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Welcoming Lakeesha and Vincenzo to the *Restatement of Torts*

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Barbara Kritchevsky*

Welcoming Lakeesha and Vincenzo to the *Restatement of Torts*

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I. INTRODUCTION

Illustrations are a crucial part of all *Restatements*. Illustrations show how the law applies to different situations and how it affects specific people. *Restatements of Torts* have not simply explained land-owners' duties, for example, but have provided examples of how land-owner liability doctrines work in practice. The *Second Restatement of*

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Torts discusses the duty a possessor of land owes to someone who enters the property by discussing the liability of “A Company” to “B, the daughter of one of the A Company’s workmen,” who was bringing dinner to her father at the plant.¹ The *Third Restatement* gives the example of “Ed and Margaret,” who carpool to work and park in the Viner Hospital lot.² Margaret walks to her office building and Ed visits his brother in the hospital.³

The illustrations reflect a major substantive change in the *Restatements*. The *Second Restatement* explains that B is a licensee to whom the company is liable.⁴ The *Third Restatement* eliminates the distinction between invitees, licensees, and trespassers; it would find the hospital liable to both Ed and Margaret when they fall in the icy lot even though Margaret is technically a trespasser.⁵ The substantive legal changes in the *Third Restatement* have been the subject of extensive commentary.⁶ But the *Restatement* has received no attention for

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1. RESTATEMENT (SECOND) OF TORTS § 341 cmt. d, illus. 1 (AM. L. INST. 1965).
 2. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 51 cmt. c, illus. 1 (AM. L. INST. 2010).
 3. *Id.*
 4. RESTATEMENT (SECOND) OF TORTS § 341 cmt. d, illus. 1 (AM. L. INST. 1965).
 5. See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 51 (AM. L. INST. 2010) (setting forth a general duty of landowners to entrants on land). The *Second Restatement*, on the other hand, had different provisions on duties to licensees, invitees, and trespassers. See RESTATEMENT (SECOND) OF TORTS §§ 333–39, 341–44 (AM. L. INST. 1965).

There is no single *Third Restatement of Torts*. Instead of one publication, *Restatements* of various aspects of tort law are being published over time. The products liability *Restatement* was published in 1998, and the volume on physical and emotional harm in 2010. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM (AM. L. INST. 2010); RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. (AM. L. INST. 1998). Between the two was the volume on apportionment of liability. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB. (AM. L. INST. 2001). The *Restatement on Economic Harm* was recently finalized. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR ECON. HARM (AM. L. INST. 2020). The volume on intentional torts to persons is now in draft form. See RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERS. (AM. L. INST., Tentative Draft No. 4, 2019). Other topics are in the very early stages. The ALI Annual Report for 2019–20 explains that the projects to restate the law of remedies and the law of defamation and privacy were launched in 2019. AM. L. INST., ANNUAL REPORT 2019–2020, at 14–15 (2020), https://www.ali.org/media/filer_public/50/60/506023fc-664b-4a0b-bb99-73c911c6eb3b/2019-2020_annual_report.pdf [https://perma.cc/F6RH-QK3L]. For a discussion of the reasons for restating the law of torts in several volumes, see Hildy Bowbeer, *Flying Trampolines and Falling Bookcases: Understanding the Third Restatement of Torts (Spring 2010)*, 37 WM. MITCHELL L. REV. 1034, 1035–36 (2011).

Generic references to the *Third Restatement* in this Article refer to the volume on *Liability for Physical and Emotional Harm*. References to other parts, such as references to the *Restatement of Products Liability*, indicate that specific part.

6. See, e.g., Michael D. Green, *The Third Restatement of Torts in a Crystal Ball*, 37 WM. MITCHELL L. REV. 993, 994–96 (2011) (part of Symposium on the *Third Restatement*); Stephen D. Sugarman, *Land-Possessor Liability in the Restatement*

the dramatic change at play in the background: the illustrations. The illustrations refer to the parties by name.⁷

The use of names has ramifications as important as the substantive changes. One difference the use of names highlights is the change in gender roles. The names in this example highlight different views on gender from those in the *Second Restatement*. While the names are commonplace American names, the gender roles are different. A woman goes to the office, as opposed to the workmen and fathers working in the *Second Restatement's* factory.⁸ And while this example uses standard American names, other illustrations use names such as Ahmed and Raissa.⁹ We meet Vincenzo, a camper who negligently fails to extinguish his campfire at night,¹⁰ and Lakeesha, an infant born with a birth defect.¹¹

The use of names is a change from most other *Restatements*. While all *Restatements* provide illustrations, those examples generally refer to the actors in other fashions—by letters, as the *Second Restatement of Torts* did,¹² or by generic terms such as “the driver.”¹³ The *Third*

(Third) of Torts: *Too Much and Too Little*, 44 WAKE FOREST L. REV. 1079 (2009); William E. Westerbeke, *The Sources of Controversy in the New Restatement of Products Liability: Strict Liability Versus Products Liability*, 8 KAN. J.L. & PUB. POL'Y 1 (1998).

7. All the illustrations in the *Third Restatement* use names except one.
8. Compare RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 51 cmt. c, illus. 1 (AM. L. INST. 2010) (discussing Margaret and Ed carpooling to work), with RESTATEMENT (SECOND) OF TORTS § 341 cmt. d, illus. 1 (AM. L. INST. 1965) (discussing “B, the daughter of one of the A Company’s workmen” entering a “factory for the purpose of bringing dinner to [her] father[.]”).
9. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM §§ 42 cmt. f, illus. 3, 47, cmt. e, illus. 1 (AM. L. INST. 2010) (Ahmed, from section 42, is a homeowner having a neighbor watch his cat and dog while he is out of town; Raissa, from section 47 is a passenger on an airline flight).
Standard American names do not mean that the names are unique to members of any ethnic or racial group. The most common names in the United States are common for all children. For example, the names Elijah, for boys, and Emma, for girls, were in the top five names for babies in 2020. *Popular Names in 2020*, SOC. SEC. ADMIN., <https://www.ssa.gov/cgi-bin/popularnames.cgi> [<https://perma.cc/5AN3-QWC3>] (last visited Jan. 16, 2022). Analysis of data from the first decade of the century reveals that of the babies named Elijah, 55.1% were white children, 36.7% were Black children, and 3% were Hispanic children. See Konstantinos Tzioumis, *Data Descriptor: Demographic Aspects of First Names*, SCI. DATA, Mar. 6, 2018, <https://www.nature.com/articles/sdata201825.pdf> [<https://perma.cc/7NR9-USX4>]. Of the babies named Emma, 54.5% were white children, 14.1% were Black children, and 24.4% were Hispanic children. See *id.* But the fact that these names are common among Caucasians means that readers, especially white readers, will assume that the actors are white. See *infra* Part V.
10. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 27 cmt. a, illus. 1 (AM. L. INST. 2010).
11. *Id.* cmt. e, illus. 2.
12. The First and Second *Restatements* referred to actors by letters. RESTATEMENT (SECOND) OF TORTS (AM. L. INST. 1965); RESTATEMENT (FIRST) OF TORTS (AM. L.

Restatement's illustration of Ed and Margaret would refer to A and B under the *Second Restatement's* approach. The approach most *Restatements* take would refer to “a driver and passenger.”¹⁴ This Article argues that all *Restatements* should use names.¹⁵ *Restatements*, and legal writing generally, should use names and examples that reflect the diversity of society.

Names reveal a great deal in today's society. Names usually reflect gender.¹⁶ Mary is almost exclusively a woman's name while James is virtually always male.¹⁷ The use of names in examples highlights gen-

INST. 1934). Other *Restatements* use letters. See *infra* note 48 (listing other *Restatements*).

13. Most parts of the *Third Restatement* use proper names, but the *Restatement of Apportionment of Liability* and the *Restatement of Liability for Economic Harm* use generic terms. See *infra* section II.B. Some other *Restatements* use generic terms. See *infra* notes 48, 50 (listing *Restatements*).
14. See *infra* notes 48, 50; see e.g., RESTATEMENT (SECOND) OF TORTS § 390 cmt. d, illus. 8 (AM L. INST. 1965).
15. Names here refer exclusively to first names. This is partially because *Restatement* illustrations use first names and partially because first names often indicate gender, unlike last names. First names also more directly indicate a person's ethnicity—a last name may indicate an ethnic background that had little influence on a person's upbringing. Jefferson M. Fish, *What Do Names Tell Us? Part II Last Names, The Cultural Mirror*, PSYCH. TODAY, Mar. 28, 2011, <https://www.psychologytoday.com/us/blog/looking-in-the-cultural-mirror/201103/what-do-names-tell-us-part-ii-last-names> [<https://perma.cc/MMY6-KEG4>]. And the tradition of married women taking the husband's last name means that a married woman may have nothing in common with the ethnicity that a last name indicates. See *id.*
16. This present-day reality reflects two assumptions that are open to challenge: names should reflect gender, and gender is a dichotomy. The link between names and gender will disappear if the trend of using names that do not announce male or female becomes more pronounced. See Alex Williams, *Is Hayden a Boy or Girl? Both. 'Post-Gender' Baby Names Are on the Rise*, N.Y. TIMES (Aug. 18, 2016), <https://www.nytimes.com/2016/08/21/fashion/gender-neutral-baby-names.html> [<https://perma.cc/3FTY-T8RD>] (noting that researchers have found an eighty-eight percent increase in the number of unisex baby names since 1985). But see *infra* note 19 (noting how people frequently ascribe a gender to supposedly gender-neutral names and ascribe a gender to invented names).

The more fundamental assumption is that all people have one of two possible genders that stays static throughout their lives. Gender transitions, gender fluidity, and non-binary identities challenge this notion. Christina Richards et al., *Non-Binary or Genderqueer Genders*, 28 INT'L REV. PSYCHIATRY 95, 98–100 (2016) (reviewing gender literature); see also Lisa M. Diamond, *Gender Fluidity and Nonbinary Gender Identities Among Children and Adolescents*, 14 CHILD DEV. PERSP. 110, 110–14 (2020) (discussing nonbinary, gender fluid, and transgender identities among children and adolescents). This Article reflects the current norms regarding naming and gender identity but does not mean to imply that those norms should not soon be outdated.

17. Mary has been the most common female name given to babies over the past 100 years, *Top Names Over the Last 100 Years*, SOC. SEC. ADMIN. (Mar. 2021), <https://www.ssa.gov/oact/babynames/decades/century.html> [<https://perma.cc/6943-YFKX>], but Mary has not ranked in the top 1,000 male names, *Popularity of*

der roles. A name alone can broadcast an actor's gender, while a letter only reveals such information if a gendered pronoun is also used. The *Second Restatement's* illustration of A, who "is an otherwise normal girl who is a little overweight, and is quite sensitive about it"¹⁸ could be gender neutral if it said that A "is a junior high student who is a little overweight." The use of a name makes that choice.¹⁹ So, the example of Alice, who "was operating a tractor manufactured by XYZ Farm Equipment"²⁰ in the *Third Restatement of Products Liability*, places front and center the fact that a woman is taking the action and is taking action that is not stereotypically feminine.

Names do not only reveal gender and gender roles—names often also reflect ethnicity. Names like Carlos reflect a Hispanic background, while Natasha is Slavic.²¹ Some names are likely to reveal religion. The name Mohammed likely reflects not only an Arabic, but also an Islamic background.²² Names can also indicate race. The

Name, U.S. SOC. SEC. ADMIN., <https://www.ssa.gov/cgi-bin/babynome.cgi> (last visited Dec. 22, 2021) (Enter "Mary" in the text box, select "Male," and click "Go."). James has been the most popular male name during the last century, *Top Names Over the Last 100 Years*, *supra*, and ranked sixth for male babies born in 2020, *Popular Names in 2020*, SOC. SEC. ADMIN., *supra* note 9, but it is has not appeared in the top 1,000 female names, *Popularity of Name*, *supra* (Enter "James" in the text box, select "Female," and click "Go."). Over the years, many popular names do not remain tethered to one gender, but the most popular boys' and girls' names are still distinctly different. *See, e.g., Popular Names in 2020*, *supra* note 9 (Social Security Administration reports that the most popular male names in 2020 were Liam, Noah, Oliver, Elijah, William, James, Benjamin, Lucas, Henry, and Alexander; the most popular female names were Olivia, Emma, Ava, Charlotte, Isabella, Charlotte, Sophia, Amelia, Isabella, Mia, Evelyn, and Harper).

