

Vanderbilt University Law School

Scholarship@Vanderbilt Law

Vanderbilt Law School Faculty Publications

Faculty Scholarship

Spring 2023

Developing Inclusive Language Competency in Clinical Teaching

Jennifer Safstrom

Joseph Mead

Follow this and additional works at: <https://scholarship.law.vanderbilt.edu/faculty-publications>



Part of the [Legal Ethics and Professional Responsibility Commons](#), [Legal Profession Commons](#), and the [Litigation Commons](#)



DATE DOWNLOADED: Wed May 31 13:27:56 2023

SOURCE: Content Downloaded from [HeinOnline](#)

Citations:

Please note: citations are provided as a general guideline. Users should consult their preferred citation format's style manual for proper citation formatting.

Bluebook 21st ed.

Jennifer Safstrom & Joseph Mead, Developing Inclusive Language Competency in Clinical Teaching, 29 CLINICAL L. REV. 349 (2023).

ALWD 7th ed.

Jennifer Safstrom & Joseph Mead, Developing Inclusive Language Competency in Clinical Teaching, 29 Clinical L. Rev. 349 (2023).

APA 7th ed.

Safstrom, J., & Mead, J. (2023). Developing inclusive language competency in clinical teaching. *Clinical Law Review*, 29(2), 349-404.

Chicago 17th ed.

Jennifer Safstrom; Joseph Mead, "Developing Inclusive Language Competency in Clinical Teaching," *Clinical Law Review* 29, no. 2 (Spring 2023): 349-404

McGill Guide 9th ed.

Jennifer Safstrom & Joseph Mead, "Developing Inclusive Language Competency in Clinical Teaching" (2023) 29:2 *Clinical L Rev* 349.

AGLC 4th ed.

Jennifer Safstrom and Joseph Mead, 'Developing Inclusive Language Competency in Clinical Teaching' (2023) 29(2) *Clinical Law Review* 349

MLA 9th ed.

Safstrom, Jennifer, and Joseph Mead. "Developing Inclusive Language Competency in Clinical Teaching." *Clinical Law Review*, vol. 29, no. 2, Spring 2023, pp. 349-404. HeinOnline.

OSCOLA 4th ed.

Jennifer Safstrom & Joseph Mead, 'Developing Inclusive Language Competency in Clinical Teaching' (2023) 29 *Clinical L Rev* 349

Please note:
citations are provided as a general guideline. Users should consult their preferred citation format's style manual for proper citation formatting.

Provided by:

Vanderbilt University Law School

-- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at

<https://heinonline.org/HOL/License>

-- The search text of this PDF is generated from uncorrected OCR text.

-- To obtain permission to use this article beyond the scope of your license, please use:

[Copyright Information](#)

DEVELOPING INCLUSIVE LANGUAGE COMPETENCY IN CLINICAL TEACHING

JENNIFER SAFSTROM & JOSEPH MEAD*

Drawing from legal pedagogy, litigation practice, and teaching experience, this article seeks to compile a set of key considerations for inclusive language decision-making in the clinical setting. Using a multi-factor framework—accuracy, precision, relevance, audience, and respect—this analysis explores the process for deciding on terms to use in practice and the potential implications of those choices on student learning, case outcomes, and attorney-client relationships. In addition, this article explores some current trends and best practices when adopting these principles in the context of specific groups. This article connects these principles to broader academic and practice issues, including the American Bar Association accreditation standards and Rules of Professional Conduct.

INTRODUCTION¹

“As lawyers, our stock in trade is language. We can choose language that makes our points persuasively or language that is distracting and possibly offensive. Distracting or offensive language, of course, doesn’t serve our clients, our profession, or our image in the eyes of the public.”²

* Jennifer Safstrom serves as Visiting Assistant Clinical Professor of Law, Stanton Foundation First Amendment Clinic, Vanderbilt Law School. Joseph Mead is Senior Counsel, Institute for Constitutional Advocacy and Protection, Georgetown University Law Center.

¹ The authors would like to extend their appreciation to the many colleagues who provided feedback on this project, including Susan Kay, Cara Suvall, Lauren Rogal, Michael Bressman, Shelby Calambokidis, and Eloy Rodriguez La Brada. With additional gratitude to Angela Brown for her editing assistance and to the attendees of the Mid-Atlantic Regional Clinical Conference (2023) and American University Washington College of Law’s Clinical Program Fiftieth Anniversary Symposium (2022) for their suggestions. All views expressed are the authors’ own and do not necessarily reflect those of any current or previous employer, client, or other entity.

The authors will adhere to the Fair Citation Rule, listing every author of a publication in lieu of using “et al.” upon first reference. See, e.g., *DLR Style Conventions Update: Full and Fair Citation Rule*, DENVER L. REV., <https://www.denverlawreview.org/style-conventions> (last visited Jan. 29, 2023) (“Authors who are women and from historically marginalized groups are often under-cited in publications. This lack of recognition can lead to disparities in securing job placements, acquiring grant funding, receiving awards, and tenure considerations.”).

² Jane Reardon, *Inclusive Language Is Allyship*, 2CIVILITY (Apr. 22, 2021), <https://www.2civility.org/inclusive-language-is-allyship/>.

Words have power,³ including the power to persuade or offend. They influence how we think about the world and ourselves, how we communicate, and how we effect change.⁴ Choosing appropriate language communicates respect. It can also amplify understanding; as we take the time to learn why people prefer some labels to others, we gain a window into how they view themselves, as well as their concerns, motivations, and histories. This is why other client-focused disciplines, like medicine,⁵ emphasize language training as part of their professional development, recognizing that using proper language can have an outsized impact on the professional-client relationship.⁶

And word choices also serve advocacy goals onto themselves. A longstanding and ever-growing pile of empirical literature indicates that people are more or less likely to want to help a person based on how that person is described. For example, people were more likely to want to help—and less likely to want to punish—a person described as having a substance use disorder, as opposed to someone described as a substance abuser or addict.⁷ Finding the right way to describe a party can trigger or avoid biases in the decisionmaker,⁸ and choosing the right language can invoke better outcomes.⁹

³ The paper uses terms that some individuals may find offensive. While the authors seek to minimize the incorporation of unnecessary terms, this paper explicitly discusses identity language that some may find controversial.

⁴ See generally JOHN M. CONLEY, WILLIAM M. O'BARR & ROBIN CONLEY, *JUST WORDS: LAW, LANGUAGE, AND POWER* (3d ed. 2019).

⁵ See e.g., William Alexander, *Ask the OEDI: Hispanic, Latino, Latina, Latinx - Which Is Best?*, DUKE UNIV. SCH. OF MED. (Sept. 8, 2022), [https://medschool.duke.edu/blog/ask-oedi-hispanic-latino-latina-latina-latinx-which-best](https://medschool.duke.edu/blog/ask-oedi-hispanic-latino-latina-latinx-which-best).

⁶ Amy F. Crocker & Susan N. Smith, *Person-First Language: Are We Practicing What We Preach?*, 12 J. MULTIDISCIPLINARY HEALTHCARE 125–29 (2019) (advocating for inclusive teaching practices while acknowledging difficulties in “maintain[ing] this practice while performing patient care” because of a disconnect with the “norm[s] in most practice settings”).

⁷ See John F. Kelly, Sarah J. Dow & Cara Westerhoff, *Does Our Choice of Substance-Related Terms Influence Perceptions of Treatment Need? An Empirical Investigation with Two Commonly Used Terms*, 40 J. DRUG ISSUES 805, 805–18 (2010); John F. Kelly & Cassandra M. Westerhoff, *Does It Matter How We Refer to Individuals with Substance-Related Conditions? A Randomized Study of Two Commonly Used Terms*, 21 INT'L J. DRUG POL'Y 202 (2010).

⁸ See Kelly, et al., *supra* note 7, at 805.

⁹ Differences in language can implicate legal analysis and case outcomes. This is evidenced by the varied factual recitations of the same events proffered by the D.C. Circuit and the U.S. Supreme Court, respectively, that led to different substantive outcomes about the existence of probable cause for an arrest. *Compare Wesby v. District of Columbia*, 765 F.3d 13, 16 (D.C. Cir. 2014), *rev'd*, 138 S. Ct. 577 (2018) (“A group of late-night partygoers responded to a friend’s invitation to gather at a home in the District of Columbia. The host had told some friends she was moving into a new place and they should come by for a party. Some of them informally extended the invitation to their own friends, resulting in a group of twenty-one people convening at the house. With the festivities well underway, Metropolitan Police Department (“MPD”) officers responded to a neighbor’s complaint of

Although lawyers and teachers undoubtedly recognize this—and many teach inclusive language in various ways—the authors were unable to find a comprehensive guide to teaching law students about how to use inclusive language to describe people. Other disciplines recognize that using proper language can significantly influence the professional-client relationship and emphasize appropriate language as part of students' training.¹⁰ The closest proximate resource was an article written twenty years ago that mentions the benefits of teaching inclusive language to law students.¹¹

In this paper, the authors argue that intentionally teaching inclusive language provides benefits beyond specific word choice; it can reinforce effective communication practices and encourage the habit of reflection that exemplifies inclusive lawyering. This paper thus proposes a series of practices to guide the communicator toward more

illegal activity. When the police arrived, the host was not there. The officers reached her by phone, and then called the person she identified as the property owner, only to discover that the putative host had not finalized any rental agreement and so lacked the right to authorize the soiree. The officers arrested everyone present for unlawful entry. But because it was undisputed that the arresting officers knew the Plaintiffs had been invited to the house by a woman that they reasonably believed to be its lawful occupant, the officers lacked probable cause for the arrest.”) with *District of Columbia v. Wesby*, 138 S. Ct. 577, 583 (2018) (“Around 1 a.m. on March 16, 2008, the District’s Metropolitan Police Department received a complaint about loud music and illegal activities at a house in Northeast D.C. The caller, a former neighborhood commissioner, told police that the house had been vacant for several months. When officers arrived at the scene, several neighbors confirmed that the house should have been empty. The officers approached the house and, consistent with the complaint, heard loud music playing inside. After the officers knocked on the front door, they . . . immediately observed that the inside of the house ‘was in disarray’ and looked like ‘a vacant property.’ . . . The officers smelled marijuana and saw beer bottles and cups of liquor on the floor. In fact, the floor was so dirty that one of the partygoers refused to sit on it while being questioned. Although the house had working electricity and plumbing, it had no furniture downstairs other than a few padded metal chairs. The only other signs of habitation were blinds on the windows, food in the refrigerator, and toiletries in the bathroom. In the living room, the officers found a makeshift strip club. Several women were wearing only bras and thongs, with cash tucked into their garter belts. The women were giving lap dances while other partygoers watched. Most of the onlookers were holding cash and cups of alcohol. After seeing the uniformed officers, many partygoers scattered into other parts of the house. The officers found more debauchery upstairs. A naked woman and several men were in the bedroom. A bare mattress—the only one in the house—was on the floor, along with some lit candles and multiple open condom wrappers. A used condom was on the windowsill. The officers found one partygoer hiding in an upstairs closet, and another who had shut himself in the bathroom and refused to come out. The officers found a total of 21 people in the house. After interviewing all 21, the officers did not get a clear or consistent story. . . . The officers then contacted the owner. . . [who stated] he had not given Peaches (or anyone else) permission to be in the house—let alone permission to use it for a bachelor party.”).

¹⁰ Crocker & Smith, *supra* note 6, at 125–29.

¹¹ Lorraine Bannai & Anne Enquist, *(Un)examined Assumptions and (Un)intended Messages: Teaching Students to Recognize Bias in Legal Analysis and Language*, 27 SEATTLE U. L. REV. 1 (2003).

thoughtful language choices, as well as a compilation of resources to distribute to students for further study. This article then considers how courts, lawyers, and others have wrestled with language choices in particular contexts.¹² With the constant change of language, it is neither useful nor possible to offer a fixed set of specific language choices; rather, understanding how these practices are debated and played out in courts and other forums today provides useful case studies on the importance of inclusive language and the utility of these practices.

I. WHY TEACH INCLUSIVE LANGUAGE?

Adopting inclusive language practices allows lawyers to adapt terms based on the given message, setting, and audience in alignment with intended legal outcomes. This type of situational awareness and adaptation is often utilized by individuals with marginalized identities. Code-switching is a practice adopted by “minorities . . . to avoid prejudice” and “assimilate into a variety of social circumstances . . . [w]hen social environments require strict codes of behavior.”¹³ Rather than relegating this work to those with minoritized or marginalized identities,¹⁴ lawyers should actively consider language choices that promote inclusion.¹⁵

Inclusive language strategies aim to remove the barriers created by word choice in communication across different identities. This is a dynamic and iterative process that is further complicated by the layered experiences of each individual and by the ways a person reconciles various aspects of their intersectional identities.¹⁶ As lawyers,

¹² See *infra* Section IV (Inclusive Language in Practice).

¹³ Allison Wiltz, *How Code-Switching Causes More Harm Than Good*, MEDIUM (Oct. 29, 2020), <https://aninjusticemag.com/how-code-switching-causes-more-harm-than-good-18ede1a57ba0> (noting “all marginalized groups adjust to white-dominated spaces”).

¹⁴ Erik Wingrove-Haugland & Jillian McLeod, *Not “Minority” but “Minoritized,”* 21 TEACHING ETHICS 1, 1 (2021), https://www.pdcnet.org/tej/content/tej_2021_0021_0001_0001_0011 (“Rather than referring to ‘minorities,’ ‘members of minority groups’ or ‘under-represented minorities,’ we should refer to such individuals as ‘minoritized.’ Using ‘minoritized’ makes it clear that being minoritized is about power and equity not numbers, connects racial oppression to the oppression of women, and gives us an easy way to conceive of intersectionality as being a minoritized member of a minoritized group.”).

¹⁵ Sarah Elisabeth Blair, *The Invisibility of Whiteness: An Intersectional Analysis of Race, Class and Gender from the American Mosaic Survey*, CAL. STATE UNIV. SACRAMENTO (Nov. 1, 2019), <https://csu-csus.esploro.exlibrisgroup.com/esploro/outputs/graduate/The-invisibility-of-whiteness-an-intersectional/99257831074101671> (“The invisibility of whiteness has been shown to perpetuate racial inequality.”).

¹⁶ *What Is Intersectionality*, CTR. FOR INTERSECTIONAL JUST., <https://www.intersectionjustice.org/what-is-intersectionality> (last visited Jan. 29, 2023) (“The concept of intersectionality describes the ways in which systems of inequality based on gender, race, ethnicity, sexual orientation, gender identity, disability, class and other forms of discrimination ‘intersect’ to create unique dynamics and effects.”).

we help bridge this gap: translating our client's narrative and goals into the legal vernacular. Language choices are the first step in this process. For instance, while client counseling may play a critical role in navigating and deciding on terminology, especially when individual preferences are out of sync with institutional norms, it is not possible to properly advise on this matter without an accurate understanding of the implications—including the potential risks and benefits—of word choice.¹⁷ Accordingly, inclusive language has a number of practical and pedagogical benefits, which are explored further in this section.

A. Reinforcing Effective Communication

A lawyer's principal tool is language. Effective lawyers take special pride in using clear and powerful language to advance the goals of their clients and of justice. Judges and practicing lawyers often describe good communication, especially in writing, as one of the most important skills any lawyer can have.¹⁸ As a result, law schools teach effective communication in specialized courses devoted to legal writing and oral advocacy, and reinforce those principles throughout the curriculum.¹⁹

Clinics naturally provide a chance to further hone a student's communication skills by deploying them to advance a client's interests, a representation goal, or other clinic objective. The need for good communication in experiential settings becomes more urgent, as interests beyond a grade may be at stake. And writing may be publicly filed or otherwise broadly disseminated, further increasing the need for potency and accuracy.²⁰

Teaching inclusive language supports and reinforces efforts to en-

¹⁷ The process of informing a client of the potential consequences and corresponding risk for each available option is key to effective counseling and is a core lawyering competency. See generally DAVID A. BINDER, PAUL BERGMAN & SUSAN C. PRICE, *LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH* (1991).

¹⁸ See generally Mark K. Osbeck, *What Is "Good Legal Writing" and Why Does It Matter?*, 4 DREXEL L. REV. 417, 466 (2012).

¹⁹ There are additional strategies that could be adopted to foster an inclusive classroom environment that are internally facing. For instance, modeling the use of pronouns and asking students to share how their pronouns at the beginning of the semester can foster inclusion and engagement. *Creating an LGBTQ-Inclusive Classroom*, UNIV. OF ARIZ. LIBRARIES, <https://libguides.library.arizona.edu/c.php?g=744315&p=5350892> (last visited Jan. 29, 2023). Internal curriculum decisions may implicate a different set of considerations than deciding, for instance, what language to use in a brief to a court or administrative agency.

²⁰ Margaret E. Johnson, *An Experiment in Integrating Critical Theory and Clinical Education*, 13 AM. U. J. GENDER SOC. POL'Y & L. 161, 165–66 (2005) ("Students learn to recognize and evaluate the effect of the social, political, economic, and systemic context within which the client's issues have arisen. Students learn that context affects the nature of the client-lawyer relationship, the client's decision-making, and outcomes.").

hance communication.²¹ Generally, educators remind students that it falls to the writer or speaker to work to understand the meaning, connotations, baggage, context, and history of the words chosen to ensure that student-attorneys are communicating precisely and accurately what is intended, in the most effective way possible, in light of the audience and the client's goals. Inclusive language practices provide an opportunity for a specific iteration of these general goals. The practices of intentional word choice, thinking about the impact of language on different audiences, and avoiding assumptions or sloppy language, along with the habits of engaging in further research and reflection to improve work product,²² are all things that effective advocates—and good lawyers—do.²³

B. Ethics

The clinical course is often where law students first confront real-world ethical dilemmas. Student-lawyers are, perhaps for the first time, bound by the ethical code of the profession.²⁴ Client contacts inherently implicate ethics, and “[e]very clinical teacher is a legal ethics and professional responsibility teacher.”²⁵ Although not every clinical course will include separate classroom instruction in ethics, complying with professional standards is inherently part of the clinical experience because ethics are an indelible part of legal practice.²⁶

Using inappropriate language will demonstrate incompetence, inaccuracy, and possibly disrespect to such a degree that it triggers professional discipline.²⁷ For example, lawyers must be competent, in understanding not only the law but also the underlying facts, technologies, and context to provide effective representation.²⁸ Rules require

²¹ *Persuasive Writing*, THE WRITING CTR., GEORGETOWN UNIV. L. CTR. (2019), <https://www.law.georgetown.edu/wp-content/uploads/2019/09/Persuasive-Writing.pdf> (discussing compelling writing strategies, generally, and offering specific approaches to enhance organization, persuasiveness, and clarity, among others).

²² See *Conducting Research Through an Anti-Racism Lens*, UNIV. OF MINN. (Jan. 31, 2023 6:57 PM), <https://libguides.umn.edu/antiracismlens>.

²³ Bannai & Enquist, *supra* note 11, at 10.

²⁴ Peter A. Joy, *The Ethics of Law School Clinic Students as Student-Lawyers*, 45 S. TEX. L. REV. 815, 832 (2004) (“The language in most jurisdictions’ student practice rules explicitly or implicitly supports the conclusion that a student-lawyer should be treated as a lawyer for ethics purposes.”).

²⁵ Peter A. Joy, *The Law School Clinic as a Model Ethical Law Office*, 30 WM. MITCHELL L. REV. 35 (2003).

²⁶ *Id.*; see also Gilda M. Tuoni, *Teaching Ethical Considerations in the Clinical Setting: Professional, Personal and Systemic*, 52 U. COLO. L. REV. 409 (1981).

²⁷ *Matter of Teague*, 15 N.Y.S.3d 312, 313 (2015) (“Respondent was charged with having made patently offensive racial, ethnic, homophobic, sexist, and other derogatory remarks to attorneys, in violation of rule 8.4(h) of the Rules of Professional Conduct”); *Matter of Denenberg*, 137 N.Y.S.3d 363, 364 (2020).

²⁸ MODEL RULES OF PRO. CONDUCT, R. 1.1 (AM. BAR ASS’N 1980), <https://>

fairness towards opposing parties, third parties, and the court.²⁹ American Bar Association (ABA) Model Rule 8.4(g) prohibits “engag[ing] in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law.”³⁰ Furthermore, Rule 8.4(d) prohibits lawyers from “engag[ing] in conduct that is prejudicial to the administration of justice.”³¹ Additional communication obligations in the attorney-client relationship are governed by Rule 1.4.³² Under these rules, intentionally misgendering opposing counsel or a party, for example, may constitute ethical misconduct.³³ Although it did not lead to formal discipline, the Clerk of the Supreme Court reprimanded litigants in a high-profile lawsuit because they misgendered the plaintiff.³⁴ This vio-

www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_1_competence/ (Competence); see also Xeris Gregory, *Ignorance Is Not Bliss: Why More Than the Model Rules of Professional Conduct Are Necessary for Competency in the Legal Profession*, 42 J. LEGAL PROF. 243, 247 (2018) (“A culturally incompetent lawyer, therefore, jeopardizes the ‘adequate representation’ requirement of model rule 1.1.”); L. Danielle Tully, *The Cultural (Re)turn: The Case for Teaching Culturally Responsive Lawyering*, 16 STAN. J. CIV. RTS. & C.L. 201, 228 (2020) (“MRPR 1.1 (Competence), MRPR 1.3 (Diligence), and MRPR 1.4 (Communication) require attorneys to consider cultural context and social cognition in the provision of legal services.”).

