Should Legal Writing Be Woke?

John G. Browning

On August 3, 2020, at the height of a national reckoning about racial injustice after the killing of George Floyd by a white police officer, an appellate decision in an obscure zoning-ordinance case attracted national media attention. More accurately, a footnote in that obscure zoning case sparked debate over whether it's time for writing — and legal writing in particular — to purge certain terms with racially troubling origins. The term in question was *grandfather clause*, and the Massachusetts Appeals Court's condemnation of it ignited a debate that spread from the pages of *The New York Times* to the anchor desks at Fox News and CNN. The case and the ensuing debate inspired Scribes to present a companion webinar to this article in May 2021. For Scribes, spotlighting words and phrases normally relegated to judicial opinions and lawyers' briefs represented an irresistible way to broaden the discussion.

For years, legal commentators and scholars have commented on how aspects of legal writing may still reflect systemic racism while neglecting the voices of underrepresented communities.[1] And even before the Massachusetts Appeals Court addressed the use of *grandfather clause*, pundits outside the legal system decried its continued use and the use of other terms.[2] But the court's

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[1] *See, e.g.*, Teri McMurtry-Chubb, *Still Writing at the Master's Table: Decolonizing Rhetoric in Legal Writing for a "Woke" Legal Academy*, 21 The Scholar 255 (2019); Lucy Jewel, *Neurorhetoric, Race, and the Law: Toxic Neural Pathways and Healing Alternatives*, 76 Md. L. Rev. 663 (2017).

[2] Alan Greenblatt, *The Racial History of the "Grandfather Clause,"* Nat'l Pub. Radio (Oct. 22, 2013), https://www.npr.org/sections/codeswitch/2013/10/21/239081586/the-racial-history-of-the-grandfather-clause; Nancy Riley, *Words*

explanation of its decision to avoid using the term *grandfather clause* touched a chord.

Scribes' webinar panelists included the Massachusetts judge who had authored the opinion, Justice James Milkey. The panel also featured Scribes board member and University of Illinois–Chicago School of Law Associate Dean and Professor Teri McMurtry-Chubb; South Texas College of Law Professor Josh Blackman; and University of Tennessee–Knoxville Law Professor Lucy Jewel.

I served as moderator and will try to maintain that role in this article, describing arguments from both sides of the issue while offering some high-profile examples that have drawn media attention. My hope is to further the dialogue and debate by examining specific words and phrases with troubling or allegedly troubling origins, as well as by looking at the debate over lawyers' and courts' treatment of gender-identity issues through the use of preferred pronouns. Finally, I'll consider whether cases involving slavery or opinions written by judges who were slaveholders should be cited differently from other case authority. Needless to say, any editorial comments or personal opinions that I add along the way belong to me, not to Scribes or the *Journal*.

The Grandfather of the Debate — *Grandfather Clause*

Preeminent lexicographer Bryan Garner defines *grandfather clause* as "a clause in the constitutions of some Southern American states exempting from suffrage restrictions the descendants of

Matter: Why We Should Put an End to "Grandfathering," The Medium (May 31, 2019), https://medium.com/@nriley/words-matter-why-we-should-put-an-end-to-grandfathering-8b19efe08b6a; Scottie Andrew & Harmeet Kaur, *Everyday Words and Phrases That Have Racist Connotations*, CNN (July 7, 2020), https://www.cnn.com/2020/07/06/us/racism-words-phrases-slavery-trnd/index.html.

men who voted before the Civil War."[3] Professor Garner adds that in modern usage, the phrase "has extended senses, too, referring to any statutory or regulatory clause exempting a class of persons or transactions because of circumstances existing before the clause takes effect."[4] And while modern legal usage almost exclusively involves this latter usage, the term is perhaps best known in the historical sense.

After ratification of the Fifteenth Amendment prohibiting racial discrimination in voting, multiple Southern states passed laws making men eligible to vote if they had been able to vote before African Americans were enfranchised, or if they were the lineal descendants of voters from that time.[5] Particularly in the 1890s, states adopted voting laws with a variety of requirements that intended to disenfranchise Blacks (such as literacy tests, poll taxes, and constitutional quizzes), but that also featured grandfather clauses so as not to risk Southern whites' losing their voting rights too.[6] Soon after achieving statehood in 1907, Oklahoma passed such a law featuring a literacy test along with a grandfather clause.[7] It had an immediate and severe effect in a fledgling state that had already begun to elect Black legislators.[8] Of the more than 55,000 African Americans in Oklahoma at the turn of the century, only 57 came from states that had allowed Blacks to vote

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3 Bryan A. Garner, *Garner's Dictionary of Legal Usage* 395 (3d ed. 2011).

