ESSAY

The Subverting of the Goeduck: Sex and Gender, Which and That, and Other Adventures in the Language of the Law

I remember when my parents bought me my first encyclopedia—the World Book, 1955 edition. As 10-year-old boys will do, I set about exploring the volumes for racy material. One of the first entries I turned to was “Lady Godiva.” Across from the distinctly disappointing entry on Godiva was a photograph of one of the oddest creatures I had ever set eyes on: the *Panope generosa*, or goeduck clam. That’s spelled g-o-e-d-u-c-k.¹

You won’t find that spelling anywhere today—not even in Washington state, where the goeduck is indigenous, is an important food and trade commodity, and is a college mascot.² Nor will you find the original spelling in any dictionary,³ nor in the Encyclopedia Britannica,⁴ nor in the World Book.⁵ The spelling “goeduck” was adopted by the first English-speaking settlers of the Northwest in an effort to render phonetically the native name for the clam, which in the Coast Salish tongue sounded something like *goiduck* or *gweeduck*.⁶ That phonetic spelling has now been eradicated.

When did g-o-e-d-u-c-k become g-e-o-d-u-c-k? The inverted spelling had probably started to creep into usage even before 1956. Certainly sometime between 1956, when “goeduck” was accepted as the correct spelling, and 1976, by

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2. The Evergreen State College, Olympia, Washington.
5. 8 *World Book* 92 (1990) (listing “goeduc” and “gweduc” as variant spelling).
6. See also id. at 246: “Goeduck. See Geoduck.”
which time only an occasional document could be found containing that spelling, it happened. *Where* did it happen? No one is sure, but in all likelihood the motivating force behind the change was the Washington State Code Reviser’s Office, and the conspirators were the Washington Department of Fisheries and the Office of the State Printer.

How and why did it happen? Again, no one knows for sure. And even though it was not so terribly long ago, barely a person can be found in Washington State government who remembers seeing the work spelled “goeduck.” My best guess as to what happened is this: Somewhere along the line, some well-meaning sub-sub-reviser of the Washington Administrative Code—repository of, among other things, shellfish regulations—decided that the word did not look quite right. “Goe-,” after all, is an uncommon English letter combination. “Geo-,” by contrast, thanks to the Greeks, is comfortably familiar. And while “earth-duck” makes little sense as a name for a species of clam, the strange-looking formation “goeduck” made no sense at all to this sub-sub, who took it upon himself to “correct” the spelling. Today, throughout Washington and the world, the common name for *Panope generosa* is spelled “geoduck.”

What harm does it do? Little, except to move the word’s spelling a step further away from its pronunciation. Someone encountering the word “goeduck” for the first time could make a fair stab at pronouncing it correctly. Someone encountering the word “geoduck” for the first time is doomed to failure. Newcomers to Washington must have the word pronounced for them and then wonder why it isn’t spelled the way it sounds. They (and most natives as well) have no way of knowing that it *used to be.*

Although little harm results from the inability to discern the pronunciation of a word by a phonetic reading, this little episode in anti-etymology illustrates the control that the law exercises over language. Codebooks can effectively mandate a change in language, even when the changed form is less logical than the original, even when the changed form is inconsistent with the original, *even when the changed form is an error.* It makes one wonder: How many other errors have been codified

7. See, *e.g.*, WASH. ADMIN. CODE § 220-56-310 (Shellfish—Daily bag limit) and § 220-56-355 (Clams—Unlawful acts) (1986).
into our language, and what effect have these errors had on our thoughts and on our ability to articulate those thoughts?

The "adventures in the language of the law" that follow examine some contemporary usage problems that have special implications for the law and suggest ways these problems might be avoided or resolved.

I. WHY WE FIGHT: "GENDER" AND "SEX"

Why shouldn't we quarrel about a word? What is the good of words if they aren't important enough to quarrel over? Why do we choose one word more than another if there isn't any difference between them?

—G. K. Chesterton

Why not bend to the prevailing winds? Why fight for a spelling, a meaning, or a distinction that many view as outdated? The answer is that if the threatened usage is worth preserving then it's worth fighting for, no matter how outdated or schoolmarmish it may make its proponent appear. An especially timely case in point is the vanishing distinction between "sex" and "gender."

The framers of the nineteenth amendment to the United States Constitution wrote:

The rights of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of sex.8

Notice that the framers wrote "sex," not "gender." And right they were. Gender is a property of words, not of people. The only place that "gender discrimination" can occur is in a grammar book, and when it does, it's pretty boring. Words have gender; people have sex.

Webster's Second New International Dictionary Unabridged, still one of the most respected authorities on American English, records that the word "sex" pertains to physiological distinctions, "gender" to grammatical ones.9 Fowler's Modern English Usage agrees:

gender, n., is a grammatical term only. To talk of persons or creatures of the masculine or feminine g., meaning

8. U.S. Const. amend. XIX.
of the male or female sex, is either a jocularity (permissible or not according to context) or a blunder.10

The great New York Times editor and usage watchdog, Theodore M. Bernstein, cautioned that

gender is a grammatical term, denoting (in English) whether words pertaining to a noun or pronoun are classed as masculine, feminine or neuter. It is not a substitute for “sex” (but then, what is?). Indeed, in some foreign languages “gender” often disregards sex. In German, for example, Weib, the word for woman, is neuter; in French plume, the word for pen, a sexless article, is feminine. To use “gender” as if it were synonymous with “sex” is an error, and a particularly unpardonable one in scientific writing.11

Even the more liberal Harper Dictionary of Contemporary Usage concurs:

The use of gender to mean “sex” in senses other than grammatical is considered “colloquial” by some dictionaries but is frowned on by careful users of the language. To say “students of the feminine gender” is pretentious. “Women students” is much better.12

Why then, with so many authoritative voices raised in support of preserving the distinction between “gender” and “sex,”13 do so many constitutional scholars (who ought to know

“Which is one of the most disgusting things about America today?” she had asked.

The instant I replied, “Discrimination based on sex,” she blew a whistle and I was surrounded by a crowd hissing me for not saying “discrimination based on gender.”

I fled to the nearest saloon. “What’s the difference between a couple in the park and a martini?” I asked the saloonkeeper.

“Easy,” he said. “The couple can have sex but the martini can only have gender, which, by the way, would be neuter.”