²⁹ MODEL RULES OF PRO. CONDUCT, R. 3.4 (AM. BAR ASS’N 1980), https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_3_4_fairness_to_opposing_party_counsel/ (Fairness to Opposing Party); MODEL RULES OF PRO. CONDUCT, R. 4.4 (AM. BAR ASS’N 1980), https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_4_4_respect_for_rights_of_third_persons/ (Respect for Rights of Third Persons).

³⁰ MODEL RULES OF PRO. CONDUCT, R. 8.4 (AM. BAR ASS’N 1980), https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_8_4_misconduct/ (Misconduct); see also Ellen Yaroshesky, *The Long Road to New York’s Anti-Discrimination and Anti-Harassment Ethics Rule*, 50 HOFSTRA L. REV. 627, 656 (2022).

³¹ Rule 8.4, *supra* note 30 (Misconduct).

³² MODEL RULES OF PRO. CONDUCT, R. 1.4 (AM. BAR ASS’N 1980), https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_4_communications/ (Communications).

³³ See Chan Tov McNamarah, *Misgendering*, 109 CAL. L. REV. 2227, 2319 (2021) (“deadnaming . . . [is] a form of misgendering”); Chan Tov McNamarah, *Misgendering as Misconduct*, UCLA L. REV. IN DISCOURSE (May 11, 2020), <https://www.uclalawreview.org/misgendering-as-misconduct/>.

³⁴ Elura Nanos, *Supreme Court Clerk Totally Slaps Down Bathroom Bigots for Using ‘Her,’* L. & CRIME (May 3, 2017, 10:52 AM), <https://lawandcrime.com/high-profile/u-s-supreme-court-clerk-totally-slaps-down-bathroom-bigots-for-using-her/>; see also Letter from Scott S. Harris, Clerk of the Ct., Sup. Ct. of the U.S., to John C. Eastman, Amicus Att’y, Ctr. for Const. Juris. (Feb. 24, 2017), https://www.scribd.com/document/340234327/16-273-Letter-to-Amicus-Atty-Eastman?irclid=XPuTlRwI4zjGRuPSPgWORypXUkAxx12OVVyhUU0&irpid=27795&utm_source=impact&utm_medium=cpc&utm_campaign=affiliate_pdm_acquisition_Sovrn%20Commerce&sharedid=1850603&irgwc=1.

lated a Supreme Court rule of practice that requires litigants to use an appropriate caption. Conduct violative of these rules, such as the use of insulting references, can lead to disciplinary action.³⁵

Judges, too, are bound by ethical obligations to perform duties impartially and promote public confidence in the judiciary. For example, under New York law, “where a person before the court has advised the court that their preferred gender pronoun is ‘they,’ the inquiring judge may not require them to use instead ‘he’ or ‘she’ in the proceeding.”³⁶ In Indiana, supervisory courts have admonished judges when they refuse to use a party’s pronouns.³⁷ Not every court has followed this ethical command; some judges on the Fifth Circuit have expressly refused to recognize the pronouns used by a party on appeal.³⁸

While using improper language will not always lead to discipline, an attorney’s obligation to be ethical is more than avoiding misconduct—it requires pursuing the highest ideals of the profession. Clinics provide opportunities to reinforce the highest ethical principles, as the Rules of Professional Conduct establish a floor—but not a ceiling—to quality practice.³⁹

C. Cultural Competence

Preparing students to represent a diverse clientele has, at least in theory, been on law schools’ agendas for years.⁴⁰ More recent calls for increased focus on cultural competence⁴¹ led to recent changes to

³⁵ See, e.g., Debra Cassens Weiss, *After Learning Lawyer’s Remark Was a ‘Serious Covert Insult,’ Judge Refers Incident to State Bar*, ABA J. (July 21, 2022, 9:53 AM), <https://www.abajournal.com/news/article/fter-learning-lawyers-remark-was-serious-covert-insult-judge-refers-incident-to-state-bar> (reporting “‘See You Next Tuesday’ [wa]s a euphemism for the C-word” towards two female attorneys).

³⁶ N.Y. Advisory Comm. on Jud. Ethics, Op. 21-09 (Jan. 28, 2021), <https://nycourts.gov/legacyhtm/ip/judicialethics/opinions/21-09.htm>.

³⁷ See, e.g., *Matter of R.E.*, 142 N.E.3d 1045, 1054 (Ind. Ct. App. 2020) (“All parties in Indiana’s trial courts deserve to be treated with respect and dignity. The trial court’s treatment of R.E. here was disrespectful and inappropriate.”).

³⁸ *Gibson v. Collier*, 920 F.3d 212, 217, 217 n.2 (5th Cir. 2019); *United States v. Varner*, 948 F.3d 250, 253 (5th Cir. 2020); see also, Diana Flynn, *FILED: Fifth Circuit Must Reconsider Opinion that Misgenders Trans Litigant*, LAMDA LEGAL (Mar. 23, 2020), https://www.lambdalegal.org/blog/20200323_kyle-duncan-fifth-circuit-misgender-trans-litigant.

³⁹ Thomas W. Cranmer, *A Floor, Not a Ceiling*, MICH. BAR J. (Dec. 2005), at 12, <https://www.michbar.org/file/barjournal/article/documents/pdf4article943.pdf>.

⁴⁰ See, e.g., Susan Bryant, *The Five Habits: Building Cross-Cultural Competence in Lawyers*, 8 CLIN. L. REV. 33, 40 (2001).

⁴¹ See Aastha Madaan, *Cultural Competency and the Practice of Law in the 21st Century*, ABA J. (Mar./Apr. 2016), https://www.americanbar.org/groups/real_property_trust_estate/publications/probate-property-magazine/2016/march_april_2016/2016_aba_rpte_pp_v30_2_article_madaan_cultural_competency_and_the_practice_of_law_in_the_21st_century/ (“According to the National Center for Cultural Competence

ABA Standard 303, which now requires that “[a] law school shall provide education to law students on bias, cross-cultural competency, and racism . . . at least once [] before graduation. For students engaged in law clinics or field placements, . . . educational occasion will take place before, concurrently with, or as part of their enrollment in clinical or field placement courses.”⁴² This explicit command to require bias training before or during clinical courses creates an added incentive for clinicians to be mindful of the cultural competency components of their courses.

Teaching inclusive language allows clinicians to introduce basic principles of cultural competency by ensuring that the student is taking the first steps toward understanding the people they are describing. As Celeste Fiore argues, “mastering the basics, like vocabulary words or cultural history,” is a start along a path towards cultural competency.⁴³ By understanding why a person or group uses particular language to describe themselves, one can gain the first window into how that person or group thinks about themselves. For example, understanding the choices that members of certain disability groups have for preferring person-first or identity-first language⁴⁴ makes one better able to understand some of the concerns and motivations that group members might have.⁴⁵ And in order to “appreciate why different people prefer different labels, students may need to research the historical and political roots of the terms,” providing additional insight into how and why particular identities are important.⁴⁶ At an even

(NCCC), cultural competence ‘embraces the principles of equal access and non-discriminatory practices in service delivery.’”); see also Nelson P. Miller, *Beyond Bias – Cultural Competence as a Lawyer Skill*, MICH. BAR J. (June 2008), https://www.fordham.edu/download/downloads/id/3026/beyond_bias_cultural_competency.pdf%20Interpreters (“A lawyer’s cultural competence goes beyond avoiding bias. To serve diverse clients, lawyers should have special communication and interpersonal skills. Those skills can be taught and learned.”).

⁴² Louis D. Billionis & Neil W. Hamilton, *Revised ABA Standards 303 (b) and (c) and the Formation of a Lawyer’s Professional Identity, Part 3: Cross-Cultural Competency, Equal Access, and the Elimination of Bias, Discrimination, and Racism*, NAT’L ASS’N FOR L. PLACEMENT (Nov. 2022), <https://www.nalp.org/revised-aba-standards-part-3>.

⁴³ Celeste Fiore, *Gaining Cultural Competency*, GPSOLO (July/Aug. 2019), at 52, 54, https://www.americanbar.org/groups/gpsolo/publications/gp_solo/2019/july-august/gaining-cultural-competency/.

⁴⁴ *Person-First Language vs. Identity-First Language: Which Should You Use?*, THESAURUS.COM (Dec. 17, 2021), <https://www.thesaurus.com/e/writing/person-first-vs-identity-first-language/> (“There’s a term for choosing to say people with disabilities instead of disabled people, and vice versa. People with disabilities is an example of what’s called person-first language, while terms like disabled people are sometimes called identity-first language.”) (emphasis in original).

⁴⁵ Dana S. Dunn & Erin E. Andrews, *Person-First and Identity-First Language: Developing Psychologists’ Cultural Competence Using Disability Language*, 70 AM. PSYCH. 255, 262–63 (2015).

⁴⁶ Bannai & Enquist, *supra* note 11, at 14.

more basic level, avoiding slurs and other offensive language relating to a person's identity is the smallest, yet an incomplete, step away from cultural ignorance.⁴⁷

To be sure, teaching students the basic principles of inclusive language will not, by itself, produce culturally competent lawyers any more than it will, by itself, produce effective communicators. But it provides an accessible, low-barrier touchpoint that forces the student to move past their own assumptions and consider another's perspective, and the social and historical context that comes with it.⁴⁸

D. Understanding the Client

Closely related to ethics and cultural competence are the specific interests in understanding one's clients and having a productive relationship. Other fields, such as medicine,⁴⁹ have expressly acknowledged that using improper language to describe a patient (or otherwise being culturally incompetent)⁵⁰ creates a barrier between professional and client.⁵¹ This seems intuitive: misgendering a client or using an unfamiliar (or offensive) term to describe them will signal that the attorney does not understand—or, worse, does not care to understand—the client. This signaling creates instant relational distance between lawyer and client. It can erode trust, damaging one of the most important parts of a productive attorney-client relationship. And it may make the attorney less effective in understanding, and therefore in representing, the best interests of the client.⁵²

⁴⁷ Phyllis C. Taite & Nicola “Nicky” Boothe, *Teaching Cultural Competence in Law School Curricula: An Essential Step to Facilitate Diversity, Equity, & Inclusion in the Legal Profession*, 2022 UTAH L. REV. 813, 818 (2022) (invoking examples of racial slurs and other evidence of overt bias as evidence that legal profession needs cultural competency training); Samuel Vincent Jones, *Law Schools, Cultural Competency, and Anti-Black Racism: The Liberty of Discrimination*, 21 BERKELEY J. AFR.-AM. L. & POL'Y 84, 97 (2021).

⁴⁸ See, e.g., Jon C. Dubin, *Clinical Design for Social Justice Imperatives*, 51 SMU L. REV. 1461, 1498 (1998) (discussing clinical diversity as a social justice imperative to enhance multicultural education and non-discrimination); Cynthia M. Ward & Nelson P. Miller, *The Role of Law Schools in Shaping Culturally Competent Lawyers*, MICH. BAR J. (Jan. 2010), at 16 (“In-house legal clinics often provide students with intercultural practical legal experiences through individual client representation. Students serve diverse populations in clinics for disability law, low-income taxpayers, urban redevelopment, human trafficking, and elder law. Clinics also expose students to other intercultural experiences.”).

⁴⁹ Crocker & Smith, *supra* note 6, at 125–29.

⁵⁰ Sylvia Stevens, *Cultural Competency: Is There an Ethical Duty?*, OR. STATE BAR BULLETIN (Jan. 2009), <https://www.osbar.org/publications/bulletin/09jan/barcounsel.html>.

⁵¹ Crocker & Smith, *supra* note 6, at 125–29 (stating that, in the medical context, incorrect language “may place a barrier between themselves and the person in their care”); see also Rakshitha Arni Ravishankar, *Why You Need to Stop Using These Words and Phrases*, HARVARD BUS. REV. (Dec. 15, 2020), <https://hbr.org/2020/12/why-you-need-to-stop-using-these-words-and-phrases>.

⁵² Ward & Miller, *supra* note 48, at 18 (“[A]n advocate who delivers a culturally com-

E. Understanding Law and Change

Law students are trained to be not only effective advocates for clients, but also stewards of justice. The preamble to the ABA's Model Rules of Professional Conduct recognizes:

As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education. In addition, a lawyer should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority. A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance.⁵³

As Professor Etienne Toussaint persuasively argues, there is no clear consensus on what this preamble means, which leads to law schools' providing inconsistent and unhelpful guidance to emerging lawyers on how to navigate their roles as public citizens learned in the law.⁵⁴ Whatever the specific contours of the public citizenship aspiration, however, one cannot work towards the improvement of justice without understanding the injustices present in the status quo.

What is clear is that changing the language of the law is an important part of shifting the law. Indeed, rejecting the language the law currently uses is often one of the first steps to making it fairer and more just toward the people that the law currently mistreats.⁵⁵

II. PRACTICES TOWARD INCLUSIVE LANGUAGE

A. Preliminary Notes

When teaching appropriate language, instructors quickly realize that simply producing a dictionary or set of specific rules would not be useful. There is no way to cover all of the myriad language choices and

petent presentation to a particular community group is likely to be viewed more trustworthy, thereby encouraging the advocate's audience to seek help.”)

⁵³ MODEL RULES OF PRO. CONDUCT, Preamble & Scope (AM. BAR ASS'N 1980), https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_preamble_scope/.

⁵⁴ Etienne C. Toussaint, *The Miseducation of Public Citizens*, 29 GEO. J. POVERTY L. & POL'Y 287, 329 (2022).

⁵⁵ While this paper focuses on inclusive language generally, some guidance may be specific to written (e.g., capitalization of Black or Deaf) or spoken (e.g., pronunciation of Mx.) communications.

identities that a law student will encounter over their career. And the inevitable continued evolution of language would render any attempt at an authoritative compilation almost instantly out of date. Further, many of the language choices are themselves open to contestation, as demonstrated by disputes over the terms “Latinx” and “BIPOC.”⁵⁶

Providing a set of general practices instead of specific rules addresses these practical difficulties. Moreover, it instills a perspective in the students to inquire and reflect, not as a rote exercise of memorization but as a shift in their perspectives towards their language and the world. As previously noted, this article is not the first to suggest an emphasis on inclusive language. Some twenty years ago, Professors Lorraine Bannai and Anne Enquist suggested a similar approach, writing that focusing on bias in language can help teach students about bias in law.⁵⁷ They write:

Whether the issue is one of gender, race, national origin, sexual orientation, or disability, the overriding principles governing word choice are the same: (1) realize that what a person is called affects how that person is seen, and respect the individual’s right to self-chosen labels; (2) write precisely and avoid offense; (3) whenever possible, prefer the specific term over the general term; (4) prefer terms that describe what people are rather than what they are not; (5) note that a word’s connotations may change as the part of speech changes; (6) emphasize the person over the difference; and (7) avoid terms that are patronizing or overly euphemistic or that paint people as victims. Language choices based on these principles are the hallmark of the culturally competent lawyer.⁵⁸

The framework proposed by the authors in this article builds off the foundation established by Bannai and Enquist. The structure proposed in this piece distills many of these concepts listed above and organizes their assessment based on the underlying animating principles furthered by these considerations (e.g., asking for an individual’s preferences demonstrates respect; understanding a word’s connotations can impact its relevance or influence audience sentiment) and reframes these considerations into a balancing test. This framework also helps to emphasize values for deliberation over any specific set of rules, as the individual factors put forth by Bannai and Enquist could counsel towards opposite outcomes. For instance, the choice of whether to use a specific term over a general label could be consistent with an individual’s preference, but could also limit the accuracy of the message conveyed (e.g., misdescribe underlying statistical evi-

⁵⁶ See *infra* Sections IV.A.2 (Latinx) & IV.A.4 (BIPOC).

⁵⁷ Bannai & Enquist, *supra* note 11, at 10.

⁵⁸ *Id.* at 22.

dence) or bias the decisionmaker (e.g., surface negative connotations). In such a case, balancing respect for individual preference with legal precision and audience considerations is important, rather than simply defaulting to individual preference as an overarching principle. Moreover, this test articulates these priorities in a unique way, accounting for audience implications (e.g., considerations of decisionmakers) because of the practice-focused nature of clinical education, as opposed to other law courses.

B. Inquire, Educate, Explore

When choosing the terms to describe someone, to the extent possible, one should talk to the client or person being described to capture the language they use for themselves.⁵⁹ One can attempt to understand the language choices used by others with a relevant identity. As Bannai and Enquist recognize, “[b]ecause most groups are fully aware of the power words have in shaping how they are perceived, they have carefully chosen the labels they want used to describe themselves. . . [and] [t]hese self-chosen labels should be respected.”⁶⁰

Recognize that language evolves rapidly, and so terms common years ago may no longer be ideal. The term “African American” falling out of use in favor of “Black,” the shift away from people-first to identity-first language, the rise of the term “Latinx”, and the increasing acceptance of the singular “they,” for example, illustrate that language is evolving. As lawyers must keep up with developments in law, technology, and other modes of practice to provide effective representation, they also have an obligation to understand how word meanings have evolved. Finally, one should also inquire into the language used in the relevant laws to understand where there is friction or divergence.

Students should be prepared to move outside of their comfort zones, beginning with acknowledging their own biases. Recognize that the language perceived to be the most appropriate might not be the language preferred by the individual with whom one is interacting, and that there may be wide variations in those preferences between members of a particular community. Be willing to use new language in

⁵⁹ There may be additional complexity in distilling institutional preferences when representing organizational clients, needing to account for multiple officers, directors, shareholders, or constituents. See MODEL RULES OF PRO. CONDUCT, R. 1.13 (AM. BAR ASS’N 1980), https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_13_organization_as_client/ (Organization as Client); see also John M. Burman, *Ethical Considerations When Representing Organizations*, 3 WYO. L. REV. 581, 591 (2003).

⁶⁰ Bannai & Enquist, *supra* note 11, at 13.

light of new learning and social evolution of the lexicon. Do not simply avoid thinking about language and identities because of worries about making a mistake,⁶¹ but do make amends when erring.⁶² Recognize errors and, rather than adopting a defensive approach, consider ways to improve for next time.⁶³ Ignoring identities and language choices does not make them go away. While this ongoing learning mandate may initially seem overwhelming, embracing the inquiry with intellectual curiosity and a commitment to building interpersonal competence is more likely to enable success and prevent “diversity fatigue.”⁶⁴

Student practitioners should also learn to appreciate the nuance of various terms. Inquiring into terms of identity is not as simple as looking up a word in a dictionary. Terms of identity are often deeply contested, laden with historical baggage, and socially bounded. The fact that there is contestation within groups about appropriate language—consider the terms “Latinx” or “BIPOC”—should not dissuade a lawyer from attempting to investigate the appropriate term for their particular case.⁶⁵ Different groups within the disability community have very different views on person-first versus identity-first approaches.⁶⁶ And lawyers should recognize that terms may be appropriate for use within a community that would not be appropriate for use outside that community: often, communities will “reclaim” slurs to deprive them of their sting, but that should not be viewed as an invitation to outsiders to use the offensive language.⁶⁷ The use of such terms

⁶¹ Taite & Boothe, *supra* note 47, at 824 (“Most new things engender levels of discomfort, but race inevitably engenders higher levels of anxiety because professors may be afraid to say the wrong thing.”).

⁶² *Learn How to Apologize*, ANTI-RACISM DAILY NEWSLETTER (Jan. 21, 2022), <https://blogs.uco.edu/diversity-committee/2022/01/21/learn-how-to-apologize/> (advising individuals to “[i]nvest in self-reflection,” “[s]ay you’re sorry,” “[a]cknowledge the impact,” “[c]hange your behavior”).

⁶³ Lawyers try hard to avoid making mistakes, but it is an inevitable part of practice. Good lawyers and good teachers view mistakes as opportunities to grow. See generally Easton & Oseid, *And Bad Mistakes; I’ve Made a Few: Sharing Mistakes to Mentor New Lawyers*, 77 ALB. L. REV. 499 (2014).

⁶⁴ Patrick Smith, *Diversity Fatigue Is Setting In, and Law Firms Must Fight It*, AM. LAW. (June 22, 2021), <https://www.law.com/americanlawyer/2021/06/22/diversity-fatigue-is-setting-in-and-law-firms-must-fight-it/> (describing diversity fatigue as “a cynicism or tiring of efforts around diversity, equity and inclusion . . . [that] threatens the progress . . . [made towards] eliminating systemic racism and creating a more inclusive environment”).

⁶⁵ See *infra* Sections IV.A.2 (Latinx) & IV.A.4 (BIPOC).

⁶⁶ Lydia Brown, *Identity-First Language*, AUTISTIC SELF ADVOC. NETWORK, <https://autisticadvocacy.org/about-asan/identity-first-language/> (last visited Jan. 29, 2023).