4 *Id.*

5 Greenblatt, *Racial History*, *supra* note 2.

6 *Id.*

7 *Id.*

8 Michael L. Bruce, "Hamlin, Albert Comstock," *The Encyclopedia of Oklahoma History and Culture*, https://www.okhistory.org/publications/enc/entry.php?entry=HA015 (last visited Jan. 19, 2022).

in 1867.[9] In 1915, the U.S. Supreme Court struck down Oklahoma's grandfather clause as unconstitutional.[10]

Scholars and courts have also recounted the grandfather clause's earlier use against white European immigrants (particularly Irish Catholic immigrants) in the Northeast.[11] States like Massachusetts and Connecticut, alarmed by the tide of Irish immigrants, were imposing literacy tests accompanied by grandfather clauses as far back as the 1850s.[12] At least one Southern state's grandfather clause was modeled on the anti-Irish 1857 Massachusetts statute.[13]

Yet as the 20th century pushed toward its later decades, few outside academic and civil-rights circles were still aware of the grandfather clause's origin as a tool for prejudice and oppression. Ironically, in everyday legal usage the term now carried the message of practical fairness reflected in Professor Garner's secondary definition: a person shouldn't suffer hardship under a new rule for conduct that was perfectly upright for years before. Despite this deracialized modern usage, in recent years the term's ignoble origins have resurfaced, and calls to abandon *grandfather clause* in favor of a more neutral reference, such as *legacy*, have intensified.

The debate reached a peak in, of all places, a garden-variety zoning appeal. In *Comstock v. Zoning Board of Appeals of*

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[9] *Id.* (citing Michael J. Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality* (2006)).

[10] *Guinn v. United States*, 238 U.S. 347 (1915). Sadly, the Oklahoma Legislature met in a special session to enact a new law getting around the Court's ruling — essentially, "grandfathering in" the grandfather clause. It would remain on the books until a 1939 U.S. Supreme Court ruling.

[11] Greenblatt, *Racial History*, *supra* note 2.

[12] *Veasey v. Abbott*, 830 F.2d 216, 331 n.10 (5th Cir. 2016) (Costa, J., dissenting) (citing Alexander Keyssar, *The Right to Vote: The Contested History in the United States* (rev. ed. 2009)).

[13] Greenblatt, *Racial History*, *supra* note 2.

Gloucester,[14] the appellate court ruled that owners of waterfront property could replace their rundown garage with a new one that was three feet taller. While discussing statutory protections for structures that predate applicable zoning restrictions, in a footnote on page 8 of the 18-page opinion, Justice James Milkey took the opportunity to pen a rejection of *grandfather clause*:

> We decline to use that term, however, because we acknowledge that it has racist origins. Specifically, the phrase "grandfather clause" originally referred to provisions adopted by some States after the Civil War in an effort to disenfranchise African-American voters by requiring voters to pass literacy tests or meet other significant qualifications, while exempting from such requirements those who were descendants of men who were eligible to vote prior to 1867.[15]

The court's footnote attracted far more attention than footnotes in judicial opinions usually get — much less footnotes in zoning opinions by intermediate state appellate courts. This included considerable attention from national media outlets.[16] And while, to date, no other courts have expressed a similar rejection of *grandfather clause*, it has been abandoned by other entities. For example, in December 2020, the Wake County (North Carolina) school system announced that it too would cease using the term because of its racially charged origins. A spokesperson for the school system tweeted, "We are aware of the racist origins of the

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[14] 153 N.E.3d 395 (Mass. App. Ct. 2020).

[15] *Id.* at 400 n.11 (citations omitted).

[16] *See, e.g.*, Azi Paybarah, *Massachusetts Court Won't Use Term "Grandfathering," Citing Its Racist Origin*, N.Y. Times (Aug. 3, 2020), https://www.nytimes.com/2020/08/03/us/racism-massachusetts-grandfathering.html; Lucas Manfredi, *"Grandfathering" to No Longer Be Used Due to "Racist Origins," Says Massachusetts Appeal Court*, Fox News (Aug. 3, 2020), https://www.foxnews.com/us/grandfather-clause-racist-origins.

term *grandfathering*, and our intent is to discontinue use of this term starting next year."[17]

The attention suddenly being paid to a term like *grandfather clause* helped to focus more attention on other terms in law and government that are seen by many to be, if not blatantly racist or sexist in origin, then certainly quaint, outdated linguistic artifacts. In New Jersey, for example, Gov. Phil Murphy signed a bill ending the use of the term *freeholder* as a title for certain county leaders. The term (replaced as of January 1, 2021, with *county commissioner*) was centuries old, dating back to colonial days when only white male landholders could be elected to public office.[18] The term goes even further back to 18th-century England, referring to a person who owned land free of any debts, mortgages, or other encumbrances.[19] State Senate President Steve Sweeney said that the title *freeholder* "perpetuates a legacy of bigotry that disenfranchised groups of Americans and denied them full rights and equal opportunities. We should be diligent in erasing all remnants of oppression that are unjust and divisive."[20] Gov. Murphy added, "Amid a national reckoning to reexamine vestiges rooted in structural racism, this action will eliminate the use of the term 'Freeholder' in county government — a title that is an outgrowth of a time when people of color and women were excluded from public office."[21]

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[17] T. Keung Hui, *Wake Schools Will Stop Using the Term "Grandfathering" Because It Has "Racist Origins,"* News & Observer (Dec. 5, 2020), https://www.newsobserver.com/news/local/education/article247590995.html.

[18] Michael Sol Warren, *Freeholders No More — Murphy Signs Bill Ending County Title Criticized as Racist*, N.J.com (Aug. 21, 2020), https://www.nj.com/politics/2020/08/freeholders-no-more-murphy-says-hell-sign-bill-ending-county-title-criticized-as-racist.html.