18. RESTATEMENT (SECOND) OF TORTS § 46 cmt. f, illus. 13 (AM. L. INST. 1965).
19. Even use of an apparently gender-neutral name such as Robin would likely lead the reader to assume a gender for the actor. *See* David D. Van Fleet & Leanne Atwater, *Gender Neutral Names: Don't Be So Sure!*, 37 SEX ROLES 111, 117, 121–22 (1997) (observing that studies have found names generally considered gender neutral—like Les and Fran—are perceived as gendered, and that readers see invented names, such as those in science fiction, as gendered); *see also* Rebecca S. Bigler & Campbell Leaper, *Gendered Language: Psychological Principles, Evolving Practices, and Inclusive Policies*, 2 POL'Y INSIGHTS FROM BEHAV. & BRAIN SCI. 187, 192 (2015) ("Parents can create novel names that are not traditionally associated with females or males. However, depending on the names' phonological features, even novel names may be associated more with one gender than another." (citation omitted)).
20. RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 16 cmt. b, illus. 4 (AM. L. INST. 1998).
21. INTERPOL, A GUIDE TO NAMES AND NAMING PRACTICES 70, 79 (2006), https://www.fbiic.gov/public/2008/nov/Naming_practice_guide_UK_2006.pdf [<https://perma.cc/Z6B6-MGBC>] (listing the common origin for the name Carlos as Portuguese and Natasha as Russian) (U.K.).
22. *See* K.M. Sharma, *What's in a Name?: Law, Religion, and Islamic Names*, 26 DENVER J. INT'L L. & POL'Y 151, 158–59 (1998); *see also infra* note 286 (discussing a case in which an employee named Mamdouh prevailed in a Title VII suit against an employer who persisted in addressing the employee by an American-

name LaKeisha is almost always the name of an African American woman.²³ The use of names in an example that reflects relationship or marital status can indicate sexual orientation. It is hard to read the statement that Stephen and Rick are spouses to mean anything except that they are married gay men.²⁴

Names are a sensitive subject precisely because they reveal so much about a person. They reflect areas such as gender, where the law and those who write about the law have struggled. The law has wrestled with gender. A major shift in the law of torts over the past fifty years has been the change from the “reasonable man” to the “reasonable person” as the hallmark of the common actor.²⁵ There are

ized “nickname” based, in part, on the importance the employee placed on the religious significance of his name).

23. Tzioumis, *supra* note 9, (explaining that in 2010, 91.18% of Lakisha usage was Black or African American compared with only 8.82% white); *see also* William Kremer, *Does a Baby's Name Affect Its Chances in Life?*, BBC WORLD SERV. (Apr. 11, 2014), <https://www.bbc.com/news/magazine-26634477> [<https://perma.cc/QEE5-BH7F>] (explaining that a person's first name alone makes it increasingly easy to guess if a person in the United States is Black); Roland G. Fryer, Jr. & Steven D. Levitt, *The Causes and Consequences of Distinctively Black Names*, 119 Q.J. ECON. 767, 769 (2004) (explaining that in the early 2000s, around forty percent of African American girls born in California were given names that were not given to a single white girl born that year). Different researchers discuss characteristics of names that are likely to be those of Black people. Saku Aura & Gregory D. Hess, *What's in a Name*, 48 ECON. INQUIRY 214, 221 (2010) (finding that a Black person's name tended to be less common, have “more syllables and higher Scrabble scores”—more letters with greater Scrabble point values such as Q and J—have “fewer ‘oh’ endings, [and] are more likely to end in a vowel”); *see also* David N. Figlio, *Names, Expectations, and the Black-White Test Score Gap* 6–7 (Nat'l Bureau of Econ. Rsch., Working Paper No. 11,195, 2005), https://www.nber.org/system/files/working_papers/w11195/w11195.pdf [<https://perma.cc/LX22-KZGR>] (“Four frequent attributes of low socio-economic status names are particularly striking: (1) the name begins with one of a number of prefixes, such as ‘lo-’, ‘ta-’, and ‘qua-’; (2) the name ends with one of a number of suffixes, such as ‘-isha’ and ‘-ious’; (3) the name includes an apostrophe; and (4) the name . . . is particularly long, with several low-frequency consonants. . . . [A]s a name increases in its number of identified attributes, its bearer is . . . more likely to be Black.”).
24. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 43 cmt. e, illus. 1 (AM. L. INST. 2010) (giving this example). *Restatements* generally ignore the lesbian, gay, bisexual, transgender, queer, intersex, and asexual (LGBTQIA+) community, not only by omission from examples, but by failing to address the specific effect that some legal doctrines have on people in same-sex relationships. *See generally* Courtney G. Joslin & Lawrence C. Levine, *The Re-statement of Gay(?)*, 79 BROOK. L. REV. 621 (2014).
25. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM §§ 3, 6, 12 (AM. L. INST. 2010) (defining the standard for negligence in gender-neutral language); RESTATEMENT (SECOND) OF TORTS § 283 (AM. L. INST. 1965) (giving the “reasonable man” standard); *see infra* text accompanying notes 186–191; *See generally* Pat K. Chew & Lauren K. Kelley-Chew, *Subtly Sexist Language*, 16 COLUM. J. GENDER & L. 643 (2007); Fannie J. Klein, *Does the Law's “Reasonable Man” Embrace the Reasonable Woman?*, 17 N.Y.L.F. 543 (1971).

claims that common casebooks reflect a male bias.²⁶ Legal academia has also struggled to address race in the law school classroom,²⁷ and there is a growing recognition of the need for a conscious effort to confront implicit bias in the legal profession.²⁸

There has been a movement away from the use of names in some high-stakes situations, precisely because they reflect so much and generate subconscious reactions. The National Conference of Bar Examiners has changed from proper names to generic labels in Multistate Bar Exam questions,²⁹ at least partially in response to fears of bias.³⁰ The use of generic labels in an illustration—“the driver hit the pedestrian”—says much less³¹ and is likely to generate a different reaction than “Jennifer hit Drew,” which in turn is very likely to elicit a

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26. See Carl Tobias, *Gender Issues and the Prosser, Wade and Schwartz Torts Casebook*, 18 GOLDEN GATE U. L. REV. 495 (1988) (examining gender issues in a common law school casebook); see *infra* text accompanying notes 187–189.
27. See Margalynne J. Armstrong & Stephanie M. Wildman, *Teaching Race/Teaching Whiteness: Transforming Colorblindness to Color Insight*, 86 N.C. L. REV. 635 (2008); Rhonda V. Magee, *The Way of ColorInsight: Understanding Race and Law Effectively Through Mindfulness-Based ColorInsight Practices*, 8 GEO. J.L. & MOD. CRITICAL RACE PERSPS. 251, 260–64 (2016); Amy H. Kastely, *Out of the Whiteness: On Raced Codes and White Race Consciousness in Some Tort, Criminal, and Contract Law*, 63 U. CIN. L. REV. 269 (1994); *infra* text accompanying notes 294 & 344.
28. See generally Justin D. Levinson & Danielle Young, *Implicit Gender Bias in the Legal Profession: An Empirical Study*, 18 DUKE J. GENDER L. & POL'Y 1 (2010).
29. Current sample questions use general descriptors, such as “[a] father lived with his son.” MULTISTATE BAR EXAM, MBE SAMPLE TEST QUESTIONS (2016), <https://www.ncbex.org/pdfviewer/?file=%2Fdmsdocument%2F17> [<https://perma.cc/7MUS-SRSD?type=image>]. Older questions used proper names. MULTISTATE BAR EXAM., SAMPLE MBE III (July 1998), <https://www.ncbex.org/pdfviewer/?file=%2Fdmsdocument%2F18> [<https://perma.cc/4V3H-5YM4>] (using proper names such as Beth and Albert, as well as generic identifiers such as Homeowner and Neighbor).
30. The National Conference of Bar Examiners cautions against questions that reflect gender or racial bias. SUSAN M. CASE & BETH DONAHUE, NAT'L CONF. OF BAR EXAM'RS, THE ONE-PAGE GUIDE TO WRITING MULTIPLE-CHOICE QUESTIONS (NOV. 2018), https://lawprofessors.typepad.com/academic_support/files/multiple_choice_drafting_guidelines_by_s_2.%20Case%20of%20NCBE.pdf [<https://perma.cc/7NLL-GQ8D>] (recommending a question “uses common nouns to describe actors” and “avoids gender, ideological, racial/ethnic, or rural/urban biases”); see *infra* notes 132–153 and accompanying text for further discussion of the use of names in the Multistate Bar Examination and the switch to labels.
31. The fact that a general term says less on its face does not mean that it does not send a message. See Anna Lindqvist et al., *Reducing a Male Bias in Language? Establishing the Efficiency of Three Different Gender-Fair Language Strategies*, 81 SEX ROLES 109, 110–17 (2018) (finding that purportedly gender-neutral words are unconsciously associated with men); Karla A. Lassonde & Edward J. O'Brien, *Occupational Stereotypes: Activation of Male Bias in a Gender-Neutral World*, 43 J. APPLIED SOC. PSYCH. 387, 393–94 (2013) (finding that people infer a specific gender from supposedly gender-neutral occupational titles such as doctor/nurse or businessperson/secretary); see *infra* section IV.

different response than “Jamaal hit Katie.” The use of generic labels is also easier. While the writer who uses labels may still have to work to avoid gender-specific terms and pronouns,³² the generic labels hide questions of race, ethnicity, sexual orientation, and religion. But the use of generic labels also insulates readers from exposure to diverse names and the diversity in society they reflect. Labels dodge questions of diversity that the use of names necessarily raises, and labels thus reinforce preconceived ideas.³³ Labels sweep diverse names out of sight and risk reinforcing the notion that certain names reflect the other, not people that lawyers and those who study the law have to talk about.³⁴

The law, like society more broadly, has struggled with issues of diversity. The legal academy and the organizations that regulate it emphasize the importance of diversity in selecting a student body.³⁵ Potential legal employers must promise not to discriminate.³⁶ Law schools must not discriminate in hiring and must have a diverse faculty.³⁷ But these outward measures will have limited success if hidden bias remains unabated. A promise not to discriminate does little good if hiring partners deem Imani or Mohammed less qualified than Claire or William Bennett Bishop IV, despite the same grades and honors.³⁸ It does not prevent attorneys from preferring Lauren to LaToya as a client.³⁹

32. See *supra* note 18 and accompanying text (example of overweight teen).

33. See *infra* section IV.

34. Kathryn M. Stanchi, *Resistance Is Futile: How Legal Writing Pedagogy Contributes to the Law's Marginalization of Outsider Voices*, 103 DICK. L. REV. 7 (1998).

35. AM. BAR. ASS'N, ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2020–2021, at 15 (2020), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/standards/2020-2021/2020-21-aba-standards-and-rules-for-approval-of-law-schools.pdf [https://perma.cc/87BA-6CZH]; see *Bylaws Section 6-3. Diversity: Nondiscrimination and Affirmative Action*, ASS'N OF AM. L. SCHS. (Jan. 2016), <https://www.aals.org/about/handbook/bylaws/> [https://perma.cc/Q7KY-B9Z8].

36. MODEL RULES OF PRO. CONDUCT r. 8.4(g) (AM. BAR ASS'N 2020); see ASS'N OF AM. L. SCHS., *Placement Bulletin*, Aug. 13, 2015, at 1, <https://www.aals.org/wp-content/uploads/2016/07/PB-Web-Sample.pdf> [https://perma.cc/Q28P-QZGY]; NAT'L ASS'N OF L. PLACEMENT, PRINCIPLES AND STANDARD FOR LAW PLACEMENT AND RECRUITMENT ACTIVITIES pt. 4(E) (2019) (Rescinded Dec. 12, 2018).

37. MODEL RULES OF PRO. CONDUCT r. 8.4(g) (AM. BAR ASS'N 2020); see ASS'N OF AM. L. SCHS., *supra* note 36, at 1.

38. See Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination* (Nat'l Bureau of Econ. Rsch., Working Paper No. 9,873, 2003), https://www.nber.org/system/files/working_papers/w9873/w9873.pdf [https://perma.cc/BXD8-FECA].

39. See Brian Libgober, *Getting a Lawyer While Black: A Field Experiment*, 24 LEWIS & CLARK L. REV. 53, 54–56 (2020) (discussing a study showing that attorneys are more likely to respond to e-mail inquiries about representation from persons with white-sounding names). Clients may also be more likely to hire lawyers with

This Article argues that the *Third Restatement of Torts*⁴⁰ made the right decision in the use of names generally, and the use of diverse names in particular. It argues that all *Restatements*, and legal writers generally, should make a conscious effort to use names and examples that reflect the diversity of society. Part II discusses the *Restatements*, how they refer to the actors in the illustrations, and how they have begun to reflect an ethnically and culturally diverse society. Part III discusses the debates about names that were at the forefront in the struggle for gender equality and how those debates can inform the current issues involving diversity more broadly. Part IV explains why the use of supposedly neutral descriptors is not a substitute for the use of names. Neutrality is not neutral; the fact of implicit bias means that facially neutral illustrations perpetuate bias and stereotypes. Part V explains how the use of names that reflect diversity is a crucial step in combatting the law's struggle with bias. Familiarity helps to reduce implicit bias, as does confronting counter-stereotypical situations.⁴¹ The use of names in illustrations can increase familiarity and provide positive associations with previously unfamiliar names.