⁶⁷ Karen Juanita Carrillo, *How the Chicano Movement Championed Mexican-American Identity and Fought for Change*, HISTORY CH. (Sept. 18, 2020), <https://www.history.com/news/chicano-movement> (“By adopting ‘Chicano’ or ‘Xicano,’ activists took on a name that had long been a racial slur—and wore it with pride. And instead of only recognizing their Spanish or European background, Chicanos now also celebrated their Indigenous and

might also be ill-received by more general audiences.⁶⁸

C. Accuracy

One common mistake that writers or speakers commit is making assumptions, which project their own biases onto the world. The duty to inquire is closely associated with the duty to be accurate in one's communication. For example, if one does not know the gender of a person, using a gendered pronoun could mislead the decisionmaker and/or signal disrespect for the individual.⁶⁹ It sends a message of sloppiness and error, making the reader or listener distrust what the lawyer is telling them. Worse, it reveals the speaker or author's assumptions and biases about the world, which can send problematic signals to the listener or reader. For example, assuming a judge is a man and using a masculine pronoun, when the judge is in fact a woman, sends a message that judges should be male.⁷⁰

D. Precision

Know when to use an appropriate level of generality versus granularity.⁷¹ Choose the description that is specific or general enough to accomplish one's goals and accurately reflect the identity of the person. For example, many Native Americans identify primarily as members of their particular tribes and prefer to be identified with reference to their tribe, rather than as "Native American" or "Indian." A person's specific race may be more important to their identity and the narrative than the umbrella term "Person of Color." In many situations, therefore, people "prefer specific terms to general ones."⁷² Even when more than one term is accurate, one may be more precise (e.g., Latina versus Cuban).

Sometimes, however, higher levels of generality are useful to match legal categories or to convey solidarity with a larger community.⁷³ The terms "People of Color" and "LGBTQ," for example, are

African roots.").

⁶⁸ See *infra* Section II.F (Audience); see, e.g., Domenick Scudera, *Reclaiming the Gay F-Word*, HUFF. POST (Feb. 2, 2016), https://www.huffpost.com/entry/reclaiming-the-gay-fword_b_1092157.

⁶⁹ Bannai & Enquist, *supra* note 11, at 40 ("Students can see immediately that they must be aware of the appropriate ways to address a client so as to avoid offense or insensitivity and to be accurate. For example, one cannot assume that a woman has the same name as her husband or children or that she uses the title 'Mrs.' A mistake on those points may not only be inaccurate, it can also cause offense.").

⁷⁰ *Id.* at 11.

⁷¹ *Id.* at 13 ("legal writing requires a high standard of precision in word choice").

⁷² *Id.* at 16; see also Pamela Paul, Opinion, *Let's Say Gay*, N.Y. TIMES (Oct. 23, 2022), <https://www.nytimes.com/2022/10/23/opinion/queer-gay-identity.html>.

⁷³ Meera E. Deo, *Why BIPOC Fails*, 107 VA. L. REV. ONLINE 115, 124, 128–29 (2021)

used precisely because they are useful to describe an inclusive group of people “to unite people with shared experiences for mutual political and social benefits.”⁷⁴ And more ambiguous general terms provide a measure of safety to people facing oppression. For instance, the terms “queer” and “LGBTQ” are “highly ambiguous by design.”⁷⁵ More specific terms “actually [identified] oppressed groups based on vectors of oppression not easily blurred. A lot of activists decided they prefer blurring.”⁷⁶

As with the other practices, the communicator will have to exercise judgment to decide the appropriate level of specificity. The key is to research and reflect on the choices the writer or speaker makes to ensure they capture exactly what they intend.

E. Relevance

Only use those aspects of a person’s identity that are relevant to the case.⁷⁷ If a person’s race or disability is not part of the legal story, there may be no need to include it. Doing so may invoke the decisionmaker’s bias, or even reflect one’s own.⁷⁸ But if a person’s race or disability, even if not legally relevant, is important to understand the complete picture, then include it.⁷⁹ Keep in mind *parallelism*—if identifying characters in the narrative as transgender because it is relevant, consider identifying others as cisgender. Deciding what information to include or omit requires a judgment call: “[S]tudents should think through why they are or are not including such a fact rather than unthinkingly including or omitting it.”⁸⁰

For example, it may not be strictly relevant to the constitutional analysis that a person killed by police is Black or Deaf,⁸¹ but such

(explaining “unity can lead to erasure, . . . [and] foregrounding a group in name only is pure virtue signaling, which is even more destructive for long-term equity goals”).

⁷⁴ *Id.* at 124.

⁷⁵ Dilan Esper (@dilanesper), TWITTER (Oct. 23, 2022, 1:17PM), <https://twitter.com/dilanesper/status/1584247582070476800?s=20&t=ADG2Y5HxlbYjTsM229tr4g>.

⁷⁶ *Id.* (noting the term “queer” can mean “‘transgender,’ ‘gender neutral,’ ‘nonbinary,’ ‘agender,’ ‘pangender,’ ‘genderqueer,’ ‘demisexual,’ ‘asexual,’ ‘two spirit,’ ‘third gender’ or all, none or some combination” thereof because the term encompasses not only sexual activity but the “self that is at odds with everything around it and it has to invent and create and find a place to speak and to thrive and to live”)

⁷⁷ Bannai & Enquist, *supra* note 11, at 13.

⁷⁸ Rupa G. Singh, *Words Matter. Perhaps Especially Ours as Lawyers*, CAL. LAW. ASS’N, <https://calawyers.org/litigation/words-matter-perhaps-especially-ours-as-lawyers/> (last visited Jan. 29, 2023).

⁷⁹ L. Danielle Tully, *Race and Lawyering in the Legal Writing Classroom*, 26 LEGAL WRITING J. 195, 196 (2022).

⁸⁰ Bannai & Enquist, *supra* note 11, at 15.

⁸¹ See, e.g., *Williams v. Champagne*, 13 F. Supp. 3d 624, 632 (E.D. La. 2014) (establishing elements for Eighth Amendment excessive force claim, requiring “(1) an injury (2) which resulted directly and only from the use of force that was clearly excessive to the need

identities may be legally dispositive in the context of other claims.⁸² Even when not legally salient, those aspects of the person's identity may very well be important parts of the story, especially when crafting the public narrative.⁸³ Depending on the audience, one may want to elevate or deemphasize that context. Individuals should avoid assuming that an aspect of a person's identity is not relevant. While it might be most expedient to construe the concept of relevance narrowly and to avoid the discomfort of having to critically interrogate all aspects of a person's identity, a shallow assessment of this prong increases the odds that bias will surface, even if unconsciously.⁸⁴

F. Audience

Attorneys communicate with a range of stakeholders. Litigators⁸⁵ primarily (but not exclusively) communicate with the goal of persuading judges, some of whom will be inclined to be hostile to the rights of the client, and one's language needs to be tailored to further the representation goals.⁸⁶ But lawyers also communicate to advance the cause of justice, which includes efforts to shape the law and the language that the law uses. Lawyers can use their platforms to educate judges about the terms used and the reasons for those choices. And because briefs are typically public, litigators should be aware of the messages they are sending to clients and to the broader community with the language they choose to use.⁸⁷

and (3) the force used was objectively unreasonable") (internal citation omitted).

⁸² Jasmine Hilton, *DOJ: Lawsuit in Maryland over Fatal Police Shooting Should Not Be Dismissed Yet*, WASH. POST (Oct. 16, 2022), <https://www.washingtonpost.com/dc-md-va/2022/10/16/doj-ryan-leroux-lawsuit-montgomery/> (discussing Americans with Disabilities Act claim raised in case of police shooting).

⁸³ See, e.g., Michael Siegel, *Racial Disparities in Fatal Police Shootings: An Empirical Analysis Informed by Critical Race Theory*, 100 B.U. L. REV. 1069, 1080 (2020); Jeffrey A. Fagan & Alexis D. Campbell, *Race and Reasonableness in Police Killings*, 100 B.U. L. REV. 951, 966 (2020).

⁸⁴ *Implicit Bias Initiative*, ABA J., <https://www.americanbar.org/groups/litigation/initiatives/task-force-implicit-bias/> (last visited Jan. 29, 2023) (describing "implicit bias" as "a preference (positive or negative) for a group based on a stereotype or attitude we hold that operates outside of human awareness and can be understood as a lens through which a person views the world that automatically filters how a person takes in and acts in regard to information").

⁸⁵ While this paper uniquely considers the consequences of inclusive language practices in court-facing work, these principles can be applied across lawyering contexts and for a variety of audiences (e.g., drafting transactional work product, development of community education materials, and/or communications made in the course of representation).

⁸⁶ Singh, *supra* note 78, at 51.

⁸⁷ Public-facing language should enhance accessibility, "clarity and transparency." See *Guidance on Inclusive Language*, NAT'L COLLEGIATE ATHLETIC ASS'N (Nov. 10, 2022), at 3, https://ncaaorg.s3.amazonaws.com/inclusion/bstprac/NCAAINC_GuideInclusiveLanguage.pdf (recommending the use of "plain writing rather than jargon (e.g., 'the ball is in your court' or 'pass the baton')"; to "[e]xercise prudence when using idioms (e.g., 'holding

The word choices made by the parties can change the way that judges author their opinions. For example, in *Barton v. Barr*, Justice Kavanaugh chose to use “the term ‘noncitizen’ as equivalent to the statutory term ‘alien’” based on the language used by the parties.⁸⁸ Litigants can easily drop a footnote if using alternative language without distracting from their arguments or undermining their case.

However, these concepts are not only important in the litigation context and can be adapted across audiences. For instance, a community or social enterprise clinic may need to assist a client “[i]n considering where and how D[iversity,] E[quity, and] I[nclusion] principles might be incorporated into the bylaws,” which requires a mastery of how a board of directors, agency leadership, organizational staff, or the entity’s clients may view these concepts.⁸⁹ Similarly, a policy advocacy clinic should target its language to the decisionmakers it is seeking to influence, while also being responsive to individuals and organizations working in coalition to implement the change.⁹⁰

G. Respect

An overarching goal of language use is to convey respect, which means using language that humanizes and destigmatizes. Recognize that many terms come with baggage, and the use of certain phrases flattens a person to a particular aspect of their identity or a condition that they are experiencing. In general, use “terms that describe what people are rather than by what they are not.”⁹¹ “Nonwhite” and “minorities” are words that invite comparison to white, implicitly treating whiteness as the dominant norm. Instead, describe a person by their race or, if needed, a positive term like “Person of Color.”

“Emphasize the person over the difference.”⁹² For example, describing an individual as an “addict” reduces their identity to a single issue, and the word “addict” has a number of negative connotations and stereotypes associated with it.⁹³ If, instead, one describes the

down the fort’ or ‘in the trenches’”); and to “[s]pell out acronyms and abbreviations”); see also *The Social Justice Phrase Guide*, ADVANCEMENT PROJECT (Oct. 5, 2015), <https://advancementproject.org/resources/the-social-justice-phrase-guide/>.

⁸⁸ 140 S. Ct. 1442, 1446 n.2 (2020).

⁸⁹ See Michelle Berger, *Diversity, Equity, and Inclusion in Nonprofit Bylaws*, ABA J. (Mar.-Apr. 2019), https://www.americanbar.org/groups/bar_services/publications/bar_leader/2018_19/march-april/diversity-equity-and-inclusion-in-nonprofit-bylaws/.

⁹⁰ See Juan Amador, Hassana Howe & Margarita L. Valdez Martínez, *The Importance of DEI in Advocacy Efforts*, CTR. FOR ASS’N LEADERSHIP (Sept. 26, 2022), https://www.asaecenter.org/resources/articles/an_plus/2022/09-september/the-importance-of-dei-in-advocacy-efforts.

⁹¹ Bannai & Enquist, *supra* note 11, at 18.

⁹² *Id.* at 20.

⁹³ Michael P. Botticelli & Howard K. Koh, *Changing the Language of Addiction*, 316

individual as “a person living with a substance use disorder,” that phrasing emphasizes their humanity by putting the person first. Further, by using the phrase “living with,” the author or speaker treats the condition as distinct from their core identity, making it just part of the individual’s complex, layered humanity. Finally, by using the medical terminology “substance use disorder” instead of the loaded term “addict,” one avoids invoking a negative stereotype in the readers’ or listeners’ minds. Empirical evidence confirms that this actually changes the way that recipients of the communication will respond.⁹⁴

Resist the urge to simplify and flatten people in making word choices. As Professors Monica Cosby and Annalise Butth note: “Oversimplified narratives are a hallmark of punitive systems. Complicated situations are reduced to good or bad, and people become either a victim or offender. Labels fail to acknowledge the intricate nature of people and harm.”⁹⁵ Such language may take on a deficit framing “that prioritizes what’s missing or what’s wrong” rather than “language that focuses on strengths and potentials.”⁹⁶ When using a flat label to describe someone, it may invite the listener or reader to think of the individual in simplified, inaccurate, and unnuanced ways. Lawyers are “challenge[d] [] to communicate more clearly and accurately without falling back on stereotypes or tropes that perpetuate harmful misinformation.”⁹⁷

JAMA 1361–62 (2016).

⁹⁴ Kelly, et al., *supra* note 7, at 805–18 (2010); Kelly & Westerhoff, *supra* note 7, at 202.

⁹⁵ Monica Cosby & Annalise Butth, *Restorative Revelations*, 17 U. ST. THOMAS L.J. 81, 100 (2020).

⁹⁶ *Here to Here Language Guide*, HERE TO HERE (July 2020), https://www.heretohere.org/wp-content/uploads/2020/07/H2H-Language-Guide_A-Resource-for-Using-Asset-Based-Language-with-Young-People.pdf; see *Asset-Based Language Mirrors the Communities We Serve*, CITY YEAR (Mar. 29, 2022), <https://www.cityyear.org/national/stories/equity/asset-based-language-mirrors-the-communities-we-serve/> (“[W]e don’t call the learners we serve “at-risk youth.” We strive to call out the talents, goals and accomplishments of young people instead, and focus on the resources, relationships and supports caring adults can provide students to help them flourish—highlighting solutions rather than simply ‘the problem.’”); see also *A Guide to Coded Language in Education Vol. I & II*, CLASS TROUBLE (Feb. 1, 2020), <https://classtrouble.club/blogs/resonance-archives/a-guide-to-coded-language-in-education-vol-i> (discussing the use of the term “Under Resourced” as “a way of describing the historical exploitation of BI&POC communities as happenstance rather than as coordinated campaigns of disenfranchisement, marginalization, and terror . . . [and] does not name the intentions of white supremacy, capitalism, or empire”); but see Miriam Axel-Lute, *The Opposite of Deficit-Based Language Isn’t Asset-Based Language. It’s Truth-Telling.*, SHELTERFORCE (Nov. 12, 2019), <https://shelterforce.org/2019/11/12/the-opposite-of-deficit-based-language-isnt-asset-based-language-its-truth-telling/> (“General relentless positivity culture has been called out as unhealthy and unhelpful to social justice work, and for good reason.”).

⁹⁷ Here to Here, *supra* note 96.

H. *Special Note: Use Care with Metaphors & Colloquialisms*

Use caution before using any terms of protected class identity as a negative in formal communications. This issue often arises in the context of disability.⁹⁸ For example, it is legitimate to use the word “blind” to refer to someone who is visually impaired; however, use caution when using the word to refer to a state of ignorance, like “blind spot,” given that this phrase has negative implications for visually impaired people.⁹⁹ Avoiding animal metaphors may be similarly advised, especially when discussing negative characteristics.¹⁰⁰ Other common idioms may also carry negative implications. For instance, while “don’t ask, don’t tell” as a colloquial expression meaning to “intentionally look[] the other way so as not to be implicated” is innocuous, the phrase may have particular social connotations that could be potentially triggering, such as the term’s common use in reference to the military’s anti-LGBTQ policy.¹⁰¹ Another example is the use of the term “gypped” to mean “defrauded, swindled, [or] cheated,” which originated as a negative reference to Romani people, who are commonly described as gypsies.¹⁰²

The use of some idioms or comparisons may be more closely contested. For instance, some individuals may have concerns about negative associations with race or skin color, which may counsel against “using the term[s] ‘dark’ or ‘darkness’ as a metaphor for ‘bad things,’ ‘evil,’—or anything negative.”¹⁰³ To provide another example, while the term “cockeyed” can refer to an individual’s disability, it is also used generally to mean things that are “askew, awry, [or] topsy-turvy.”¹⁰⁴ Some may argue that such attenuated language is too far

⁹⁸ See *infra* Section IV.D (Disability and Medical Conditions).

⁹⁹ Monica Torres, *Instead of These Ableist Words, Use Inclusive Language at Work*, HUFF. POST (July 8, 2022), https://www.huffpost.com/entry/disability-language-work_15f85d522c5b681f7dal3c3839 (describing the terms “insane,” “psycho,” “lame,” “moronic,” or “crazy” as ableist).

¹⁰⁰ Nick Haslam, *Why It’s So Offensive When We Call People Animals*, CONVERSATION (Apr. 17, 2017), <https://theconversation.com/why-its-so-offensive-when-we-call-people-animals-76295>.

¹⁰¹ Arika Okrent, *A Post-Military Taxonomy of “Don’t Ask, Don’t Tell,”* SLATE (Oct. 2, 2013), <https://slate.com/human-interest/2013/10/don-t-ask-don-t-tell-a-breakdown-of-the-nonmilitary-uses-of-the-idiom.html>.

¹⁰² Janaki Challa, *Why Being ‘Gypped’ Hurts the Roma More Than It Hurts You*, NPR (Dec. 30, 2013), <https://www.npr.org/sections/codeswitch/2013/12/30/242429836/why-being-gypped-hurts-the-roma-more-than-it-hurts-you> (“According to the Oxford English Dictionary, the first known recorded definition of the term ‘gypped’ dates back to the 1899 Century Dictionary, which says that it is ‘probably an abbreviation of gypsy, gipsy, as applied to a sly unscrupulous fellow.’”).

¹⁰³ Lillie Marshall, *Is Saying “Dark” to Mean “Bad” an Offensive, Racist Metaphor?*, TEACHING TRAVELING: CMTY. EXPL. GLOB. EDUC. (Dec. 4, 2021), <https://www.teachingtraveling.com/metaphor-darkness-as-bad/>.

¹⁰⁴ *Cockeyed*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/cockeyed>.

removed to be meaningfully connected with an individual's identity. Accordingly, some may dismiss or mock inclusive language principles because of the perception that this line drawing has been unreasonably extended.¹⁰⁵ Such thinking exemplifies the risk inherent in making language decisions: there is a potential of alienating the listener or reader because of word choice. Explaining one's language choices and the reasoning behind those decisions can help further understanding between people.¹⁰⁶

III. STUDENT GUIDANCE

In distilling this framework, the authors have developed a four-page handout to introduce these language inclusivity concepts to students. In addition to a description of these principles, the handout includes a compilation of resources for students to use in furthering their own learning and understanding without providing a rigid, dispositive list of terminology. The included resources are largely organizations that represent and are comprised of individuals from those respective identities and communities. Resources from the National Center on Disability and Journalism, GLAAD, and the Marshall Project, for instance, provide particular insight into the identifiers that are commonly used or preferred by members of their represented communities. The authors felt that developing and sharing a resource that introduces these considerations to students provides a clearer structure of the model and an example for ongoing application. This teaching resource is included as an Appendix to this article.

IV. INCLUSIVE LANGUAGE IN PRACTICE

The principles of accuracy, precision, relevance, audience, and respect provide a flexible framework for analyzing specific language choices.¹⁰⁷ These considerations serve as a guide for decision-making, rather than dictate a specific set of terms that should be universally used in all situations and contexts. This section will analyze the application of these principles in practice, seeking to understand how courts, litigants, and the legal community are using inclusive language

eyed (last visited Jan. 29, 2023).

¹⁰⁵ Brooke Leigh Howard, *Stanford's 'Harmful Language' List Mocked for 'Sheer Insanity'*, DAILY BEAST (Dec. 21, 2022), <https://www.thedailybeast.com/stanfords-harmful-language-list-mocked-for-sheer-insanity>.

¹⁰⁶ See, e.g., Michele Estrin Gilman, *Beyond Window Dressing: Public Participation for Marginalized Communities in the Datafied Society*, 91 FORDHAM L. REV. 503, 555 n.26 (2022) (adding footnote to clarify the "us[e] [of] the term 'marginalized'" in light of "the unique experiences and histories of different groups and individuals").

¹⁰⁷ See *supra* Section II.C –G (discussing accuracy, precision, relevance, audience, and respect).

terms and implementing these principles. These considerations are assessed in the context of race and ethnicity, residency or citizenship status, gender and sexual identity, and disability, as well as status affiliated with experiencing sexual assault and domestic violence, involvement with the criminal legal system, or homelessness. The following examples may help contextualize how these terms have been applied in practice and may provide insight into a student's adoption of inclusive language practices as they balance the considerations set forth in this framework.¹⁰⁸

A. Race and Ethnicity

When discussing race or ethnicity,¹⁰⁹ avoid stereotypes or epithets. It is also important to be cautious of coded words that might not directly reference race, but that have latent meaning or historical connotations that impute meaning. For instance, terms like “urban,” “blue-collar worker,” or “thug” may have fraught meanings and prior uses.¹¹⁰ A racial lens may be an essential component of the narrative or claims at issue; however, where possible, it may be helpful to discuss groups or individuals in ways that do not overly associate them with a negative issue, such as poverty, which could unintentionally reinforce false associations.¹¹¹ It is also helpful to avoid oversimplification of an individual's identity and the Black-white dichotomy, as people may identify as another race or as biracial. It is also recommended to define individuals' identities in an affirmative manner, rather than describing someone by what they are *not*, which is why the terms “minority” or “non-white” should be avoided.¹¹²

¹⁰⁸ See *supra* Section III (Student Guidance); see also Appendix (student resource guide).

¹⁰⁹ “[R]ace refers to a group sharing some outward physical characteristics and some commonalities of culture and history. Ethnicity refers to markers acquired from the group with which one shares cultural, traditional, and familial bonds.” *Usage Notes: The Difference Between ‘Race’ and ‘Ethnicity’*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/words-at-play/difference-between-race-and-ethnicity> (last visited Jan. 29, 2023).