[19] *Id.*

[20] *Id.*

[21] *Id.*

On the national level, the Biden administration is encouraging the elimination of controversial terms that have long been used in federal statutes and policy documents: *alien* and *illegal alien*. In their place, the government has proposed *undocumented individual* or *undocumented noncitizen*. One commentator has called the move "a significant development that is welcomed by advocates of the undocumented, since the long-standing use of 'alien' is a not-so-subtle dog whistle that has been effectively used to dehumanize not only the undocumented, but actual American citizens."[22]

Alien dates back to English common law. Derived from the Latin *alienus*, meaning "belonging to another," the word's original usage was decidedly neutral, referring simply to someone born outside the king's dominion. But as immigration law developed in American history, it took on a tone of restriction — from the Chinese Exclusion Act of 1882, to the numerical limits and national hierarchy of the Johnson-Reed Act of 1924, to post-9/11 restrictions and the current border crisis. While some argue that terms like *illegal alien* are factually accurate and neutral, other observers have hailed the Biden change as a return to "language of compassion."[23]

The debate recently reached the U.S. Court of Appeals for the Eleventh Circuit, in a case reviewing the Board of Immigration Appeals' denial of a Honduran immigrant's challenge to his removal.[24] Judge Martin wrote a separate concurrence to explain why he preferred not to use the term *alien*, which the panel had used ten times in its primary opinion. Approving of Justice Kavanaugh's use of the term *noncitizen* for the statutory equivalent

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[22] Ed Morales, *Biden Is Right About "Aliens,"* CNN (Mar. 2, 2021), https://www.cnn.com/2021/03/02/opinions/alien-federal-government-immigration-biden-morales/index.html.

[23] *Id.*

[24] *Martinez-Rivera v. U.S. Att'y Gen.*, No. 20-13201 (11th Cir. July 8, 2021).

of *alien*, Judge Martin observed that *alien* is "increasingly recognized as an 'archaic and dehumanizing' term."[25] Judge Martin said he saw "no need to use a term that 'has become pejorative' where a non-pejorative term works perfectly well."[26]

Judge Martin's colleague Judge Branch disagreed in his own separate concurring opinion. Judge Branch pointed out that the majority's use of the term *alien* was "grounded in the text of the Immigration and Nationality Act ('INA')."[27] Judge Branch asserted that since "it is not our role to 'fix' the text of the INA, we should not stray into legislative draftsmanship."[28] To usurp such a legislative role, according to Judge Branch, would be disastrous: "[I]f we were to substitute the term 'alien' for 'noncitizen' in reference to specific statutory provisions, we risk stating the law inaccurately."[29]

This concern with statutory precision is hardly new. In his dissent in *Moncrieffe v. Holder*, another immigration case, Justice Alito stated that "'[a]lien' is the term used in the relevant provision of the [INA], and this term does not encompass all noncitizens."[30]

Chinese Wall

Another legal term of troubling racial derivation is *Chinese wall*, meant to refer to the ethical barriers set up within a law firm to prevent a legal professional who came from a disqualifying law firm from accessing confidential information that could create a conflict of interest. Bryan Garner's *Dictionary of Legal Usage*

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[25] *Id.*, slip op. at 20 (quoting a *Washington Post* article on the new Biden administration order).

[26] *Id.*

[27] *Id.*, slip op. at 21.

[28] *Id.* (citation omitted).

[29] *Id.*

[30] *Moncrieffe v. Holder*, 569 U.S. 184, 210 n.3 (2013) (Alito, J., dissenting).

states that the term is derived from the Great Wall of China, although another explanation has been offered as well — the internal screens of Chinese architecture.[31]

Although the term appears to have originated in financial circles to describe a way of limiting conflicts of interest between objective company analysis and touting for initial public offerings, it spread to the legal sphere. Its use was perpetuated and perhaps normalized in a 1980 *University of Pennsylvania Law Review* article entitled *The Chinese Wall Defense to Law Firm Disqualification*.[32] In the legal context, the term refers to how firms may head off conflicts of interest by separating or screening off a lawyer or paralegal from representing a client in a lawsuit or a deal when that legal professional was once employed with or has confidential information from an adverse party. Although such internal screens were once permitted, they are now disfavored in most jurisdictions.[33]

As widespread as the term *Chinese wall* once was (and may still be in some circles), its cultural insensitivity has rarely been raised. One notable exception was a concurring opinion by California Court of Appeals Justice Harry Low, himself a Chinese American, in the 1988 case *Peat Marwick, Mitchell & Co. v. Superior Court*.[34] In this accounting-malpractice case, Justice Low wrote a separate concurrence specifically to address the use of *Chinese wall*. His opinion was earnest and eloquent:

> I concur in the opinion of Justice Haning, but write separately to comment on the apparently widespread use of the term "Chinese Wall" to describe the type of screening

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[31] Garner, *Dictionary of Legal Usage* at 154.

[32] Comment, *The Chinese Wall Defense to Law Firm Disqualification*, 128 U. Pa. L. Rev. 677 (1980).

[33] *See, e.g.*, *Phoenix Founders, Inc. v. Marshall*, 887 S.W.2d 831 (Tex. 1994); State Bar of Tex. Prof. Ethics Comm., Formal Ethics Op. 569 (Apr. 2006).

[34] 245 Cal. Rptr. 873, 887–88 (1988).

