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## Pronouns and Privilege

By the Honorable Mustafa Kasubhai (he/him)

*"[I]t is not difference which immobilizes us, but silence. And there are so many silences to be broken."*  
—Audre Lorde

COVID-19 forced most court hearings to go remote. Midway through the shutdown, I had the chance to empanel a grand jury after the previous one termed out. Excited about finally finding ways to bring people back safely into the courthouse, we summoned 70 potential grand jurors and placed them in three courtrooms to conduct voir dire. I was in my element. Engaging with the public, asking questions about their ability to serve as a grand juror, answering questions about service and the 18-month obligation. Speaking with potential jurors is a prime opportunity to share the importance of jury service to our judiciary and our democracy. As I asked questions and moved on to the next juror, I expressed my appreciation for their attendance and politely said, "Thank you, sir" or "Thank you, ma'am." My last "Thank you, sir" was met with "and I'm not a sir."

The time-honored expression of respect in gendered terms utterly failed. I had screwed up, even after having months before broadly incorporated practices in my chambers encouraging parties and counsel to identify their pronouns and

to find ways to speak in gender-neutral terms, precisely to prevent incidents like that. The incident demonstrates at least a double harm to the LGBTQ+ community. The first is the decision someone might make not to speak out and to remain silent, which contributes to invisibility and diminishment. Second, if someone decides to speak out, they are doing so without knowing what costly consequence they might bear. Both harms keep our courts from being accessible. Moreover, my intention to foster a more accessible space was insufficient to overcome the momentum of my practiced conventions.

I wrote this essay from my perspective as a cisgender male and as a judge in the District of



Judge Mustafa Kasubhai

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## Immigrant Students Leading the Way

By Karla E. Márquez

On May 12, UndocuLaw North West (ULNW) hosted its first webinar for non-citizen prospective law students and pre-law counselors. The first session of the webinar was open to all participants, and the second provided an intimate setting for undocumented and non-citizen students to discuss the challenges of pursuing a legal education as non-citizens.

"I first applied to law school in 2013 as a DACAmented student and was admitted to several schools. There were many great law school resources for people of color, but not for students like me. I felt lost and rescinded my applications," said ULNW co-founder Diego Gutierrez, a 2021

graduate of Lewis & Clark Law School. Diego became a lawful permanent resident before re-applying to law school and naturalized during his 1L year, but he did not want other students to defer their dreams and experience isolation through the application process. With support from Mimi Huang, assistant dean of admissions at Lewis & Clark Law School, Diego gathered a team of students to plan for the first ULNW webinar.

During the first session of the webinar, ULNW co-founder and DACA recipient Jose Garcia-Puente discussed how factors such as money-saving strategies, the state and campus

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## Pronouns and Privilege

Oregon. I am committed to finding ways to increase access to the courts. I offer this essay up as a description, not a prescription, of my own continuing journey, with all of its stumblings and fumbings, toward equity.

Several years ago, I first noticed faculty at the University of Oregon School of Law sending me emails with their pronouns in signature lines. At the time I thought I was tuned in to what was happening in diversity and inclusion, although I've come to appreciate that thinking I know what it's all about is the first sign that I don't know nearly enough. I was curious and skeptical. My immediate reaction those many years ago was that this practice seemed performative and unnecessary. After all, I'd known these faculty members for years, and I thought I had been aware of their gender identity and thus their pronouns, hadn't I?

Over time, my first reaction slowly transformed from a skepticism of pronoun identification to an appreciation of its importance, but it was still not something I saw myself doing. It was something the newer generation of lawyers and professionals employed. I, on the other hand, was already a judge, and my time for this kind of change was past. Also, employing my pronouns felt both inauthentic to me and simultaneously a bit too political for a judge. My excuses included that surely by now people knew my gender and pronoun usage, and I did not see any other judge using pronouns in this way, substantiating my conclusion that perhaps it was just too political. Let the next generation carry the water on this one. When I reflect on my thoughts about pronouns, the image of a wet, slippery fish writhing about and struggling for a way out comes to mind. I was that fish.