The Article concludes that the decision to use names, especially names that reflect a diverse population of people from different racial, ethnic, and religious backgrounds in a variety of gender roles and personal relationships, serves a valuable function by normalizing those names and the people who have them as important actors in valuable roles. Using names that reflect the diversity of American society can help to expose those who study and practice law to examples they might otherwise choose not to see. The familiarity, in turn, should help to reduce the bias⁴² and everyday micro-aggressions that people with diverse names suffer.⁴³ Authors may struggle in using diverse names, and their choices may generate criticism. But the fact that writing to reflect diversity may be difficult shows why it is so important. Exposure to names that may be unfamiliar to some people will help these names become more common.⁴⁴ This exposure can serve as one step to eliminating subconscious bias in the legal profession and beyond.⁴⁵

white-sounding names. See Jerry Kang et al., *Are Ideal Litigators White? Measuring the Myth of Colorblindness*, 7 J. EMPIRICAL LEGAL STUDS. 886, 899–905 (2010) (analyzing implicit stereotypes of the ideal litigator).

40. See *supra* note 6. While the *Restatement of Products Liability* first used names, the *Restatement of Liability for Physical and Emotional Harm* first used diverse names.

41. See *infra* notes 332–334 and accompanying text.

42. See *infra* notes 280–288 and accompanying text.

43. See *infra* notes 286, 293–297 and accompanying text.

44. See *e.g.*, *infra* notes 156–170 and accompanying text.

45. Eliminating unconscious bias in the legal profession is particularly important because of its homogeneity. See AM. BAR. ASS'N., ABA PROFILE OF THE LEGAL PROFESSION 2020, at 33 (2020), <https://www.americanbar.org/content/dam/aba/>

II. NAMES IN THE *RESTATEMENTS*

Restatements have always used illustrations to demonstrate how concepts apply.⁴⁶ Law, especially tort law, is about interactions among people. It would be hard to show how legal concepts apply without offering illustrations of how the principles operate in practice. Since virtually any legal illustration will involve human beings, the illustration must find a way to refer to those individuals. One possibility is to simply use letters: B is the daughter of a person who works at A corporation.⁴⁷ Many *Restatements* still use letters as the primary means of identifying parties.⁴⁸ Another option is to use labels: a buyer purchases a defective product from a retailer.⁴⁹ Labels—generic terms—are a common method of identification.⁵⁰ The third option is to use names: Ed and Margaret are coworkers who park in the Viner

administrative/news/2020/07/potlp2020.pdf [https://perma.cc/H8SK-EUKW] (“Nearly all people of color are underrepresented in the legal profession compared with their presence in the U.S. population. For example, 5% of all lawyers are African American—the same percentage as 10 years earlier—but the U.S. population is 13.4% African American.”).

46. See, e.g., AM. L. INST., CAPTURING THE VOICE OF THE AMERICAN LAW INSTITUTE: A HANDBOOK FOR ALI REPORTERS AND THOSE WHO REVIEW THEIR WORK 42–45 (2015) [hereinafter HANDBOOK FOR ALI REPORTERS]; RESTATEMENT (FIRST) OF TORTS § 13 cmt. h, illus. 2 (AM. L. INST. 1933) (describing physician A, who induces patient B “to consent to an abortion”). The *Restatements* follow a standard format. There is general outline of the area of law that is the subject of the *Restatement*. HANDBOOK FOR ALI REPORTERS, *supra*, at 33–34. Each section of the outline has numbered statements of legal principles that aim to restate the law as it exists at the time. *Id.* at 36. Following each provision are comments, which explain and elaborate on the legal principle. *Id.* at 42. Following many comments are illustrations that give examples showing the operation of the principles under discussion. *Id.* at 43–44. *Restatements* follow the commentary with reporter’s notes, which give authority for the comments, provide the source for some examples, and refer to relevant secondary authority. *Id.* at 45.
47. See *supra* note 1. This is the approach the *First Restatement* takes. See *infra* text accompanying notes 56–58.
48. See RESTATEMENT (THIRD) OF AGENCY (AM. L. INST. 2006); RESTATEMENT (SECOND) OF CONFLICTS OF L. (AM. L. INST. 1988); RESTATEMENT (SECOND) OF CONTS. (AM. L. INST. 1981); RESTATEMENT OF EMP. L. (AM. L. INST. 2015); RESTATEMENT (SECOND) OF L. OF JUDGMENTS (AM. L. INST. 1982); RESTATEMENT (THIRD) OF PROP.: SERVITUDES (AM. L. INST. 2000); RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT (AM. L. INST. 2011); RESTATEMENT (THIRD) OF SURETYSHIP & GUAR. (AM. L. INST. 1996); RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB. (AM. L. INST. 2000); RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. (AM. L. INST. 1998); RESTATEMENT (THIRD) OF TRUSTS (AM. L. INST. 2012); RESTATEMENT (THIRD) OF UNFAIR COMPETITION (AM. L. INST. 1995).
49. See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR ECON. HARM § 13 cmt. b, illus. 1 (AM. L. INST. 2020).
50. See RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT (AM. L. INST. 2011); RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS. (AM. L. INST. 2000); RESTATEMENT OF THE L. CHARITABLE NONPROFIT ORGS. (AM. L. INST., Tentative Draft No. 3, 2017); RESTATEMENT (THIRD) OF PROP.: MORTGGS. (AM. L. INST. 1997); RESTATEMENT (THIRD) OF TORTS: LIAB. FOR ECON. HARM (AM. L. INST. 2020).

Hospital parking lot.⁵¹ This approach is very rare outside of the *Third Restatement of Torts*.⁵²

A writer who uses names must then decide which names to use. It would be possible to just use the names of the parties if an illustration simply recounted the facts of a case,⁵³ but that shortcut is not available when the illustration is not so rooted. So, the writer must select names.⁵⁴ The choice of names raises additional issues. Names reflect more than gender. Names often also reflect race, ethnicity, and religion. The use of names in describing a relationship often reveals sexual orientation. The writer might simply use names that describe the people and relationships that are familiar to the writer. But then the

51. See *supra* note 2 and accompanying text.

52. See RESTATEMENT OF THE L. CHARITABLE NONPROFIT ORGS. (AM. L. INST., Tentative Draft No. 3, 2019) (using proper names for institutions and people, including last names); RESTATEMENT OF THE L. OF LIAB. INS. (AM. L. INST., Proposed Final Draft 2018) (using proper names for companies and generic terms for people); RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERS. (AM. L. INST., Tentative Draft No. 4, 2019).

53. That is not the practice, however. For example, an illustration on intent discusses the actions of “Steve, a police officer,” who engages in a chase that injures Ruth. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 1 cmt. c, illus. 4 (AM. L. INST. 2010). The illustration is based on *Jackson v. Town of Milton*, 669 N.E.2d 225 (Mass. App. Ct. 1996), in which the police officer was Kevin Foley and the injured motorist was James F. Jackson. See also, e.g., *id.* § 17 cmt. c, illus. 1 (changing names from Dr. Charles Poretta and Alfred Jones to Dr. Jones and Ronald in *res ipsa loquitur* illustration based on *Jones v. Porretta*, 405 N.W.2d 863 (Mich. 1987)); *id.* at § 19 cmt. f, illus. 4 (changing the parties from Kinney Rent A Car and Harold Spink to Ajax and Ron in an illustration based on *Danielenko v. Kinney Rent A Car, Inc.*, 441 N.E.2d 1073 (N.Y. 1982)).

54. The illustrations are not the result of an off-the-cuff decision. None of the *Restatements* come about quickly. *How the Institute Works*, AM. L. INST., <https://www.ali.org/about-ali/how-institute-works/> [<https://perma.cc/NXL3-NHTR>] (last visited Feb. 10, 2021) (describing the drafting process). Once a project is identified and approved, the ALI’s director selects reporters and advisers for their expertise and perspective. *Id.* The reporters, typically legal scholars, are responsible for researching and drafting; the advisers, typically lawyers or professors, review the drafts. *Id.* The reporters develop various drafts that the advisers and a consultative group of ALI members with an interest in the subject matter review. *Id.* The advisers and members consultative group review a preliminary draft. This results in a council draft, which the council—group of lawyers and judges—reviews. This draft either is sent back to the reporters and advisers for further consideration or is approved as a tentative draft that is submitted to the ALI membership. *Id.* If the council finds the draft is not ready for membership approval but would benefit from discussion, it will be submitted to the membership as a discussion draft. *Id.* The drafts then come for review before the ALI membership. A tentative draft is debated at the annual meeting and then either approved or sent back to the reporters and advisers for overhaul. *Id.* A series of tentative drafts takes place over the course of several years. *Id.* Once the revisions are completed, a proposed final draft goes to the council for review, and then to the membership for approval. *Id.* Once approved, the final draft is slated for publication. *Id.*; see also HANDBOOK FOR ALI REPORTERS, *supra* note 46, at 15–20 (2015) (discussing the drafting cycle).

older white lawyers who hold positions of influence are likely to use the names of well-off white colleagues and acquaintances.⁵⁵ Or the writer may consciously strive to use names that reflect the diversity of a broader society—of the people who might be part of the scenarios that the illustrations describe and who might be lawyers and law students reading the illustrations. The *Restatements of Torts* over the years reflect these choices in practice.

A. Illustrations in the *Restatements of Torts*

The illustrations in the *First Restatement of Torts*, published in 1934, reflect the times. It refers to parties with letters, but this practice does not hide assumptions about traditional gender roles. For example, the first illustration in the provision on defense of third parties provides: “A, seeing B apparently about to subject A’s daughter C to insulting familiarities, is privileged to use any reasonable means to prevent B from doing so.”⁵⁶ Consistent with the era, the parties in the illustrations reflect stereotypical gender roles. The men are professionals⁵⁷ and the women are wives, daughters, and victims who need male protection.⁵⁸ While the illustrations say nothing about the race or religion of the actors, it is fair to assume that the average lawyer at the time was a white, Christian man who assumed that the actors were the same.⁵⁹

The *Second Restatement of Torts*, published in 1965, reflect the same approach. Letters, again, identify the actors in the illustrations.⁶⁰ The illustrations, again, reflect stereotypical gender roles. Men are professionals,⁶¹ women are mothers,⁶² and women and girls

55. The American Law Institute has faced criticism for being elitist and lacking diversity based on age and other identities. See Kristen David Adams, *Blaming the Mirror: The Restatements and the Common Law*, 40 IND. L. REV. 205, 210–13 (2007); Alex Elson, *The Case for an In-Depth Study of the American Law Institute*, 23 LAW & SOC. INQUIRY 625, 632–33 (1998).

56. RESTATEMENT (FIRST) OF TORTS § 76 cmt. b, illus. 1 (AM. L. INST. 1934).

57. *Id.* § 13 cmt. h, illus. 2 (a male doctor induces a woman to consent to an abortion). The gender of other professionals is not identified. See *id.* § 13 cmt. h, illus. 1 (dentist A victimizes a male).

58. *Id.* § 57 cmt. b, ill. 1 (A man induces B woman to submit to intimate familiarities by producing counterfeit gold certificate); *id.* § 55 cmt. b, illus. 2 (A man engages in bigamous marriage with two women).

59. See *infra* Part IV.

60. See *supra* text accompanying note 1.

61. See, e.g., RESTATEMENT (SECOND) OF TORTS § 525 cmt. b, illus. 1 (AM. L. INST. 1965) (A is a man who works as a car dealer); *id.* § 436 cmt. a, illus. 1 (the manager of B company is a man); *id.* § 343B cmt. b, illus. 1 (A is a man who operates a grocery store); *id.* § 888 cmt. c, illus. 3 (A, the fire chief, is a man); *id.* § 892A cmt. d, illus. 4 (B, a surgeon, is a man).

62. *Id.* § 436 cmt. f, illus. 3 (B, a woman, witnesses her child being struck by a vehicle); *id.* § 343B cmt. b, illus. 1 (B, a child, is at the store with his mother); *id.*

are assistants to the men⁶³ and the victims of bullies.⁶⁴ The epitome of reasonableness, of course, was the “reasonable man.”⁶⁵ There was nothing to challenge the assumption that actors were white and Christian.

The parties had names in the first volume of the *Third Restatement of Torts*, the 1998 volume on Products Liability.⁶⁶ The first illustration refers to a bottle of AAA Champagne that Jack purchased from BBB Liquor Mart.⁶⁷ The use of names made the gender of all of the actors evident at a glance.⁶⁸ Reflecting changes in women’s roles generally in the thirty years since the *Second Restatement*, as well as a growing awareness of the need to combat sexism in legal writing,⁶⁹ the women in the illustrations work outside the home.⁷⁰ Sandra lays tile,⁷¹ Alice drives a tractor,⁷² and Dr. Smith is a woman⁷³ Those, however, are the only examples that challenge gender norms.⁷⁴

§ 312 cmt. b, illus. 1 (B, a woman, is with her child when A, a man, intentionally shoots a dog near the child).