> mechanism discussed in this case. While our opinion uses the term "screen," both the parties and the trial court used the term "Chinese Wall," which seems to have become a term of art. I write to express my profound objection to the use of this phrase in this context.
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> The enthusiasm for handy phrases of verbal shorthand is understandable. Occasionally, however, lawyers and judges use a term which is singularly inappropriate. "Chinese Wall" is one such piece of legal flotsam which should be emphatically abandoned. The term has an ethnic focus which many would consider a subtle form of linguistic discrimination. Certainly, the continued use of the term would be insensitive to the ethnic identity of many persons of Chinese descent. Modern courts should not perpetuate the biases which creep into language from outmoded, and more primitive, ways of thought.
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> It may be sobering to recall that little more than a century ago our own Supreme Court held that persons of Chinese ancestry could not testify in court against a person of Caucasian descent. In People v. Hall (1854) 4 Cal. 399, 404, the court, speaking through Chief Justice Hugh C. Murray, declared that "[t]he same rule which would admit them to testify, would admit them to all the equal rights of citizenship, and we might soon see them at the polls, in the jury box, upon the bench, and in our legislative halls." It is worth noting, given recent events on the American political stage, that language and attitudes once embodied in a judicial opinion would now lead to the removal of a Governor, and membership in groups adhering to those attitudes could lead to denial of confirmation for high public office.
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> It is necessary to raise a clenched cry for jettisoning the outmoded legal jargon of a bygone time. If the image of a wall must be used, perhaps "ethics wall" is more suitable phraseology.

Indeed, the ABA Model Rules of Professional Conduct prefer the word *screened*, and Rule 1.0(k) defines *screened* as "the isolation of a lawyer from any participation in a matter through the

timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law." *Screen* and its offshoots seem like a perfect workable substitute, as does *ethical wall*. As with other pieces of "legal flotsam," no good reason appears to justify the continued use of *Chinese wall*.

Rule of Thumb

In our webinar, a panelist noted a growing antipathy for the phrase *rule of thumb* — and listed it as a prime candidate for being dropped from the legal lexicon — because of a growing perception that it was first used to excuse domestic violence. In reality, however, this troublesome origin story appears to be little more than a legal folk tale, as modern scholars have recognized.

The term's earliest usage in the 17th century was usually associated with trades where measurements were approximated by comparison to the length or width of a human thumb.[35] The phrase's allegedly troubling association with domestic abuse was commonly thought to date back to 1782, with a rumored statement by a British judge, Sir Francis Buller, that legally condoned a man's "chastising" his wife so long as it was with a reasonable instrument, which could only be "a rod not thicker than his

[35] Henry Ansgar Kelly, *Rule of Thumb and the Folklaw of the Husband's Stick*, 44 J. Legal Educ. 341, 343 (1994); *see also* Stephen J. Dubner, *Rule of Thumb*, Freakonomics.com (July 1, 2011), https://freakonomics.com/2011/07/rule-of-thumb/; Gary Martin, *What's the Meaning of the Phrase "Rule of Thumb"?*, Phrase Finder, https://www.phrases.org.uk/meanings/rule-of-thumb.html (last visited Jan. 24, 2022); Stephanie Shapiro, *The Misunderstood "Rule of Thumb" Misconception: Many Feminists for Years Thought the Phrase "Rule of Thumb" Referred to British Common Law's Tolerance of Wife-Beating*, Balt. Sun (Apr. 17, 1998), https://www.baltimoresun.com/news/bs-xpm-1998-04-17-1998107056-story.html.

thumb."[36] But while Buller himself certainly existed (he was appointed to the King's Bench in 1778), there was apparently no court case in which he made such a statement.[37] A popular caricaturist, James Gillray, is credited with depicting Buller in a cartoon as "Judge Thumb," in the foreground of an illustration showing a man beating his wife while the "judge" is holding up two bundles of sticks (with each stick ending in a carved thumb).[38] The piece was titled "Judge Thumb; or, Patent Sticks for Family Correction: Warranted Lawful!"[39]

As Professor Henry Kelly's article debunking the "rule of thumb" mythos points out, Gillray wasn't even particularly original, since at least two earlier cartoons similarly depict a judge, purportedly Buller, condoning wife-beating.[40] In the absence of an actual court case associated with Judge Buller or a "rule of thumb," Professor Kelly looks to English jurist and scholar Sir William Blackstone and his *Commentaries on the Laws of England* as the potential source. But even though Blackstone did indeed allude to "old law" that allowed husbands to chastise their wives in a "reasonable" manner, Professor Kelly makes it clear that Blackstone never referred to a rule of thumb, and in fact may have been mistaken about the degree of support for such "chastisement" in the civil- and canon-law precedent.[41]

Despite all this, Blackstone's *Commentaries* were a significant influence on early American jurisprudence, and the "English common law tradition" is cited as support in some of the earliest U.S. cases upholding a husband's "right" to beat his wife.[42] These cases even use the debunked justification — "as long as the stick

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[36] Kelly, 44 J. Legal Educ. at 343.

[37] *Id.* at 351.

[38] *Id.* at 341, 351.

[39] *Id.*

[40] *Id.* at 351.

[41] *Id.* at 351–52.