I have the luxury of a certain privilege as a judge and a cisgender man. While that privilege is tempered in some ways by my experiences as a person of color, the privilege is still quite real. My judicial position affords me the insulation from being confronted with my shortcomings quite so quickly, if at all. Very few people will tell me I'm wrong or demand I do something differently. There is little feedback. In the few times lawyers let down their guard and share thoughts or frustrations about the courts, I hear a resignation that judges will be judges, and the cost to a lawyer of disaffecting a judge is too great a risk. My privilege is compounded by the



The Honorable Mustafa Kasubhai  
U.S. District Court, District of Oregon

intersectional synergy of being a judge and a cisgender man. I am a beneficiary of a privilege that too often engenders the silence of others. Privilege is my walled garden that shuts out the sounds and sights from the rest of the world.

What else am I failing to see or hear? Until 18 months ago, I failed to more clearly see or hear the value, the weight, and the power of pronouns. I give credit to the many trailblazers—those faculty at the UO School of Law; the diversity, equity, and inclusion staff at the Oregon State Bar; and all the newer lawyers who provided their pronouns in their email signature lines. They realized something I had clearly missed. It is grammatically clear that conventional singular pronouns used to describe people are intrinsically gendered. The use of these gendered pronouns every day and all of the time required me to assume someone's gender and also exclude people who identify as non-binary. A truth and a comfortable benefit about privilege is that I get to be all too unaware of my unconscious biases. The harder truth is that while I might be oblivious to those biases, the objects of my biases are all too aware of the impacts.

The impact of this abstract understanding became more clear as I considered how many people over the last 14 years that I have been a judge must have appeared in front of me anxious or fearful that their gender identity, if it didn't conform to that which they believed I expected, would be met with a severe consequence, such as a higher sentence or fine, a loss of custody, reduced parenting time, a snide remark, or at least a disapproving look. How many people were compelled to conceal their gender identity in court, and how many people agonized and stressed over these decisions, and how many people spent so much of their mental and emotional energy on passing, to avoid recrimination in court, that they were unable to spend time preparing for court?

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How many attorneys have not been able to present their best cases for the same reasons? This landscape is despairing and exhausting. As long as this kind of exclusion persists, our courthouse doors are only slightly ajar.

I'm not sure how to get those doors all the way open. The judiciary is by nature conservative and it changes slowly. Convention is favored. And formality is, well, formalized. Gendered pronouns

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*As long as this kind of exclusion persists, our courthouse doors are only slightly ajar.*

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are ubiquitous in everyday language, and formal gendered honorifics such as *Mr.*, *Mrs.*, or *Ms.* are expected in court. Court decorum requires attorneys to refer to witnesses, jurors, and opposing counsel by their last names. How do we do that without a gendered honorific? How do we do that without assuming what someone's gender identity is? We lack conventions for this kind of conversation in our courts. What if we judges asked others to state their pronouns or we created a space in which attorneys and litigants could volunteer their own? Judges can lead the way—we need not be bystanders.

As a judge I have a great deal of latitude in defining the experience in the courtroom. I started working from the idea that if people, and lawyers in particular, saw a judge identifying his pronouns in an email signature line, then people appearing in front of me might not experience fear or anxiety, at least on the basis of gender identity. I drew the comparison to the value of being a judge of color. It is axiomatic that representation on the bench makes a difference to the perception of fairness. I have had countless experiences wherein people have shared with me how empowering it is to see someone with brown skin on the bench. It has made people of color feel like there was a place for them in our courts. Even though I am a cisgender male judge, if people of diverse gender identities felt safe and welcomed, then perhaps they could allocate their attention and energy on presenting their best selves and their best cases in the courtroom.

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## Pronouns and Privilege

Now, if you receive an email from me, in the automated signature line and next to the District of Oregon seal you will find my pronouns (he/him) by my name. Once I started using my pronouns in my signature line, my courtroom deputy and law clerks began including their pronouns in their email signature lines, without any direction from me. But how many litigants, witnesses, or lawyers actually receive an email from my staff or me? I searched for ways to do more.

On the District of Oregon court website each judge has our own section in which we can include information unique to our chamber's practices. I had been on the District Court bench for over a year and a half, and I had yet to upload any information to my section. This was the perfect opportunity to formalize my communications regarding, among several other practices, the use of pronouns. My courtroom rules provide:

*The parties and counsel are encouraged to advise the Court of their pronouns. People appearing before this Court may do so in writing and when appearing for conferences, hearings or trials. Attorneys are encouraged to identify their pronouns in their signature lines when submitting documents for filing. All parties and counsel are instructed to address each other in all written documents and court proceedings by those pronouns previously identified.*

The same written advice is provided in my case management and trial management orders, in Rule 16 conference scheduling orders, and in my instruction letter outlining procedures for settlement conferences.

