinions.⁴¹¹ In the example above from *Taylor v. Sturgell*, switching from female to male generic could be confusing for a reader.

2. Justice John Paul Stevens

Born in 1920, John Paul Stevens is the oldest member of the Court.⁴¹² He served in the U.S. Navy in the 1940s and was a law clerk to Supreme Court Justice Wiley Rutledge during the 1947 Term.⁴¹³ He was also Associate Counsel to the Subcommittee on the Study of Monopoly Power of the House of Representatives Judiciary Committee, and a member of the Attorney General’s National Committee to Study Antitrust Law.⁴¹⁴ In 1975, after he had served for five years on the Seventh Circuit Court of Appeals, Republican President Gerald Ford nominated Stevens to the Supreme Court.⁴¹⁵ At the time, Stevens was considered a “judge’s judge” known for “thoroughness and his sophisticated arguments.”⁴¹⁶ Ford believed that Stevens would be easily confirmed because he was not well known and did not appear to be a political partisan or a strict ideologue.⁴¹⁷ By the end of his first term he was considered the Court’s “new moderate.”⁴¹⁸ Over the course of his tenure on the Court, as it has become more conservative, he has become more liberal.⁴¹⁹

Justice Stevens is the closest to Justice Ginsburg in his use of gendered words. He, too, alternates the use of gendered pronouns, most often using a female generic for lawyers, judges, and plaintiffs in civil actions, and using a male generic for criminal defendants. Justice Stevens’s use of alternating pronouns was on display in his dissent in *Montejo v. Louisiana*, a criminal case from the 2008 Term:

Because *Miranda* warnings do not hint at the ways in which a lawyer might assist her client during conversations with the police, I remain convinced that the warnings prescribed in *Miranda*, [footnote omitted] while sufficient to apprise a defendant of his *Fifth Amendment* right to remain silent, are inadequate to inform an unrepresented, indicted defendant of his *Sixth Amendment* right to have a lawyer present at all critical stages of a criminal prosecution.⁴²⁰

411. Writing about gender-neutral language in the field of technical writing, Katherine Durack notes that by “actively challenging sexism,” nonsexist language (as distinct from the less political gender-neutral language) “may draw attention to the text and away from the task at hand.” Durack, *supra* note 25, at 193–94.

412. See The Justices of the Supreme Court, <http://www.supremecourtus.gov/about/biographiescurrent.pdf> (last visited October 14, 2009).

413. *Id.*

414. *Id.*

415. *Id.*

416. BOB WOODWARD & SCOTT ARMSTRONG, *THE BRETHERN: INSIDE THE SUPREME COURT* 401 (1979) (providing a behind-the-scenes look at the work of the Court between 1969 and 1976).

417. *Id.* at 401.

418. *Id.* at 444.

419. TOOBIN, *supra* note 144, at 6.

420. 129 S. Ct. at 2100 (Stevens, J., dissenting); see also *Harbison*, 129 S. Ct. at 1488 (“It would require a federal lawyer who obtained relief for her client in § 2254 proceedings to continue to

In the above example, Stevens assigned a gendered pronoun based on the generic actor he was discussing: a feminine pronoun for a generic lawyer, and a masculine pronoun for a generic criminal defendant. In an example from the 2007 Term, Stevens alternated gendered generics for the antecedent noun “voter”:

A voter who is indigent or has a religious objection to being photographed may cast a provisional ballot that will be counted only if she executes an appropriate affidavit. . . . A voter who has photo identification but is unable to present that identification on election day may file a provisional ballot that will be counted if she brings her photo identification to the circuit county clerk’s office within 10 days.⁴²¹

If the voter is casting his ballot in person, he must present local election officials with written identification[.] . . . If the voter is voting by mail, he must include a copy of the identification with his ballot.⁴²²

In the same case, Justice Souter also alternated pronouns for “voter,”⁴²³ although he used male-gendered generics for other antecedents.⁴²⁴ Justice Breyer used paired pronouns and masculine-gendered generics.⁴²⁵ Justice Scalia used only masculine-gendered generics.⁴²⁶

In the 2008 Term, Justice Stevens used female-gendered pronouns for the following antecedents: “plaintiff,”⁴²⁷ “lawyer,”⁴²⁸ “counsel,”⁴²⁹ and “alien.”⁴³⁰ He used male-gendered pronouns for the antecedents “arrestee,”⁴³¹

represent him during his state retrial; similarly, it would require federal counsel to represent her client in any state habeas proceeding following her appointment.”).