[42] *Id.* at 344, 361–63.

was no thicker than his thumb."[43] The earliest U.S. case seems to be an 1824 Mississippi case, *Bradley v. State*.[44] But the rule-of-thumb folktale was perpetuated by a handful of other cases, including an 1868 North Carolina case,[45] an 1874 North Carolina case,[46] and an 1871 Alabama case.[47]

Even with this lack of support, writers and occasionally legal scholars perpetuate the folktale, never pausing, it seems, to do the intellectual legwork to attempt to substantiate their assertions. One author of a 1988 book on the history of divorce in Western society actually cites torts icon William Prosser in support of the statement that "the right of chastisement was referred to as the 'Rule of Thumb,' which allowed a husband to beat his wife as long as the stick was no thicker than his thumb."[48] Yet not only did Prosser not use the expression *rule of thumb*, he actually debunks the folktale:

> A husband or father, as the head of the household, was recognized by the early law as having authority to discipline the members of his family. He might administer to his wife "moderate correction . . ." although there is probably no truth whatever in the legend that he was permitted to beat her with a stick no thicker than his thumb.[49]

Those who have perpetuated what Prosser rightly described as mere "legend" include feminist scholars, journalists, and legal

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[43] *Id.* at 344, 345.

[44] 1 Miss. (1 Walker) 156 (1824).

[45] *State v. Rhodes*, 61 N.C. (Phil. Law) 453 (1868) (husband acquitted because "His Honor was of opinion that the defendant had a right to whip his wife with a switch no larger than his thumb").

[46] *State v. Oliver*, 70 N.C. 60 (1874).

[47] *Fulgham v. State*, 46 Ala. 143 (1871).

[48] Roderick Phillips, *Putting Asunder: A History of Divorce in Western Society* 325 (1988).

[49] William L. Prosser, *Handbook of the Law of Torts* 136 (4th ed. 1971).

academics in the area of domestic violence.[50] More troubling than its being used inaccurately and without actual etymological basis, however, is that the term's use has been added to what could be considered the word hit list. As Professor Kelly puts it, this "venerable and innocuous expression" has "been given a phony origin as designating an allowable weapon for wife-beaters, and in consequence there has been an effort to boycott its traditional usage because of the supposedly sinister circumstances of its beginnings."[51] As a result, use of the term has been protested for decades. A Harvard student was criticized by classmates for using the expression, and at George Washington University, a female student denounced its use by a university administrator discussing budget problems.[52]

In short, the expression *rule of thumb* provides a cautionary example of how the potent combination of sloppy etymology and fervent political correctness can result in a literary rush to judgment and an unfounded campaign to purge a term from our lexicon.[53] Legal writers, the National Organization for Women, and even the U.S. Commission on Civil Rights have mistakenly associated the term with spousal abuse without concern for historical accuracy or even a good dictionary. Good writing calls for reliable history. The question becomes whether legal writers dare use the term and risk causing offense, even if the objections are

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[50] *See, e.g.,* Martha Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 Harv. L. Rev. 727, 740 n.52 (1988); Joan M. Schroeder, *Using Battered Woman Syndrome Evidence in the Prosecution of a Batterer*, 76 Iowa L. Rev. 553, 555 n.17 (1991); Hope Keating, *Battered Women in Florida: Will Justice Be Served?*, 20 Fla. St. U. L. Rev. 679, 680–81 (1993).

[51] Kelly, 44 J. Legal Educ. at 341–42.

[52] Shapiro, *The Misunderstood "Rule of Thumb," supra* note 35.

[53] Patricia T. O'Connor, former editor of the *New York Times Book Review*, has gone so far as to describe it as "one of the most persistent myths of political correctness." Patricia T. O'Connor & Stewart Kellerman, *Origins of the Specious: Myths and Misconceptions of the English Language* 123–26 (2009).

historically unfounded. Perhaps the term — despite its true origin — has become so thorny that some writers will consider an alternative.

How Far Is Too Far?

Discontinuing a term like *Chinese wall* makes perfect sense, while defending a term like *rule of thumb* from misguided critics makes equal sense. But at what point does canceling words and phrases cease to make sense? At what point does political correctness veer into the absurd and become an exercise in self-parody?

For fear of not being inclusive enough, Rep. Cori Bush made a speech in honor of Mother's Day in which she dropped the word *mothers* in favor of *birthing people*.[54] This hitherto-unknown category of person also appears on the website of Harvard Medical School, the National Institutes of Health, and the Hawaii Department of Human Services.[55] A small group of progressive academics have called for an end to the use of the word *supremacy* in quantum computing, calling it "racist."[56] The Associated Press announced that it was dropping the term *mistress* from its stylebook, in reference to a woman who is in a long-term relationship with a man who is married to someone else. The AP called the term "archaic and sexist," provoking a backlash from commentators humorously proposing alternatives

[54] Matthew Walther, *Sorry, But They're Called "Mothers" — Not "Birthing People*," N.Y. Post (May 11, 2021), https://nypost.com/2021/05/11/sorry-but-theyre-called-mothers-not-birthing-people/.

[55] *Id.*

[56] Dave Huber, *Academics Chide Article on Quantum Computing for Using Term "Supremacy": It's "For Racists*," College Fix (Dec. 12, 2019), https://www.thecollegefix.com/academics-chide-article-on-quantum-computing-for-using-term-supremacy-its-for-racists/.

like *homewrecker* and *sidepiece*.[57] A sommelier organization announced that it was dropping the term *master* as a designation of high achievement because of its possible slavery-era connotations, while the Houston Association of Realtors proclaimed that it would replace *master* with *primary* as a description for bedrooms and bathrooms for the same reason.[58] As you can imagine, opinions are sharply divided on whether some or all of these suggestions have crossed the line.