Id. See also Gender, Encyclopædia Britannica, IV. Micropaedia 457-58 (1980) (discussing “gender” as a classification of grammar, and admitting no alternate meanings); Encyclopædia of English 9 (A. Zeiger, ed. 1973) (“Gender . . . is that modification of a word by means of which objects are distinguished in regard to sex.”); Burkat, Of Gender, Sex, Grammar and All That, N.Y. Times, Feb. 19, 1990, at A16, col. 1 (“Many English-speaking women have taken ideological positions that have nothing to do with the difference between ‘gender’ and ‘sex.’ . . . [L]et us all remember one simple fact of life: words have gender; people have sex.”); The Canadian Press, Sex and Titles, 148
better) and government officials (who probably can’t be expected to) speak of “gender discrimination”? It could be that they are talking about how to distinguish a masculine pronoun from a feminine one. But unless they are discussing the specific language of a law or bill, they are probably not talking about pronouns. Usually they are talking about men and women, and when they say “gender” what they mean is “sex.” This ascription of a purely grammatical property to human beings, suggests that people—at least some people—can no longer distinguish between a thing and its name.

There are at least two possible reasons for the ubiquity of the “sex”–“gender” error. The first is that legislators and legal writers may think that the word “sex” is nasty. It is, after all, distracting. It makes people think lurid thoughts, and lets them forget that discrimination is serious business.

But if that’s the problem, the scholars only compound it by substituting the word “gender,” which—apart from being the wrong word for what they mean—is a mellifluous, gentle-sounding word, ill-suited to the tough, serious-minded purpose of constitutional scholars and the only slightly less serious-minded purpose of government officials. “Gender” is not a firm, no-nonsense word like “sex.” It has an evasive, almost euphemistic effect, like calling a war an “incursion” or a spade an “excavation implement” instead of a dirty shovel.

A second explanation for constitutional scholars’ eagerness to use the word “gender” in the civil rights context may be that they think the word “sex” is ambiguous. They may be afraid that if they said “discrimination on account of sex,” their readers would think they meant sexual activity, orientation, or preference. But the literate reader would not think

__COPY TALK 3 (1990) (“don’t confuse sex with gender. When you’re writing about differences between men and women, or about discrimination, the issue is sex. When you’re dealing with differences in grammatical form (actor and actress, prince and princess), the issue is gender.”); Wood, Who’s Who and What’s What?, IABC COMMUNICATION WORLD, September 1990, at 42.__

14. W.B. Allen, chairman of the U.S. Commission on Civil Rights made this erroneous claim explicitly in a recent speech, when he said, “I consider it a matter of great regret that our legislators so infelicitously used the term ‘sex’ rather than ‘gender’ in our civil rights statutes. For that may well be the proximate cause of folk taking them too literally, and attempting to make sex itself a political matter.” Address by W.B. Allen, Blacks? Animals? Homosexuals? What Is a Minority?, Symposium on Public Policy Implications of Contemporary Homosexuality (Oct. 7, 1989) reprinted in LVI:7 VITAL SPEECHES OF THE DAY 204, 207 (Jan. 15, 1990). Actually, the legislators’ use of the word “sex” would have been “infelicitous” only if they were legislating the civil rights of words rather than those of human beings.
that, because the literate reader knows that the word for that concept is not "sex" but "sexuality."

The University of Puget Sound School of Law\textsuperscript{15} is currently offering a course entitled “Gender and Justice.” I am sure the course has nothing to do with choosing appropriate nouns and pronouns when writing judicial opinions. It should be called “Sex and Justice.” I can appreciate the likely complaint: “If we called it that, people might think that the course was about justice and sexual conduct, rather than sex discrimination.” Maybe, then, the course should be given a different name. Just because the word "sex" is ambiguous, meaning both a biological trait of organisms and the conduct associated with the reproduction of organisms, does not legitimize the misuse of "gender." To say that "People might misunderstand ‘sex,’ so we’ll say ‘gender’ instead” makes as much sense as saying, “People might misunderstand ‘pen,’ so we’ll say ‘pencil’ instead.” If what you really mean is “pen,” you cannot force the second term to become a synonym for the first; trying to do so merely compounds the problem.

A recent colloquy in the \textit{New York Times} has extended the debate. Responding to the \textit{Times}'s use of the term ‘gender gap,’ the editor of a technological journal wrote: “The term ‘gender’ is increasingly misused as a substitute for ‘sex.’ . . . I can only assume you have elected to permit this misuse, despite a valid and useful distinction between the terms.”\textsuperscript{16} (Authority for the validity of the distinction is noted above; its usefulness will be addressed below.) A few weeks later another reader answered:

\begin{quote}
[T]he use of the word ‘gender’ to mean an individual’s sex is well established in English and recognized by current dictionaries as standard. . . . The two usage guides [that the first writer] cites . . . have been superseded by guides that have kept pace. . . . (Lady Mary Wortley Montagu wrote in 1709: “Of the fair sex . . . my only consolation for being of that gender”). . . . [A] use that stresses the social and cultural over the biological differences between the sexes has steadily grown since about 1960.\textsuperscript{17}
\end{quote}

\textsuperscript{15} The standard registration form for the University of Puget Sound School of Law consistently asks me for my gender. I consistently deny having one.

\textsuperscript{16} Weinstein, ‘Gender’ Cannot Replace Sex (but What Can?), \textit{N.Y. Times}, Dec. 27, 1990, at A18, col. 3 (citing Fowler, supra note 3, and Bernstein, supra note 4).

\textsuperscript{17} Steinmetz, Dictionary Recognize ‘Gender’ for ‘Sex,’ \textit{N.Y. Times}, Jan. 18, 1991, at A18, col. 3-4. Steinmetz cites A. OAKLEY, \textit{Sex, Gender, and Society} (1972) for the
It must be borne in mind that the latter response comes from a dictionary editor. Of course there have been instances—some highly respectable ones—of the use of "gender" in place of "sex." Lady Montagu's ambivalence—and Charles Dickens's more famous whimsicality, "black divinities of the feminine gender"—both easily fit Fowler's exception for "jocularity." It is the non-jocular use of "gender" for "sex" that is at best confusing and at worst dangerous.