63. *Id.* § 341 cmt. d, illus. 1 (daughter brings her father, a “workman,” dinner at the factory); *id.* § 652C cmt. b, illus. 1 (B is a male marketer and A is a female actress used in his advertisement).
64. *Id.* § 46 cmt. e, illus. 6 (principal of high school berates schoolgirl for immoral conduct); *id.* § 46 cmt. f, illus. 13 (overweight girl called hippopotamus).
65. *Id.* § 11 cmt. a (“The qualities which primarily characterize the reasonable man, to whose standard the actor is required to conform in order to be protected in his ignorance of the actual facts, are normal acuteness of perception and soundness of judgment.”).
66. The Reporter for the *Restatement*, Professor Aaron Twerski, did not recall the exact thinking leading up to decision to use names. He explained that he always disliked illustrations using A, B and C because he found the use of letters “dehumanizing,” “terribly confusing,” and hard to follow, whereas names are much easier to remember. Professor Twerski did not recall if the use of descriptors such as “the driver” was an option that the drafters considered. Professor Twerski said that Geoffrey Hazard, then-president of the American Law Institute, was a very hands-on editor but did not question the switch to names. Telephone Interview with Aaron Twerski, Rep., Am. L. Inst. (Feb. 10, 2021).
67. RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2 cmt. c, illus. 1 (AM. L. INST. 1998).
68. All the names in the illustrations are gender-specific names such as Jack, John, and Patricia.
69. See *infra* notes 179–194 and accompanying text.
70. Professor Twerski said that “even back then” the reporters were sensitive to concerns of gender equity in the illustrations. Telephone Interview with Aaron Twerski, *supra* note 66.
71. RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2 cmt. i, illus. 11 (AM. L. INST. 1998).
72. *Id.* § 16 cmt. b, illus. 4.
73. *Id.* § 21 cmt. c, illus. 1.
74. The men in the examples are engaged in gender-typical actions. The only possible exception is John, who purchases an electric blender that he only uses to make milkshakes. RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 3 cmt. b, illus. 1 (AM. L. INST. 1998).

The names used in the *Restatement of Products Liability* failed to dissuade the typical reader from making the subconscious assumption that the actors were all Caucasians, and presumably members of a Christian religion.⁷⁵ The *Restatement* used names such as Ann, Mary, John, and Robert—traditional, everyday American names.⁷⁶ The names are also popular among Caucasians.⁷⁷ While these names are used by people of all racial backgrounds,⁷⁸ using traditionally Caucasian names implies white actors and leads the average reader to assume those actors are Caucasian.⁷⁹ There are no names that reflect ethnic diversity except, perhaps, Sonia.⁸⁰

The *Restatement on Apportionment of Liability*, published in 2000,⁸¹ reverted to the use of letters. The first illustration discusses “A, a police officer, [who] enters B’s land to apprehend C, who is suspected of committing a crime.”⁸² The illustrations appear to strive for gender neutrality by largely steering clear of gendered pronouns.⁸³

75. See *infra* Part IV. Professor Twerski did not recall any considerations that went into the choice of which names to use. Telephone Interview with Aaron Twerski, *supra* note 66.

76. *Popular Baby Names in 1998*, SOC. SEC. ADMIN., <https://www.ssa.gov/OACT/babynames/index.html> [<https://perma.cc/9HUU-UJAU>] (last visited Jan. 24, 2021) (listing the top 100 baby names for 1998 with Mary as the forty-fourth most popular female name, John as the fifteenth most popular male name, and Robert as the twenty-third most popular male name). Ann did not fall within the top 100 names in 1998, but it held a place in the top 100 names from 1900 to 1973, reaching peak popularity in 1936. See *Popularity of Name Ann*, SOC. SEC. ADMIN., <https://www.ssa.gov/OACT/babynames/index.html> [<https://perma.cc/5Y6H-VEAC>] (last visited Jan. 24, 2021).

77. Researcher Konstantinos Tzioumis found that of 4,250 first names, Ann was used 94.86% for white babies, Mary 92.35%, John 94.38%, and Robert 94.51%. Tzioumis, *supra* note 9 (breaking down 4,250 first names into racial categories).

78. Ann, Mary, John, and Robert are also used as names for Hispanic, Black, and Asian babies, albeit less frequently than for white babies. See *id.*

79. See Kastely, *supra* note 27, at 286 (discussing perceptions of race). For a discussion of the reasons behind the rise of Black-identified names, see *infra* note 217.

80. Sonia is the Spanish form of Sonya, which originated in Russia. *Etymology & Historical Origin of the Baby Name Sonia*, OH BABY! NAMES, <https://ohbabynames.com/all-baby-names/sonia/> [<https://perma.cc/4H5Y-FCEX>] (last visited Jan. 24, 2021). Sonia is commonly used in the United States, Spain, and Portugal while another derivative, Sonja, is common in Slavic countries. *Id.*

81. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB. (AM. L. INST. 2000).

82. *Id.* § 2 cmt. j, illus. 1.

83. For example, an illustration concerning A and B, who are jockeys in a horse race, states “A claims that B” negligently caused their horses to collide, “injuring A. B argues that A” understood the risks. *Id.* § 2 cmt. j, illus. 2. This illustration never uses gendered pronouns.

Still, the gender-specific pronouns it does use are male,⁸⁴ and the few references to women continued to reflect traditional roles.⁸⁵

Things changed dramatically a decade later. *The Restatement (Third) of Torts: Liability for Physical and Emotional Harm*, published in 2010, reflects a conscious effort to portray a diverse society in its illustrations.⁸⁶ The examples reflect diverse gender roles. Paula is a construction worker,⁸⁷ Camille is a pilot,⁸⁸ and Keith is a stay-at-home father.⁸⁹ It introduces a gay couple—Rick smells smoke while piloting a small plane with his spouse, Steve.⁹⁰ While many of the actors retain common names such as Phil, Nancy, Sarah, and Richard, there are many names that are not traditionally Anglo-American. For example, there are Hispanic names such as Juan, Arabic names such as Ahmed, and the Slavic names Natasha and Raissa.⁹¹ Names that are predominantly African American are in short supply, but there is a Lakeesha and a Jamar.⁹²

84. *See id.* § 3 cmt. b, illus. 1 (A parks his automobile); *id.* illus. 4 (B fails to follow his doctor's instructions).

85. *See id.* § 6 cmt. c, illus. 1 (A drives negligently, injuring her husband and child); *id.* § A18 cmt. e, illus. 3 (A is a tenant assaulted by her former boyfriend).

86. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM (AM. L. INST. 2010). The reporter, Michael D. Green, explained that the original reporter, now-deceased Gary Schwartz, used names in early illustrations and when Green took over, he continued the practice. Green said that he did not remember if the original names were diverse, but he realized that there were “a lot more names than Dick and Jane” and made an effort to include diverse names himself. He did not recall if anything else spurred the decision. Telephone Interview with Michael Green, Rep., Am. L. Inst. (Feb. 3, 2021).

87. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 28 cmt. l, illus. 11 (AM. L. INST. 2010).

88. *Id.* § 32 cmt. b, illus. 2.

89. *Id.* § 42 cmt. h, illus. 6.

90. *Id.* § 43 cmt. e, illus. 1.

91. *See id.* § 4 cmt. d, illus. 2 (Juan negligently operates a vehicle); *id.* § 42 cmt. f, illus. 3 (Ahmed's neighbor fails to keep an eye on his pets); *id.* § 58 cmt. d, illus. 1 (Natasha is an investor); *id.* § 47 cmt. e, illus. 1 (Raissa is an airline passenger); *Ahmed*, BEHIND THE NAME, <https://www.behindthename.com/name/ahmed> [https://perma.cc/SB6X-9L8S] (Nov. 20, 2020) (noting Ahmed is an Arabic name); *Juan*, BEHIND THE NAME, <https://www.behindthename.com/name/juan-1> [https://perma.cc/K94U-KCJ2] (Dec. 14, 2019) (noting Juan is a Spanish name); *Natasha*, BEHIND THE NAME, <https://www.behindthename.com/name/natasha> [https://perma.cc/DKR3-J5S3] (Nov. 16, 2019) (noting Natasha is a Russian name); *Raissa*, BEHIND THE NAME, <https://www.behindthename.com/name/raissa/submitted> [https://perma.cc/6H9W-SDNW] (last visited Jan. 24, 2021) (noting Raissa is a Belarusian name).

92. Professor Green, a reporter, did not recall any reason for using or failing to use more traditionally Black names. Telephone Interview with Michael Green, *supra* note 66.

The website Behind the Name identifies Jamar as a recent name, possibly a mix of Lamar and Jamal, which is of African American usage. *Jamar*, BEHIND THE NAME, <https://www.behindthename.com/name/jamar> [https://perma.cc/D6HJ-CUQA] (Feb. 4, 2020). It is not on the Harvard Dataverse. Tzioumis, *supra*

The most recent installment of the *Third Restatement of Torts: Liability for Economic Harm*, and the installment furthest along in the drafting stage, *Intentional Torts*, do not reflect a consistent approach or focus on diversity. The *Restatement of Liability for Economic Harm*, published in 2020, takes a different approach than the prior *Torts Restatements*. It uses generic labels such as buyer and builder to refer to the actors in its examples.⁹³ For example, the first illustration begins, “Lawyer prepares a will for Client.”⁹⁴ Gender is not often mentioned; the drafters generally repeat the nouns describing the actors instead of using pronouns.⁹⁵ But when gender does appear, the roles are mostly traditional and almost all professionals are male.⁹⁶ Women are generally described by relationship. They are wives, daughters, and mothers.⁹⁷ There are no references to race, ethnicity, sexual orientation, or religion.⁹⁸ Diversity is not a focus.

The most recent drafts of the sections on *Intentional Torts to Persons*, published in 2017 and 2019, do not yet reflect final decisions regarding names used in illustrations, although the most recent draft reflects great diversity.⁹⁹ The current illustrations often switch from using letters to names. The first illustration of battery uses names, for

note 9. That source says that over ninety percent of individuals with a variant spelling of Lakeesha were African American. *See supra* note 23. None of the names on a 2006 list of the “Blackest” male or female names appears in the illustrations except a variant spelling of the number twenty male name, Darryl. *See Top 20 ‘Whitest’ and ‘Blackest’ Names*, ABC NEWS (May 1, 2015), <https://abcnews.go.com/2020/top-20-whitest-blackest-names/story?id=2470131> [<https://perma.cc/822Q-ACLG>]. On the other hand, *Restatement* illustrations use five of the “whitest” female names and three of the “whitest” male names.

93. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR ECON. HARM § 27 cmt. e, illus. 6 (AM. L. INST. 2020) (describing a business deal between Builder, Designer, and Investor); *see also id.* § 14 cmt. a, illus. 1 (describing a transaction for a used car using Buyer and Seller titles).
94. *Id.* § 1, cmt. e, illus. 1.
95. *See id.* § 26, cmt. c, illus. 1 (“Creditor sues Debtor and wins a judgment for damages. Creditor obtains a writ of garnishment . . .”).
96. *Id.* § 15 cmt. b, illus. 2 (male employee); *id.* § 17 cmt. d, illus. 2 (woman is a singer); *id.* § 21 cmt. e, illus. 12 (female shoplifter). *But see id.* § 22 cmt. d, illus. 13 (female business manager).
97. *Id.* § 1 cmt. e, illus. 1 (daughter); *id.* § 19 cmt. e, illus. 6 (mother).
98. While these traits are less relevant to liability for economic harm than to other areas of torts, race certainly could play a role in topics such as malicious prosecution and abuse of process, which are addressed in the draft. *Id.* §§ 21, 26.
99. The names in the drafts are not final. The reporter of the section on intentional torts, Professor Jonathan Cardi, explains that some early drafts use letters as placeholders and that other names are not final. Cardi stated that he is focused on using diverse names. E-mail from Jonathan Cardi, Rep., Am. L. Inst., to author (Feb. 1, 2021, 4:10 PM) (on file with author). The deputy director of the American Law Institute, Stephanie Middleton, says, “Sometimes we have a little fun with the names in early drafts—using names of people we know—but before we go to final we eliminate the fun.” E-mail from Stephanie Middleton, Deputy Dir., Am. L. Inst., to author (Feb. 1, 2021, 7:13 PM) (on file with author).

instance, while the third uses letters.¹⁰⁰ The actors appear in some non-traditional roles: Rhonda and Regina engage in a boxing match,¹⁰¹ and Miguel is a cheerleader.¹⁰² The first tentative draft includes an example that involves gay people, albeit not in the most favorable manner: oblivious Olivia fervently kisses Paula on their first date despite Paula's protests.¹⁰³ Many of the sections that use names use diverse name reflecting a broad range of ethnicities. Seiji batters Ichiro, for example.¹⁰⁴ There are various Hispanic names, such as Esperanza, Miguel, and Jorge.¹⁰⁵ Some illustrations use names that are traditionally African American such as Kwame and Laticia.¹⁰⁶ There are Asian names such as Hongju,¹⁰⁷ Arabic names such as Ahmed and Rakim,¹⁰⁸ and names from fiction such as T'Challa and Circe.¹⁰⁹