¹¹⁰ See, e.g., Jemima McEvoy, *Here's How ‘Urban,’ A Term Plagued By Racial Stereotypes, Came to Be Used to Describe Black Musicians*, FORBES (June 10, 2020), <https://www.forbes.com/sites/jemimamcevoy/2020/06/10/heres-how-urban-a-term-plagued-by-racial-stereotypes-came-to-be-used-to-describe-black-musicians/?sh=7c2cb16346e7>; Scott Cummings, *Racial Prejudice and Political Orientations Among Blue-Collar Workers*, Soc. Sci. Q. (1977), <https://www.jstor.org/stable/42859715>; *The Racially Charged Meaning Behind The Word ‘Thug’, All Things Considered*, NPR (Apr. 30, 2015), <https://www.npr.org/2015/04/30/403362626/the-racially-charged-meaning-behind-the-word-thug>.

¹¹¹ See *supra* Section III.H (noting negative associations that may be raised by some metaphors and colloquial expressions).

¹¹² Bannai & Enquist, *supra* note 11, at 18 (discussing the use of “positive” terms, such as “[P]eople of [C]olor,” rather than describing an individual or community as what they are not, e.g., non-white); see also Wingrove-Haugland & McLeod, *supra* note 14.

1. *Black or African American*

The use of the terms African American and Black are not interchangeable. African American implies recent connection to an African nation (e.g., a recent immigrant).¹¹³ The use of African American is usually not as accurate to describe people whose connection to Africa is more distant, but may also be a “very deliberate move on the part of [B]lack communities to signify [both their] American-ness . . . [and] African heritage,” acknowledging that for a “long time in our country’s history, [B]lack people were most likely direct descendants of enslaved Africans.”¹¹⁴ As immigration has changed, however, there are more people “coming from Africa, from the Caribbean, [and] from Europe[] who identify as [B]lack but [do not] identify as African American.”¹¹⁵ For others, “‘Black’ is often a better default that recognizes and celebrates the race, culture, and lived experiences of people all over the world”¹¹⁶ and that acknowledges how skin color “fundamentally shapes any core part of any [B]lack person’s life in the U.S. context, and really around the world.”¹¹⁷ However, the term “Black” is itself not monolithic, as it may not account for colorism¹¹⁸ or intersectional¹¹⁹ harms.

Preferences between these terms vary and are individual-specific.¹²⁰ When using either term, it should be capitalized. Although “African-American scholars and writers” have long fought “to capitalize the word black in the context of race,” it has only more recently “gained widespread acceptance.”¹²¹ For instance, the Associated

¹¹³ Cydney Adams, *Not All Black People Are African American. Here’s the Difference*, CBS NEWS (June 18, 2020), <https://www.cbsnews.com/news/not-all-black-people-are-african-american-what-is-the-difference/> (“‘There are black people in every continent who are all over the world,’ explained Professor Celeste Watkins-Hayes, an African American studies professor at Northwestern University. ‘African American is nation-specific. We are typically talking about black people who are born in the United States.’”).

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ John Eligon, *A Debate Over Identity and Race Asks, Are African-Americans ‘Black’ or ‘black’?*, N.Y. TIMES (June 26, 2020), <https://www.nytimes.com/2020/06/26/us/black-african-american-style-debate.html>.

¹¹⁸ See Ellis P. Monk, Jr., *The Unceasing Significance of Colorism: Skin Tone Stratification in the United States*, AM. ACAD. ARTS & SCI. (2021), https://www.amacad.org/sites/default/files/publication/downloads/Daedalus_Sp21_05_Monk.pdf.

¹¹⁹ See Jennifer C. Nash, *Home Truths on Intersectionality*, 23 YALE J.L. & FEMINISM 445 (2011).

¹²⁰ Lydia Saad, *Gallup Vault: Black Americans’ Preferred Racial Label*, GALLUP (July 13, 2020), <https://news.gallup.com/vault/315566/gallup-vault-black-americans-preferred-racial-label.aspx> (“Black Americans were also about evenly split, with 42% preferring the term Black and 35%, African American; 7% said they prefer another term; 3% were unsure; and 13% volunteered that it doesn’t make a difference.”).

¹²¹ Eligon, *supra* note 117.

Press, the style guide followed by most major media publications, updated its guidance in 2020 to reflect this change.¹²² Some scholars recommend using the term “Black” only in its adjective form (e.g., “Black people”), rather than in its noun form (e.g., “Blacks”).¹²³

Courts’ uses of these terms have varied. Before assessing the use of Black and African American, it is important to note that antiquated terminology still arises in modern opinions. In some cases, that may be a reference to the historical record containing such language. For instance, when considering a Kentucky abortion law in 2019, Justice Clarence Thomas authored a concurrence that used the term “negro” when discussing the history of the eugenics movement.¹²⁴ In asserting “that abortion is an act rife with the potential for eugenic manipulation,” the use of outdated terminology was likely a strategic choice meant to highlight the purported bias Justice Thomas perceived.¹²⁵

In other cases, offensive racial terms may be the subject of the litigation and essential to the claims at issue. Although the use of such terms can be omitted where not necessary, offensive language may not always be avoided in order to provide an accurate and precise rendition. The need to use vulgar or crass terminology often arises in the context of discrimination cases where a refusal to sanitize language can also render an emotional response. For instance, court opinions

¹²² *Explaining AP Style on Black and White*, ASSOC. PRESS (July 20, 2020), <https://apnews.com/article/archive-race-and-ethnicity-9105661462> (“AP’s style is now to capitalize Black in a racial, ethnic or cultural sense, conveying an essential and shared sense of history, identity and community among people who identify as Black, including those in the African diaspora and within Africa. The lowercase black is a color, not a person. AP style will continue to lowercase the term white in racial, ethnic and cultural senses.”).

¹²³ Ng’ang’a Wahu-Muchiri, *Dear The Economist, “Aim to Use Black as an Adjective, not a Noun,”* LINKEDIN (June 11, 2020), <https://www.linkedin.com/pulse/dear-economist-aim-use-black-adjective-noun-wahu-muchiri-ph-d-> (referencing “style guidelines suggested by the National Association of Black Journalists,” including “aim to use [B]lack as an adjective, not a noun. Also, when describing a group, use [B]lack people instead of just [B]lacks”).

¹²⁴ *Box v. Planned Parenthood of Ind. & Ky., Inc.*, 139 S. Ct. 1780, 1785 (2019) (Thomas, J., concurring) (“Many eugenicists believed that the distinction between the fit and the unfit could be drawn along racial lines, a distinction they justified by pointing to anecdotal and statistical evidence of disparities between the races. Galton, for example, purported to show as a scientific matter that ‘the average intellectual standard of the negro race is some two grades below’ that of the Anglo-Saxon, and that ‘the number among the negroes of those whom we should call half-witted men, is very large.’”) (citing FRANCIS GALTON, *HEREDITARY GENIUS: AN INQUIRY INTO ITS LAWS AND CONSEQUENCES* 1, 338–39 (1869)).

¹²⁵ *Id.* at 1787; see also *id.* at 1788 (“In a report titled ‘Birth Control and the Negro,’ Sanger and her coauthors identified blacks as ‘the great problem of the South’—‘the group with ‘the greatest economic, health, and social problems’—and developed a birth-control program geared toward this population. . . . She later emphasized that black ministers should be involved in the program, noting, ‘We do not want word to go out that we want to exterminate the Negro population, and the minister is the man who can straighten out that idea if it ever occurs to any of their more rebellious members.’”) (internal citation omitted).

routinely use the full version of the n-word in their factual recitations of employment discrimination disputes.¹²⁶ When the use of outdated and offensive terminology finds its way into proceedings where it is not relevant, however, courts should acknowledge its significance and impact,¹²⁷ and also be aware of re-traumatization.¹²⁸

Courts' distinctions between the use of Black and African American are more varied. Some courts seem to combine Black and African American into one category in order to accurately include all individuals who may fall into either (or both) group(s), which may come at the expense of precision. For example, in one case considering a school district's "racial quota system for admission to certain schools" and scrutinizing "practices that 'perpetuate systemic racism,'" the school district and the court used "Black/African American."¹²⁹ This usage was consistent when referring to underlying data and statistics,¹³⁰ as well as in the discussion and analysis of the school's policy.¹³¹ In another example from the Southern District of New York analyzing demographic differences in the makeups of juries across divisions, the court acknowledged that "[i]n the Manhattan Division, the jury-eligible population includes 20.92 percent Black or African American ("Black") individuals, . . . [but that in] the White Plains Division, [] the jury-eligible population is only 12.45 percent Black."¹³² The introduction of the data encompasses both groups, but the opinion goes on to use only "Black" in its analysis, as indicated by the parenthetical notation. The court also includes a footnote with this

¹²⁶ See, e.g., *Tademy v. Union Pac. Corp.*, 614 F.3d 1132, 1135 (10th Cir. 2008); *Hrobowski v. Worthington Steel Co.*, 358 F.3d 473, 476 (7th Cir. 2004); *Love v. Premier Util. Servs.*, 186 F. Supp. 3d 248, 253 (E.D.N.Y. 2016).

¹²⁷ But see *Middleton v. State*, 64 N.E.3d 895, 902 (Ind. Ct. App. 2016), *aff'd*, 72 N.E.3d 891 (Ind. 2017), and *transfer granted, opinion vacated*, 86 N.E.3d 171 (Ind. 2017) (concluding attorney was "ineffective when, during voir dire, he referred to [his client] as a 'negro'" and that counsel's "choice of words was wholly unacceptable and amounted to deficient performance," but also declining to reverse defendant's conviction for failing to "establish[] that but for counsel's error, the result of the proceeding would have been different.").

¹²⁸ Shantel Crosby, *Trauma-Informed Approaches to Juvenile Justice: A Critical Race Perspective*, 67 JUV. & FAM. CT. J. 5 (Mar. 1, 2016), <https://doi.org/10.1111/jfcj.12052>.

¹²⁹ *Sargent v. Sch. Dist. of Phila.*, No. 22-CV-1509, 2022 WL 3155408, at *8 (E.D. Pa. Aug. 8, 2022).

¹³⁰ *Id.* ("Moreover, the criteria-based schools that the zip code preference policy applies to are racially diverse in distinct ways, (e.g., Palumbo in 2020–2021 was 36% Asian, 34% Black/African American, 15% white, 11% Hispanic/Latino, and 4% other, whereas Carver was 14% Asian, 61% Black/African, 8% white, 11% Hispanic/Latino and 6% other)") (internal citation omitted).

¹³¹ *Id.* at *6 ("By its plain language, Indicator 4.1 does not address, at all, increasing the number of Black/African American or Hispanic/Latinx students who are admitted to or who attend the School District's criteria-based schools, rather Indicator 4.1 addresses increasing the number of Black/African American or Hispanic/Latinx students who are qualified to attend such schools.").

¹³² *United States v. Scott*, 545 F. Supp. 3d 152, 159–60 (S.D.N.Y. 2021).

explanatory sentence: “In using the terms Black and Latinx, the Court adopts the meanings ascribed by the parties’ experts to the terms ‘Black or African American’ and ‘Hispanic or Latino.’”¹³³

Courts can acknowledge multi-racial identities where applicable. For example, in recent litigation in Georgia, the court relied on census data when considering a vote-dilution case. The court acknowledged “the population of District 3 was 52.02 [percent] Black (including those who identified as another race in addition to Black)” and that the current “population was 48.79 [percent] Black and 9.88 [percent] Hispanic (including Black Hispanics).”¹³⁴ This data provides nuance and detail in its assessment, while also acknowledging and respecting the unique identities of individuals that do not fall within one category or label. In another case, the Fourth Circuit recognized the claimant “[a]s an African American woman of Haitian descent who, until August 2020, was a career civilian employee with the Army,” providing detail and context for her identity in relation to her employment claim.¹³⁵ In another example, the First Circuit “follow[ed] the parties in using the terms White, Black, Asian, and Latinx, as well as the term Multi-Race/Other” in referring to student demographics, accounting for intersectional groupings as reflected by the data.¹³⁶

Courts and litigants can demonstrate respect by evolving language as it is incorporated into new opinions. For instance, in a recent case assessing race and jury selection, the Minnesota Court of Appeals capitalized the term “Black,” despite the original source having used the term in lowercase.¹³⁷ When citing *State v. Griffin*, the appellate court incorporated this change into its parenthetical: “concluding that when ‘parties agree that persons self-identifying as [B]lack are a distinctive group in the community . . . the first element of the *Williams* test’ has been satisfied.”¹³⁸ On the other hand, some courts may defer to the capitalization in source materials,¹³⁹ but opt to capitalize in non-quoted sections.¹⁴⁰ Some courts may not adhere to this capitaliza-

¹³³ *Id.* at 159 n.2.

¹³⁴ *Rose v. Raffensperger*, No. 1:20-CV-02921-SDG, 2022 WL 3135915, at *2 (N.D. Ga. Aug. 5, 2022).

¹³⁵ *Laurent-Workman v. Wormuth*, No. 21-1766, 2022 WL 17256701, at *1 (4th Cir. Nov. 29, 2022).

¹³⁶ *Bos. Parent Coal. for Acad. Excellence Corp. v. Sch. Comm. of City of Bos.*, 996 F.3d 37, 42 (1st Cir. Apr. 28, 2021).

¹³⁷ *State v. Johnson*, No. A21-1494, 2022 WL 17086760, at *2 (Minn. Ct. App. Nov. 21, 2022).

¹³⁸ 846 N.W.2d 93, 100 (Minn. Ct. App. 2014).

¹³⁹ *See, e.g., United States v. Talley*, No. 22-CR-00028-SI-1, 2022 WL 14813850, at *1 (N.D. Cal. Oct. 25, 2022) (“The dispatcher asked if the man was ‘white, black, Asian, or Hispanic.’”).

¹⁴⁰ *Id.* at *3 (“Talley is Black, with a medium to dark complexion.”); *see also id.* (“[H]e was Black or Latino.”).

tion guidance and instead opt to lowercase the terms unless quoting a source, even when relevant to the claims at issue.¹⁴¹ These word and capitalization choices balance accuracy and context with respect and modernization.¹⁴²

2. *Latino/a/x or Hispanic*

The terms Latino/a/x and Hispanic are not interchangeable. “Hispanic refers to people who speak Spanish and/or are descended from Spanish-speaking populations, while Latino refers to people who are from or descended from people from Latin America.”¹⁴³ “‘Hispanic’ is generally accepted as a narrower term that includes people only from Spanish-speaking Latin America, including those countries/territories of the Caribbean or from Spain itself. With this understanding, a Brazilian could be Latino and non-Hispanic, a Spaniard could be Hispanic and non-Latino, and a Colombian could use both terms.”¹⁴⁴ Being of Latin or Hispanic ethnicity can be separate from racial identity, as individuals “can be white, Black, [I]ndigenous American, Mestizo, mixed, and even of Asian descent.”¹⁴⁵ However, some individuals may not identify with a separate racial identity,¹⁴⁶ and not all individuals and entities may define these identity categories in the same way. The U.S. Census Bureau, for instance, recognizes the distinction between race and ethnicity, but “use[s] the term ‘Hispanic or Latino’ interchangeably.”¹⁴⁷

There is ongoing discussion and controversy regarding the use of

¹⁴¹ *Robinson v. Ardoin*, 37 F.4th 208, 215 (5th Cir. 2022) (reviewing “order of the district court that requires the Louisiana Legislature to enact a new congressional map with a second black-majority district” in voting rights case); see also *id.* at 217 (“One [metric] is ‘DOJ Black,’ which counts as black a voter who identifies as either solely black or as both black and white.”).

¹⁴² Compare Section III.D (Precision) with Section III.G (Respect).

¹⁴³ *The Difference Between Hispanic and Latino*, HISPANIC NETWORK, <https://hnmagazine.com/2017/09/difference-hispanic-latino/> (last visited Jan. 29, 2023).

¹⁴⁴ *What’s the Difference Between Hispanic and Latino?*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/story/whats-the-difference-between-hispanic-and-latino> (last visited Jan. 29, 2023).

¹⁴⁵ HISPANIC NETWORK, *supra* note 143.

¹⁴⁶ Kim Parker, Juliana Menasce Horowitz, Rich Morin & Mark Hugo Lopez, *Chapter 7: The Many Dimensions of Hispanic Racial Identity*, PEW RSCH. CTR. (June 11, 2015), <https://www.pewresearch.org/social-trends/2015/06/11/chapter-7-the-many-dimensions-of-hispanic-racial-identity> (“For example, when asked about their race on Census Bureau decennial census and survey forms, many Latinos do not choose one of the standard racial classifications offered. Instead, more than any other group, Latinos say their race is ‘some other race,’ mostly writing in responses such as ‘Mexican,’ ‘Hispanic’ or ‘Latin American.’”).

¹⁴⁷ Eric Jensen, Nicholas Jones, Kimberly Orozco, Lauren Medina, Marc Perry, Ben Bolender & Karen Battle, *Measuring Racial and Ethnic Diversity for the 2020 Census*, U.S. CENSUS BUREAU (Aug. 4, 2021), <https://www.census.gov/newsroom/blogs/random-samplings/2021/08/measuring-racial-ethnic-diversity-2020-census.html>.

the emerging term “Latinx” in reference to individuals from Latin America. This term, “relating to . . . Latin American heritage” is “used as a gender-neutral alternative to Latina or Latino.”¹⁴⁸ While the term is welcomed by many as an intersectional and inclusive term, there is also staunch opposition. Many Latinos are not aware of the term or do not identify with the label;¹⁴⁹ others may prefer another term for inclusion, like “elle” or “Latine,”¹⁵⁰ or another identifier, like “Chicano/a.”¹⁵¹ More problematically, the use of the term could be viewed as politically manipulative¹⁵² or linguistically imposing¹⁵³:

[U.S. Representative Ruben] Gallego noted, “When Latino politicians use the term, it is largely to appease White rich progressives who think that is the term we use. It is a vicious circle of confirmation bias.” [The] League of United Latin American Citizens (LULAC) . . . announced . . . [it] will cease using “Latinx,” saying, “The reality is there is very little to no support for its use and it’s sort of seen as something used inside the Beltway or in Ivy League tower settings.” And, exemplifying the controversy, Hispanic columnist Angel Eduardo called the use of the term “lexical imperialism,” adding that it is “almost exclusively a way to indicate a particular ideological leaning.”¹⁵⁴

¹⁴⁸ *Latinx*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/Latinx> (last visited Jan. 29, 2023).

¹⁴⁹ Mark Hugo Lopez, Jens Manuel Krogstad & Jeffrey S. Passel, *Who Is Hispanic?*, PEW RSCH. CTR. (Sept. 15, 2022), <https://www.pewresearch.org/fact-tank/2022/09/15/who-is-hispanic/> (“Only 23% of U.S. adults who self-identify as Hispanic or Latino have heard of the term Latinx, and just 3% say they use it to describe themselves, according to a 2019 survey. Awareness and use of the term vary across subgroups, with Hispanics ages 18 to 29 among the most likely to have heard of the term—42% say they have heard of it, compared with 7% of those 65 and older. Some of the most common use of Latinx is among Hispanic women ages 18 to 29—14% say they use it, compared with 1% of Hispanic men in the same age group.”).

¹⁵⁰ Sakshi Venkatraman, *A Gender Neutral Spanish Pronoun? For Some, ‘Elle’ Is the Word*, NBC NEWS (Oct. 14, 2020), <https://www.nbcnews.com/news/latino/gender-neutral-spanish-pronoun-some-elle-word-n1242797>.

¹⁵¹ Roque Planas, *Chicano: What Does the Word Mean and Where Does It Come From?*, HUFF. POST (Oct. 21, 2012), https://www.huffpost.com/entry/chicano_n_1990226 (“Mexican Americans have used the word ‘Chicano’ to describe people of Mexican origin living in the United States since the early twentieth century.”).

¹⁵² Marc Caputo & Sabrina Rodriguez, *Democrats Fall Flat with ‘Latinx’ Language*, POLITICO (Dec. 6, 2021), <https://www.politico.com/news/2021/12/06/hispanic-voters-latinx-term-523776> (“As Democrats seek to reach out to Latino voters in a more gender-neutral way, they’ve increasingly begun using the word Latinx, a term that first began to get traction among academics and activists on the left. But that very effort could be counterproductive in courting those of Latin American descent, according to a new nationwide poll of Hispanic voters.”).

¹⁵³ Alexander, *supra* note 5 (explaining why Latinx does not conform with Latinos’ native language, as “Spanish has no gender-neutral nouns or pronouns (like [English’s use of] ‘they’ or ‘it’), so all nouns have to end in one of these forms. When a noun refers to a mixed-gender group or a collective of individuals the masculine form is used.”).