As the responding writer insisted, there is now ample authority for the proposition that "gender" means the same thing as "sex." That is because most dictionaries now defer to the popular error. Our lexicons have become like competing television news teams, trying to one-up one another. A usage—no matter how inappropriate, retrograde, or downright wrong—that gains a modicum of popular acceptance is now welcomed with open arms into the citadel of the language by the very forces that once vigilantly guarded our tongue against assaults on clarity, precision, and meaning. Dictionaries become destroyers rather than preservers of the language when they rush to record an erroneous or ambiguous usage merely because it has become popular. Dictionaries have become levelers of language, refusing to recognize that a majority often can be wrong. Dictionary editors' work is self-admittedly descriptive rather than prescriptive. For that reason, dictionary editors have less interest in the correctness, clarity, or social impact of words than in reporting their usages, right or wrong. Dictionary editors merely record, and having recorded move on.

Popular usage may make a wrong a right, but nothing can restore the clarity of language that is thereby lost. That loss is the cultural equivalent of the extinction of a species. Dictionary editors, in their zeal to "keep pace," are more eager to be "with it" than "correct." But the value of language is not a matter of contemporary style nor of traditional rules. It is a matter of clarity. The test of a questionable usage must finally proposition that "[s]ex differences may be 'natural,' but gender differences have their sources in culture." It is always an author's prerogative to use a word in a novel way, especially if the intention is made clear; but exercising that prerogative does not confer universal validation on the usage, any more than it would if I were to write, "Throughout this article, I shall use the word 'right' in the sense of 'wrong.'" The uncritical adoption of Oakley's specialized and somewhat fanciful use of "gender" to refer to "cultural differences" may be an instance of the legal profession's rush to adopt whatever neologistic jargon comes its way.

be whether it enhances or diminishes understanding. If the latter, then the dictionary that zealously "recognizes" a usage that diminishes understanding only drives one more nail into the coffin of the verbal discourse it once served to facilitate.

When a debated usage involves a distinction such as that between "gender" and "sex," it little profits the disputants to argue back and forth, each pointing to authority for one usage or the other. The better approach is to ask, given authority for the distinction, is the distinction worth preserving?

The distinction between "sex" and "gender" is a critical one. If "sex" is accepted as a meaning of the word "gender," we are left with no way to express clearly and exclusively the grammatical property that we mean by "gender." The result is that the reader or listener is never sure whether the writer or speaker is using "gender" in the traditional grammatical sense or in the neological "cultural" sense. This forces the writer or speaker to clarify the term each time it is used, which in turn requires more words and makes communication more taxing for both communicator and audience. If the writer or speaker fails to clarify the term, it is left to the reader or listener to do so, and the writer or speaker runs the risk that the reader or listener will do so incorrectly, causing communication to fail. Thus, we would have the discursive equivalent of what microeconomists call a market defect.

The distinction between "gender" and "sex" is also worth preserving because the distinction provides a brief and easy way to specify whether the subject is language or people. If the distinction between "gender" and "sex" is maintained, a reliable difference in law and in fact exists between making a statute "gender-neutral" (meaning that it should contain no masculine or feminine pronouns) and making it "sex-neutral" (meaning that it should have no consequences that would favor either sex over the other). If the distinction between "sex" and "gender" is obscured or obliterated, it would be unclear whether a "gender-neutral" statute would be expected to be neutral in language only, in impact only, or in both.19 The artificial (and etymologically unsupported) assertion that "gender" refers to cultural differences and "sex" to biological differ-

19. This raises the question of linguistic revisionism as political tactic: Does the insistence on gender-neutrality—and its resultant blurring of the distinction between "gender" and "sex"—create a condition in which the gender-neutrality of a statute's language guarantees the sex-neutrality of its actual impact? This question could be the subject of another article, but is beyond the scope of this one.
ences, if accepted, would leave us with no way to determine what is meant by a “gender-neutral” statute, and would make it all too easy for legislators to palm-off a gender-neutral statute where a sex-neutral one was actually sought.

The word “fireman” will serve to illustrate the difference between gender-neutrality and sex-neutrality. “Fireman” is not gender-neutral; it is of the masculine gender. It is, however, sex-neutral, just like “chairman,” and many other words than end in -man. The suffix “man” in this case means “person,” not “adult male.” The word “firefighter,” by contrast, is both gender-neutral and sex-neutral.

“Firefighter” is the better word, though, not because it is gender-neutral but because it is a more precise term for the concept it represents and, conveniently, a more interesting word as well. Nevertheless, the allegation of sexism in such words as “fireman” and the attendant effort to purge the language of that sexism raise some interesting questions.

Does the word-choice of “firefighter” over “fireman” effectively suppress the notion that all firemen are, or must be, male? Did such a notion exist in the first place? If it did, it has been effectively abolished by changed hiring practices and new attitudes, not by the use of one word over another.

One of the few Federal Rules of Evidence to have thus far escaped gender-neutralization is Rule 606, which reads in relevant part:

Nor may a juror's affidavit or evidence of any statement made by him concerning a matter about which the juror would be precluded from testifying be received for these purposes.20

In fact, the careful use of “the juror” rather than “he” as the subject of “precluded” suggests that an attempt was made to gender-neutralize the rule, but that one “him” slipped by unnoticed. However, it is an easy matter to correct:

Nor may a juror's affidavit or evidence of any statement made by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

We have now gender-neutralized the rule. We have not, however, sex-neutralized it, because (and this is the point) it

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was sex-neutral from the start. That is to say, no female juror could escape its ambit merely because a masculine pronoun was used.

On the issue of gender-sensitivity, the Associated Press now directs its readers this way:

*man, mankind.* Either may be used when both men and women are involved and when no other term is convenient. . . . Frequently the best choice is a substitute such as *humanity, a person or an individual.*

No one will put up much of a fight over changing “mankind” to “humanity.” At the same time, no one can argue credibly that “mankind” intends to exclude half of the human race, nor that it is likely to be misunderstood as doing so. But avoiding misunderstanding is only one motivation for changing a word. In the case of “gender” and “sex,” preserving a distinction achieves clarity of meaning. In the case of “mankind” and “humanity” (both of which contain the syllable “man”), the motivation for changing the word is harder to find. There are two reasons for changing a word: first, it’s not the right word or the best word for the job; second, it’s not the word we’re out to change; it’s the *idea.* Questions about word substitutions, the motivations behind those substitutions, and their effectiveness, must therefore be fact-specific.