And like the misconceptions surrounding the etymology of *rule of thumb*, a misconception has spread that the word *picnic* is racist in origin and can be traced back to bigoted whites' celebrations during lynchings. A "Words Matter Task Force" at the University of Michigan's IT department even included it on a list of offensive terms, meant to be eliminated in favor of "inclusive" language that would foster "a culture where everyone feels welcome, valued, and respected."[59] In another article, Treva Lindsey — a women's studies professor at Ohio State University — was quoted as saying, "The word *picnic* carries with it the meaning that there was a time when white folks gathered to eat outside, [and] burning black flesh would be on the menu."[60]

In reality, however, while accounts of lynchings and other incidents of racial violence have frequently described a disgusting carnival-like atmosphere, the word *picnic* is not racist in origin or

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[57] Kirsten Flemming, *"Mistress" Becomes Woke Brigade's Latest Target*, N.Y. Post (Apr. 14, 2021), https://nypost.com/2021/04/14/mistress-becomes-woke-brigades-latest-target/.

[58] Andrew & Kaur, *Everyday Words*, *supra* note 2.

[59] Bradford Betz, *University of Michigan's IT Department Suggests Terms like "Picnic" and "Brown Bag" Are Offensive*, Fox News (Dec. 24, 2020), https://www.foxnews.com/us/university-of-michigans-it-department-suggests-calls-terms-like-picnic-and-brown-bag-offensive.

[60] Elizabeth Wellington, *Is the Word "Picnic" Racist? How to Deal with Questions About Language Right Now*, Phila. Inquirer (June 20, 2020), https://www.inquirer.com/news/language-race-systemic-racism-tipping-point-picnic--20200801.html.

connotation. As scholars have noted, the word *picnic* is derived from the 17th-century French word *pique-nique*, referring to social gatherings in which attendees each contributed a portion of the food or another useful item.[61] Although the word *pique-nique* dates back at least as far as a 1692 edition of *Origines de la Langue Francoise de Menage*, its first appearance in the English language as *picnic* did not occur until 1800.[62]

At some point, the furor over words that supposedly have racially charged origins defies reason, reminiscent of the notorious 1999 forced resignation of Washington, D.C., mayoral staffer David Howard for using the word *niggardly* to describe his administration of a government fund. The word might mean "stingy" and have its etymological roots in Scandinavia, but by merely sounding like a racial slur, it cost Howard his position.[63]

A more recent example can be found in the 2015 demand by student activists at Pennsylvania's Lebanon Valley College that administrators rename the school's Clyde A. Lynch Memorial Hall because of the name *Lynch*'s "racial connotations."[64] The building's name honors a former college president, Dr. Clyde A. Lynch[65] — and the surname *Lynch* is among the 20 most common in Ireland, deriving from *seafarer* or *exile*.[66] The students later

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[61] *Fact Check: The Word Picnic Does Not Originate from Racist Lynchings*, Reuters (July 13, 2020), https://www.reuters.com/article/uk-factcheck-picnic-origin-lynchings/fact-check-the-word-picnic-does-not-originate-from-racist-lynchings-idUSKCN24E21V.

[62] *Id.*

[63] *Word Costs City Official His Job*, AP News (Jan. 28, 1999), https://apnews.com/article/4d97adcd78ad93d17f12830a20e1cb18.

[64] Colin Deppen, *Student Attempt to Remove College's "Lynch" Building Ignites Public Backlash*, Penn Live (Dec. 8, 2015), https://www.pennlive.com/news/2015/12/student_attempt_to_rename_coll.html.

[65] *Id.*; *see also* "Lebanon Valley College History," Lebanon Valley College, https://www.sutori.com/en/story/lebanon-valley-college-history--4ZhmQUofYKdXHZ7dU9HmLsAh (last visited Jan. 24, 2022).

[66] Ireland-Information.com, *The Origin of Irish Family Names*, https://www.ireland-information.com/heraldichall/irishsurnames.htm.

expressed regret over their decision to target the building name, which had upset many and distracted attention from other demands that were, according to one professor, "reasonable and sensible."[67]

Personal Pronouns and the Courts

As a number of scholars and legal writers have observed, our nation's highest court has been slow to embrace gender-neutral language.[68] And while the Supreme Court held in *Bostock v. Clayton County*[69] that firing an employee merely for being gay or transgender violates Title VII, Justice Samuel Alito's dissent made clear his belief that forcing personal-pronoun requirements on people raises First Amendment concerns. Pointing to a New York City human-rights ordinance that makes ignoring someone's preferred pronoun a punishable offense, Alito wrote that the Court's decision "may even affect the way employers address their employees," and may give rise to claims "that the failure to use [plaintiffs'] preferred pronoun violates one of the federal laws prohibiting sex discrimination."[70]

The U.S. Court of Appeals circuits have differed on whether to honor transgender litigants' pronoun preferences. For instance, in *United States v. Varner*,[71] the Fifth Circuit refused a transgender prisoner's request to be addressed with the pronoun reflecting her

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[67] Daniel Walmer, *Prof: LVC Students Regret Impact of Lynch Demand*, Lebanon Daily News (Dec. 10, 2015), https://www.ldnews.com/story/news/local/2015/12/10/lvc-prof-students-regret-impact-lynch-demand/77095242/.

[68] Leslie M. Rose, *The Supreme Court and Gender-Neutral Language: Setting the Standard or Lagging Behind?*, 17 Duke J. Gender L. & Pol'y 81 (2010).