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100. RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERS. § 3 (AM. L. INST., Tentative Draft No. 4, 2019).
101. *Id.* § 14 cmt. d, illus. 7.
102. *Id.* illus. 6.
103. RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERS. § 102 cmt. b, illus. 10, 11 (AM. L. INST., Tentative Draft No. 1, 2015).
104. *Id.* § 3 cmt. b, illus. 6.
105. *Id.* § 14 cmt. d, illus. 6 (Miguel); *id.* § 30 cmt. g, illus. 14 (Jorge); *id.* § 31 cmt. c, illus. 1 (Esperanza); see *Esperanza*, BEHIND THE NAME, <https://www.behindthename.com/name/esperanza> [<https://perma.cc/P2DM-XK62>] (June 13, 2019) (listing Esperanza as a Spanish name); *Jorge*, BEHIND THE NAME, <https://www.behindthename.com/name/jorge> [<https://perma.cc/Y68D-4V34>] (Feb. 28, 2019) (listing Jorge as a Spanish name); *Miguel*, BEHIND THE NAME, <https://www.behindthename.com/name/miguel> [<https://perma.cc/S88R-AZUK>] (Nov. 16, 2019) (listing Miguel as a Spanish name).
106. RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERS. § 30 cmt. d, illus. 4 (AM. L. INST., Tentative Draft No. 4, 2019) (Laticia); *id.* cmt. e, illus. 6 (Kwame); *Kwame*, BEHIND THE NAME, <https://www.behindthename.com/name/kwame> [<https://perma.cc/2UJR-FZ5F>] (Jan. 25, 2013) (listing Kwame as a Western African name); *Latisha*, BEHIND THE NAME, <https://www.behindthename.com/name/latisha> [<https://perma.cc/Z824-RFZ5>] (Apr. 16, 2019) (listing Letitia and Leticia as variants, among others).
107. RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERS. § 32 cmt. g, illus. 8 (AM. L. INST., Tentative Draft No. 4, 2019); see *Hongju*, NAMES, <https://www.names.org/n/hongju/about> [<https://perma.cc/N6SW-GAJZ>] (last visited Feb. 13, 2021) (indicating Hongju is of Korean origin).
108. RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERS. § 32 cmt. g, illus. 8 (AM. L. INST., Tentative Draft No. 4, 2019) (Rakim); *id.* § 30 cmt. d, illus. 5 (Ahmed); see *Ahmed*, BEHIND THE NAME, <https://www.behindthename.com/name/ahmed> [<https://perma.cc/WA6Q-Y2KF>] (Nov. 20, 2020) (listing Ahmed as an Arabic name); *Rakim*, BEHIND THE NAME, <https://www.behindthename.com/name/rakim/> submitted [<https://perma.cc/DV23-JJ5M>] (last visited Feb. 13, 2021) (indicating Rakim is of Arabic origins, a variant of Rahim).
109. RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERS. § 30 cmt. h, illus. 20 (AM. L. INST., Tentative Draft No. 4, 2019) (T'Challa); *id.* illus. 22 (Circe). T'Challa is the given name of Marvel's Black Panther; Circe was a sorcerer in the *Odyssey*. *T'Challa Black Panther*, MARVEL, <https://www.marvel.com/characters/black-panther-t-challa> [<https://perma.cc/4MHL-CUDW>] (last visited Feb. 14, 2021) (describing T'Challa's role as Black Panther); *Circe*, BRITANNICA, <https://www.britannica.com/topic/Circe-Greek-mythology> [

Given the changes in naming conventions and increased diversity in the illustrations, it is surprising that there is no discussion of the reasons underlying the changes.¹¹⁰ The change was not mandated by the American Law Institute (ALI).¹¹¹ The ALI provides a handbook for reporters drafting the *Restatements*, which includes a section on language and structure.¹¹² The 2015 edition of the ALI Handbook directs the reporters to use gender-neutral language to avoid the appearance of sexism.¹¹³ It states that the ALI is committed to the elimination of gender bias and allows gendered language only where gender is relevant.¹¹⁴ It cautions reporters to avoid sexist language by avoiding gender-specific language. The Handbook notes that “one should not write of lawyers, for example, as if they consisted entirely of men or, for that matter, of women, and should not use gender-specific pronouns when referring to nonspecific but representative members of a group or class.”¹¹⁵ Despite this attention to gender, the handbook does not refer to race, ethnicity, or sexual orientation.

It is noteworthy that there is virtually no published discussion of the benefits of using names in the *Restatements*. At the 2002 annual meeting, ALI member Professor Susan F. French warned against using letters to identify parties in the *Restatement (Third) of the Law of Agency*, noting that letters could cause confusion and explaining:

In all of your Illustrations, you are using letters to identify the parties, and I'd like to ask you to think about using short names or real words instead. It's a

HKU3] (last visited Feb. 14, 2021) (describing Circe's role in the *Odyssey*). Neither is on the Social Security list of top 1,000 names for 2020. *Popular Names in 2020*, *supra* note 9 (listing the top and female names for 2020).

The reporter of the *Restatement of Intentional Torts to Persons*, Professor Jonathan Cardi, explained that he strived to include names from many cultures and roughly equal gender representation. He explained that he tried to use names that flout common stereotypes about race and gender. E-mail from Jonathan Cardi, *supra* note 99; *see infra* note 343 (elaborating on efforts to promote diversity).

110. Professor Green did not recall any discussion of the use of names, or of the names used, at any stage of the *Restatement* process. There was no pushback against an illustration with a gay couple or other naming choices. Telephone Interview with Michael Green, *supra* note 86. Similarly, Professor Twerski does not recall any questioning of the use of names in the *Restatement on Products Liability*. Telephone Interview with Aaron Twerski, *supra* note 66.
111. Professor Green did not recall that the ALI has ever intervened in response to the naming conventions in any of the *Restatements*. Telephone Interview with Michael Green, *supra* note 86.
112. HANDBOOK FOR ALI REPORTERS, *supra* note 46. The first version of this handbook was published in 2005.
113. *Id.* at 29.
114. *Id.* at 29–33. The use of names is in some tension with this dictate because most names indicate gender.
115. *Id.* at 30.

little bit difficult to keep all these things straight as to who's who when you are dealing with P's, B's, A's, and whatnot.¹¹⁶

The ALI Handbook does caution against the use of letters, and it says to use either names or generic labels; for example, it says to refer to a married couple as either Arthur and Betty or Husband and Wife, not H and W.¹¹⁷ None of drafts of the *Third Restatement*, however, address the use of names.

The use of names in examples is consistent with general writing advice to use names in writing to tell stories and aid clarity. A significant amount of literature recommends that authors use names to refer to people to aid clarity and enliven the writing.¹¹⁸ In practice, attorneys work with and write about real people with real names.¹¹⁹ Drafters of examples and hypotheticals do not have an established set of names with which to work, and using names from cases only works for examples that track cases.¹²⁰ So the choice to use names means that the writer must choose names. Absent a conscious effort, writers are necessarily going to use names with which they are familiar. Writers who are white men will then logically use names that are traditionally Caucasian. Regardless of the author, readers are likely to see names that do not reflect a specific ethnicity as Caucasian.¹²¹ The writer who consciously strives for diversity faces a wide universe of choices, given all the characteristics names reveal. Should the writer use names (and thus reveal the characteristics inherent in the choice of names) or hide as many identifying characteristics as possible behind letters and ge-

116. Susan Fletcher French, Professor of L. Emerita, UCLA L., Remarks at the ALI annual meeting (May 13–15, 2002), in AM. L. INST., 2002 ANNUAL MEETING PROCEEDINGS 101 (2003). This request did not carry the day, however. The illustrations in the *Restatement of Agency* use letters, primarily A and P. See RESTATEMENT (THIRD) OF AGENCY (AM. L. INST. 2006); see also *supra* note 66 (explaining that one reason behind the use of names in the products liability *Restatement* was to avoid the confusion that the use of letters could cause).

117. HANDBOOK FOR ALI REPORTERS, *supra* note 46, at 45 (2015). The assumption of a heterosexual couple is implicit in the designation husband and wife, but this was a fairer assumption in 2015 than today. See *Obergefell v. Hodges*, 576 U.S. 644, 674–75 (2015) (finding that the Due Process Clause guarantees same-sex couples the right to marry).

118. Trent M. Latta, *Don't Call Me Plaintiff, Call Me Ishmael*, NWSIDEBAR (Mar. 27, 2013), <https://nwsidebar.wsba.org/2013/03/27/call-me-ishmael/> [<https://perma.cc/T5DM-X6H3>] (explaining that good legal writing is not very different from good fiction writing because writers in both genres must tell a story that holds the reader's attention); see also *infra* notes 123–128 and accompanying text (noting that names engage human interest and bring actors to life).

119. While brief writers cannot make up names, they may nonetheless decide to substitute labels such as “appellant” for names. This is a practice that legal writing experts frown on. ANTONIN SCALIA & BRYAN A. GARNER, MAKING YOUR CASE: THE ART OF PERSUADING JUDGES 120–22 (2008); see *infra* text accompanying notes 123–128.

120. See *supra* note 53 and accompanying text.

121. See *infra* Part IV.

neric labels? Are the drafters of the *Third Restatement of Torts* on the right track in using names or should the *Restatements* follow the lead of the drafters of the Multistate Bar Examination and move from names to generic identifiers?

B. Naming Actors in Other Legal Writing

The use of names finds support in advice about legal writing generally.¹²² The struggle to identify actors is by no means exclusive to the *Restatements*, as all legal writing is at some level about human choice and human interaction. The question of how to refer to the humans whose actions give rise to legal disputes is fundamental to legal writing.

The issue of how to refer to people is crucial in brief writing, where writers must choose between referring to clients and opposing parties by names or labels. Names add human interest—no one would want to read a novel about “Lover No. 1 and Lover No. 2.”¹²³ Labels are generic and, by stripping individuals of their identities, make those individuals indistinct and to some extent unreal.¹²⁴ Court rules, including the *Federal Rules of Appellate Procedure*, caution against use of litigation labels such as “appellant” and “appellee.”¹²⁵ But even those rules provide that such generic terms as “the stevedore” are appropriate substitutes for names.¹²⁶ Bryan Garner and other well-known experts on brief-writing also advise using names instead of litigation labels.¹²⁷ In their co-authored book, Garner and Justice Antonin Scalia counter the oft-heard advice that writers should refer to individual defendants as “defendant” to dehumanize them by explaining that clarity should take precedence over gamesmanship.¹²⁸

The use of names adds clarity, but names can also generate emotional reactions that brief writers may want to avoid. The use of names can evoke prejudices that should not influence the decision of a dispute.¹²⁹ One opponent of the use of names states that “judges are

122. See Latta, *supra* note 118; SCALIA & GARNER, *supra* note 119.

123. Bryan A. Garner, *Are Legalistic Labels a Bad Habit or a Necessity?*, AM. BAR ASS'N J. (Apr. 1, 2015, 6:06 AM), https://www.abajournal.com/magazine/article/are_legalistic_labels_a_bad_habit_or_a_necessity [<https://perma.cc/4B33-XRN7>].

124. *Id.*

125. FED. R. APP. P. 28(d) (suggesting instead that counsel should use the parties' names or descriptive labels such as the employee for clarity).

126. *Id.*

127. See BRYAN A. GARNER, *THE WINNING BRIEF* (3d ed. 2014); Garner, *supra* note 123.

128. SCALIA & GARNER, *supra* note 119, at 121. Justice Scalia and Garner also emphasize the importance of controlling “the semantic playing field.” *Id.* at 35. A lawyer representing American Airlines should refer to the client as “American,” not “AA.” *Id.* at 35–36. The opponent, however, should refer to the business as “the Company” or “the Corporation.” *Id.* at 36.

129. Garner, *supra* note 123 (quoting judges who emphasize that acts are judged, not individuals). Garner quotes Judge Jim Rosenbaum (retired), who explains that

supposed to see the legal issue and decide that objectively. It should not matter if the defendant has a WASP name or an ethnic name.”¹³⁰ Retired Judge James M. Rosenbaum is more overt, explaining that the use of names is not as fair as the advocates imply: “Names like Goldberg, Latricia, Yellow Feather, Marciano, Johnson-Smith, X (as in Malcolm), or many others you can easily—but probably uncharmingly—think of, can carry a lot of baggage that may well infect impartial decision-making.”¹³¹ The use of names may trigger bias, leading some to counsel against the practice. Lawyers should look to the best interests of the client in deciding whether to use names. The choice can have high stakes for the client.