¹⁵⁴ Frank Newport, *Controversy Over the Term ‘Latinx’: Public Opinion Context*, GAL-

Courts have adopted a myriad of terms to describe Latin American peoples. Some courts have grappled with this inquiry. For instance, in *State v. Zamora*, a Washington court sought to balance these considerations in a lengthy footnote:

Throughout this opinion we use the language of “race” or “racial” when characterizing the nature of the misconduct consistent with our prior opinions on allegations of race-based misconduct in jury trials. We note, however, that these principles apply to ethnicity as well. Therefore, while “Hispanic” or “Latinx” identifies a person’s ethnicity and not their race, the language of race when discussing these principles includes Hispanic and Latinx persons. The United States Supreme Court adopted this view in *Peña-Rodriguez*, noting that it has “used the language of race when discussing the relevant constitutional principles in cases involving Hispanic persons.” *Peña-Rodriguez v. Colorado*, 580 U.S. 206, 137 S. Ct. 855, 863, 197 L. Ed. 2d 107 (2017); see also *About the Hispanic Population and Its Origin*, U.S. Census Bureau (last revised Apr. 15, 2022) (“[R]ace and Hispanic origin (also known as ethnicity) are two separate and distinct concepts. These standards generally reflect a social definition of race and ethnicity recognized in this country, and they do not conform to any biological, anthropological, or genetic criteria.”).¹⁵⁵

Courts may also adopt the language presented by the parties.¹⁵⁶ For example, in one opinion from the Southern District of New York, the court quotes the plaintiffs’ language in “express[ing] concern that the NYPD’s enforcement of the curfew was ‘likewise facilitating discrimination against Black and Latinx people.’”¹⁵⁷ However, courts may eschew the use of terms presented by the parties in favor of seeking to uphold respect for communities beyond the scope of the case. In one instance, the District of Arizona rejected the parties’ use of “Latinx persons,” noting that “a majority of U.S. Hispanics¹⁵⁸ state they prefer the terms Hispanic or Latino,” and opting to “refer[] to these persons as Hispanic[].”¹⁵⁹ Courts have often used the term His-

LUP (Jan. 7, 2022), <https://news.gallup.com/opinion/polling-matters/388532/controversy-term-latinx-public-opinion-context.aspx>.

¹⁵⁵ 512 P.3d 512, 516 n.6 (2022) (website address omitted).

¹⁵⁶ See, e.g., *Nat’l Women’s L. Ctr. v. Off. of Mgmt. & Budget*, 358 F. Supp. 3d 66, 75 (D.D.C. 2019), appeal dismissed and remanded, No. 19-5130, 2020 WL 13561758 (D.C. Cir. June 9, 2020) (“Plaintiff Labor Council for Latin American Advancement (‘LCLAA’) is ‘a national 501(c)(3) representing the interests of approximately 2 million Latino/a trade unionists throughout the United States and Puerto Rico, as well as other non-unionized Latino workers,’ and ‘has 52 chapters around the country.’ Sanchez Decl. ¶ 3.”).

¹⁵⁷ *Floyd v. City of New York*, No. 08 CIV. 1034 (AT), 2020 WL 3819566, at *2 (S.D.N.Y. July 8, 2020) (citing *Floyd* and *Davis* Pls. Supp. Ltr. at 1, 3, ECF No. 768).

¹⁵⁸ Like the use of the term “Blacks,” the use of the word “Hispanics”—as a noun rather than an adjective—can be considered pejorative. See Wahu-Muchiri, *supra* note 123.

¹⁵⁹ *United States v. Merlo-Espinal*, No. CR 21-1720-TUC-CKJ (DTF), 2022 WL 2191192, at *3 (D. Ariz. June 17, 2022) (citing Luis Noe-Bustamante, Lauren Mora & Mark Hugo

panic.¹⁶⁰ Many courts have nonetheless opted for the use of Latinx,¹⁶¹ whereas some have adopted Latino/a as an inclusive term.¹⁶² Some courts may use both terms together, in parallel.¹⁶³ At times, it may be most appropriate to refer to an individual by their specific national origin, rather than to use a general term (e.g., Hispanic/Latinx¹⁶⁴), to add to the statement's precision.¹⁶⁵

3. *Native or Indigenous People*

The terms “American Indian, Indian, Native American, or Native” are acceptable and often used interchangeably in the United States; however, Native Peoples often have individual preferences on how they would like to be addressed.¹⁶⁶ As noted, individuals may prefer

Lopez, *About One-in-Four U.S. Hispanics Have Heard of Latinx, but Just 3% Use It*, PEW RSCH. CTR. (Aug. 11, 2020), <https://www.pewresearch.org/hispanic/2020/08/11/about-one-in-four-u-s-hispanics-have-heard-of-latinx-but-just-3-use-it>).

¹⁶⁰ *State v. Marrara*, No. A-5552-17, 2022 WL 16842732, at *7 (N.J. Super. Ct. App. Div. Nov. 10, 2022) (discussing assertions that the “State exercised its preemptory challenges to remove the only seated Hispanic male prospective jurors”); *In re E.A.*, No. 2D JUV.2d Juv. No. B315127, 2022 WL 16943058, at *2 (Cal. Ct. App. Nov. 15, 2022) (assessing “appellant’s contention that the officers impermissibly detained him because he is Hispanic”); *Dunn v. Park III Condo. Homeowners Ass’n*, No. D079026, 2022 WL 12234397, at *2 (Cal. Ct. App. Oct. 21, 2022) (“alleg[ing] [individuals] are of Hispanic national origin”).

¹⁶¹ See, e.g., *League of United Latin Am. Citizens v. Abbott*, No. 121CV1006RPJESJVB, 2022 WL 1631301, at *5 (W.D. Tex. May 23, 2022) (“Voto Latino . . . avers that it will ‘have to expend and divert additional funds and resources that it would otherwise spend’ elsewhere ‘to combat’ the effects of Defendants’ redistricting plan on ‘Latinx voters in Texas.’”).

¹⁶² See, e.g., *Tenecora v. Ba-Kal Rest. Corp.*, No. 2:18-cv-7311 (DRH) (AKT), 2021 WL 424364, at *4 (E.D.N.Y. Feb. 8, 2021) (discussing statements that “reflect[ed] an attitude discriminatory against Latino/as . . . [including] regular insults and ethnic slurs”); *Valdez v. City of Chicago*, No. 20 C 388, 2022 WL 4482816, at *3 (N.D. Ill. Sept. 27, 2022) (noting the promotion of “five Latino/a CPD employees in 2019, including one to captain, two to commander, one to deputy chief, and one to chief” and noting plaintiff “never heard [defendant] make derogatory comments about Latinos”); *Brumfield v. Dodd*, 749 F.3d 339, 345 (5th Cir. 2014) (citing *Grutter v. Bollinger*, 188 F.3d 394, 398 (6th Cir. 1999) (“[T]here is little room for doubt that access to the University for African-American and Latino/a students will be impaired to some extent and that a substantial decline in the enrollment of these students *may well result if* the University is precluded from considering race as a factor in admissions.”)) (emphasis in original).

¹⁶³ See, e.g., *Roberts v. Bassett*, No. 22-622-cv, 2022 WL 16936210, at *1 (2d Cir. Nov. 15, 2022) (describing “Plaintiffs, who are white and not of Hispanic/Latino ethnicity”).

¹⁶⁴ Case search for “latinx/o/a” and “latino/a/x” yielded no results on Westlaw.

¹⁶⁵ *United States v. Barrera-Vasquez*, No. 2:21CR98, 2022 WL 3006773, at *1 (E.D. Va. July 28, 2022) (assessing plaintiff’s allegations that a “law disparately affects Latinx persons”); *id.* at *1 n.1 (“Although Barrera-Vasquez’s motion argues that Latinx individuals collectively bear the burden of § 1326, the supporting materials speak largely about issues dealing with Mexican immigration. The Court notes that Barrera-Vasquez is not Mexican; he is from El Salvador.”) (internal citation omitted).

¹⁶⁶ *The Impact of Words and Tips for Using Appropriate Terminology: Am I Using the Right Word?*, NATIVE KNOWLEDGE 360, <https://americanindian.si.edu/nk360/informational/impact-words-tips> (last visited Jan. 29, 2023) (emphasis omitted).

to be identified by geographic ancestry or specific tribal membership (e.g., Native Hawaiians or Potawatomis).¹⁶⁷ Intentionally derogatory terms should be avoided.¹⁶⁸ Some disfavor the terms “American Indian” or “Indian,” arguing that they are “misnomer[s]” because they may create confusion with “Indian Americans who come from south Asia.”¹⁶⁹ The term “Indian” may also have a pejorative connotation because of historical inaccuracy underpinning the term’s origin.¹⁷⁰ The terms for Native individuals in other countries may vary, with Australian Indigenous people using the term “Aboriginal” and Canadian Natives opting for the term “First Nations.”¹⁷¹ The terms “Native” and “Indigenous” are properly capitalized, and the change in the latter was reflected in the Associated Press style guide updates made in 2020.¹⁷²

Courts have adopted a range of terms to reflect Native peoples’ identities. Some courts have capitalized the use of the terms Indigenous¹⁷³ and Native,¹⁷⁴ but not all.¹⁷⁵ Courts have also identified an

¹⁶⁷ Indian Entities Recognized by and Eligible To Receive Services From the United States Bureau of Indian Affairs, 84 Fed. Reg. 1200 (Feb. 1, 2019), <https://www.govinfo.gov/content/pkg/FR-2019-02-01/pdf/2019-00897.pdf> (“This notice publishes the current list of 573 Tribal entities recognized by and eligible for funding and services from the Bureau of Indian Affairs (BIA) by virtue of their status as Indian Tribes.”); see also *Territory Acknowledgement*, NATIVE LAND DIGIT., <https://native-land.ca/resources/territory-acknowledgement/> (last visited Jan. 29, 2023).

¹⁶⁸ *Interior Department Completes Vote to Remove Derogatory Names from Five Locations*, U.S. DEP’T OF THE INTERIOR (Jan. 12, 2023), <https://www.doi.gov/pressreleases/interior-department-completes-vote-remove-derogatory-names-five-locations> (“Secretary’s Order 3404 considered only the sq___ derogatory term in its scope. Secretary’s Order 3405 created a Federal Advisory Committee for the Department to formally receive advice from the public regarding additional derogatory terms, derogatory terms on federal land units, and the process for derogatory name reconciliation.”).

¹⁶⁹ Dacoda McDowell-Wahpekeche, *Which Is Correct? Native American, American Indian or Indigenous?*, OKLAHOMAN (Apr. 22, 2021, 6:01 AM), <https://www.oklahoman.com/story/special/2021/04/22/what-do-native-people-prefer-called/4831284001/>.

¹⁷⁰ Peter d’Errico, *American Indians - Native Americans*, UNIV. OF MASS. (“The term ‘Indian,’ in reference to the original inhabitants of the American continent, is said to derive from Christopher Columbus . . . because he was convinced he had arrived in ‘the Indies’ (Asia), his intended destination.”) (last visited Jan. 29, 2023).

¹⁷¹ *Indigenous Identity: More Than “Something Else,”* NATIVE AMS. IN PHILANTHROPY (Nov. 24, 2020), <https://nativephilanthropy.org/2020/11/24/indigenous-identity-more-than-something-else/>.

¹⁷² *AP Changes Writing Style to Capitalize ‘B’ in Black*, ASSOC. PRESS (June 19, 2020), <https://apnews.com/article/race-and-ethnicity-us-news-business-ap-top-news-racial-injustice-71386b46dbff8190e71493a763e8f45a> (“The news organization will also now capitalize Indigenous in reference to original inhabitants of a place.”).

¹⁷³ *Mitchell v. Morton Cnty. Sheriff Kyle Kirchmeier*, No. 1:19-CV-149, 2020 WL 8073625, at *4 (D.N.D. Dec. 10, 2020), *aff’d in part, rev’d in part and remanded sub nom. Mitchell v. Kirchmeier*, 28 F.4th 888 (8th Cir. 2022) (“Mitchell contends [d]efendants have a history of discriminating against and racially profiling individuals in Indigenous communities.”); *id.* at *19 (“consider[ing] the history of Morton County’s interactions with Indigenous and non-Indigenous individuals”).

individual's Native status from outside of the United States,¹⁷⁶ but have at times used the term to mean "originating from" rather than "original resident of a territory."¹⁷⁷

As in the context of race, courts' references to laws or source materials may contain outdated language or use less-preferred terms.¹⁷⁸ Courts may consider an individual's preference and seek to reconcile it with underlying source materials. For instance, one California state court introduced a footnote acknowledging this distinction: "Undesignated statutory references are to the Welfare and Institutions Code. In addition, because [the] I[ndian] C[hild] W[elfare] A[ct] uses the term 'Indian,' we do the same for consistency, even though we recognize that other terms, such as 'Native American' or '[I]ndigenous,' are preferred by many."¹⁷⁹ This acknowledgment can engender further respect for these communities and provide a more accurate contextualization of an individual or community's origin and ancestral history.

4. BIPOC

The term BIPOC,¹⁸⁰ (pronounced "bye-pock") which stands for Black, Indigenous, and People of Color (or the related term POC, for People of Color¹⁸¹) has been both embraced and rejected by large numbers of individuals. Those who use the label see it as a unifying term that centers "the specific violence, cultural erasure, and discrimination experienced by Black and Indigenous people" while

¹⁷⁴ *Chugach Alaska Corp. v. Lujan*, 915 F.2d 454, 457 (9th Cir. 1990) ("[T]he BIA must determine whether a Native group meets the majority requirement in two steps.").

¹⁷⁵ See, e.g., *Duarte de Guinac v. I.N.S.*, 179 F.3d 1156, 1159 (9th Cir. 1999) (using term "indigenous groups").

¹⁷⁶ Compare *Mendoza v. Att'y Gen. of U.S.*, 482 F. App'x 734, 737 (3d Cir. 2012) (using "indigenous ethnicity," "indigenous person," and "indigenous Guatemalan") with *Juan-Pedro v. Sessions*, 740 F. App'x 467, 468 (6th Cir. 2018) (consistently lower-casing the term, even when appearing differently in the underlying administrative record) ("They will kill us because we are [i]ndigenous.").

¹⁷⁷ See, e.g., *Yousif v. Garland*, 53 F.4th 928 (6th Cir. 2022) ("Yousif is a native and citizen of Iraq who came to the United States in 2000 as a refugee.").

¹⁷⁸ See, e.g., *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486, 2493 (2022) ("[T]he Constitution allows a State to exercise jurisdiction in Indian country. Indian country is part of the State, not separate from the State."); *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2459 (2020) ("[T]he U. S. government agreed by treaty that '[t]he Creek country west of the Mississippi shall be solemnly guaranteed to the Creek Indians.'" (citing Treaty With the Creeks, Arts. I, XIV, Mar. 24, 1832, 7 Stat. 366, 368 (1832))).

¹⁷⁹ *In re M.G.*, No. E079180, 2022 WL 16757493, at *1 (Cal. Ct. App. Nov. 8, 2022).

¹⁸⁰ BIPOC, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/BIPOC> (last visited Jan. 29, 2023).

¹⁸¹ BIPOC vs. POC, DICTIONARY.COM, <https://www.dictionary.com/compare-words/bi-poc-vs-poc> (last visited Jan. 29, 2023) ("BIPOC is often used to emphasize the unique experiences of Black and Indigenous people.").

“reinforc[ing] the fact that not all [P]eople of [C]olor have the same experience, particularly when it comes to legislation and systemic oppression.”¹⁸² Some favor the term’s conscious attempt to de-center whiteness, “enabl[ing] a shift away from terms like ‘marginalized’ and ‘minority.’”¹⁸³

Those who disfavor the term assert it is a confusing label or that it is exclusionary because by “naming Black people separately from other [P]eople of [C]olor, as BIPOC does, you are in effect claiming that Black people aren’t People of Color, though Black people coined the term.”¹⁸⁴ In particular, the word can undermine specificity and accuracy. While it may be appropriate to refer to a group of immigrants as “People of Color,” it is less precise, and thus less favored, to use this general language to describe specific, identified individuals (e.g., a group of immigrants from Somalia) or who are experiencing a unique or targeted harm (e.g., a policy change that adversely impacts asylum seekers from Venezuela). This is the reasoning underscoring the concerns of activists and linguists who feel it is “disingenuous to have a conversation about police brutality against ‘[P]eople of [C]olor’ when we know that police brutality disproportionately targets Black people.”¹⁸⁵ Litigants and courts may not always adopt such language, however, even in relation to these concerns.¹⁸⁶

There are very few court cases using the term “BIPOC.” When used, this language has been largely adopted by courts from underlying documents,¹⁸⁷ testimony,¹⁸⁸ or opinions.¹⁸⁹ Recently, the Supreme

¹⁸² Kizha Davidson, *Why We Use BIPOC*, YWCA (Apr. 6, 2022), <https://www.ywcaworks.org/blogs/ywca/wed-04062022-0913/why-we-use-bipoc>.

¹⁸³ Crystal Raypole, *BIPOC: What It Means and Why It Matters*, HEALTHLINE (Nov. 9, 2021), <https://www.healthline.com/health/bipoc-meaning>.

¹⁸⁴ Andrea Plaid & Christopher MacDonald-Dennis, *‘BIPOC’ Isn’t Doing What You Think It’s Doing*, NEWSWEEK (Apr. 9, 2021), <https://www.newsweek.com/bipoc-isnt-doing-what-you-think-its-doing-opinion-1582494>.

¹⁸⁵ Constance Grady, *Why the Term “BIPOC” Is So Complicated, Explained by Linguists*, VOX (June 30, 2020), <https://www.vox.com/2020/6/30/21300294/bipoc-what-does-it-mean-critical-race-linguistics-jonathan-rosa-deandra-miles-hercules> (“When you say ‘[P]eople of [C]olor,’ then you’re erasing the fact that Black people are being shot down on the street looped in videos across the nation,” says Miles-Hercules. ‘It is not South Asian people, right? And that’s important.’ Crucially, Miles-Hercules adds, this distinction doesn’t mean that the issues South Asian people are facing are unimportant. ‘We absolutely should be paying attention to what’s going on at the India-China border right now,’ they say. ‘But when you say ‘[P]eople of [C]olor,’ you’re not actually homing in on any of those things specifically.’”).

¹⁸⁶ *Boykins v. City of San Diego*, No. 21-CV-01812-AJB-AHG, 2022 WL 3362273, at *6 (S.D. Cal. Aug. 15, 2022) (“Plaintiffs also allege that SDPD officers use race ‘as the sole justification to detain/arrest and search BIPOC people in San Diego[.]’ and ‘Plaintiffs’ injuries and damages were a foreseeable result of this practice and custom.’”).

¹⁸⁷ See *Harris-Mitchell v. Ferriero*, No. 20-2617-EFM, 2022 WL 3444783, at *15 (D. Kan. Aug. 17, 2022) (describing task force report and noting “[t]he document does state that ‘[t]here is a disproportionate number of BIPOC [Black, Indigenous, and People of Color]

Court of Minnesota’s Special Redistricting Panel used the term in discussing “Minnesota’s population growth over the last decade [a]s attributable entirely to increases among Black, Indigenous, and People of Color (BIPOC), making the BIPOC population nearly a quarter of the population statewide.”¹⁹⁰ Also relying on population data, the District of Maryland used the term to acknowledge that the “Black, Indigenous, People of Color (‘BIPOC’) population of the County has increased from 27 [percent] in 2000 to 48 [percent] in 2020, and [that] the Black population in the County has increased from 20 [percent] to 32 [percent] over the same period.”¹⁹¹ Similarly, the Supreme Court of Washington, in considering whether a person’s race or ethnicity was relevant to the seizure inquiry for the purposes of state constitution, acknowledged the “disproportionate police contacts, investigative seizures, and uses of force against Black, Indigenous, and other People of Color (BIPOC).”¹⁹² Some courts have quoted other language introduced by litigants, such as the term “minoritized.”¹⁹³

B. Citizenship and Immigration Status

Language related to an individual’s national origin may implicate their citizenship or immigration status. This implication can be especially wrought, as immigration or nationality status can also connote political status and privileges. The terms “illegal,” “illegals,” or “ille-

in GS-9 and below[.]”); see also *Jackson v. Minn. Dep’t of Hum. Servs.*, No. 20-CV-749 (KMM/TNL), 2022 WL 1261690, at *9 (D. Minn. Apr. 28, 2022) (describing “charts indicating [its] target percentages for hiring BIPOC (Black, Indigenous, People of Color) employees and supervisors as well as the actual percentages of BIPOC hires”).

¹⁸⁸ *Ind. Univ. Chapter of Turning Point USA v. City of Bloomington, Ind.*, No. 1:22-cv-00458-SEB-TAB, 2022 WL 17082799, at *1 (S.D. Ind. Nov. 18, 2022) (describing city mural project as “show[ing] the BIPOC community its commitment to equity and justice” citing to “Pearson Aff. ¶ 10”); see also *Maron v. Legal Aid Soc’y*, No. 21 CIV. 5960 (KPF), 2022 WL 1910247, at *11 (S.D.N.Y. June 2, 2022) (describing the organization’s “views on how best to ‘fight for justice for [its] clients’ and ‘advocate against and litigate policies and laws that silence and oppress BIPOC and communities of color.’”).

¹⁸⁹ *Oliver v. Arnold*, 19 F.4th 843, 863 (5th Cir. 2021) (citing *Cajune v. Indep. Sch. Dist. 194*, No. 0:21-CV-01812 (D. Minn. filed Aug. 3, 2021)) (“Title VI claim alleging school committee forbade parents of ‘Japanese, Norwegian, Dutch, Irish, and so on’ ancestry to participate in event ‘focused on centering equity and bringing awareness’ to ‘the BIPOC community’”).

¹⁹⁰ *Watson v. Simon*, 970 N.W.2d 42, 47 (Minn. 2022).

¹⁹¹ *Balt. Cnty. Branch of Nat’l Ass’n for the Advancement of Colored People v. Balt. Cnty., Md.*, No. 21-CV-03232-LKG, 2022 WL 657562, at *2 (D. Md. Feb. 22, 2022), modified, No. 21-CV-03232-LKG, 2022 WL 888419 (D. Md. Mar. 25, 2022).