[69] 140 S. Ct. 1731 (2020).

[70] *Id.* at 1782 (Alito, J., dissenting) (internal citation omitted); *see also* Dennis Baron, *Will the Supreme Court Soon Be Policing Your Speech?*, The Web of Language Blog (Nov. 20, 2020), https://blogs.illinois.edu/view/25/1239846659.

[71] 948 F.3d 250 (5th Cir. 2020).

gender identity. Imprisoned as Norman Varner in 2012 after pleading guilty to child-pornography charges, Varner moved to change the name on his judgment of confinement to "Kathrine Nicole Jett" and to be addressed with female pronouns.[72] While acknowledging that eight other circuits had chosen to honor transgender parties' pronoun preferences,[73] Judge Kyle Duncan observed that "no authority supports the proposition that we may require litigants, judges, court personnel, or anyone else to refer to gender-dysphoric litigants with pronouns matching their subjective gender identity."[74] He said that if a court were to compel the use of preferred pronouns, "it could raise delicate questions about judicial impartiality"; by doing so, the court might "unintentionally convey its tacit approval of the litigant's underlying position."[75] Finally, the court held that ordering use of a particular pronoun might turn out to be "more complex than at first it might appear," given the plethora of potential pronouns — including *ze*, *xemself*, and *eirself*. "Deploying such neologisms," the court opined, could hinder communications among the parties and the court, and the court wished to steer clear of the "quixotic undertaking of enforcing pronoun usage."[76]

Similarly, the Eighth Circuit recently rejected a convicted stalker's request to be addressed as "they/them," and dismissed the defendant's argument that "purposeful and deliberate misgendering" amounted to prosecutorial misconduct.[77] Pointing out that Thomason had signed a plea agreement using masculine pronouns, used masculine pronouns during the sentencing hearing, and acknowledged that his own sentencing letter would use

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[72] *Id.* at 252.

[73] *Id.* at 255 n.3 (citing cases from the First, Second, Third, Fourth, Sixth, Seventh, Eighth, and Ninth Circuits).

[74] *Id.* at 254–55.

[75] *Id.* at 256.

[76] *Id.* at 258.

[77] *United States v. Thomason*, No. 19-2537 (8th Cir. 2021).

masculine pronouns, the court held that there was no showing that any use of pronouns affected either the outcome of Thomason's case or the sentencing. The court added that "clarity suffers and confusion may follow when legal writing refers to a single individual as 'they,' especially when the materials advert to other actors who are naturally described as 'they' or 'them' in the traditional plural."[78]

Our northern neighbors, however, take a markedly different approach to a party's preferred pronouns. Recently, in what was described as a first for Canadian courts, British Columbia's Provincial Court announced a new mandatory procedure in which lawyers are asked to indicate the pronouns they want used when introducing themselves and their clients in court.[79] Announcing the new policy, the court stated that it would improve the experiences of gender-diverse people in the legal system and would help in avoiding confusion and the need for corrections when someone is misgendered. Known formally as "Notice to the Profession and Public 24" (or "NP–24" for short), parties or lawyers will now have to provide their preferred pronouns during the salutation for a proceeding when the formal record begins. The court elaborated:

> Providing a forum of justice that is impartial, fair, consistent, and assures equal access for everyone is part of the mission of the Provincial Court of British Columbia. Giving people dignity and respect by using their correct titles and pronouns is one aspect of such a forum . . . . Using incorrect gendered language for a party or lawyer in court can cause uncomfortable tension and distract them from the

[78] *Id.*, slip op. at 6.

[79] Zena Olijnyk, *B.C. Courts Adopt Policy of Asking for Preferred Pronouns to Encourage Diversity, Inclusion*, Canadian Law. (Jan. 5, 2021), https://www.canadianlawyermag.com/practice-areas/litigation/b.c.-courts-adopt-policy-of-asking-for-preferred-pronouns-to-encourage-diversity-inclusion/336588.

> proceedings that all participants should be free to concentrate on.[80]

These examples reflect the diverse reactions we come to expect with any movement to reshape familiar usage. For judges and other legal writers, the challenge will be reconciling the need for clarity and the desire to respect a party's preference. Requiring judges to use certain pronouns is one thing. It may be another thing to expect judges, as a matter of common courtesy, to use the pronouns that litigants prefer — as most people try to do in everyday life.

"Woke" Citations?

In a 2020 *Stanford Law Review* article, Justin Simard, a Michigan State University law professor, caused a stir with an article calling for judges and lawyers to adopt "a broader historical perspective" when citing cases that involved enslaved people. Simard argued that a case's slave origins might "lessen its persuasive authority" and that citing such a case could cause "dignitary harms."[81] While Simard acknowledged the difficulty of "[j]udging past actors purely by modern ethical standards," he nevertheless argued that because "[a]s white men, all [19th-century] judges benefited from the racial politics of slavery" (and, in Simard's view, "Most Northern judges were also complicit"), citing slave cases is inherently suspect. Simard asserted that "judges who choose to rely on slave cases should justify the legal persuasiveness of their citations and work to ameliorate the dignitary harms inherent in citing slave cases."[82]

Specifically, Simard suggested that legal-research tools should adopt a symbol denoting a case's slavery-related history. He also

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[80] *Id.*

[81] Justin Simard, *Citing Slavery*, 72 Stan. L. Rev. 79 (Jan. 2020).