Other forms of legal writing carry high stakes, notably exams. Bar exams are one of the highest-stakes examples, since admission to the legal profession in almost all states depends on successful completion of four exams: the Multistate Bar Exam (MBE), the Multistate Professional Responsibility Exam (MPRE), the Multistate Performance Test (MPT), and the Multistate Essay Exam (MEE).¹³² Over half the states use the Uniform Bar Exam (UBE), made up of the MBE, MEE, and MPT.¹³³ All of the exams rest on hypothetical legal situations involving human actors who must somehow be identified. Published exams and study aids reflect a move away from names to generic labels, especially for multiple choice exams.¹³⁴

Virtually all states give the MPRE, a multiple-choice exam.¹³⁵ The available practice questions use generic identifiers to refer to the parties. Sample test questions available on the MPRE website deal with

criminal charges are impersonal, and the *Federal Rules of Evidence* limit the extent to which personalizing information can enter in trial. *Id.* Avoiding names can minimize the introduction of irrelevant considerations into judging. *Id.* A lawyer can also refer to a client in a way designed to convey favorable associations. *See supra* note 128 and accompanying text.

130. Garner, *supra* note 123 (quoting Professor Ronald Rotunda).

131. *Id.* (quoting Judge Jim Rosenbaum).

132. NAT’L CONF. OF BAR EXAM’RS, UNDERSTANDING THE UNIFORM BAR EXAMINATION 5 (July 2017), <https://www.ncbex.org/pdfviewer/?file=%2Fdmsdocument%2F209> [<https://perma.cc/PP79-HPQ7>].

133. *See id.* at 2 (showing that all but thirteen states have adopted the UBE as of 2021).

134. *See CASE & DONAHUE, supra* note 30 (recommending drafters “use[] common nouns to describe actors” and “avoid[] gender, ideological, racial/ethnic, or rural/urban biases”); *see also* NAT’L CONF. OF BAR EXAM’RS, NEW YORK STATE BAR EXAMINATION MME & MPT QUESTIONS (Feb. 2018), <https://www.nybarexam.org/examquestions/FEB2018QA.pdf> [<https://perma.cc/QM4R-QYUP>] (using questions including “[a] woman whose hobby was making pottery,” a “defendant,” and “a developer”). For further discussion of the use of names on the MBE, *see infra* text accompanying notes 143–72.

135. *Jurisdictions Requiring the MPRE*, NAT’L CONF. OF BAR EXAM’RS, <https://www.ncbex.org/exams/mpre/> [<https://perma.cc/USR9-HRQ2>] (last visited Jan. 24, 2021) (noting that every state but Wisconsin requires passage of the MPRE for admission to the bar).

an attorney who represents a wife in an acrimonious divorce, an oil and gas developer who seeks legal representation, and a law firm with 300 lawyers in ten states.¹³⁶ The only identifiers are generic terms like “attorney,” “client,” “wife.”¹³⁷

The major exam is the MBE, given in every state and territory except for Louisiana and Puerto Rico.¹³⁸ The MBE has shifted from using names to generic identifiers in its questions. Retired exams from the 1990s use proper names in the questions, mostly common American names such as Beth and Albert. For example, a question on the 1998 bar exam asks about Beth, who solicited Albert for cocaine that she resold to Carol, an undercover police officer.¹³⁹ The MBE now uses generic identifiers such as driver and pedestrian.¹⁴⁰ Sample questions on the MBE website involve a father shot by his alcoholic son, a woman in State A who sues a retailer in State B, and a young man who suggests to a friend that they steal a neighbor’s television.¹⁴¹ None of these persons has a name. Using generic identifiers does not avoid the need to indicate gender, however. The examiners describe some actors as “a man” or “a woman” and use gender-specific pronouns, in one case to counter gender stereotypes.¹⁴²

Exams that require essay responses appear more likely to use names. The MPT, which asks the examinee to perform a task that a

136. NAT’L CONF. OF BAR EXAM’RS, MPRE SAMPLE TEST QUESTIONS, <https://www.ncbex.org/pdfviewer/?file=%2Fdmsdocument%2F3> [<https://perma.cc/YH72-HHS5>] (last visited Aug. 21, 2021).

137. *Id.* The use of generic labels does not avoid references to gender. The sample questions use both male and female pronouns. For example, the attorney in question one informed the board that “he” may withdraw and the attorney in question three informed the president that “she” was withdrawing. *Id.*

138. *See Jurisdictions Administering the MBE*, NAT’L CONF. OF BAR EXAM’RS, <https://www.ncbex.org/exams/mbe/> [<https://perma.cc/K6WB-LTNN>] (last visited Jan. 24, 2021) (showing Louisiana and Puerto Rico as the only jurisdictions that do not administer the MBE).

139. *See* Nat’l Conf. of Bar Exam’rs, Sample MBE III, at 2 (1998), <https://www.ncbex.org/pdfviewer/?file=%2Fdmsdocument%2F18> [<https://perma.cc/KHJ6-3YD3>].

140. *See, e.g.*, NAT’L CONF. OF BAR EXAM’RS, MBE SAMPLE TEST QUESTIONS 1 (2016), <https://www.ncbex.org/pdfviewer/?file=%2Fdmsdocument%2F17> [<https://perma.cc/785E-GAE7>] (“A woman from State A filed an action against a retailer . . . in State B.”).

141. *Id.* at 1–2.

142. *Id.* Question two involves a man who sues a railroad, and question eight involves a woman who borrows a large sum from a bank. *Id.* at 1. Question ten involves a nurse who tells his attorney that he was fired because of his age. *Id.* at 3. Other questions carefully avoid indications of gender. Nothing in question sixteen reveals the gender of a protestor or police officer, for instance. *Id.* at 4. The reference to a male nurse counters the stereotypes that nurses are female. *See infra* text accompanying notes 326–333.

junior attorney might have to perform, uses names.¹⁴³ Recent test summaries on the MPT website involve the law firm Betts & Flores and Carol Richards, the niece and legal guardian of Eli Doran.¹⁴⁴ MEE questions appear to be moving away from names, however. The MEE website provides six October 2020 questions. Four of the questions refer to people only by generic identifiers such as woman, father, and bartender.¹⁴⁵ Two of the questions use names. One uses the everyday names Amy, Bob, and David, and the names in the other—Aldo, Belinda, and Carlos—reflect some diversity.¹⁴⁶ Study questions from September 2020 use only generic terms,¹⁴⁷ while older study questions used both names and generic labels.¹⁴⁸ The names are chiefly generic ones such as Fran, Gina, and Hank, but Ivan does appear in one.¹⁴⁹ Texas is one state that uses names to reflect ethnic diversity. Exams over the past ten years have used names such as Juan, Dante, and Yaz.¹⁵⁰

To a large extent though, any discussion of the bar exam necessarily focuses on the MBE and the choices the National Conference of Bar Examiners (NCBE) makes in drafting it.¹⁵¹ The switch from names to descriptive terms in the MBE was not made quickly, and the surrounding debate illustrates how fraught naming decisions are. It is

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143. See, e.g., NAT'L CONF. OF BAR EXAM'RS, FEBRUARY 2020 MPT SUMMARIES (2020), <https://www.ncbex.org/pdfviewer/?file=%2Fdmsdocument%2F285> [https://perma.cc/LJU3-RGJY] (using names including Alice, Quinn, William, and Janet).
144. See *id.* at 1. While the firm name Flores appears Hispanic, none of the first names in the available summaries carries a strong racial, religious, or ethnic association.
145. NAT'L CONF. OF BAR EXAM'RS, OCTOBER 2020 MEE SAMPLE QUESTIONS (2020), <https://www.ncbex.org/pdfviewer/?file=%2Fdmsdocument%2F291> [https://perma.cc/YUV2-UG69].
146. Compare *id.* at 4 (question two), with *id.* at 9–10 (question four).
147. See NAT'L CONF. OF BAR EXAM'RS, SEPTEMBER 2020 MEE QUESTION 1 CRIMINAL LAW & PROCEDURE (2020), <https://www.ncbex.org/pdfviewer/?file=%2Fdmsdocument%2F287> [https://perma.cc/N2SX-ULMQ] (involving four questions using generic labels and another two using the common names Barbara, Carrie, Aaron, Adele, and Ben).
148. Three of the nine July 2010 questions used names. See NAT'L CONF. OF BAR EXAM'RS, JULY 2010 MEE QUESTIONS AND ANALYSES (2010), <https://www.ncbex.org/pdfviewer/?file=%2Fdmsdocument%2F187> [https://perma.cc/UY6L-UUQ5].
149. *Id.* at 3. The names are from question one.
150. TEX. BD. OF L. EXAM'RS, OCTOBER 2020 PROCEDURE AND EVIDENCE QUESTIONS 4 (2020), https://ble.texas.gov/2020_Oct_Civ_Crim [https://perma.cc/9JRZ-Q3JJ] (describing lawyers Juan and Dante, who represent Claire and Aaron, respectively); TEX. BD. OF L. EXAM'RS, FEBRUARY 2020 PROCEDURE AND EVIDENCE QUESTIONS 6 (2020), https://ble.texas.gov/2020_Feb_Civ_Crim [https://perma.cc/9ZHQ-FARZ] (including Yaz and Zane, who rob a convenience store, and the elderly witness, Xavier).
151. As discussed above, almost all states use the MPRE and MBE. See NAT'L CONF. OF BAR EXAM'RS, *supra* notes 135, 138. The MPT and MEE are also in wide use. See NAT'L CONF. OF BAR EXAM'RS *supra* notes 132–33.

evident that the NCBE wants unbiased exams. Its guide to writing multiple choice questions supports this, directing drafters to “avoid[] gender, ideological, racial/ethnic, or rural/urban biases.”¹⁵² The switch to labels aimed to help reduce these biases.¹⁵³

The move away from names comes in light of studies showing disparate bar exam pass rates along racial lines.¹⁵⁴ The bar examiners say the disparity is not a result of exam bias but a corollary of lower Law School Admission Test (LSAT) scores and law school grade point averages.¹⁵⁵ And while the examiners officially do not acknowledge a link between the disparity and exam content, “[i]n 1994, the NCBE commissioned a study of ‘the gender, ethnicity, and naming conventions used in the MBE as a whole.’”¹⁵⁶ The study found a definite gender bias. Male characters outnumbered women three to one and many of the women were in stereotypical roles.¹⁵⁷ The bar examiners determined it should eliminate bias, not because such bias affected exam takers, but because it is “the right thing to do.”¹⁵⁸

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152. CASE & DONAHUE, *supra* note 30. Similar guides were in use before the switch, when the guide encouraged question drafters to avoid proper nouns. See Beth E. Donahue, *Recent Changes in NCBE’S Multiple-Choice Examination Programs*, BAR EXAM’R, Aug. 2008, at 25, 26, https://thebarexaminer.org/wp-content/uploads/PDFs/770308_donahue.pdf [<https://perma.cc/5NSY-QQE4>] (explaining that common nouns should be used in lieu of proper nouns when at all practicable).
153. While the bar examiners apparently have not given this reason explicitly, the debate underlying that switch strongly supports that conclusion and that is the understanding of bar exam specialists. E-mail from Mike Sims, President of Barbri, to author (Jan. 25, 2021, 16:59 CST) (on file with author) (stating that he recalled hearing that explanation in presentations).
154. See Christina Shu Jien Chong, *Battling Biases: How Can Diverse Students Overcome Test Bias on the Multistate Bar Examination*, 18 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 31, 36–40 (2018) (discussing performance statistics); Joan Howarth, *Teaching in the Shadow of the Bar*, 31 U.S.F. L. REV. 927, 931–33 (1997) (same).
155. Howarth, *supra* note 154, at 933 (“In other words, the testing validates itself.”); see also Joan W. Howarth, *The Professional Responsibility Case for Valid and Nondiscriminatory Bar Exams*, 33 GEO. J. LEGAL ETHICS 931 (2020) (contending that professional ethical duties require less discriminatory attorney licensing mechanisms, borrowing from Title VII’s framework for reducing disparate impact).
156. Howarth, *supra* note 154, at 933–34 (quoting Lynda Leidiger & Mary M. Sandifer, *Names, Gender, and Ethnicity in the MBE*, BAR EXAM’R, Aug. 1996, at 21, 22). Leidiger and Sandifer’s study gave way to recommendations that were implemented in the 1997 MBE.
157. Leidiger & Sandifer, *supra* note 156, at 23. There were 208 men, 76 women, and 44 of unspecified gender in the 200 questions. *Id.* Men were more likely to be police officers, property owners, and perpetrators. Women were more likely to be victims, patients, and fill stereotypical roles like nurses. *Id.*
158. *Id.* at 22. Leidiger & Sandifer said that there was no empirical evidence of a link between test content and racial disparities in exam performance. *Id.* They did note, however, that a study showed that Black examinees performed better on National Teachers Examination questions with Black content. *Id.*

But how can the examiners eliminate bias? The examiners aimed to eliminate bias first by eliminating names when possible and using names without racial or ethnic connotations if not.¹⁵⁹ Functional names were preferable “because they do not connote gender or ethnicity, or otherwise introduce elements that could distract or provoke an examinee.”¹⁶⁰ Functional terms were not possible in all cases, such as in a problem with three grandchildren.¹⁶¹ In those cases, the examiners would use “common first names.”¹⁶² In short, the effort to eliminate bias prioritizes anonymity over diversity.¹⁶³

This approach was met with criticism because it mistakes anonymity for neutrality. Professor Joan Howarth, scholar and leader in legal education, among other areas, stated: “Such efforts are often more of a whitewashing, where the ‘un-raced’ subject is white and where the only race not noticed is whiteness.”¹⁶⁴ A policy of eliminating names with “racial, political, or sociological overtones” in effect is likely to be a policy that eliminates names that are not familiar to “white, middle-class psychometricians.”¹⁶⁵ Using names that have no racial or cultural identification results in names that reflect a “WASP sensibility.”¹⁶⁶ The bar examiners’ response to this criticism was an argument that diversity would be practically impossible to achieve.¹⁶⁷ The argument goes that diversity would be too unwieldy given test-takers’ myriad nationalities;¹⁶⁸ for instance, representation of Asian names would require representation of Thai, Filipino, Japanese, and Korean

159. *Id.* at 23; Howarth, *supra* note 154, at 935 (saying that the examiners meant to make the examination color-blind, mentioning race only when essential to a question, and questioning how race can be eliminated from the law); *Checklist for the Preparation of Essay Questions*, 64, THE BAR EXAM’R, Aug. 1995, at 36, 37 (counseling against use of names with racial, political, or sociological overtones).