¹⁹² *State v. Sum*, 199 Wash. 2d 627, 631, 511 P.3d 92, 97 (2022).

¹⁹³ See *Pernell v. Fla. Bd. of Governors of State Univ. Sys.*, No. 4:22CV304-MW/MAF, 2022 WL 16985720, at *14 (N.D. Fla. Nov. 17, 2022) (quoting professor’s use of the term “minoritized students”); see also *Viewpoint Neutrality Now v. Powell*, No. 20-CV-1055 (PJS/JFD), 2023 WL 1110448, at *8 (D. Minn. Jan. 30, 2023) (citing plaintiff’s reference to the “‘minoritized identities’ [within] the college community.”).

gal immigrant” should be avoided.¹⁹⁴ It is also recommended to avoid the term “alien,” as it is often “used as a dehumanizing slur.”¹⁹⁵ Some government actors have also begun shifting their use of derogatory terms.¹⁹⁶ Instead, advocates encourage the use of alternative terms, including: “undocumented,” “unauthorized,” “non-citizens,” “without status,” or “unlawfully present.”¹⁹⁷ However, these terms may come with their own limitations and controversies. For instance, the Associated Press has observed that the term “undocumented” may be inaccurate because “[m]any illegal immigrants aren’t ‘undocumented’ at all; they may have a birth certificate and passport from their home country, plus a U.S. driver’s license, Social Security card or school ID. What they lack is the fundamental right to be in the United States.”¹⁹⁸

Courts reflect the full range of this language, using both disfavored terms¹⁹⁹ and more inclusive language, such as “undocumented”²⁰⁰ or “without legal status.”²⁰¹ At times, those references

¹⁹⁴ Monika Batra Kashyap, “*Illegal*” vs. “*Undocumented*”: A NWIRP Board Member’s Perspective, NW. IMMIGRANT RTS. PROJECT, <https://www.nwirp.org/illegal-vs-undocumented-a-nwirp-board-members-perspective/> (last visited Jan. 29, 2023).

¹⁹⁵ Nicole Acevedo, *Biden Seeks to Replace ‘Alien’ with Less ‘Dehumanizing Term’ in Immigration Laws*, NBC NEWS (Jan. 22, 2021), <https://www.nbcnews.com/news/latino/biden-seeks-replace-alien-less-dehumanizing-term-immigration-laws-n1255350> (noting “New York City and states such as California and Colorado have already taken steps to eliminate the term’s use at the local levels”).

¹⁹⁶ Maria Sacchetti, *ICE, CBP to Stop Using ‘Illegal Alien’ and ‘Assimilation’ Under New Biden Administration Order*, WASH. POST (Apr. 19, 2021), https://www.washingtonpost.com/immigration/illegal-alien-assimilation/2021/04/19/9a2f878e-9ebc-11eb-b7a8-014b14aeb9e4_story.html (“The Biden administration has ordered U.S. immigration enforcement agencies to stop using terms such as ‘alien,’ ‘illegal alien’ and ‘assimilation’ when referring to immigrants in the United States.”); see also *The Dehumanizing History of the Words We’ve Used to Describe Immigrants*, FOSTER, <https://www.fosterglobal.com/blog/the-dehumanizing-history-of-the-words-weve-used-to-describe-immigrants> (last visited Jan. 29, 2023) (“The word ‘alien’ will no longer appear in California’s labor code because it could be seen as disparaging to people not born in the United States, thanks to a new law that Gov. Jerry Brown (D) signed.”).

¹⁹⁷ Kashyap, *supra* note 194.

¹⁹⁸ *Id.* (quoting Paul Colford, *‘Illegal Immigrant’ No More*, ASSOC. PRESS (Apr. 2, 2013), <https://blog.ap.org/announcements/illegal-immigrant-no-more>).

¹⁹⁹ See, e.g., *State v. Dep’t of Com.*, No. CV 21-1523, 2022 WL 17251152, at *3 (E.D. La. Nov. 28, 2022) (“The court held that Mississippi’s assertion that DACA would cost the state money because it provides social benefits to illegal immigrants was insufficient to establish standing where it ‘submitted no evidence.’”); *United States v. Franklin*, No. CR 5:19-268-JFA, 2022 WL 16574698, at *3 (D.S.C. Nov. 1, 2022) (“[T]he defendant used her position as a law enforcement officer . . . to create and authorize fraudulent documents for illegal immigrants attempting to obtain CIS U-Visas.”).

²⁰⁰ See, e.g., *United States v. Dasilva*, No. 3:21-CR-267, 2022 WL 17242870, at *6 (M.D. Pa. Nov. 23, 2022) (“Only the Seventh Circuit has definitively found that the Second Amendment grants undocumented individuals the right to bear arms.”); *Mejia Lopez De Velasquez v. Garland*, No. 19-228, 2022 WL 17170537, at *2 (2d Cir. Nov. 23, 2022) (discussing conditions under which the “C[onvention] A[gainst] T[orture] prohibits removing an undocumented individual”); *Walsh v. Packers Sanitation Servs., Inc.*, No. 4:22-CV-3246,

have been related to the historical record,²⁰² but they have also been used in relation to the current debate over immigration.²⁰³ Whether to acknowledge an individual's immigration status and its implications is dependent on the context of a case. In a recent example, the District of Nebraska considered the role of citizenship status in granting a Temporary Restraining Order "relating to the use of child labor by the defendant, Packers Sanitation Services."²⁰⁴ In assessing irreparable harm, the court considered the impact that a lack of legal status had on the claims: "It is reasonable to infer, from the record, that many of the children and witnesses involved may be undocumented or transient, and that documentary evidence may be particularly important. It is also reasonable to infer that the possible undocumented status of children and witnesses may offer a party seeking to interfere with an investigation the sort of leverage that could be used to prevent full cooperation."²⁰⁵ Such considerations can instill respect for individuals while also providing a more complete understanding of the context of immigration status.

2022 WL 16856947, at *2 (D. Neb. Nov. 10, 2022) ("It is reasonable to infer, from the record, that many of the children and witnesses involved may be undocumented or transient, and that documentary evidence may be particularly important. It is also reasonable to infer that the possible undocumented status of children and witnesses may offer a party seeking to interfere with an investigation the sort of leverage that could be used to prevent full cooperation.").

²⁰¹ See, e.g., *United States v. Valdez-Hurtado*, No. 22 CR 466, 2022 WL 16573567, at *8 (N.D. Ill. Nov. 1, 2022) (discussing "immigrant criminal defendants without legal status"); *Zelaya v. Hammer*, No. 3:19-CV-62, 2022 WL 16757087, at *6 (E.D. Tenn. Aug. 9, 2022) ("The fact that both Named Plaintiffs do not have legal status in the United States perhaps renders them *more* typical of the class members."); *State v. Sanchez-Sanchez*, No. 110885, 2022 WL 16985847, at *31 (Ohio Ct. App. Nov. 17, 2022) ("The defense argued that Sanchez went to New York because he was in fear of being deported as he was in the country without legal status with his seven-year-old daughter.").

²⁰² See, e.g., *Jane W. v. Thomas*, 560 F. Supp. 3d 855, 883 (E.D. Pa. 2021) (referencing Alien Tort Statute, 28 U.S.C. § 1350).

²⁰³ See, e.g., *Sanchez-Sanchez*, at *3 (relaying exchange in *voire dire* to assess prospective juror bias)

[DEFENSE COUNSEL]: [I]llegal immigration has been a hot topic for the last few years. I think the judge touched on it. Would you agree?

JUROR NO. 14: Yes.

[DEFENSE COUNSEL]: You will hear rhetoric basically saying that all illegal immigrants are rapists, drug dealers or murderers?

JUROR NO. 14: Yes.

[DEFENSE COUNSEL]: You have heard it?

JUROR NO. 14: Yes.

[DEFENSE COUNSEL]: I am not saying you would agree with it?

JUROR NO. 14: Right.

[DEFENSE COUNSEL]: Some people do believe that. Do you believe that?

JUROR NO. 14: I do not believe that.

²⁰⁴ *Walsh*, at *1.

²⁰⁵ *Id.* at *2.

C. Gender and Sexual Identity

Sex is usually categorized as female or male,²⁰⁶ but there is variation in the biological attributes that comprise sex assigned at birth, which is denoted “by a doctor . . . based on the genitals you’re born with and the chromosomes.”²⁰⁷ Gender identity— “[o]ne’s innermost concept of self as male, female, a blend of both or neither”—“can be the same or different from their sex assigned at birth,” and has social and legal implications.²⁰⁸ Gender identity is also distinct from gender expression, which is the “[e]xternal appearance of one’s gender identity, usually expressed through behavior, clothing, body characteristics or voice, and which may or may not conform to socially defined behaviors and characteristics typically associated with being either masculine or feminine.”²⁰⁹ Individuals may transition when experiencing gender dysphoria, “striv[ing] to more closely align their internal knowledge of gender with its outward appearance,” socially (e.g., changing names, pronouns, or appearance) or physically (e.g., with medical intervention).²¹⁰ These concepts of gender identity and expression are further distinguishable from sexual orientation, which describes the “emotional, romantic or sexual attraction to other people.”²¹¹ There is a range of terms that can be used to denote sexual preference. Some language, like the terms “homosexual” and “transsexual,” is almost universally seen as outdated.²¹² However, the use of some terms, such as “queer,” may be more closely contested because of competing philosophies from members of the LGBTQ community as to whether to evolve language as society changes or to

²⁰⁶ The terms “womxn” and “womyn” have been used as alternative spellings for “woman” or “women” “to avoid the suggestion of sexism perceived in the sequences m-a-n and m-e-n, and to be inclusive of trans and nonbinary women.” Joni Weiss, *Womxn vs Women*, UTAH PRIDE CTR., <https://utahpridecenter.org/womxn-vs-women/> (last visited Jan. 29, 2023). Case search for “womxn” yielded no results on Westlaw. A search for the term “womyn” provided limited results. See *Biometrics, LLC v. New Womyn, Inc.*, 112 F. Supp. 2d 869 (E.D. Mo. 2000) (appearing as party name); *Century HLM, LLC v. Cardio-Quip, LP*, No. 4:19 CV 2608 DDN, 2020 WL 709246, at *3 (E.D. Mo. Feb. 12, 2020) (citing case name); *Farmers Ins. Exch. v. Michigan Ins. Co.*, No. 298984, 2011 WL 4949689, at *1 (Mich. Ct. App. Oct. 18, 2011) (noting event name of the “Michigan Womyn’s Music Festival”).

²⁰⁷ *Sex and Gender Identity*, PLANNED PARENTHOOD, <https://www.plannedparenthood.org/learn/gender-identity/sex-gender-identity> (last visited Jan. 29, 2023).

²⁰⁸ *Sexual Orientation and Gender Identity Definitions*, HUM. RTS. CAMPAIGN, <https://www.hrc.org/resources/sexual-orientation-and-gender-identity-terminology-and-definitions> (last visited Jan. 29, 2023).

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *But see Bostock v. Clayton Cnty., Ga.*, 140 S. Ct. 1731, 1741 (2020) (“[I]t is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.”).

reclaim the use of historical terms.²¹³

For starters, individuals and courts can avoid gendered references.²¹⁴ The use of the male-female dichotomy may be inapt. For instance, one plea bargain agreement contained references to “he/she” or “his/her”; however, a prospective criminal defendant may not identify with either pronoun, setting up a false dichotomy.²¹⁵ Such language in the general recitation of the law, as opposed to when referring to specific parties, is unnecessarily limiting.²¹⁶ Relatedly, general gendered references, such as in salutations or regarding family structure should also be avoided. Instead, opt for inclusive greetings (e.g., “hello everyone” instead of “greetings ladies and gentlemen” or “hey guys”) and replace gendered terms such as “mom” and “dad” with labels such as “parent” or “caregiver” that do not denote gender or a particular biological relationship. This shift similarly promotes the inclusion of a range of family structures and child-rearing arrangements, not only for LGBTQ individuals.²¹⁷ The use of gender-neutral terms in professional spaces is similarly encouraged, such as the use of “chairperson,” “council member,” or “postal worker.”

Courts can default to gender-neutral pronouns when the identity

²¹³ *Using LGBTQ+ Inclusive Language*, PROWRITINGAID, <https://prowritingaid.com/lgbt-inclusive-language> (last visited Jan. 29, 2023); Juliette Rocheleau, *A Former Slur Is Reclaimed, and Listeners Have Mixed Feelings*, NPR (Aug. 21, 2019), <https://www.npr.org/sections/publiceditor/2019/08/21/752330316/a-former-slur-is-reclaimed-and-listeners-have-mixed-feelings>.

²¹⁴ The use of gender-inclusive language has become more prevalent in the reproductive rights movement, for instance, because “LGBTQ people need access to reproductive health care, including contraception, abortion, assisted reproductive services, HIV care, pregnancy care, parenting resources, and more.” *Queering Reproductive Health, Rights & Justice*, NAT’L LGBTQ TASK FORCE, <https://www.thetaskforce.org/reproductive-justice/> (adopting term “pregnant person”).

²¹⁵ *Rowe v. State*, No. CACR03-522, 2004 WL 1465814, at *1 (Ark. Ct. App. June 30, 2004) (“[B]y entering a plea of guilty herein, he/she waives and gives up (a) his/her right to persist in a plea of not guilty, (b) his/her right to remain silent and not to testify against himself/herself, (c) his/her right to be confronted with witnesses against him/her and to cross-examine such witnesses under oath, (d) his/her right to compel witnesses to testify in his/her behalf, (e) his/her right to a jury trial to determine his/her guilt, (f) his/her right to appeal his/her conviction herein and (g) any and all objections to the proceedings herein against him/her.”) (original emphasis omitted).

²¹⁶ *See, e.g., O’Neill v. Neusch*, No. A-4925-17T2, 2019 WL 4071977, at *3 (N.J. Super. Ct. App. Div. Aug. 29, 2019) (“The model jury charge explains a host’s duty to a social guest: ‘A social guest is someone invited to his/her host’s premises. The social guest must accept the premises of his/her host as he/she finds them. In other words, the host has no obligation to make his/her home safer for his/her guest than for himself/herself. The host also is not required to inspect his/her premises to discover defects that might cause injury to his/her guest.’”) (citing Model Jury Charges (Civil), 5.20F, “Duty Owed – Condition of Premises” (approved Mar. 2000)).

²¹⁷ *Inclusive and Gender-Neutral Language*, NAT’L INST. HEALTH (Oct. 20, 2022), <https://www.nih.gov/nih-style-guide/inclusive-gender-neutral-language>.

of a litigant, attorney, or other person is unclear.²¹⁸ Individuals may use²¹⁹ “they/them/theirs” pronouns or a gender-neutral honorific, like “Mx.” (pronounced “mix”).²²⁰ This information can be included to denote respect even when not directly related to the claims at issue,²²¹ but this information may be dispositive to some claims.²²² The use of “they/them”²²³ has been accepted as a singular pronoun, consistent with dictionary use and commonly-referenced style guides;²²⁴ however, even when used to refer to a singular individual, it follows the same grammar conventions as “they” in its plural form (i.e., “they are suing” versus “they is suing”), which can add ambiguity or confusion.²²⁵ This transition in language, as evidenced by dictionary changes and popular use, is also reflected in legal scholarship that can be cited in support of this inclusive language reform.²²⁶ Courts should adopt

²¹⁸ *Perry v. White*, No. 2:22-CV-00477-TL, 2022 WL 1909020, at *1 (W.D. Wash. June 3, 2022) (“Plaintiff’s sex or gender is unclear from the pleadings. Therefore, the Court uses the gender-neutral pronoun ‘they/them’ to refer to Plaintiff.”).

²¹⁹ A.C. Fowlkes, *Why You Should Not Say ‘Preferred Gender Pronouns,’* FORBES (Feb. 27, 2020), <https://www.forbes.com/sites/ashleefowlkes/2020/02/27/why-you-should-not-say-preferred-gender-pronouns/?sh=7a89b0fc1bd6> (noting “the phrase ‘preferred gender pronouns,’ while well-intended, gives the impression that pronouns other than the ones specified are acceptable” and recommending to “drop the word ‘preferred’”).

²²⁰ *Rudler v. MLA L. Offs., Ltd.*, No. 19-CV-2170 (EK) (LB), 2021 WL 4398087, at *2 (E.D.N.Y. Sept. 27, 2021) (incorporating “they” seamlessly above the line and including footnote that explained “Plaintiff’s July 16, 2021 filing in opposition to Defendants’ Objections identifies they/them/their as Mx. Green’s preferred pronouns.”).

²²¹ See, e.g., *Matter of O. K.*, 517 P.3d 1044, 1047 (2022) (including footnote in a custody/permanency hearing that acknowledged “J uses the personal pronouns he/him or they/them. Accordingly, we will use they/them in this opinion.”).

²²² *L.O.K. by & through Kelsey v. Greater Albany Pub. Sch. Dist. 8J*, No. 6:20-CV-00529-AA, 2022 WL 2341855 (D. Or. June 28, 2022) (analyzing school discrimination allegations under the Fourteenth Amendment of the U.S. Constitution, Title IX, and related claims) (“Plaintiff L.O.K. is a twelve-year-old child who is intersex and non-binary. L.O.K. Decl. ¶ 1. ECF No. 34. Plaintiff uses they/them pronouns. L.O.K. Decl. ¶ 1.”).

²²³ Some individuals identify by more than one set of pronouns (e.g., “she/they” or “he/they”). “Rolling pronouns refer to the use of multiple pronouns that can be used alternately or shift over time. Typically, people who prefer using multiple sets of pronouns also encourage others to rotate through all of them or mix them around when speaking to or referring to them.” *Why some people use she/they & he/they pronouns*, LGBTQ NATION (May 30, 2022), <https://www.lgbtqnation.com/2022/05/people-use-pronouns/>.

²²⁴ *Dyjak v. Wilkerson*, No. 21-2012, 2022 WL 1285221, at *1 (7th Cir. Apr. 29, 2022) (“Dyjak uses they/them/their pronouns in the briefs and motions in this case, and we have followed suit. We note in this connection that, despite the potential for some confusion about the singular and the plural, this usage of ‘they/them/their’ has now been accepted by numerous style guides and dictionaries as appropriate in referring to a singular person of unknown or non-binary gender.”) (citing *MLA Handbook* § 3.5 (9th ed. 2021); *Am. Psychological Ass’n, A Publication Manual* § 4.18 (7th ed. 2020); *Associated Press Stylebook* (55th ed. 2020)).

²²⁵ *Singular “They,”* AM. PSYCH. ASS’N (July 2022), <https://apastyle.apa.org/style-grammar-guidelines/grammar/singular-they> (“Use a plural verb form with the singular pronoun ‘they.’”).

²²⁶ *People v. Gobrick*, No. 352180, 2021 WL 6062732, at *1 (Mich. Ct. App. Dec. 21,

clearer rules to guide litigants and counsel in adapting to these evolving linguistic changes,²²⁷ and seek to minimize records references that use disfavored or inaccurate terms.²²⁸ Other government actors should similarly incorporate gender-neutral terminology.²²⁹

D. Disability and Medical Conditions

When describing individuals with health conditions,²³⁰ the people-first approach centers the individual (“people with disabilities”) instead of focusing on the condition (“disabled person”).²³¹ However, subcommunities may differ or individuals may seek to center this aspect of their personhood with an identity-first framing.²³² For exam-

2021) (citing Merriam-Webster Dictionary, American Physiological Association, Michigan Bar Journal, and ABA Journal in footnote adoption the use of they/them pronouns).

²²⁷ *Id.* (noting “this Court does not yet have an official policy in regard to the use of preferred pronouns”).

²²⁸ *Id.* (explaining that “apart from references to the record that use the pronouns he/him, we use the they/them pronouns where applicable”).

²²⁹ Compare Chris Micheli, *What is Gender-Neutral Legislative Drafting?*, Cal. Globe (Nov. 3, 2020) <https://californiaglobe.com/articles/what-is-gender-neutral-legislative-drafting/> (“expanding the use of the word ‘they’ to include its use as a singular pronoun”) with *Bill Drafting Manual*, Ky. General Assembly (Nov. 2021), <https://legislature.ky.gov/LRC/Publications/Informational%20Bulletins/IB117.pdf> (“[U]sing the masculine pronouns to cover all persons can and should be avoided by drafting in a way to avoid the pronoun, by repeating the noun instead of using a pronoun, or by using—in moderation—both masculine and feminine pronouns together (‘he or she,’ ‘him or her,’ ‘his or her.’)”; see also Donald L. Revell & Jessica Vapnek, *Gender-Silent Legislative Drafting in a Non-Binary World*, 48 CAPITAL UNIV. L. REV. 103, 104 (2020).

²³⁰ This section does not address all of the practical or ethical considerations that may be raised in the course of representing a person with a disability. This could include providing physical adaptations in meeting spaces, ensuring documents are accessible to adaptive technology tools, and adapting to communication preferences. See Derek J. Dittmar, *Disability Access in the Practice of Law – Begin Making Your Law Firms More Accessible for Disabled Employees and Clients with this Simple Checklist*, N.C. BAR BLOG (May 16, 2022), <https://ncbarblog.com/disability-access-in-the-practice-of-law-begin-making-your-law-firms-more-accessible-for-disabled-employees-and-clients-with-this-simple-checklist/>. This could also manifest when assessing a client’s competency and decision-making. See Robert Rubinson, *Constructions of Client Competence and Theories of Practice*, 31 ARIZ. ST. L.J. 121 (1999). Such questions, however, are beyond the scope of this project.