The changes I've made are far from flawless. For example, the first iteration of the above-quoted language encouraged parties and counsel to "advise the Court of their preferred pronouns." Not long after I had uploaded this information last summer, I received a call from Lake Perrigüey. He had seen the changes to my website section, and in a kind and courageous way he proceeded to explain to me that "preferred pronouns" evokes the idea that a person's pronoun is optional, and gives the impression that pronouns other than the ones specified are acceptable. For many people, a pronoun is not a preference, but a statement of fact. His explanation made obvious and perfect sense to me, but only after he voiced it. Mr. Perrigüey was willing to

reach across that far-too-present chasm between judges and the bar and take a chance on educating me.

I quickly revised my documents, but I couldn't as quickly shake off the doubt that I, personally, could normalize these changes in a way that created something positive rather than having it utterly collapse around me and cause harm. While I think about equity issues generally, I can speak from personal experience on

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*The last formal procedure I have adopted is to include my pronouns in my signature line on all my written opinions, unpublished and published.*

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race and ethnicity. But I don't have the experience of being anything other than a cisgender man, and I began to realize that I lacked the language to speak on gender equity. I'm all too familiar with purported allies claiming the authoritative stage and speaking for others. I did not want to be that person. But was I becoming that person? And yet I did not want to quit, because quitting is also a privilege that I can get away with.

Changes to documents on my website seemed too passive. Soon after those changes were made, I committed to begin every civil hearing, status conference, and jury selection with an introduction that invited attorneys or potential jurors to introduce themselves and provide their pronouns so I could be sure to address them respectfully and appropriately. Lawyers have been quite responsive, jurors not so much. There also remains for me the constant reminder of the major blunder on my part that I described above—I had fallen into a pattern of making assumptions—and now I try every day to practice otherwise.

Then one day an out-of-state attorney was in a Rule 16 conference. I invited the attorneys to introduce themselves and to kindly provide their pronouns. This time, the attorney said he did not understand what I was asking him to do. Thinking I had not adequately described the exercise, I rephrased the invitation. There was a pause on the phone line, and the attorney repeated that he didn't understand. I was pretty sure I had explained it simply and surmised

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that he did not want to oblige. This had not happened before. I made one more effort and explained that I wanted people from diverse gender identities to be acknowledged with respect and that was the reason I invited this introduction. Another pause on the line was followed by the attorney's declaring something to the effect of, "I'm not interested; just go ahead and assume."

In that space between breaths before I spoke again, I realized something important. He was not comfortable. The point of this work was to create a safe place and to normalize gender diversity. But I also realized that in order to do that, I had to create a safe and accessible place for everyone. So I stuffed my ego and assumed. This experience also reminded me that while there may be some cisgender individuals who do not want to disturb the privileged practice of assuming gender, there can just as surely be non-binary gendered people who want it the same way because it would still not be safe to openly identify.

The last formal procedure I have adopted is to include my pronouns in my signature line on all my written opinions, unpublished and published. Assuming the practice reflects an authentic commitment to equity and inclusion, imagine how powerful a statement it could be when Ninth Circuit Court judges do this. And dare I dare to imagine when U.S. Supreme Court justices include their pronouns?

Over the last year I've had many uncertain experiences with pronouns. Admittedly my footing has not always been steady as I've tried to navigate this landscape. So why do this work? As a judge in our federal courts I have a responsibility to find ways to ensure access to our courts. When people are not seen or heard, they have no real access to the courts. When people feel unsafe coming into the courts because of their gender identity, there is no real access. When we deny someone their identity, we have the power to erase them. That is horrifying. But when we can acknowledge gender, a name, and identity, we exercise the power to honor a person's dignity. When we do this we say, "I see you, I hear you." That is how we can break the silences between us.

*U.S. Magistrate Judge Mustafa Kasubhai of the U.S. District Court for the District of Oregon is based in Eugene.*