II. IT’S NOT THE RIGHT WORD: A MAD TEA PARTY

“You should learn not to make personal remarks,” Alice said with some severity: “it’s very rude.”

The Hatter opened his eyes very wide on hearing this; but all he *said* was “Why is a raven like a writing-desk?”

“Come, we shall have some fun now!” thought Alice. “I’m glad they’ve begun asking riddles—I believe I can guess that,” she added aloud.

“Do you mean that you think you can find out the answer to it?” said the March Hare.

“Exactly so,” said Alice.

“Then you should say what you mean,” the March Hare went on.

“I do,” Alice hastily replied; “at least—at least I mean what I say—that’s the same thing, you know.”

“Not the same thing a bit!” said the Hatter. “Why, you
might just as well say that "I see what I eat' is the same thing as 'I eat what I see!'"

"You might just as well say," added the March Hare, "that 'I like what I get' is the same thing as 'I get what I like!'"

"You might just as well say," added the Dormouse, which seemed to be talking in its sleep, "that 'I breathe when I sleep' is the same thing as 'I sleep when I breathe'!"

"It is the same thing with you," said the Hatter, and here the conversation dropped . . . 22

A word may be ripe for change if it is not the right word. A word is not the right word if it is inaccurate to express the intended meaning, if it is ambiguous and likely to result in misunderstanding, or if it is simply uninteresting. People also seek to change a word because it is not the best word: it may be inappropriate, ineffective, or counterproductive in the context. An increasingly common reason for finding certain words not to be the best is that they offend. A word may offend because it is inherently offensive, or because some person or group is especially sensitive to it.

Few words if any are inherently offensive; but they can come to be so. Ernst Cassirer, in his study Language and Myth, describes how the alteration of a word—initially a name, to which mystic significance is aboriginally attached—can effectively alter the concept it codifies:

Whenever a special god is first conceived, it is invested with a special name, which is derived from the particular activity that has given rise to the deity. As long as this name is understood, and taken in its original sense, the limits of its meaning are the limits of the god's powers; through his name the god is permanently held to that narrow field for which he was originally created. Quite otherwise, however, if through an accident of phonetic changes or the obsolescence of its verbal root the name loses its meaning and its connection with the living language. Then the name no longer suggests to those who use it the idea of a single activity, to which the subject that bears it must be exclusively bound. The word has become a proper name—and this connotes, just like the given name of a man, the conception of a personality. Thus, a new Being has been produced, which

continues to develop by a law of its own.\textsuperscript{23}

Today, someone named Shoemaker is not necessarily a cobbler. The process by which a neutral word becomes offensive is similar. A black man, for example, called \textit{negro} ("black") by a Spanish-speaking slave-trader, comes to be called \textit{nigger} by a Southern plantation owner of Scottish origin. By its association with servility and inferiority, the word \textit{nigger} itself comes to mean something quite different from "black man." It takes on "a law of its own." It comes to hurt, and finally, to be used for no purpose other than hurting. Lenny Bruce recognized this in his pioneering and iconoclastic effort to sensitize the public's language-consciousness:

Are there any niggers here tonight? I know that one nigger who works here, I see him back there. Oh, there's two niggers, customers, and ah, \textit{aha}! Between those two niggers sits one kike—man, thank God for the kike! . . . The point? That the word's suppression gives it the power, the violence, the viciousness. If President Kennedy got on television and said, "Tonight I'd like to introduce the niggers in my cabinet," and he yelled "niggerniggerniggernigger" at every nigger he saw, "boogeyboogeyboogeyboogeyboogey, niggerniggerniggernigger" till nigger didn't mean anything any more, till nigger lost its meaning—you'd never make any four-year-old nigger cry when he came home from school.\textsuperscript{24}

Growing up in the South, I heard white kids use the word \textit{nigger} to insult \textit{other white kids}. The word itself had become inherently offensive \textit{apart} from its original meaning. This was why Lenny Bruce's campaign was unsuccessful: Making the word meaningless so it would no longer hurt was a futile proposition, because the word had already been separated from its meaning and had become \textit{merely} a weapon. No matter how many times it was said or in what context, it would still hurt.\textsuperscript{25}

Words that are used only to hurt are justly attacked. On the other hand, words whose offensiveness arises not from the

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\textsuperscript{23} E. Cassirer, \textit{Language and Myth} 20-21 (1953) (emphasis in original) (referring to Usener's original research).

\textsuperscript{24} L. Bruce, \textit{The Essential Lenny Bruce} 15-16 (J. Cohen ed. 1968).

\textsuperscript{25} In a famous comedy routine, the "Seven Words You Cannot Say on Television," George Carlin assaulted the notion of inherently offensive words. Interestingly, in a recent national cable-television broadcast (The USA Channel, Dec. 22, 1990) of an R-rated comedy, \textit{The Kentucky Fried Movie}, four words were excised from the film as objectionable. All had sexual or scatological connotations except one: "nigger."\end{flushleft}
use of the word but from the sensitivity of the listener are more problematic. Much of the attack on sexism in the English language falls into this category. Some of the words attacked as sexist might, in time, become offensive by separation from their natural root-meaning just as “nigger” has become offensive by separation from its root meaning. But in most contexts, words such as “mankind,” “lady,” and the use of “he” as the referent to an antecedent indefinite pronoun are still acceptable, correct, and inoffensive. Nevertheless, listeners’ sensitivities, whether justified or not, create a new motivation for changing a word: not offense, but fear of offending.

Increasingly, writers, or those who exercise authority over them, fear that their words might offend. Thus, well-meaning social workers and public administrators have run us through a number of euphemisms for “old”—“elderly,” “senior citizen,” “Golden Ager,” and “aging”—under the assumption that the term “old” might be offensive to old people. But I’ve never known an old person who had the slightest hesitation about using the term “old,” nor have I found anyone who has known one. We have gone from “colored” to “Negro” to “Black” to “African American” and back to “people of color” without ever hitting upon a term that all black Americans will accept. That is as it should be: group classification based on physical description should be unacceptable, and we should not be comfortable with any universal term that implies such a classification. Yet our discomfort is too easily codified into a new kind of tyranny: the tyranny of over-caution.26

The rush to avoid offense—whether because a word is inherently offensive, because readers are sensitive, or because a writer is overcautious—may lead to ungrammatical, illogical, or unclear constructions. The effort toward gender-neutrality provides a handy example of how this occurs: It is now common to find a plural pronoun mismatched with a singular antecedent in a strained effort to achieve gender-neutrality. Here is an example:

**A. If an employee alleges a violation of their rights, they have no recourse.**

The singular antecedent noun (“employee”) cannot give rise to a plural pronoun (“their”). One “employee” cannot

magically become more than one just four words later (unless the employee in question is a paramecium). One of the most commonly suggested ways of avoiding the anomaly of referring to a singular employee in the plural is to recast the entire sentence in the plural:

B. *If employees allege a violation of their rights, they have no recourse.*

Now we have a grammatically correct and logical sentence, but it no longer does the job. It suggests a group, rather than a single, allegation. Clarity and precision are lost. Traditionally, English grammar solved the problem by using the generic "he."