²³¹ *People First Language*, OFFICE OF DISABILITY RTS, D.C., <https://odr.dc.gov/page/people-first-language> (last visited Jan. 29, 2023) (“‘People First Language’ (PFL) . . . uses phrases such as ‘person with a disability,’ ‘individuals with disabilities,’ and ‘children with disabilities,’ as opposed to phrases that identify people based solely on their disability, such as ‘the disabled.’ The phrase ‘mental retardation’ is offensive and outdated. The terms ‘developmental disability,’ ‘cognitive disability,’ or ‘intellectual disability’ may be substituted as more respectful options.”).

²³² See *What Is the Difference Between a Person Who Is “deaf,” “Deaf,” or “Hard of Hearing”?*, THUNDER BAY REG’L HEALTH SCI. CTR. (Mar. 2015), https://tbrhsc.net/wp-content/uploads/2015/03/sign_language.pdf; see also Amanda Taboas, Karla Doepke & Corinne Zimmerman, *Short Report: Preferences for Identity-First Versus Person-First Language in a US Sample of Autism Stakeholders*, NAT’L AUTISTIC SOC’Y (Oct. 13, 2022), <https://doi.org/10.1177/13623613221130845> (reporting that a majority of surveyed “[a]utistic

ple, a Deaf person²³³ may prefer that framing—rather than using the phrase “a person who is deaf”—because it is specific to individuals who “are members of a cultural/linguistic group whose language is a signed language . . . [and who] have inherited their sign language, use it as a primary means of communication among themselves, and hold a set of beliefs about themselves and their connection to the larger society.”²³⁴ And, at the time of this writing, there is a growing trend in the disability community towards identity-first language, recognizing that people-first language could indicate that the identity is something of which to be ashamed.²³⁵ As Lisa Egan put it: “No one has ever told me that I should describe myself as a ‘person with gayness’ or a ‘person with womanliness.’ I’m gay and I’m a woman—no need to qualify that I’m a person too.”²³⁶ This emerging backlash to people-first language underscores the ongoing evolution and contestation of language.

When analyzing disability-related issues, the communicator will need to choose an appropriate level of specificity or generality. It may be advisable to refer to a specific disability or condition, or to obscure it by not including sensitive personal information that works against the person’s interests or preferences. Differences in degree or condition may also be denoted by the term selected: for instance, “visual impairment” may denote a different level of visual ability than “blind.” Both may be appropriate, but blind may be used to refer to a specific medical or legal standard.²³⁷ As noted, terms that carry negative associations or that reduce a person to their illness, like the term “addict,” should also be avoided, opting for alternative language such as “person with a substance use disorder.”²³⁸ When possible, it is pref-

adults preferred to self-identify using identity-first language (87%)”.

²³³ *Interpreter Etiquette & the Do’s and Don’ts of Working with an Interpreter*, Office of Court Interpreting Services, D.C. CTS. (Apr. 8, 2022), <https://www.dccourts.gov/sites/default/files/divisionspdfs/Dos-and-Donts-When-Working-With-an-Interpreter.pdf> (describing recommended practices for working with interpreters assisting individuals with Limited English Proficiency or Deaf persons).

²³⁴ THUNDER BAY REG’L HEALTH SCI. CTR., *supra* note 232.

²³⁵ *Identity-First Language*, AUTISTIC SELF ADVOC. NETWORK, <https://autisticadvocacy.org/about-ASAN/identity-first-language/> (last visited Jan. 29, 2023).

²³⁶ Lisa Egan, *I’m Not a Person with a Disability. I’m a Disabled Person*, EVERYDAY FEMINISM (Dec. 17, 2012), <https://everydayfeminism.com/2012/12/im-not-a-person-with-a-disability/>.

²³⁷ Troy Bedinghaus, *What Is the Meaning of Legally Blind*, VERYWELL HEALTH (Oct. 12, 2022), <https://www.verywellhealth.com/what-does-it-mean-to-be-legally-blind-342192> (“If you are deemed ‘legally blind’ it means your central visual acuity—the part of your vision that allows you to see straight ahead—is 20/200 or less in your better eye when wearing corrective lenses or your field of vision is no more than 20 degrees.”).

²³⁸ *Words Matter - Terms to Use and Avoid When Talking About Addiction*, NAT’L INST. ON DRUG ABUSE, NAT’L INST. HEALTH (Nov. 29, 2021), <https://nida.nih.gov/nidamed-medical-health-professionals/health-professions-education/words-matter-terms-to-use-avoid->

erable to adopt a positive framing (“accessible restroom”) as opposed to a deficit framing (“handicapped parking spot”).²³⁹

As previously discussed, many metaphors and idioms contain ableist language that can be derisive to individuals with certain health conditions.²⁴⁰ In addition to the terms “insane,” “psycho,” “lame,” “moronic,” and “crazy,”²⁴¹ terms like “spastic,” “nuts,” and “idiot” should be generally avoided, but especially when describing mental health conditions.²⁴² The use of “lame,” “cripple,” or “gimpy” “reinforce[s] negative perceptions of people with mobility disorders.”²⁴³ This language may be infused into modern expressions—“crippling fines,” “handicapped our ability to respond,” and “blinded to the obvious,” to name a few—that present a similar slight, even when not being used to describe individuals with those conditions.²⁴⁴ Avoid framing someone’s condition as limiting or pitying, such as “confined to,” “afflicted,” or “suffered from”; but also avoid superhero framing, such as “overcame” or “fought.”²⁴⁵ Some terms may be charged with a particular sexist or racist history, as evidenced by the sexist origins of “hysterical”²⁴⁶ or the stigmatization of those who contracted monkeypox, which prompted a name change to “mpox” to curb negative

when-talking-about-addiction (advising against the use of the terms “junkie,” “user,” “abuser,” “drunk,” and “habit,” among others; providing a list of recommended terms, including “person in recovery or long-term recovery,” “person who misuses alcohol/engages in unhealthy/hazardous alcohol use,” and “person is in active use”).

²³⁹ *Is It Okay for Non-Disabled People to Use Accessible Bathroom Stalls?*, HIE HELP CTR., <https://hiehelpcenter.org/2018/03/19/okay-non-disabled-people-use-accessible-bathroom-stalls/> (last visited Jan. 29, 2023).

²⁴⁰ See *supra* Section II.H (including the example “blind spot”).

²⁴¹ See Torres, *supra* note 99.

²⁴² *Guidance on Inclusive Language*, NAT’L COLLEGIATE ATHLETIC ASS’N (Nov. 10, 2022), at 6, https://ncaaorg.s3.amazonaws.com/inclusion/bestprac/NCAAINC_GuideInclusiveLanguage.pdf.

²⁴³ *Id.*

²⁴⁴ See Drew Dakessian, *Ableist Language & Phrases That You May Unknowingly Use*, WORLD INST. FOR DISABILITY (Oct. 27, 2021), <https://wid.org/ableist-language-phrases-that-you-may-unknowingly-use/> (listing “You’re acting bipolar”; “I’m so OCD/ADHD”; “Fall on Deaf ears”; “Turn a Blind eye.”; “Wheelchair bound”).

²⁴⁵ *Id.* (explaining that telling an individual with a disability that they are “inspirational” can be offensive as it “give[s] the impression that having a disability is the sole thing that defines a disabled person . . . [and that] you find disabled people inspiring just by virtue of their disabilities suggests that they’re inherently limited”). *Id.*

²⁴⁶ Shalome Sine, *On the Sexist Et[ym]ology of “Hysteria,” and What Academia Did About It*, MEDIUM (Sept. 18, 2015), <https://medium.com/@peacelovetrig/on-the-sexist-etymology-of-hysteria-and-what-academia-did-about-it-ef98815ddb6c> (“Hysteria comes from the Greek root hystera, meaning ‘uterus.’ Originally, it was believed that hysteria and hysterical symptoms were caused by a defect in the womb, and thus, only women could become hysterical. . . . Hysteria has been an official diagnosis in psychology. . . . Men could not be diagnosed with hysteria because they did not have wombs. Besides, they were supposed to be too strong for these ‘womanly’ diseases. In turn, they could not (or would not) be treated for their psychological distress.”).

association.²⁴⁷

Courts have often used language inappropriately in the context of medical conditions. Take, for instance, the use of the term “schizophrenic” to mean contradictory or illogical outcomes; although this colloquial use is exclusionary, it has been used—incorrectly—by a number of courts.²⁴⁸ Even when the term is used in the appropriate medical context, courts have not always adopted a person-first framing, although some language conforms to these considerations.²⁴⁹ As noted with respect to other identities,²⁵⁰ offensive language may appear as a factual or legal element of a case.²⁵¹ Language with a negative connotation, like the pejorative uses of the terms “retard” or “retarded,” can be triggering even when used in non-medical contexts,²⁵² but their use in legal spaces persists.²⁵³ Courts should con-

²⁴⁷ *WHO Recommends New Name for Monkeypox Disease*, WORLD HEALTH ORG. (Nov. 28, 2022), <https://www.who.int/news/item/28-11-2022-who-recommends-new-name-for-monkeypox-disease> (“When the outbreak of monkeypox expanded earlier this year, racist and stigmatizing language online, in other settings and in some communities was observed and reported to W[orld] H[ealth] O[rganization].”)

²⁴⁸ See, e.g., *Wilbers v. Moneta Grp. Inv. Advisors, Inc.*, No. 406CV00005 ERW, 2006 WL 1360866, at *2 (E.D. Mo. May 17, 2006) (“Although the Supreme Court has indicated the broad scope of the phrase, [t]hat locution is not self-defining, and the Justices have been at least mildly schizophrenic in mapping its contours.”) (quoting *Minn. Chapter of Associated Builders and Contractors, Inc. v. Minn. Dep’t of Pub. Safety*, 267 F.3d 807, 811–12 (8th Cir. 2001)); *State v. Eaddy*, No. A-5219-03T1, 2006 WL 3751313, at *3 (N.J. Super. Ct. App. Div. Dec. 22, 2006) (“Defense counsel, in his opening statement, characterized the State’s case as a ‘schizophrenic prosecution.’”); *Brodeur v. McNamee*, No. 3:02-CV-823 NAM/DEP, 2005 WL 1774033, at *2 (N.D.N.Y. July 27, 2005) (describing “schizophrenic approach” of courts on a legal question).

²⁴⁹ See, e.g., *In re Newton*, No. 350554, 2020 WL 1816031, at *1 (Mich. Ct. App. Apr. 9, 2020) (noting respondent’s “spouse, [] is a diagnosed schizophrenic suffering from post-traumatic stress disorder”); compare *Naumann v. Kijakazi*, No. 4:20-CV-1048-MTS, 2022 WL 670134, at *5 (E.D. Mo. Mar. 7, 2022) (describing “[p]laintiff’s symptoms from schizophrenia and bipolar disorder”).

²⁵⁰ See *infra* Section IV.A (Race and Ethnicity).

²⁵¹ See, e.g., *Walker-Swinton v. Philander Smith Coll.*, No. 4:18-CV-00886-KGB, 2021 WL 1227847, at *13 (E.D. Ark. Mar. 31, 2021) (alleging teacher “called [student] a ‘f---ing retard’”); *Wager v. G4S Secure Integration, LLC*, No. 19CV3547MKVKNF, 2021 WL 4311373, at *1 (S.D.N.Y. Sept. 21, 2021).

²⁵² *Rodgers v. Trate*, No. 1:19-CV-000207, 2020 WL 1308181, at *5 (W.D. Pa. Mar. 19, 2020) (“A Commissioner may retard a parole date for purposes of release planning for up to 120 days without a hearing.”) (quoting 28 C.F.R. § 2.83(d)).

²⁵³ See *Brookins v. State*, 315 Ga. 86, 86 n.1 (2022) (“At the time of Brookins’s trial in 2007, both Georgia law and the mental health profession used the term ‘mental retardation’ rather than the now-preferred term of ‘intellectual disability.’ See *Hall v. Florida*, 572 U. S. 701, 704 (I), 134 S.Ct. 1986, 188 L.Ed.2d 1007 (2014) (noting the change in terminology); OCGA § 17-7-131 (as amended in 2017 by Ga. L. 2017, p. 471, § 3). We use both terms in this opinion, using ‘intellectual disability’ when speaking in general terms and using ‘mental retardation’ in our discussion, particularly in our quotations, of the specific proceedings below and the law that applied at that time.”); see also *Ochoa v. Davis*, 50 F.4th 865, 902 (9th Cir. 2022) (“Under California law, ‘[t]o state a prima facie claim for relief, the petition must contain “a declaration by a qualified expert stating his or her opin-

tinue to opt for the most inclusive terminology, adopting language that is respectful, people-centric, and responsive to individual preferences.²⁵⁴

E. Status or Affiliation

1. Survivor or Victim

There is an ongoing discussion regarding the use of the term “victim” or “survivor” to describe those affected by crime.²⁵⁵ “The term ‘victim’ typically refers to someone who has recently experienced a sexual assault,” “is commonly used when discussing a crime or when referencing the criminal [] system” and carries legal connotations.²⁵⁶ However, the term may be considered weighted, potentially “imply[ing] weakness, assum[ing] guilt, or assign[ing] blame,” even if those meanings are not inherent to the term.²⁵⁷ By contrast, “[t]he term [‘]survivor[’] often refers to an individual who is going or has gone through the recovery process” and “is used when discussing the short- and long-term effects of [] violence,”²⁵⁸ although the term also has unrelated meanings, such as its use in estate law when discussing “survivors and heirs.”²⁵⁹

The use of victim and survivor terminology is particularly charged for individuals who have experienced sexual assault, domestic violence, intimate partner abuse, or other related abuse or mistreatment. Many groups adopt the use of both terms to encompass all individu-

ion that the petitioner is mentally retarded” and ‘the declaration must explain the basis for the assessment of mental retardation in light of the statutory standard.’ *In re Hawthorne*, 35 Cal. 4th 40, 47, 24 Cal.Rptr.3d 189, 105 P.3d 552 (2005).”); *but see State v. Lotter*, 311 Neb. 878, 891, 976 N.W.2d 721, 733 (2022) (explaining “[t]he clinical term ‘mental retardation’ has since been changed to ‘intellectual disability’” and citing Florida law, American Psychiatric Association diagnostic manual, and law review article in the footnote supporting this change).

²⁵⁴ See, e.g., *Ex parte Segundo*, No. WR-70,963-02, 2022 WL 1663956, at *5 (Tex. Crim. App. May 25, 2022) (using the term “intellectual disability”); *United States v. Mosley*, 277 F. Supp. 3d 1294, 1299 (M.D. Ala. 2017) (describing “substance-abuse disorders”).

²⁵⁵ See, e.g., *Victims & Survivors*, Crime Victim and Survivor Services Division, OR. DEP’T OF JUST., <https://www.doj.state.or.us/crime-victims/> (last visited Jan. 29, 2023) (describing eligibility for compensation “[p]rogram [] created to assist victims of violent crime with expenses associated with the crime. . . includ[ing] domestic violence, sexual assault, child abuse, robbery, assault, homicide, or other compensable crime resulting in a physical or psychological injury”).

²⁵⁶ VICTIM OR SURVIVOR: TERMINOLOGY FROM INVESTIGATION THROUGH PROSECUTION, SEXUAL ASSAULT KIT INITIATIVE, at 1, <https://sakitta.org/toolkit/docs/Victim-or-Survivor-Terminology-from-Investigation-Through-Prosecution.pdf> (last visited Jan. 29, 2023).

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ *Est. of Henkin v. Kuveyt Turk Katilim Bankasi, A.S.*, 495 F. Supp. 3d 144, 152 (E.D.N.Y. 2020).

als,²⁶⁰ and affected individuals may embrace the use of both labels or prefer one over the other.²⁶¹ The term “[v]ictim-survivor has been used to express the intersectional experiences of the most marginalized groups affected by sexual assault, violence, and abuse[,] such as Black cis-women, Black trans-women, and gender non-conforming folks of color who have herstorically never been seen as victims in the eyes of culture, community, or the law.”²⁶² Other people-first labels, such as “people who have experienced abuse” or “people subjected to intimate partner violence,” may also be used.²⁶³

Courts have used a similar panoply of terms. Victim²⁶⁴ and survivor²⁶⁵ are both commonplace. At times, it may be appropriate to use one, such as when citing direct language from a witness or source ma-

²⁶⁰ SEXUAL ASSAULT KIT INITIATIVE, *supra* note 256, at 1; see *Mission, CTR. FOR VICTIM & SURVIVOR SERVS.*, <https://victimsofcrime.org/nvcvs-center-for-victim-survivor-services/> (last visited Jan. 29, 2023) (“Center for Victim & Survivor Services’ (CVSS) mission is to promote safety, healing, and justice for victims and survivors of crime by meeting their individualized needs, upholding victims’ rights, and enhancing community and national responses to harm.”); see also *NWLC Asks Appeals Court to Revive Title IX Legal Battle on Behalf of Student Survivor*, NAT’L WOMEN’S L. CTR. (Oct. 25, 2021), <https://nwlc.org/nwlc-asks-appeals-court-to-revive-title-ix-legal-battle-on-behalf-of-student-survivor/> (referring to “a student survivor’s case” and dispelling the myth that “consent can be determined by a victim’s behavior before or after an assault”).

²⁶¹ SEXUAL ASSAULT KIT INITIATIVE, *supra* note 256, at 1 (“Survivor is a term that empowers me and allows me to communicate that I have been through an ordeal, but I have come out the other end. I certainly do use the term victim, especially when I am describing the assault itself. I use the term victim to express that this crime is horrific, life changing, affects everyone that is near and dear to me.”).

²⁶² *Survivor, Victim, Victim-Survivor*, UPSETTING RAPE CULTURE, <https://upsetting-grapeculture.com/survivor-victim/> (last visited Jan. 29, 2023).

²⁶³ Leigh S. Goodmark, “*Law and Justice are not Always the Same*”: *Creating Community-Based Justice Forums for People Subjected to Intimate Partner Abuse*, 42 FLA. STATE UNIV. L. REV. 707, 707 (2015).

²⁶⁴ See, e.g., *State in Int. of L.R.*, No. 2021-C-0141, 314 So. 3d 1139, 1141 (La. App. 4 Cir. 2021) (“The issue before this Court, is the extent of a victim’s right to be heard in a juvenile court proceeding: specifically, whether the victim of a delinquent act has standing to petition or motion a juvenile court to act.”); *People v. Dais*, 119 N.Y.S.3d 87, 88 (N.Y. App. 1st Dep’t 2020) (“The court providently exercised its discretion in declining to strike the testimony of the victim, who was the People’s main witness, based on his numerous invocations of his privilege against self-incrimination.”); *Montgomery v. State*, 291 So. 3d 170, 173 (Fla. Dist. Ct. App. 2020) (considering whether “the trial court erred in permitting the victim to testify regarding injuries caused by [petitioner]’s codefendant”).

²⁶⁵ See, e.g., *Fox v. State*, 640 S.W.3d 744, 753 (Mo. 2022) (discussing state’s assertion that “preventing sexual assault survivors from incurring secondary trauma due to interactions with the criminal justice system [wa]s a[] compelling interest”); *Doe v. FedEx Ground Package Sys., Inc.*, No. 3:21-CV-00395, 2021 WL 5041286, at *7 (M.D. Tenn. Oct. 29, 2021) (quoting expert describing observed symptoms as “consistent with the experiences of sexual assault survivors I have treated”); *Nw. Immigrant Rts. Project v. U.S. Citizenship & Immigr. Servs.*, 496 F. Supp. 3d 31, 43 (D.D.C. 2020) (discussing impacts of an immigration rule change that will require “[s]urvivors of crime will now have to pay \$1,485 to seek permission for their children or spouses to join or to stay with them in the United States, more than six times the current fee”).

terial.²⁶⁶ A recent case in New York federal court discussing the “re-present[ations] [made] to victims-survivors . . . of clergy child sexual abuse” reflects the use of both terms in parallel.²⁶⁷ In another federal case in Louisiana, both terms were used to characterize the plaintiff: “a child abuse victim and sexual assault survivor.”²⁶⁸

2. *Involvement with the Criminal Legal System*

Advocates have eschewed the term “criminal justice” because of the system’s “clear mistreatment of Black people” and wrongful treatment of “those experiencing poverty, mental illness, housing instability, and drug issues” as antithetical to a “just” system.²⁶⁹ In addition, disparities in policing, enforcement, and punishment of offenses have perpetuated inequality in criminal lawmaking and incarceration.²⁷⁰ Moreover, barriers to social reintegration, like “fines, fees, and restrictions on employment and housing that make it hard for people who have been convicted of crimes to earn a legal living . . . results in a cycle of incarceration that is hard to escape.”²⁷¹ As a result, “‘criminal justice system’ is a misnomer” that implicitly perpetuates false notions about the system’s equity.²⁷²

It is also advised to separate the crime from the person. This means avoiding the use of reductive terms like “felon,” “convict,” or “inmate”²⁷³—especially when considering that many individuals who are incarcerated have not been convicted of a crime.²⁷⁴ Similarly, terms conveying moral judgment (e.g., “the bad guys”) should be avoided. Criminal history may not be necessary to include in all contexts and may not need to be disclosed if it is irrelevant, especially if it could promote bias or disclose someone’s status. As with other identi-

²⁶⁶ *Fredin v. Middlecamp*, 500 F. Supp. 3d 752, 766 (D. Minn. 2020) (“The power of sharing. Within hours of the stalking post going up, a rape survivor comes forward. He remains free.”) (quoting Pl.’s Opp’n to Summ. J. [Doc. No. 188] at 10; Am. Compl. [Doc. No. 5] ¶ 20).