160. Leidiger & Sandifer, *supra* note 156, at 23. The recommendation also said that functional terms can make an item more straightforward. *Id.*

161. *Id.*

162. *Id.*

163. Howarth, *supra* note 154, at 935 (commenting on Leidiger & Sandifer, *supra* note 156, at 24).

164. *Id.* (quoting STEPHANIE M. WILDMAN ET AL., PRIVILEGE REVEALED: HOW INVISIBLE PREFERENCE UNDERMINES AMERICA 1–4 (1996)).

165. *Id.* (quoting *Checklist for Preparation of Essay Questions*, *supra* note 159, at 37); see *supra* text accompanying note 160 (explaining preference for labels).

166. Leidiger & Sandifer, *supra* note 156, at 24 (noting that reflecting such a sensibility was not the examiners’ intent).

167. *Id.*

168. *Id.*

names, among others.¹⁶⁹ The relative ease of facial neutrality supercedes the tumult of diversity.¹⁷⁰

The switch to descriptive terms in the MBE is likely to grant the examiners merely a temporary reprieve. The issue of names and telling stories in a non-biased manner will likely become more of a focus in the years ahead as testers back away from multiple choice exams. Even the NCBE recently announced recommendations including a decreased emphasis on multiple choice bar exams.¹⁷¹ Instead, they suggest an integrated exam consisting of a variety of question formats that tests practical skills and that looks more like the current MPT.¹⁷² The individuals in the problems will need names.¹⁷³

III. WE'VE BEEN HERE BEFORE: LESSONS FROM THE STRUGGLES FOR GENDER EQUALITY

Power in Western civilization has historically rested in the hands of white men. They have social, economic, and political power.¹⁷⁴ Soci-

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169. *Id.* There was also the concern that in the bar exam, where many questions involve wrongdoing, it would be difficult to apportion the roles fairly without giving offense. *Id.* There was also a claim that it was potentially offensive to reflect ethnicity only through first names because “increasingly” American parents were choosing names that were not representative of cultural roots and that there was more “homogeneity” in naming. *Id.* This claim does not seem accurate today. *See supra* note 79; *infra* notes 312–19.
170. Howarth, *supra* note 154, at 935. Professor Howarth criticizes the examiners’ “false claim of universality.” *Id.* at 936. Howarth points to the non-associative names approved for the 1994 MBE, which included Horace and Mavis, and asks how “is ‘Mavis’ more universal than José—the fourth most common name given to Californian boys in recent years?” *Id.* (footnote omitted).
171. NAT’L CONF. OF BAR EXAM’RS, OVERVIEW OF RECOMMENDATIONS FOR THE NEXT GENERATION OF THE BAR EXAMINATION 3 (2021), <https://nextgenbarexam.ncbex.org/wp-content/uploads/TTF-Next-Gen-Bar-Exam-Recommendations.pdf> [<https://perma.cc/97K9-MGJX>].
172. *Id.*
173. Advice on legal writing explains how using names increases reader interest and helps clarity. *See supra* text accompanying notes 118–28. Clarity is certainly important in a bar exam. Time constraints are also paramount, favoring simple naming conventions. The use of names in the MPT and essay questions suggests that the use of descriptive terms becomes increasingly difficult and unrealistic when questions seek to replicate real-life scenarios. It certainly seems impossible to test letter writing or client counseling when the clients lack names.
174. Leslie Bender, *A Lawyer’s Primer on Feminist Theory and Tort*, 38 J. LEGAL EDUC. 3, 6 (1989). In 2019, sixty-two percent of elected officials were white men, despite making up only thirty percent of the population. REFLECTIVE DEMOCRACY CAMPAIGN, THE ELECTABILITY MYTH: THE SHIFTING DEMOGRAPHICS OF POLITICAL POWER IN AMERICA 2 (2019), <https://wholeads.us/research/the-electability-myth/> [<https://perma.cc/YJL4-4D39>]. Women of all races earn less than white men, with the greatest disparity occurring for Black women and Hispanic women. Valerie Lacarte & Jeff Hayes, *Women’s Median Earnings as a Percent of Men’s, 1985–2019 (Full-Time, Year-Round Workers) with Projections for Pay Equity, by Race/Ethnicity*, INST. FOR WOMEN’S POL’Y RSCH. (Sept. 28, 2020), <https://iwpr.org/>

etal power allowed men to dictate the language of the public forum.¹⁷⁵ Language reflects this androcentric view. The word “man,” for instance, is used as a generic term that in theory includes women.¹⁷⁶ Men would, however, be unlikely to assume that a generic use of “woman” included them.¹⁷⁷ The use of gender-neutral generic terms such as “person” is relatively recent.

This question of terminology has been central to the law of torts, where negligence law depends on the actions of a hypothetical reasonable human being. Tort law has long judged actions by comparing them to the actions of a mythical “reasonable man.” That term reflected a distinctly male viewpoint—the reasonable man, while theoretically generic, was in actuality male (and white).¹⁷⁸ White male judges and attorneys viewed themselves as the norm;¹⁷⁹ the actions of the reasonable man were actions that they found appropriate.¹⁸⁰ The reasonable man terminology made the gender imbalance overt while the racial imbalance remained hidden, and the gender disparity generated the first attacks. The diversity issues that names in the *Restatements* raise build on the struggles for gender parity in law and legal writing.

Gender concerns have long played a role in the substantive law of torts. Many scholars have criticized some areas of tort law, such as the law on infliction of emotional distress, as reflecting sexist view-

iwpr-publications/quick-figure/pay-equity-projection-race-ethnicity-2020/ [https://perma.cc/EP3Z-NVLV]. Compared with white men, women and minorities face lower odds of achieving higher levels of workplace power, defined as “authority and control over others in the workplace.” James R. Elliott & Ryan A. Smith, *Race, Gender, and Workplace Power*, 69 AM. SOCIO. REV. 365 (2004), http://www.tulane.edu/~jre/Elliott_%26_Smith_Race_Gender_%26_Workplace_Power_ASR_2004.pdf [https://perma.cc/288Y-6VJH].

175. Bender, *supra* note 174, at 6.

176. *Id.* Male-centered language reaches far beyond the use of a male term as the generic. For instance, fundamental works are “seminal,” not “ovular.” *Id.* at 16.

177. *Id.* at 6.

178. *Id.* at 20–21.

179. *Id.* at 18. Indeed, states could ensure that law was an exclusively male profession at the time the law of torts developed in this country. See *Bradwell v. State*, 83 U.S. (16 Wall.) 130 (1872) (finding that a state’s refusal to grant women law licenses did not violate the Constitution).

180. Bender, *supra* note 174, at 22. “Our legal system rests on an ethnocentric, androcentric, racist, Christian, and class-based vision of reality and human nature . . .” *Id.* at 10. Bender explains that the “legal world that generated the ‘reasonable man’ was predominantly, if not wholly, male,” but was also “a white, educated, and empowered world.” *Id.* at 22 & n.75; see Brian Owsley, Comment, *Racist Speech and “Reasonable People:” A Proposal for a Tort Remedy*, 24 COLUM. HUM. RTS. L. REV. 323, 357 (1993) (arguing for a “reasonable African-American” standard in torts that involve racist speech because the reasonable person standard does not recognize the harm speech can cause to minorities).

points.¹⁸¹ Writers on torts such as negligent infliction of emotional distress often discuss the sexual politics that the cases reflect.¹⁸² A broader feminist critique addresses the whole concept of reasonableness in negligence law, suggesting that the concept reflects a distinctively male concept of appropriate conduct.¹⁸³ The reasonable man terminology made this male concept of reasonable conduct explicit.¹⁸⁴ Law students learned “the reasonable man” standard until some forty years ago¹⁸⁵ and the *Second Restatement of Torts* speaks of the “reasonable man.”¹⁸⁶

The change to the “reasonable person” standard emerged as the work of feminist legal scholars made an impact. Scholars critiqued le-

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181. See generally Margo Schlanger, *Gender Matters: Teaching a Reasonable Woman Standard in Personal Injury Law*, 45 ST. LOUIS U. L.J. 769 (2001); Martha Chamallas & Linda K. Kerber, *Women, Mothers, and the Law of Fright: A History*, 88 MICH. L. REV. 814 (1990).
182. See sources cited *supra* note 181; Lucinda M. Finley, *A Break in the Silence: Including Women's Issues in a Torts Course*, 1 YALE J.L. & FEMINISM 41 (1989) (critiquing traditional standards).
183. See Caroline Forell, *Essentialism, Empathy, and the Reasonable Woman*, 1994 U. ILL. L. REV. 769; Bender, *supra* note 174, at 20–25; see also Robert Unikel, Comment, “Reasonable” Doubts: A Critique of the Reasonable Woman Standard in American Jurisprudence, 87 NW. U. L. REV. 326, 330–33 (1992) (noting that while “reasonable man” was supposedly generic, “the standard reflected a society in which women were not considered equal to men”); Schlanger, *supra* note 181 (discussing how the external structure and internal categories of negligence has been skewed by implicit male norms); Robyn Martin, *A Feminist View of the Reasonable Man: An Alternative Approach to Liability in Negligence for Personal Injury*, 23 ANGLO-AM. L. REV. 334, 338–41 (1994) (examining the jurisprudence of the “reasonable man” test and its inherently patriarchal positivist approach). The standard also reflects a distinctly white viewpoint. See Owsley, *supra* note 180.
184. Early examples of the reasonable man standard were explicitly male. In two oft-cited formulations, the reasonable man was “the man who takes the magazines at home and in the evening pushes the lawn mower in his shirt sleeves,” GUIDO CALABRESI, IDEALS, BELIEFS, ATTITUDES, AND THE LAW: PRIVATE LAW PERSPECTIVES ON A PUBLIC LAW PROBLEM 23, 139 n.94 (1985) (quoting *Hall v. Brooklands Auto Racing Club* [1933] 1 KB 205, 224 (U.K.)), and the “man on the Clapham Omnibus,” the British historical predecessor to the reasonable man.; see Kevin P. Tobia, *How People Judge What Is Reasonable*, 70 ALA. L. REV. 293, 333–35 (2018); see also WALTER BAGEHOT, THE ENGLISH CONSTITUTION 325–26 (2d ed. 1873) (discussing the “bald-headed man at the back of the omnibus” as “common-place mankind” in a treatise on the English Constitution).
185. The term reasonable person began to emerge as an alternative to the reasonable man in the late 1970s. Forell, *supra* note 183, at 770. For example, in federal cases, over three-quarters of legal writers (seventy-eight percent) between 1964 and 1966 refer to a reasonable *man*. Between 2004 and 2006, however, almost all writers (ninety-six percent) refer to a reasonable *person*. Chew & Kelley-Chew, *supra* note 25, at 672.
186. RESTATEMENT (SECOND) OF TORTS § 283 (AM. L. INST. 1965). Additionally, section 282 describes an actor’s negligent behavior as “his conduct.” *Id.* § 282 cmt. c (emphasis added); see *supra* note 65 (discussing the “reasonable man” in the *Second Restatement*).

gal casebooks and texts from a feminist viewpoint,¹⁸⁷ and law schools began to offer courses in gender and the law.¹⁸⁸ While scholars recognized that the reasonable person terminology did not eliminate the gendered assumptions underlying the reasonableness standard,¹⁸⁹ it does signal tort law's movement away from explicitly gendered language. The change to the "reasonable person" permeates the law of torts, and the *Third Restatement* reflects these advances. While the substantive law of the *Third Restatement* is still subject to criticism from a feminist viewpoint,¹⁹⁰ the *Third Restatement* uses the reasonable person terminology¹⁹¹ and illustrations that reflect women in non-stereotypical roles.