C. *If an employee alleges a violation of his rights, he has no recourse.*

Now we have agreement between pronoun and antecedent. We have logic. We have a construction that is still Good Law to grammarians. And there is no chance of misunderstanding. No one would assume that the sentence, as it stands, applies only to male employees and that some different standard would apply if a female employee were to make a similar allegation. Both grammar and idiom affirm that the sentence applies to any employee, regardless of sex.

So we have good grammar—but do we have good taste? The sentence is not likely to confuse, but is it likely to offend? It will offend those who have decided that the use of the masculine gender in such a construction as this reflects, approves, and perpetuates a male dominance that arguably led to the development of this grammatical convention in the first place. So our task is not finished.

If we wish not to offend, what options remain? We have already rejected the ungrammatical commingling of singular with plural and the misleading recasting of the entire sentence in the plural. Accepting the need to stay in the singular for both accuracy and clarity, let's consider some contemporary solutions:

D. *If an employee alleges a violation of his or her rights, he or she has no recourse.*

There is nothing grammatically wrong with this construction, but few would accept it as less than cumbersome. The addition of words makes the reader work harder, while giving
that reader no additional reward. The extra words do not clarify a message that was already clear. What those extra words do, instead, is to distract the reader from the sentence's meaning by steering the reader's attention into a subtext: The writer is saying, aside, "Hey, look, I know that not all employees are men, and I want you to know that I respect that." It's a self-congratulatory tone that says less about the writer's attitude toward sexism, either in the workplace or in the language, than it says about the writer's eagerness to be perceived as sensitive and hip. For this reason, the device is as insincere and cloying as it is cumbersome and intrusive. It does not avoid offense; it only redirects it.

Another solution is one used several times in the preceding paragraph: Don't use a pronoun at all, but repeat the noun instead.

E. If an employee alleges a violation of the employee's rights, the employee has no recourse.

The problem with this solution is not grammatical but stylistic. The repetition makes the sentence arhythmic and dull. It is correct, but not reader-friendly. And, in this example at least, it could introduce a new confusion: Is the "employee" who is the subject of the sentence the same employee whose rights are allegedly violated? It all depends upon context, and to the extent that this construction may send the reader back to a previous sentence to ascertain whether one or two employees are being discussed, it is intrusive and unacceptable.

For the same reason, equally unacceptable is the idea of leaving the prepositional object unmodified altogether:

F. If an employee alleges a violation of rights . . .

or

If an employee alleges a rights violation . . .

Here again, it is unclear whose rights are the subject of the alleged violation, and the reader is again forced to explore context. This solution is therefore acceptable only when the context is so well established that there is no chance that the reader will misunderstand.

An increasingly popular solution is to recast the sentence in the feminine gender:

G. If an employee claims a violation of her rights, she has no recourse.
Because this usage, though grammatically and socially correct, is less familiar and time-honored than the use of the generic masculine, there is a danger that, this time, the reader really might think that employees of only one sex are being discussed. Once again, context will make this clear; but, unlike the case in constructions E and F, the reader is not likely to return to a previous passage to see if only female employees are being discussed. Given clarity of context, the "her" should slide by as easily as a "his" would have traditionally, not causing a second's confusion. An increasing number of writers and teachers use this solution, employing generic feminine pronouns interchangeably with generic masculine throughout their discourse, preserving the indefiniteness while avoiding offense.

Another solution, which works particularly well in a context such as the one in our example, is the use of a hypothetical:

H. Suppose that Mary, an employee, claims a violation of her rights . . .

Here, even more than in G, it is clear that the message isn't restricted to female employees. At the same time, the use of a female as an example avoids the offense that might attend the assumption that the "employee" is male. It shows the reader the writer's comfort with femininity in the workplace and in the language. Most importantly, it is as effective as example D, and makes the sentence more, not less, interesting.

And that is the point: If offensiveness—whether inherent, acquired, or imputed by sensitivity or overcaution—makes it advisable to change a word or phrase, it can be done interestingly and creatively, without wounding the logic and rhythm of our language in the process.

III. WRONG WORDS, WRONG IDEAS

If thought corrupts language, language can also corrupt thought.

—George Orwell

Sometimes it's not the ambiguity or the inherent or imputed offensiveness of a word that motivates change. Sometimes change is motivated by the notion that, by changing the word, one can change or suppress the idea that it expresses. If
Cassirer's famous thesis that language precedes thought\textsuperscript{27} is correct, then by limiting, arbitrarily redefining, or eliminating individual words, we can also alter and destroy ideas. Because the misuse of words broadens the gap between what is said and what is meant, words may be misused \textit{deliberately} by those who prefer that we \textit{not} understand. George Orwell, in his novel, \textit{Animal Farm}, and in his depiction of "Newspeak," in 1984, saw the manipulation of language as an index of everything that is most dangerous about totalitarianism.

Contemporary lore is rich with examples of just such deception practiced, on occasion, by our own government.\textsuperscript{28} Richard Gambino has described how the Watergate conspirators' use of language diverted moral responsibility from the actors to the acts, from the speakers to their words:

In a now famous phrase, Ron Ziegler and John Ehrlichman have declared White House statements proven false to be "no longer operative." This is a very handy phrase which can mean any of the following:

- It wasn't true in the first place.
- I'm sorry I said it.
- I thought it was true then but I know now it wasn't.