421. *Crawford*, 128 S. Ct. at 1613–14.

422. *Id.* at 1617–18; *see also id.* at 1620 (“[A] voter may lose his photo identification, may have his wallet stolen on the way to the polls.”).

423. *Id.* at 1637, 1641, n.33 (Souter, J., dissenting).

424. *Id.* at 1634, 1638 (Souter, J., dissenting).

425. *Id.* at 1644 (Breyer, J., dissenting).

426. *Id.* at 1626 (Scalia, J., concurring).

427. *See, e.g.,* *Travelers Indem. Co. v. Bailey*, 129 S. Ct. 2195, 2208 (2009) (Stevens, J., dissenting) (“True direct actions are lawsuits in which a plaintiff claims that she was injured by Manville and seeks recovery directly from its insurer without first obtaining a judgment against Manville.”); *Altria Group, Inc. v. Good*, 129 S. Ct. 538, 546 (2008) (“Certainly, the extent of the falsehood alleged may bear on whether a plaintiff can prove her fraud claim.”).

428. *Harbison*, 129 S. Ct. at 1488.

429. *Id.* at 1486, 1487 n.6.

430. *Negusie*, 129 S. Ct. at 1172 (Stevens, J., concurring in part, dissenting in part) (“In *Cardoza-Fonseca*, the question was whether the standard of *INA* § 243(h), 8 U.S.C. § 1253(h) (1982 ed.), which requires an alien to show that she is more likely than not to be subject to persecution if she is deported, also governs applications for asylum under § 208(a), 8 U.S.C. § 1158(a) (1982 ed.), which authorizes the Attorney General to grant asylum to an alien who has a well-founded fear of persecution in her home country.”). Although the respondent in *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987), was a woman, this sentence speaks more generally about the requirements of the statute and the responsibilities of the Attorney General. Later in the same case, Justice Stevens uses a masculine-gendered generic for the same antecedent. *Negusie*, 129 S. Ct. at 1176, n.8.

431. *Gant*, 129 S. Ct. at 1718 (“[I]t is improbable that an arrestee could gain access to weapons stored in his vehicle after he has been handcuffed and secured in the backseat of a patrol car.”).

“motorist,”⁴³² “officer,”⁴³³ “defendant” (criminal),⁴³⁴ “prisoner,”⁴³⁵ “golfer,”⁴³⁶ “petitioner” (habeas),⁴³⁷ “alien,”⁴³⁸ “person,”⁴³⁹ and “employee.”⁴⁴⁰

In the 2007 Term, Stevens used masculine pronouns to refer to the following generic antecedents: “district judge,”⁴⁴¹ “criminal defendant,”⁴⁴² “candidate,”⁴⁴³ and “inmate.”⁴⁴⁴ No feminine-gendered generics were noted in this term. In the 2006 Term, Justice Stevens alternated pronouns in *Bell Atlantic v. Twombly*, using both a male pronoun⁴⁴⁵ and a female pronoun⁴⁴⁶ to refer to the

432. *Id.* at 1720 (“[A] motorist’s privacy interest in his vehicle is less substantial than in his home.”).

433. *Id.* at 1721 (“[I]ncident to arrest, an officer may conduct a limited protective sweep of those areas of a house in which he reasonably suspects a dangerous person may be hiding.”).

434. *See, e.g., Boyle*, 129 S. Ct. at 2248–49 (Stevens, J., dissenting) (“[N]ot enough for a defendant to . . . ; instead, evidence that he operated, managed, or directed those affairs is required.”); *Dean*, 129 S. Ct. at 1859 (Stevens, J., dissenting) (“That a defendant will be subject to punishment for the harm resulting from a discharge whether or not he is also subject to the enhanced penalty . . . indicates that the latter provision was intended to serve a different purpose.”); *Cone v. Bell*, 129 S. Ct. 1769, 1782 (2009) (“[W]e have held that when the State withholds from a criminal defendant evidence that is material to his guilt or punishment, it violates his right to due process of law in violation of the Fourteenth Amendment.”).

435. *Haywood*, 129 S. Ct. at 2113 (“[U]nder this scheme, a prisoner seeking damages from a correction officer will have his claim dismissed for want of jurisdiction.”).