[82] *Id.* at 120.

suggested that *The Bluebook* be amended to require "an additional signal, such as an '(enslaved party)' parenthetical, in citations to slave cases."[83] And he wanted state and federal judiciaries to "publicly acknowledge the legacy of slave law and make the history of slave citation accessible to those without access to legal research tools."[84] In Simard's vision, this might take the form of making slave cases accessible on court websites, adding informational plaques at courthouses below the portraits of judges who authored slave cases, or even issuing statements "apologizing for their role in slave commerce."[85]

Simard's proposal drew immediate attention. Some scholars described his article as "a thorough and thoughtful discussion of the ethical, historical, and dignitary wrongs worked by modern reliance on such tainted cases."[86] But others were troubled. In an article that (correctly) assumed *The Bluebook*'s adoption of Simard's suggestions, University of Chicago law professor Will Baude and Harvard Law School professor Stephen Sachs called such a rule "wrong," "legally misleading, morally misguided, and inconsistent with the goals of good scholarship."[87] As Baude and Sachs pointed out, many so-called slave cases are invoked for their legal conclusions about other issues, like liens or appellate jurisdiction — not for the fact that the property at issue included human beings. Cases involving enslaved persons, they say, "sometimes state ordinary rules of law."[88]

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[83] *Id.* at 121 (proposing an addition to Section 10.7.1 of *The Bluebook*, which governs "Explanatory Phrases and Weight of Authority").

[84] *Id.*

[85] *Id.*

[86] Joanna B. Apolinsky & Jeffrey A. Van Detta, *The Antebellum Irony of Georgia's Disguised Lex Fori Doctrine: O Where Have You Gone, Brainerd Currie?*, 50 Cumb. L. Rev. 407, 528 (2020).

[87] Will Baude & Stephen Sachs, *Citing Slavery in the* Bluebook, Reason.com (Oct. 30, 2020), https://reason.com/volokh/2020/10/30/citing-slavery-in-the-bluebook/.

[88] *Id.*

Baude and Sachs also argued that once lawyers and judges stop to think about how many evils the law addresses, it's "no longer plausible to claim that citing these cases unflagged reflects any indifference to their moral contents."[89] Any citation practice aimed at exposing cases' overt or implicit moral deficiencies would have to encompass decisions that are infamous for other reasons, such as the Supreme Court opinions in *Buck v. Bell* (upholding eugenic sterilization of the "unfit") and *Korematsu v. United States* (justifying the internment of Japanese Americans). Baude and Sachs oppose such a blanket rule as "unscholarly," saying that the point of citation is to document the legal past and that sometimes doing so effectively and accurately "means noting the crucial role played by slavery."[90] Documenting such history should not, they explain, be confused with being an apologist for it.

Another prominent legal scholar, Professor Josh Blackman (a panelist for our Scribes program), has also weighed in on this issue. He worries about the chilling effect that this citation rule change will have on legal scholarship, judicial opinion-writing, and even attorney work product. "Given today's culture," he asks, "why would any professor willingly litter his or her footnote with the mark of original sin? Asking a research assistant to shepardize a (slavery) case could itself be a traumatic act."[91] Taken to its extreme, Blackman says, scholars taking the safest approach should simply "not cite any authority before 1865. Yes, that era includes the Constitution. Would every citation to the Constitution have to include a parenthetical: (treating slaves as 3/5 of person, approving return of runaway slaves, and sanctioning slave trade)[?]"[92]

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[89] *Id.*

[90] *Id.*

[91] Josh Blackman, *Cancellation by Citation*, Reason.com (Oct. 30, 2020), https://reason.com/volokh/2020/10/30/cancellation-by-citation/.

[92] *Id.*

Blackman warns that this latest salvo in the culture war will continue stifling the academic freedom of conservative legal scholars: "The antiracism agenda is in full swing, and nothing can stop it. Dissent cannot be tolerated. And, I fear, most law professors will simply roll over and accept these new forms of control."[93]

Time will tell whether Professor Blackman's fears materialize or whether the legal profession will simply adapt and move forward.

Conclusion

In an interview with former Scribes president Bryan Garner, U.S. Supreme Court Justice Anthony Kennedy remarked, "[T]he law lives through language, and we must be careful about the language we use."[94] As our nation faces a reckoning with the systemic racism of its past, lawyers, judges, and legal academics are similarly reexamining words and phrases in the legal lexicon that may have troubling origins and associations. From *grandfather clause* to *Chinese wall*, such closer scrutiny may be long overdue. For other words and terms, such as *rule of thumb*, the concerns rest on an etymologically questionable foundation, and legal writers should exercise caution and avoid rushing to judgment.

Words matter. Words have power. As legal writers, we have an obligation to take care with the words we choose, whether as advocates, judges, or teachers. And as society changes, the words we use may very well change; the uptick in the use of or deference to preferred personal pronouns is but one example. As Maya

[93] *Id.*

[94] 13 Scribes J. Legal Writing 79, 97 (2010).

Angelou once said, "Do the best you can until you know better. Then when you know better, do better."[95]

[95] Lindsay Lowe, *Remember Maya Angelou by Reading 75 of Her Most Inspiring Quotes*, Parade (June 1, 2021), https://parade.com/2358/lindsaylowe/maya-angelous-most-inspiring-quotes/.