While the public was left wondering what the phrase meant, responsibility for the original lies was shifted from the liars to the lies themselves. The responsibility was not in the people, not even in the stars, but in the statements themselves, which were spoken of as if they had lives and energy of their own.\textsuperscript{29}

In similar obfuscations, crimes became "dirty tricks," and payments for such crimes became "increments in the form of currency."\textsuperscript{30} More recently, missiles fixed with nuclear warheads are not weapons but "peacemakers."

When caught, a speaker might claim that he has "misspoken." What does this word mean? Does it denote a lie? Does it denote an error? If it denotes an error, is the error one of fact or one of judgment? Is this just a slip of the tongue, or is the speaker engaging his mouth before his brain is in gear?

Of course, people may change words for reasons other

\textsuperscript{27} Cassirer, supra note 23, at 5-12, 24-38.
\textsuperscript{28} Such deception is not limited to the government. See Goodman, supra note 26.
\textsuperscript{29} R. Gambino, Watergate Lingo: A Language of Non-Responsibility, in LANGUAGE AND PUBLIC POLICY 17 (H. Rank ed. 1974).
\textsuperscript{30} Id. at 18.
than a desire to deceive. They may, from perfectly honorable motives, proceed against a "bad" or "harmful" idea by attacking its symbol—like the airmen in *Catch-22* who try to get out of flying a combat mission by changing a line on the map in the operations room to make it look as if Bologna has already been captured. As it happens, the altered map is believed; the mission is called off. But not for long. *Catch-22* is literature, after all. Moving a line on a map changes the reality it represents only in a short-lived comic fantasy.

The effort to change reality by changing our expression of it is at best futile. Attitudes are not changed by manipulating language; language is changed by influencing values. It is legitimate to change the name of the Personnel Department to the Human Resources Department only if the verbal change is accompanied by a policy change reflecting the greater appreciation for human beings that the newer term suggests. Trying to change a reality by changing its name is tilting at windmills.

What you can change, however, is the *perception* of the reality. In other words, you *deceive*. You not for long fool people into believing that an incursion is something different from a war, that a funeral director is not the same as an undertaker, that a firefighter does something different from what a fireman does. On the other hand, you just might, through repeated misuse, make them think that "gender" means the same thing as "sex," or that an airplane crash has something to do with "tragedy." The deception that results need not be intentional, and it need not be the heinous sort of deception decried by Orwell. It is deception nonetheless, and its effect impoverishes the language and the culture.

This impoverishment is scarcely less true of so-called *persuasive* uses of language. The word "fetus," for example, is used by pro-abortion forces because its Latinate, medical sound carries with it the sense of an invasive growth, something *foreign*. The counterargument is that "fetus" is not a deliberately misleading word, but the scientifically *correct* term to use up until the birth. But how often do you hear a woman say, "I feel my fetus kicking"? The opposing terms "fetus" and "baby" serve the persuasive purposes of proponents of both sides of the abortion issue, defining the poles of non-person and person in an arena in which personhood is at the very heart.

An old riddle asks, "If you call the sheep's tail a leg, how many legs does a sheep have?" The answer: "four, because calling the tail a leg doesn't make it one." Where we have called the tail a leg for centuries, an effort to make us recognize that it is a tail will probably be successful, because it doesn't seek to change the reality or the perception of the reality, only the naming of it. On the other hand, where we have called the tail a leg, an effort to make us call it a leg will probably fail. The only acceptable reason for changing a word—the only one that doesn't betray language, thought and culture—is that it's the wrong word: It doesn't reflect the culture, the values, or the form that has evolved for expression of those. But don't change the word that feels or sounds right merely because it might offend someone; don't change the word because it suggests an unpleasant thought or idea. That is what the proponents of Newspeak and its contemporary manifestations attempt to do.

The law has the power to change language, and changing language means changing, perhaps destroying, ideas. The destruction or suppression of an idea—any idea—impoverishes a culture. Lawyers, legislators, and academicians are, among other things, custodians of the language, and their abuse of that power—whether by deliberate novation or by simple error—is serious business.32

The legal profession has for decades been in the vanguard of the deconstruction of the English language. It is a sort of Gresham's law of our language that bad words drive out good. Lawyers, judges, legislators, and law professors have collectively introduced more bad words and driven out more good ones than has any other professional group, with the possible exception of the news media. And it's ironic, because lawyers, of all people, should be scrupulous about the use of language. After all, lawyers are in the business of framing persuasive arguments and authoritative dicta. The better those arguments sound, the more likely they are to succeed. Precise and effective use of language is useful to lawyers; their abuse of it makes as much sense as a workman deliberately breaking his best tools.

32. See, e.g., Young v. Community Nutrition Inst., 476 U.S. 974 (1986), in which the United States Supreme Court seized upon the grammatical ambiguity of a poorly-written statute to justify deference to an administrative agency's allegedly overbroad application of the law.
IV. THE STRAW WHICH BROKE THE CAMEL'S BACK, OR, HOW'S "THAT" AGAIN?

Everything that can be said can be said clearly.

—Ludwig Wittgenstein

 Probably the greatest grammatical error that the legal community has foisted off on an unsuspecting public is the confusion of "which" and "that." It may stem from the notion that "which" somehow sounds more formal and official than "that"—never mind the fact that it doesn't have the same meaning. Generation after generation of lawyers have found it more lawyerly to say "which." Occasionally they're right; most of the time they're wrong. But they're set in their ways. They grew up reading The Little Engine Which Could and The House Which Jack Built. Their moms read them the story of "The Goose Which Laid the Golden Egg"—recognizing, of course, that the hand which rocks the cradle rules the world. In high school, they enjoyed Edgar Rice Burroughs's The Land Which Time Forgot. When they got married, they sang "Blest Be the Ties Which Bind." It all sounded more important and official that way.

The fictional style of Scott Turow, a lawyer who is also a professional novelist, reflects the author's legal training more than it does his literary acumen:

"Ah-ha," said Stern. So they did know something. The government was investigating large trades, trades which MD handled, trades which Dixon knew about, trades which, when placed, had had a significant impact on prices. "And is there nothing else which occurs to you?"33

Nobody talks like that—not even a lawyer from Argentina. Christopher Marlowe never wrote

Was this the face which launch'd a thousand ships . . . ?34

If he had, the line would be justly forgotten by now. Hemingway, on the other hand, did write, "[T]here are some things which cannot be learned quickly."35 You cannot win them all.