436. *Fox Television Stations*, 129 S. Ct. at 1827 (Stevens, J., dissenting) (“As any golfer who has watched his partner shank a short approach knows, it would be absurd to accept the suggestion that the resultant four-letter word uttered on the golf course describes sex or excrement and is therefore indecent.”).

437. *Cone*, 129 S. Ct. at 1780.

438. *Negusie*, 129 S. Ct. at 1176, n.8 (Stevens, J., concurring in part, dissenting in part) (“[A]n alien’s lack of knowledge that he was involved in a persecutory act, could likewise indicate that he did not act with the requisite culpability.”). Justice Stevens also used a feminine-gendered generic for the same antecedent. *See id.* at 1172.

439. *Id.* at 1174 n.6 (Stevens, J., concurring in part, dissenting in part) (“The CAT prohibits a state party from returning any person to a country where there is substantial reason to believe he might be tortured.”).

440. *14 Penn Plaza*, 129 S. Ct. at 1475 (Stevens, J., dissenting) (“The Court also noted the problem of entrusting a union with certain arbitration decisions given the potential conflict between the collective interest and the interests of an individual employee seeking to assert his rights.”).

441. *Gall*, 128 S. Ct. at 594 (“[A] district judge must give serious consideration to the extent of any departure from the Guidelines and must explain his conclusion.”); *see also id.* at 596–97. In the same case, Justice Alito used several gender-neutral techniques to avoid a gendered pronoun for “judge,” including pluralizing, pairing pronouns, and using the term “district court” in place of “district judge.” *See id.* at 604–05, 608 (Alito, J., dissenting).

442. *Id.* at 596.

443. *Davis*, 128 S. Ct. at 2780 (Stevens, J., concurring in part, dissenting in part) (“[T]he Millionaire’s Amendment . . . does no more than assist the opponent of a self-funding candidate in his attempts to make his voice heard; . . . If only one candidate can make himself heard, the voter’s ability to make an informed choice is impaired.”); *see also id.* at 2778, 2781–82.

444. *Baze*, 128 S. Ct. at 1548 (Stevens, J., concurring) (“But by requiring that an execution be relatively painless, we necessarily protect the inmate from enduring any punishment that is comparable to the suffering inflicted on his victim.”).

445. *Bell Atlantic Corp.*, 127 S. Ct. at 1977 (Stevens, J., dissenting) (“Once it is clear that a plaintiff has stated a claim that, if true, would entitle him to relief, matters of proof are appropriately relegated to other stages of the trial process.”).

plaintiff. He also used a female-gendered pronoun to refer to the antecedent “judge.”⁴⁴⁷

Justice Stevens has also used the gender-neutral writing techniques of pluralizing the pronoun and the antecedent.⁴⁴⁸ In several cases, he used gendered nouns, including “craftsmen,”⁴⁴⁹ and “draftsmen.”⁴⁵⁰

F. The Court Should Increase Its Use of Gender-Neutral Language

The research presented in this article demonstrates that while most members of the Court are making some effort to avoid male-gendered generics, the overall picture is one of inconsistency. Most of the justices could and should increase their use of gender-neutral language. In too many instances, their writing communicates subtle sexism, distracts the reader, and creates ambiguity. The rewards in more effective communication to be gained from decreasing the use of gendered generics far outweigh the minimal effort needed to make the change.

Justice Alito provides a model that should be followed by all the justices. He avoids gendered generics without sacrificing style. Justice Scalia appears to be the hardest to convince that such a change has value, based on his own statements and the frequent appearance of male-gendered generics in his opinions. It is encouraging, however, that Bryan Garner was able to persuade him to draft their coauthored book using gender-neutral language. This may be a sign that if his colleagues on the Court move toward greater use of gender-neutral techniques, he may follow.

Justice Ginsburg’s approach of alternating pronouns by actor cannot easily be dismissed, even though it is not technically gender neutral. On the one hand, this method shifts the reader out of the comfort zone of the masculine as universal, and attempts to equalize a historical imbalance. On the other hand, it may force the writer into value judgments that are equally unfair.

Writers who use alternating pronouns are faced with a number of choices that may result in this method being more trouble than it is worth. For example, a writer may be forced to count the number of times each pronoun is used to be certain that they are equal. A writer will also need to decide whether male and

446. *Id.* at 1980, n.6 (Stevens, J., dissenting) (“A plaintiff’s inability to persuade a district court that the allegations actually included in her complaint are ‘plausible’ is an altogether different kind of failing, and one that should not be fatal at the pleading stage.”).