²⁶⁷ See, e.g., *Caldwell v. Archdiocese of N.Y.*, No. 20-CV-1090 (VSB), 2021 WL 1999421, at *1 (S.D.N.Y. May 19, 2021).

²⁶⁸ *Upton v. Vicknair*, No. CV 21-407, 2021 WL 2635460, at *2 (E.D. La. June 25, 2021).

²⁶⁹ Erica Bryant, *Why We Say “Criminal Legal System,” Not “Criminal Justice System,”* VERA INST. (Dec. 1, 2021), <https://www.vera.org/news/why-we-say-criminal-legal-system-not-criminal-justice-system>.

²⁷⁰ *Id.*

²⁷¹ *Id.*

²⁷² *Id.*

²⁷³ Akiba Solomon, *What Words We Use—and Avoid—When Covering People and Incarceration*, MARSHALL PROJECT (Apr. 12, 2021), <https://www.themarshallproject.org/2021/04/12/what-words-we-use-and-avoid-when-covering-people-and-incarceration>.

²⁷⁴ Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2022*, PRISON POL’Y INITIATIVE (2022), https://www.prisonpolicy.org/graphs/pie2022_jail_detail.html.

ties,²⁷⁵ adopting people-first language, including the following alternative terms, can promote respect for those who are detained in U.S. prisons and jails: “incarcerated people”; “imprisoned people”; “people in prison/jail”; “people jailed in X facility”; “John Doe, who was incarcerated at F[ederal] C[orrectional] I[nstitute]”; “Jane Doe, who is serving 12 years in [] State Prison.”²⁷⁶ This logic applies widely to a range of terms, such as “offender,” “parolee,” or “probationer,” among others.²⁷⁷ Some individuals may eschew these terms because they oppose “using the terminology of the powerful to abolish systems of control”;²⁷⁸ however, others may find the use of this language necessary (e.g., “incarcerated people” versus “people inside”) because of the weighted connotation of these terms, in an effort to avoid sanitizing issues related to mass incarceration.²⁷⁹

There may be contention around the use of certain terms. For instance, while some favor the term “returning citizen,”²⁸⁰ others have opted to use “formerly incarcerated people” because, while the “term resonates with many of the formerly incarcerated people we encounter, it is unclear in multiple contexts, including immigration status and nationality.”²⁸¹ There could also be variation in individual preference with regard to the use of these labels.²⁸²

Courts routinely use now-disfavored but deeply entrenched terms to refer to the criminal legal system.²⁸³ The use of some terms can be distancing or dehumanizing.²⁸⁴ Yet some have adopted the use of more favored terms, including “criminal legal system”²⁸⁵ and “incar-

²⁷⁵ See *supra* Section IV.D (Disability and Medical Conditions).

²⁷⁶ Solomon, *supra* note 273.

²⁷⁷ *Id.*

²⁷⁸ Alexandra Cox, *The Language of Incarceration*, 1 INCARCERATION 1, 2 (July 9, 2020), <https://journals.sagepub.com/doi/10.1177/2632666320940859>.

²⁷⁹ *Id.* at 1 (“Why pretend these words don’t seize our breath?/Prisoner, inmate, felon, convict.”) (quoting Reginald Dwayne Betts, *Felon: Poems* (2019)); see also Nguyen Toan Tran, Stéphanie Baggio, Angela Dawson, Éamonn O’Moore, Brie Williams, Precious Bedell, Olivier Simon, Willem Scholten, Laurent Getaz & Hans Wolff, *Words Matter: A Call for Humanizing and Respectful Language to Describe People Who Experience Incarceration*, BMC INT’L HEALTH & HUMAN RTS. (Nov. 16, 2018).

²⁸⁰ *Returning Citizen Stories*, FLA. RTS. RESTORATION COAL., <https://floridarcc.com/stories/> (last visited Jan. 29, 2023).

²⁸¹ Solomon, *supra* note 273.

²⁸² *Id.*

²⁸³ See, e.g., *Johnson v. Governor of State of Fla.*, 405 F.3d 1214, 1216 (11th Cir. 2005) (discussing “challenge to Florida’s felon disenfranchisement law”); *Martinez v. State*, 1989-NMSC-026, ¶ 1, 108 N.M. 382, 383, 772 P.2d 1305, 1306 (stating that “meritorious deductions may not shorten the basic thirty-year term of capital felons”).

²⁸⁴ *Alaniz v. Funk*, 1961-NMSC-140, ¶ 2, 364 P.2d 1033, 1033 (questioning “whether a jury question was involved in the case of a deputy sheriff’s killing a suspected felon in order to effect an arrest”).

²⁸⁵ See, e.g., *United States v. French*, 977 F.3d 114, 118 (1st Cir. 2020) (“Juror 86 had not disclosed this information about her son’s involvement in the criminal legal system on a

cerated person,”²⁸⁶ as well as other person-first framings.²⁸⁷ This context may be difficult to avoid when part of quoted materials, including statutory terms for specific offenses.²⁸⁸

3. *Homelessness*

As is true of other identities, homelessness does not have a single form. The U.S. Department of Housing and Urban Development, responsible for tracking homelessness and awarding grants to remedy it, has a number of different definitions and categories, including the perhaps counterintuitive concepts of “literally homeless” and “sheltered homeless.”²⁸⁹ Yet people who are not familiar with the various ways in which people use and lack shelter may have a singular image of what homelessness looks like, and the communicator should be aware that the image conjured by the reader or listener may not match the reality.

The people-first approach would discourage the use of “homeless person” in favor of “person experiencing homelessness.” Sara Rankin, the leading legal scholar of homelessness in the United States, recently explained her preference for “person-centered terminology to phrase homelessness as an experience or an adjective, as opposed to an aspect inseparable from one’s identity.”²⁹⁰ As a senior staff person

questionnaire that the Clerk’s Office distributed to her when she was called for jury duty in October 2013, prior to jury selection.”); *State v. Tesfasilasye*, 518 P.3d 193, 200 (Wash. May 19, 2022) (“One of the State’s proffered reasons for the strike—that the juror might be biased because her son had, in her view, been treated unfairly by the criminal legal system—is presumptively invalid.”); *Baker v. 3M Co. Inc.*, No. 5:19-CV-00704-AKK, 2020 WL 6750805, at *2 (N.D. Ala. Oct. 15, 2020) (noting complainant “had multiple encounters with the criminal legal system”).

²⁸⁶ *Green v. Mass. Dep’t of Corr.*, No. 2184CV02283C, 2021 WL 6335670, at *1 (Mass. Super. Nov. 30, 2021) (alleging plaintiffs “and other incarcerated persons have been deprived of their due process rights and right to counsel”); *Remick v. City of Phila.*, No. CV 20-1959, 2021 WL 4269171, at *1 (E.D. Pa. Sept. 14, 2021) (discussing “programming, visits, and movement of incarcerated persons”).

²⁸⁷ See, e.g., *Goodvine v. Duckert*, No. 22-CV-204-PP, 2022 WL 14813062, at *1 (E.D. Wis. Oct. 26, 2022) (“plaintiff was incarcerated when he filed his complaint”); *Valentine v. Collier*, No. 4:20-CV-1115, 2020 WL 3666614, at *1 (S.D. Tex. July 6, 2020) (“Pending before the Court are three Motions to Intervene filed by individuals incarcerated at Texas Department of Criminal Justice (TDCJ) prisons other than the Pack Unit, which is the prison at issue in the present case.”).

²⁸⁸ See *People v. Lane*, No. 309972, 2013 WL 5629627, at *1 (Mich. Ct. App. Oct. 15, 2013) (“felon in possession of a firearm (felon-in-possession)”); *State v. Allen*, 233 S.E.2d 585, 586 (1977) (“In an independent proceeding purportedly pursuant to the North Carolina Habitual Felons Act, G.S. 14-7.1 through 14-7.6, defendant was indicted, tried and convicted of being an habitual felon.”).

²⁸⁹ *Four Categories of the Homeless Definition*, U.S. DEP’T OF HOUS. & URB. DEV. EXCH., <https://www.hudexchange.info/homelessness-assistance/coc-esg-virtual-binders/coc-esg-homeless-eligibility/four-categories/>; 24 C.F.R. § 578.3 (2023).

²⁹⁰ Sara K. Rankin, *Civilly Criminalizing Homelessness*, 56 HARV. C.R.-C.L. L. REV.

at the U.S. Interagency Council on Homelessness wrote:

I recently asked my 11-year-old daughter what she thought when she hears someone described as a “homeless person.” She said it made her feel sad, defeated, like there was nothing to be done to help. Then I asked for her reaction when I described someone as “experiencing homelessness.” She smiled. “Oh, that’s just a person who needs some help to fix a problem they have.”²⁹¹

By emphasizing a lack of housing as a temporary condition, this framing can combat defeatism and empirically make people more willing to look for solutions.²⁹² Although “people experiencing homelessness” might be preferred by social service providers, policymakers, and scholars,²⁹³ and has been used by some courts,²⁹⁴ it is not clear that this terminology has as much traction among people who are without housing.²⁹⁵

CONCLUSION

“All individuals deserve to be treated fairly, with courtesy and respect, without regard to their race, gender, or any other protected personal characteristic,” and achieving this reality requires the use of inclusive language.²⁹⁶ The guidance set forth in this paper seeks to outline key considerations for making inclusive language choices dependent on the perceived accuracy, precision, relevance, and respect communicated by the terminology utilized by the author or speaker with a particular audience. In balancing these practical, ethical, and persuasive considerations, clinic students will be able to engage in

367, 412 (2021).

²⁹¹ *People Experience Homelessness, They Aren’t Defined by It*, U.S. INTERAGENCY COUNCIL ON HOMELESSNESS (June 28, 2017), <https://www.usich.gov/news/people-experience-homelessness-they-arent-defined-by-it/>.

²⁹² *Reframing Homelessness in the United Kingdom*, FRAMEWORKS INST. (May 2018), https://www.frameworksinstitute.org/wp-content/uploads/2020/03/crisis_messagememo_2018_reframing_homelessness.pdf.

²⁹³ See, e.g., *Rodriguez v. City of Green Bay*, No. 20-C-1819, 2022 WL 823948, at *2 (E.D. Wis. Mar. 18, 2022) (“Persons experiencing homelessness or fleeing dangerous domestic situations are also exempt from this order.”) (quoting City of Green Bay Common Council’s Proclamation of Emergency).

²⁹⁴ *Denver Homeless Out Loud v. Denver, Colo.*, 32 F.4th 1259, 1264 (10th Cir. 2022) (“Encampments of people experiencing homelessness have proliferated throughout Denver.”); *Honkala v. U.S. Dep’t of Hous. & Urb. Dev.*, No. CV 21-0684, 2022 WL 282912, at *1 (E.D. Pa. Jan. 31, 2022) (“In 2018, the total number of people experiencing homelessness in Philadelphia was 5,788.”); *Where Do We Go Berkeley v. Cal. Dep’t of Transp.*, No. 21-CV-04435-EMC, 2022 WL 1032494, at *3 (N.D. Cal. Apr. 6, 2022) (discussing “housing opportunities come up for persons experiencing homelessness”).

²⁹⁵ *Please Stop Saying ‘People Experiencing Homelessness,’ INVISIBLE PEOPLE* (Feb. 15, 2019), <https://invisiblepeople.tv/saying-people-experiencing-homelessness-will-not-influence-change/>.

²⁹⁶ *Gobrick*, at *1.

thoughtful decision-making about their language choices.

APPENDIX

INCLUSIVE LANGUAGE IN LITIGATION: AN INTRODUCTORY GUIDE

Goals of this Guide

A lawyer's principal tool is language, and lawyers should strive to use clear and powerful language. We work to understand the meaning, connotations, baggage, context, and, often, history of the words we choose to use to ensure that we are communicating precisely what we intend, in the most effective way possible, in light of who our audience is and what we are trying to accomplish.

It is our responsibility to work towards using words that demonstrate respect for our clients and others, and to communicate principles of equity, inclusion, and justice that are core to our work. Just like a writer should use a dictionary or other resource if unsure about the meaning of a potential word or concept, a writer should make an effort to inquire into the full meaning and potential implications of the language chosen to ensure that it conveys the meaning intended. Although these principles are crafted with goals of equity and inclusion in mind, you should find that they help you write not only respectfully but also effectively.

This guide is not intended to command the use of particular language, but to provide some guiding principles to consider when choosing language, along with a compilation of resources to consult when making choices about the words we use.

Practices Toward Inclusive Language

Inquire, Educate, Explore: When choosing the terms to describe someone, to the extent possible, talk to the client/person being described to capture the language they use for themselves. You also can attempt to understand the language choices used by others with a relevant identity. Recognize that language evolves rapidly, and so terms common years ago may no longer be ideal. Some terms may be contested within particular communities (such as "Latinx"). Further, recognize that the term you think is appropriate might not be the language preferred by the individual in question. You should also recognize that, as part of the process of reclaiming language and defanging slurs, individuals with a particular identity may use a term to describe themselves that would not be appropriate for an outsider to use. Finally, you should also inquire into the language used in the relevant laws to understand where there is friction or divergence. Be will-

ing to put yourself out there; this may mean investigating new concepts, and using a term that was not previously familiar to you.

Accuracy: Lawyers must ensure that their submissions to the court are completely accurate. This applies not only to underlying facts, but also to the way that people are described. The duty to inquire is closely associated with the duty to be accurate in one's writing. For example, if you do not know the gender of a person, using a gendered pronoun could mislead the decisionmaker and/or signal disrespect for the individual. Worse, it reveals the author's assumptions and biases about the world, which can send problematic signals to the reader. For example, if you use masculine pronouns for a judge when the judge is in fact a woman, you will send a message not only that your other writing should not be trusted, but reveal your bias that you think judges should be male.

Precision: Use an appropriate level of generality/granularity. Choose the description that is specific or general enough to accomplish your goals and accurately reflect the identity of the person. For example, many Native Americans identify primarily as members of their particular tribe and prefer to be identified with reference to their tribe, rather than *Native American* or *Indian*. A person's particular race may be more important to their identity and the narrative than the umbrella Person of Color term. In contrast, however, sometimes higher levels of generality are useful to match legal categories or to convey solidarity with a larger community.

Relevance: Only use those aspects of a person's identity that are relevant to the case. If a person's race or disability is not part of the legal story, there is no need to include it. But if a person's race or disability, even if not legally relevant, IS important to understand the complete picture, then include it. For example, it may not be strictly relevant to the constitutional analysis that a person killed by police is Black or Deaf, but those aspects of the person's identity may very well be important parts of the story.

Keep in mind parallelism – if you are identifying the transgender characters in your story as transgender because it is relevant, consider identifying others as cisgender.

Audience: As litigators, we primarily (but not exclusively) write with the goal of persuading judges, some of whom will be inclined to be hostile to the rights of our clients, and our language needs to be tailored to further our litigation goals. But we also write to advance the

cause of justice, which includes efforts to shape the law and shape the language that the law uses. We can use our platforms to educate judges about terms and the reasons why we make certain choices. And because our briefs are typically public, we should be aware of the messages we are sending to our clients and the community with the language we choose to use.

Respect. An overarching goal of language use is to convey respect. This means using language that humanizes and destigmatizes. Recognize that many terms come with baggage, and the use of certain phrases flattens a person to a particular aspect of their identity or a condition that they are experiencing. For example, saying “Plaintiff is an addict” reduces their identity to a single issue, and the word “addict” has a number of negative connotations and stereotypes associated with it. If, instead, you say “Jan lives with a substance use disorder,” that phrasing emphasizes their humanity by putting the “person” first. Further, by using the verb “lives with,” you treat the condition Jan has as distinct from their core identity, and make it just part of their complex, layered humanity. Finally, by using the medical terminology “substance use disorder,” instead of the loaded term “addict,” you avoid invoking a negative stereotype in the readers’ minds.

Generally, good writing (not to mention word count limits) counsels fewer, simpler words over more cumbersome phrases, but you may at times find that a modest sacrifice of crispness is helpful to convey a person in a more respectful light.

Special Note: Use care with metaphors – Try to avoid using terms of protected class identity as a negative. This is often used in the context of disability (e.g., “crippling fines,” “handicapped our ability to respond,” “their crazy/schizophrenic argument,” “blinded to the obvious,”). For example, it is legitimate to use the word “blind” to refer to someone who is visually impaired, however we should carefully consider if we use the word to refer to a state of ignorance, given that this has negative implications for visually impaired people.

COMPILATION OF RESOURCES

General

AMA, *A Guide to Language, Narrative and Concepts*, <https://www.ama-assn.org/system/files/ama-aamc-equity-guide.pdf>

APA, *Diversity, Equity, and Inclusion: Inclusive Language in Writing*, <https://www.masslegalservices.org/content/diversity-equity-and-inclu->

sion-inclusive-language-writing

AHA, Structural Racism and Health Equity Language Guide, https://professional.heart.org/-/media/PHD-Files-2/Science-News/s/structural_racism_and_health_equity_language_guide.pdf

Race

<https://www.racialequitytools.org/glossary>

Debate over BIPOC

Meera E. Deo, Why BIPOC Fails, <https://www.virginialawreview.org/articles/why-bipoc-fails/>

YWCA, Why We Use BIPOC, <https://www.ywcaworks.org/blogs/ywca/wed-04062022-0913/why-we-use-bipoc>

Debate over Latinx

<https://news.gallup.com/opinion/polling-matters/388532/controversy-term-latinx-public-opinion-context.aspx>

Melissa Ochoa, Stop using ‘Latinx’ if you really want to be inclusive, *The Conversation* (Sept 2022), <https://theconversation.com/stop-using-latinx-if-you-really-want-to-be-inclusive-189358>

Christine Garcia, In Defense of Latinx, <https://go.gale.com/ps/i.do?id=GALE%7CA544601710&sid=googleScholar&v=2.1&it=r&linkaccess=abs&issn=15425894&p=AONE&sw=W&userGroupName=Anon%7Ef46c001a>

Gender and Sexual Identity

Stanford Encyclopedia of Philosophy, Feminist Perspectives on Trans Issues, <https://plato.stanford.edu/entries/feminism-trans/NALP>, Nonbinary Resources, <https://www.nalp.org/nonbinaryresources>

GLAAD Media Reference Guide, <https://www.glaad.org/reference>

HRC, Glossary of Terms, <https://www.hrc.org/resources/glossary-of-terms>

Indigenous People

Museum of the American Indian, The Impact of Words and Tips for Using Appropriate Terminology: Am I Using the Right Word?, <https://>

[/americanindian.si.edu/nk360/informational/impact-words-tips](http://americanindian.si.edu/nk360/informational/impact-words-tips)

Disability and Medical Conditions

National Center on Disability and Journalism, Disability Language Style Guide, <https://ncdj.org/style-guide/>

Well Beings, Mental Health Language Guide, <https://wellbeings.org/mental-health-language-guide/>

Autistic Self Advocacy Network, Identity-First Language, <https://autisticadvocacy.org/about-asan/identity-first-language/>

NIH, Words Matter - Terms to Use and Avoid When Talking About Addiction, <https://nida.nih.gov/nidamed-medical-health-professionals/health-professions-education/words-matter-terms-to-use-avoid-when-talking-about-addiction>

The Well Project, Why Language Matters: Facing HIV Stigma in Our Own Words, <https://www.thewellproject.org/hiv-information/why-language-matters-facing-hiv-stigma-our-own-words>

Citizenship and Immigration Status

Migration Policy Institute, ‘Migrants’? ‘Refugees’? Terminology Is Contested, Powerful, and Evolving, <https://www.migrationpolicy.org/article/terminology-migrants-refugees-illegal-undocumented-evolving>

Sillerman Center, Immigrant and Refugee Terminology and Jargon Guide, <https://heller.brandeis.edu/sillerman/pdfs/immigration/immigrant-refugee-terminology.pdf>

Survivor v. Victim

Sexual Assault Kit Initiative, Victim or Survivor: Terminology from Investigation Through Prosecution, <https://sakitta.org/toolkit/docs/Victim-or-Survivor-Terminology-from-Investigation-Through-Prosecution.pdf>

Criminal System Involvement

Marshall Project, the Language Project, <https://www.themarshallproject.org/2021/04/12/the-language-project>

Underground Scholars, Language Guide, <https://undergroundscholars.berkeley.edu/blog/2019/3/6/language-guide-for-communicating->

about-those-involved-in-the-carceral-system

Homelessness

Invisible People, How to Use Respectful, Instead of Degrading, Language Around Homelessness, <https://invisiblepeople.tv/how-to-use-respectful-instead-of-degrading-language-around-homelessness/>

How We Talk About Homelessness: Why Language Matters, Planetizen, <https://www.planetizen.com/blogs/117634-how-we-talk-about-homelessness-why-language-matters>

Argument in favor of “people experiencing homelessness” Jennifer L. Rich, People Experience Homelessness, They Aren’t Defined by It, U.S. Interagency Council on Homelessness (June 28, 2017), <https://www.usich.gov/news/people-experience-homelessness-they-arent-defined-by-it>, archived at <https://perma.cc/RXN6-2H4D>.

Some individuals with lived experience of homelessness question such phrasing. See Please Stop Saying ‘People Experiencing Homelessness,’ Invisible People (Feb. 15, 2019), <https://invisiblepeople.tv/saying-people-experiencing-homelessness-will-not-influence-change/>, archived at <https://perma.cc/98PF-F3ZQ>.

Guide last updated January 7, 2023