34. See C. MARLOWE, THE TRAGICAL HISTORY OF DOCTOR FAUSTUS, V. i. 94-95:
   Was this the face that launch'd a thousand ships,
   And burnt the topless towers of Ilium?
35. At least Hemingway is so quoted in 9 PUB. REL. J. 6 (September, 1990)—but can you trust a publication that calls its letters column "Feedback"?
Except when it is the object of a preposition ("in which we serve"), the word "which" nearly always follows a comma and introduces a phrase that provides additional information not essential to the meaning of the sentence ("nonrestrictive" or "non-defining," the grammarians call it). The word "that," on the other hand, introduces a phrase that is essential ("restrictive" or "defining"). Strunk & White's *The Elements of Style*, offers this example:

*The lawn mower that is broken is in the garage.*

This sentence means: "We have at least two lawnmowers, one of them is broken, and the broken one is in the garage."

*The lawn mower, which is broken, is in the garage.*

This sentence means: "We have only one lawnmower, it is in the garage, and, by the way, it's broken."

Here is another example of how a "which"-"that" confusion could have significant impact on the interpretation of evidence:

*Her apartment had two windows which looked onto the parking lot.*

This construction is ambiguous. If "which" is really meant, it should be preceded by a comma, to set off the "which" clause as incidental. So amended, the sentence would read:

*Her apartment had two windows, which looked onto the parking lot.*

The meaning of this sentence is:
Her apartment had only two windows.
Both of the windows looked onto the parking lot.

By contrast, if the omission of the comma is correct, it may suggest that the author intended "that" rather than "which."
If that is so, the sentence should read:

*Her apartment had two windows that looked onto the parking lot.*

The meaning of this new sentence is quite different:
Her apartment may have had many windows.
Only two of those windows looked onto the parking lot.

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If the case turns on the number and location of windows in the apartment, this ambiguity could result in a miscarriage of justice.

The Federal Rules of Evidence are among the biggest offenders in the "which"-"that" arena. Rule 402, the basic rule of admissibility, reads in part:

Evidence which is not relevant is not admissible.37

Like Alice, this rule does not mean what it says, or at least it does not say what it means. What the rule says is this: Evidence is not admissible; and, by the way, evidence is something that is not relevant. What the rule means to say is this: There are two kinds of evidence: the kind that is relevant and the kind that is not; and the kind that is not relevant is not admissible. Since this is what it means, it should read:

Evidence that is not relevant is not admissible.

Alongside the framers of the Federal Rules of Evidence, in the "Which"-"That" Hall of Shame, stands Professor Karl Llewellyn, Father of the Uniform Commercial Code. Among his many strengths and greatnesses, knowing the difference between "which" and "that" was not to be found. The Code abounds with examples:

(1) A definite and seasonal expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance. . . .

(3) Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. . . . 38

Generations of lawyers accustomed to using and relying on the UCC have been conditioned to ignore the difference between "which" and "that." Professor Llewellyn, and others, propounded the notion that "which" is not a word with its own distinct meaning, but is merely a more formal way of saying "that." These writers are wrong; the two words do have distinct meanings, and the clarity of legal writing depends on preserving the difference. Most of the time, lawyers use "which" when, if speaking aloud, they would say "that." Thinking that

37. FED. R. EVID. 402.
they are adding formality and clarity by switching to "which," they are instead, in most cases, altering their meaning altogether. As a rule of thumb, say it aloud to yourself. Does it sound right, or does it sound stuffy? If it sounds stuffy, it's probably wrong.

The legal profession's confusion of "which" and "that" does more than irritate grammarians; it potentially sabotages the very meaning of the law itself. By such confusions, legal writers ironically destroy the very clarity upon which their profession depends. The path of the law is littered with the corpses of once-useful distinctions slaughtered by careless usage.

V. ISLAND OF LOST DISTinctions

One of the difficulties in the language is that all our words from loose using have lost their edge.

—Ernest Hemingway

Sloppy language makes sloppy law, which in turn leads to injustice. It was noted above that the confusion between "sex" and "gender" makes it possible to adopt a gender-neutral statue instead of the sex-neutral one that was intended. If the law perpetuates the notion that, for example, "differential" means the same thing as "difference," or that "verbal" means the same thing as "oral," our language loses useful words, useful distinctions, useful concepts. Already few among us know the once-useful distinctions among such words as podium, rostrum, lectern, dais, and pulpit; dock, pier, and wharf; prone and supine; alternative, choice, and option; one another and each other; tragedy, calamity, disaster, and catastrophe. Once "tragedy" comes to mean any regrettable event, from the death of a child to a devastating earthquake, we find ourselves with no word left to express what "tragedy" once meant—this is a genuine example of how losing a word through misuse means losing an idea.

The destruction of the meaning of "tragedy" is, of course, the handiwork of the news media's corruption of language, rather than the fault of the legal profession. And the loss of the true meaning of "tragedy" is a literary, not a legal, loss. But there are abundant examples of linguistic havoc wrought by lawyers and legal scholars as well. The "sex"-"gender" distinction, such a useful and critical one, has been virtually obliterator
erated by the language of the law. A few other endangered distinctions follow:

One notion that has, bafflingly, gained wide acceptance is that "verbal" means the same thing as "oral." Job ads seek out applicants with strong "written and verbal" communications skills. One can almost imagine that this misusage originated when a writer, stumped over whether to use "oral" or "vocal," hit upon "verbal" as a word that sounded as if it had overtones of both. Either "oral" ("of the mouth") or "vocal" ("of the voice") would have been a better choice. Lawyers, surprisingly, are among the chief offenders in the "oral"-"verbal" confusion, though they, above all, with their oral arguments and oral contracts, should be sensitive to the distinction. "Verbal" means "in words," and applies to written as well as spoken communication. "Vocal" rather than "oral" is the better word for spoken communication, the voice being more specific than the mouth, and "oral" having a rather clinical tone to it. But "oral" is pretty well entrenched as a result of such terms as "oral exam," and there is little benefit in arguing that those things are all more vocal than oral.

Another distinction that is under attack by legal writers is the difference between "imply" and "infer." In a profession in which the word "implied" carries so much weight (as, for example, in "implied contract"), it is particularly surprising to see the word so flagrantly misused. It is a simple rule to remember: The speaker or writer implies; the listener or reader infers. But when a court finds a contract to contain an implied term, legal commentators will observe that the court has "implied" the term, when in fact the court has done exactly the opposite. Here is a recent example:

The court could have implied an omitted term in the parties' agreement that would terminate the community property agreement where the parties are living separate and apart in a defunct marriage. Such a term should be implied in most community property agreements based on the likely intent of the parties. . . .