447. *Rita*, 127 S. Ct. at 2473 (Stevens, J., concurring) (“After all, a district judge who gives harsh sentences to Yankees fans and lenient sentences to Red Sox fans would not be acting reasonably even if her procedural rulings were impeccable.”).

448. *See, e.g., Negusie*, 129 S. Ct. at 1175 (Stevens, J., concurring in part, dissenting in part) (“We do not normally convict individuals of *crimes* when their actions are coerced or otherwise involuntary.”); *Gall*, 128 S. Ct. at 595–96 (“Probationers may not leave the judicial district . . . without notifying . . . their probation officer or the court.”).

449. *Heller*, 128 S. Ct. at 2846 (Stevens, J., dissenting) (“Today judicial craftsmen have confidently asserted that a policy choice that denies a ‘law-abiding, responsible citize[n]’ the right to keep and use weapons in the home for self-defense is ‘off the table.’”).

450. *LaRue*, 128 S. Ct. at 1025 (“Whether a fiduciary breach diminishes plan assets payable to all participants and beneficiaries, or only to persons tied to particular individual accounts, it creates the kind of harms that concerned the draftsmen of § 409.”).

female pronouns will be alternated by paragraph, by actor, and if the writer is a judge, whether consistency across opinions is a goal. These may be obstacles more easily overcome for the author of a book, or a law review article, where the writer's intent can be more easily communicated. Judicial opinions are less subject to control. They may be written by one, but usually represent the opinion of a group. They are taken apart, edited down, and excerpted in casebooks, newspapers, and briefs. Context can easily be lost, and clarity lost along with it. A full exploration of whether alternating pronouns is an effective technique in judicial opinions, given the special needs of the reader for clarity and precision, is beyond the scope of this article. An in-depth analysis of this issue is worthy of further research.

With the availability of good techniques that retain clarity and readability, the justices have little excuse to continue to use gendered generics. Several actions could help to facilitate the Court's increased use of gender-neutral language. As Chew and Kelley-Chew have advocated, professional organizations in the legal field, including the American Bar Association and the American Association of Law Schools should follow those in the scientific and social science communities and strongly promote gender-neutral language.⁴⁵¹ Law clerks, who already have a role in editing opinions,⁴⁵² can be trained to check for gender-neutral language, as they might check for other matters of style and grammar. The lawyers who submit briefs to the Court should use the invisible gender-neutral techniques most were trained to use in law school, impressing upon the justices the wide acceptance of the practice and demonstrating its readability.

The justices should also be open to all the possible methods of making their writing gender neutral. If the only remedy is to replace gendered generics with "he or she," the critics who worry about the result being tedious and repetitive might be proved right.

CONCLUSION

Once we accept that gender-neutral language in legal writing is a worthwhile goal, it is essential to look to the highest court to help to set the standard. The use of gender-neutral language by Justice Alito shows that it can be done without sacrificing style. The continued use of gendered generics interferes with the important responsibility of the Court to communicate effectively to judges, lawyers, students, and the public. The increased use of gender-neutral language by the Court is a goal worthy of attention. Realistically, judges are in the best position to change the language of the law.⁴⁵³

451. Chew & Kelly-Chew, *supra* note 13, at 675.

452. See generally Peppers & Zorn, *supra* note 144, at 56. In their interviews with Bryan Garner, several justices noted that their clerks help to edit their opinions. The Supreme Court – Stevens interview, Part 2; Breyer interview, Part 2, http://www.lawprose.org/interviews/supreme_court.php (last visited October 14, 2009).

453. Lebovits, Curtin & Solomon, *supra* note 138, at 239. ("Judges occupy a special position in the legal community. They are in a unique position to influence it. Judges can give momentum to—or stop—trends developing in the legal profession. . . . Judges are professional writers . . . who can and should use opinions to influence the legal profession for the better.").

While we cannot go back and change *Marbury* or *Lochner*, it is time for all the members of the Roberts Court to set a gender-neutral standard. The addition of the newest justice may move the Court closer to that standard.⁴⁵⁴

454. See Fischer, *supra* note 14, at 496. Professor Fischer's research showed that while on the Court of Appeals, Judge Sotomayor frequently used the gender-neutral technique of pairing pronouns.