Commentators adopt this usage probably because they want to avoid suggesting that the parties to the contract implied the term, the act of implying a term carrying with it at

least a suggestion of the parties' intention. Since the finding of the implied term often has more to do with the intention of the court than with that of the parties, the commentator notes that the court "implied" the term. Yet there is a perfect word for what the court has done, and it is "infer." Inference suggests nothing about the intent of the speaker or writer to imply; it is all in the intent and perception of the interpreter—in this case, the court. The commentators' use of "imply" instead of "infer" is probably intended as a shorthand form for "to find implied"—yet that is precisely what "infer" means. To confuse two words that are ordinarily distinct is bad enough; to choose a word when you mean its opposite is practically Orwellian in its enormity.

Instead of working on preserving distinctions that are important for the sake of clarity, legal writers seem to deploy their creative energies toward producing new distinctions where none are needed.

VI. DISTINCTIONS IN SEARCH OF DIFFERENCES

The chief virtue that language have is clearness, and nothing detracts from it so much as the use of unfamiliar words.

—Hippocrates

While legal writers have blurred several once-useful distinctions by using distinct words as if they meant the same thing ("gender" and "sex" is our principal example), legal writers have also created many distinctions that are entirely unnecessary. Do we need the words "illegal" and "unlawful" both? Does "wrongful" mean something different from "wrong"? "Wrong" alone implies a moral judgment. "Wrongful," by adding a syllable, only makes the word more pompous and less clear.

Does the legalistic neologism "coequal" add anything to the meaning of the time-honored word "equal?" It seems only to suggest a kind of superequality: Not only does A equal B, and B equal A, but A and B equal each other! Imagine! They're both equal together! the word seems to proclaim. But equality being absolute, it is of no consequence whether A and B are equal together or separately. They are equal, and that's that.

Legal writers are also at pains to promulgate the notion
that "prior to" means something different from—and ever so much more important than—the homely and serviceable "before." And in a particularly wretched excess, the American Law Institute tried to persuade the world that "reasonable" and "rational" have significantly different meanings:

The phrase "rationally believes" is intended to permit a significantly wider range of discretion than the term "reasonable," and to give a director or officer safe harbor from liability for business judgments that might arguably fall outside the term "reasonable" but are not so removed from the realm of reason when made that liability should be incurred.40

Besides fostering the circular notion that liability should be incurred only when liability should be incurred, this comment rests on the dubious premise that "reasonable" beliefs and actions are more narrowly defined than "rational" ones—a premise that convinced few and that surprised many who had always thought that "reasonable" and "rational" mean nearly, if not exactly, the same thing. The only real difference between "reasonable" and "rational" is that the former comes from Latin by way of French while the latter comes directly from Latin.

Similarly, legislators are particularly fond of using the term "oversight" in place of the term "supervision," which means the same thing but comes directly from the Latin rather than detouring through German. "Oversight" has the unfortunate quality of introducing ambiguity, since its other meaning—a mistake or omission—has a negative connotation that a legislative committee ought to want to avoid. The term "legislative oversight" sounds more like an excuse than a responsibility.

Another instance of legal writing undoing language is demonstrated in this following example:

This rule also does not require exclusion when the evidence is offered for another purpose, such as . . . negativing a contention of undue delay. . . .41

No one other than a lawyer has ever believed that "negative" is a verb. For the rest of the world, "negate" works just

40. PRINCIPLES OF CORPORATE GOVERNANCE, § 4.01(a) comment (Tent. Draft No. 4 1985).
41. FED. R. EVID. 408.
fine; so do “deny,” “counter,” “contradict,” and “defend against,” depending on context.

It may not, however, seem a particularly grievous offense to use an adjective as a verb, even when perfectly serviceable verbs exist. If all it does is to substitute one word for another, with the same intended meaning, where’s the loss of clarity? The answer is that a neologism, by its very existence, seems to suggest a different meaning, even when none is intended. “If they meant ‘negate,’” the reader thinks, “they would have said ‘negate.’” Since they said ‘negative’ instead, they must mean something different by it.” In fact, the writers didn’t mean anything different at all; they wanted only to use a word that sounded more official without altering the meaning. But implying a difference where there really is none muddles the reader’s thinking, and it is in that muddle that clarity is lost.

There is an inherent logic to language and to word-formation, however elusive that logic may sometimes be. Communications Professor C. Ray Penn recognized as much when he recently told the Blacksburg, Virginia Unitarian Fellowship that “a choice of ambiguous words creates a world in which skepticism reigns . . . a world in which no one will ultimately trust any word.”

When we violate the internal logic of our language, or of language in general, we impoverish our ability to communicate, to be understood, and to be reasoned with. That is because language—whether written, spoken, or thought—is the sine qua non of rational discourse.

VII. **JUST LET THE LANGUAGE GROW, WHY DON’TCHA?**

But doesn’t a language have to be allowed to grow, along with its people, society, and culture? It does, without question. As Philo of Alexandria once remarked, growth is “coherence capable of moving itself.” Coinages and neologisms can enrich and refresh the language, make it more colorful, and add to the communicator’s arsenal. People are constantly giving English new ways of saying and naming, new ways of catching “what oft was thought but ne’er so well express’d.”

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But when lazy or sloppy usage blurs once-important and useful distinctions or obliterates meaning, the result is not growth but disintegration, and not only of language but of thought. Philo's "coherence" ceases to be part of the equation.

Linguistic change occurs slowly, in response to the changing needs of a culture. Its growth is coherence capable of moving itself. Linguistic change should not be achieved by mandate or by popularity poll.

Whether the revisers of language make an error seem correct (as with the "geoduck" example), or make a correct usage seem erroneous (the problem of "sex" and "gender," where we began), the delicate relationship between the word and meaning, the relationship we call clarity, is damaged, perhaps destroyed.

The ancient Chinese had a saying: "The beginning of wisdom is to call things by their correct names." Lawyers, lawmakers, and law professors have a unique power over our language and wisdom. We will all be the poorer if we do not wield it wisely.

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