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187. Mary Joe Frug, *Re-Reading Contracts: A Feminist Analysis of a Contracts Casebook*, 34 AM. U. L. REV. 1065 (1985); Mary Irene Coombs, *Crime in the Stacks, or a Tale of a Text: A Feminist Response to a Criminal Law Textbook*, 38 J. LEGAL EDUC. 117 (1988).
188. The first casebook on gender and the law was published in 1974. KENNETH M. DAVIDSON, RUTH BADER GINSBURG & HERMA HILL KAY, TEXT, CASES AND MATERIALS ON SEX-BASED DISCRIMINATION (1974) (first gender and the law casebook). It was around this time that law schools began to hire female law professors. See HERMA HILL KAY, PAVING THE WAY: THE FIRST AMERICAN WOMEN LAW PROFESSORS (Patricia A. Cain ed., 2020); CYNTHIA FUCHS EPSTEIN, WOMEN IN LAW, (2d. ed. 2012); Erika Lovley, *Study: Women Lawmakers Best Men*, POLITICO (Sept. 15, 2009, 4:46 AM), www.politico.com/news/stories/0909/27152.html [<https://perma.cc/29V3-D3QZ>]; JEFFREY TOOBIN, THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT (2007); ROBERT STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S (1983); Professor Cunnea, *A Timeline of Women's Legal History in the United States and at Georgetown University*, STAN. L. SCH. (Mar. 1998), <http://wlh-static.law.stanford.edu/articles/cunnea-timeline2.pdf> [<https://perma.cc/LD9W-26AP>].
189. Alan D. Miller & Ronen Perry, *The Reasonable Person*, 87 N.Y.U. L. REV. 323, 361–62 (2012) (explaining that the reasonable person standard used male experiences to assess skills and strengths); Finley, *supra* note 182, at 57–58 (the reasonable person standard reflects a gendered understanding of reasonableness); Naomi R. Cahn, *The Looseness of Legal Language: The Reasonable Woman Standard in Theory and in Practice*, 77 CORNELL L. REV. 1398, 1404 (1992) ("The male bias inherent in a standard that explicitly excludes consideration of women as reasonable actors is obvious." (footnote omitted)); CAROLINE A. FORELL & DONNA M. MATTHEWS, A LAW OF HER OWN: THE REASONABLE WOMAN AS A MEASURE OF MAN (2000) (arguing that the reasonable person standard is anything but gender neutral).
190. See Anita Bernstein, *Restatement (Third) of Torts: General Principles and the Prescription of Masculine Order*, 54 VAND. L. REV. 1367 (2001) (criticizing the general principles section of the *Third Restatement* for looking at torts from a male perspective); Diane Klein, *Distorted Reasoning: Gender, Risk-Aversion, and Negligence Law*, 30 SUFFOLK U. L. REV. 629, 643–44 (1997) (explaining that the switch to reasonable person simply removes a linguistic bias).
191. See Martha Chamallas, *Gaining Some Perspective in Tort Law: A New Take on Third-Party Criminal Attack Cases*, 14 LEWIS & CLARK L. REV. 1351, 1357–58 (2010) (noting that the *Third Restatement's* switch to non-gendered terminology does not signal a change in the substantive law and, moreover, that the failure to address the switch in the terminology section implied the change was unimportant).

These changes in tort law did not take place in a vacuum. American society was grappling with issues of gender equality in the 1960s, 1970s, and 1980s. The 1964 enactment of Title VII of the Civil Rights Act paved the way for women to enter what were historically men's jobs.¹⁹² The proposed Equal Rights Amendment (ERA), which would have amended the Constitution to provide that "[e]quality of rights under the law shall not be denied . . . by the United States or by any state on account of sex," was at the forefront of political debate through the 1970s.¹⁹³ Supreme Court cases in the 1970s began recognizing that disparate treatment of women violated equal protection,¹⁹⁴ another step in the march toward gender equality.

This fight for change extended to issues of naming: both what names said about people and how the choice of names could reveal stereotypical assumptions. One major issue dealt with honorifics. The push for replacing Miss and Mrs. with Ms. began around 1970 out of

192. Civil Rights Act of 1964, 42 U.S.C. § 2000e; Gillian Thomas, *This Women's History Month, Celebrate Title VII for Banning Sex Discrimination in the Workplace*, ACLU (Mar. 9, 2016, 2:30 PM), <https://www.aclu.org/blog/womens-rights/womens-rights-workplace/womens-history-month-celebrate-title-vii-banning-sex> [<https://perma.cc/4YDP-R23X>].

193. Alex Cohen & Wilfred U. Codrington III, *The Equal Rights Amendment Explained*, BRENNAN CTR. FOR JUST. (Jan. 23, 2020), <https://www.brennancenter.org/our-work/research-reports/equal-rights-amendment-explained> [<https://perma.cc/7WWQ-TEZ4>]. Women's suffrage leaders Alice Paul and Crystal Eastman first introduced the ERA in 1923. *Id.* The ERA made little progress for nearly fifty years, until the amendment passed both chambers of Congress in 1972. *Id.* Congress issued a seven-year deadline for the requisite ratification by a minimum of thirty-eight states. *Id.* Only thirty-five states had accepted the ERA by 1982, despite Congress extending the ratification deadline by three years. *Id.* Recent years have seen a renewed push to adopt the ERA, including ratification by Nevada and Illinois. *Id.* Virginia became the thirty-eighth and final State to ratify the ERA, but there remains an open question as to whether the ERA will be adopted as the Twenty-Eighth Amendment to the Constitution. *Id.* The key issues are whether Congress can lift the ratification deadline and whether states can rescind their support before ratification. *Id.*; see also Ruth Bader Ginsburg, *Sexual Equality Under the Fourteenth and Equal Rights Amendments*, 1979 WASH. U. L. REV. Q. 161 (arguing that the ERA is necessary to protect against discrimination based on sex despite the equal protection guarantee).

194. Wendy W. Williams, *Ruth Bader Ginsburg's Equal Protection Clause: 1970–80*, 25 COLUM. J. GENDER & L. 41, 42 (2013) (noting that then-Professor Ginsburg "was the first lawyer to argue to the United States Supreme Court that sex classifications should, like race classifications, be subjected to the highest standard of review" under the Equal Protection Clause). Prior to Justice Ginsburg's career, "the Court had never encountered a sex classification that it did not consider perfectly reasonable and constitutionally sound." *Id.*; see also Lenora M. Lapidus, *Ruth Bader Ginsburg and the Development of Gender Equality Jurisprudence Under the Fourteenth Amendment*, 43 HARBINGER 149 (2019), https://socialchangenyu.com/wp-content/uploads/2019/06/Lenora-Lapidus_RLSC-The-Harbinger_43.2-1.pdf [<http://perma.cc/8FDR-ESYN>] (detailing landmark cases litigated by Ruth Bader Ginsburg during the 1970s to establish equal rights for women under the Equal Protection Clause).

an insistence that references to women should not focus on their marital status.¹⁹⁵ *Ms. Magazine* began publishing in 1971,¹⁹⁶ popularizing the term. Acceptance did not come quickly, however, and the *New York Times* did not embrace the honorific until 1986.¹⁹⁷

Another battle—the fight over hurricane names—attacked using women’s names to reflect derogatory stereotypes and revealed the complexities of any naming debate. The United States’ practice of giving female names to Atlantic hurricanes began in 1953 because meteorologists could provide clearer and more helpful information on the location and danger of storms by using names as opposed to longitudinal coordinates or other descriptions.¹⁹⁸ And the names were all female, evidently because military meteorologists named storms after their girlfriends.¹⁹⁹ This practice came under attack in the early

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195. Ben Zimmer traces the push to an appearance by feminist activist Sheila Michaels on a New York radio program “Womankind” in late 1969 or early 1970. Ben Zimmer, *Ms.*, N.Y. TIMES MAG. (Oct. 23, 2009), <https://www.nytimes.com/2009/10/25/magazine/25FOB-onlanguage-t.html> [https://perma.cc/SCN4-HFH8]. Recognition of the term became a focus of the women’s movement when Gloria Steinem advocated for the term in *New York Magazine*. *Id.* The term was not of recent coinage. In a 1901 edition of the *Springfield Sunday Republican* (Massachusetts), an anonymous writer proposed Ms. to satisfy the need for an honorific to avoid the potential embarrassment of mistaking a woman’s marital status. *Id.* The word dates back further, originating as early as the 1700s. Ben Zimmer, *Hunting the Elusive First “Ms.”*, VISUAL THESAURUS, (June 23, 2009), <https://www.visualthesaurus.com/cm/wordroutes/hunting-the-elusive-first-ms/> [https://perma.cc/5RSY-6CBM] (reporting on the origins of the title Ms.). The *Oxford English Dictionary* more recently proposed the gender-neutral honorific Mx. for members of the gender nonconforming community. Rachel Martin, *Oxford Dictionary Proposes Gender Neutral Title*, NAT’L PUB. RADIO (May 10, 2015, 7:39 AM), <https://www.npr.org/2015/05/10/405624481/oxford-dictionary-proposes-gender-neutral-title> [https://perma.cc/5QSC-RZSK].
196. Zimmer, *Ms.*, *supra* note 195.
197. *Id.*; David W. Dunlap, *1986—‘Ms.’ Joins the Times’s Vocabulary*, N.Y. TIMES (Apr. 6, 2017), <https://www.nytimes.com/2017/04/06/insider/1986-ms-joins-the-times-vocabulary.html> [https://perma.cc/3PJH-VXER].
198. Nat’l Oceanic & Atmospheric Admin., *Tropical Cyclone Naming History and Retired Names*, NAT’L HURRICANE CTR. & CENT. PAC. HURRICANE CTR., https://www.nhc.noaa.gov/aboutnames_history.shtml [https://perma.cc/Y6G5-XVT8] (last visited Jan. 1, 2021); *Hurricane Names—How Are Hurricanes Named?*, GEOLOGY, <https://geology.com/hurricanes/hurricane-names.shtml> [https://perma.cc/42H6-UF65] (last visited Aug. 8, 2021) (noting that hurricane names are easier to understand than using latitude and longitude coordinates, which are “difficult to remember, difficult to communicate and subject to errors”).
199. Jack Williams, *The Reasoning for Hurricane Names and Their History (Keep Suggestions to Yourself)*, WASH. POST (May 14, 2013), <https://www.washingtonpost.com/news/capital-weather-gang/wp/2013/05/14/the-reasoning-for-hurricane-names-and-their-history-keep-suggestions-to-yourself/> [https://perma.cc/RK6C-44DF].

1970s.²⁰⁰ It was, people argued, sexist to equate capricious, destructive forces exclusively with women.²⁰¹ The debate heightened as the drive to use male names grew. Commentators feared individuals would not take storms bearing men's names seriously and lamented caving to feminist pressure.²⁰² Despite the objections, the push paid off in 1978, when the United States Commerce Department announced that it would alternate male and female names.²⁰³

Rules now govern the naming process. An international committee of the World Meteorological Organization specifically governs the naming process.²⁰⁴ Names are given according to six lists of alternating male and female names²⁰⁵ of English, French, and Spanish origin, reflecting the languages of the countries in the Atlantic hurricane region.²⁰⁶ Names of very destructive storms are retired.²⁰⁷

The addition of male hurricane names by no means ended the debate. One study argues that storms named after women are more dangerous²⁰⁸ because gender-based assumptions lead people to take

200. Letter from Roxcy Bolton, Vice-President, Nat'l Org. of Women, to Dir. of the Hurricane Ctr., U.S. Weather Bureau (1970), <https://www.floridamemory.com/items/show/346050> [<https://perma.cc/Q5DY-6DAC>] (criticizing the use of women's names for hurricanes).

201. *Id.* Then-Vice President of the National Organization of Women Roxcy Bolton wrote to the Director of the Hurricane Center of the U.S. Weather Bureau asking that it stop using women's names for hurricanes beginning with the 1970 season. *Id.* Women, she explained, resented being associated with arbitrary, destructive forces. *Id.* Bolton told the press that storms should be called himicanes and that it was demeaning to read comments like "Cheryl was no lady as she devastated such and such a town." Olivia B. Waxman, *The Woman Who Helped Change How Hurricanes Are Named*, TIME (Sept. 6, 2017, 12:38 PM), <https://time.com/4927889/hurricane-names-history/>. Twiss Butler, another woman who lobbied for the name change, argued that using female names perpetuated the stereotype that women were erratic, unreliable, and destructive. Jason Samenow, *Himicanes and Hericanes: In 1970s, Some Argued Male-Named Hurricanes Would Not Be Respected*, WASH. POST (June 6, 2014), <https://www.washingtonpost.com/news/capital-weather-gang/wp/2014/06/06/himicanes-and-hericanes-in-1970s-some-argued-male-named-storms-would-not-be-respected/> [<https://perma.cc/7DMX-59ZL>].

202. Samenow, *supra* note 201.

203. Richard D. Lyons, *Another Sexist Bastion Falls: Hurricanes Renamed*, N.Y. TIMES (May 13, 1978), <https://www.nytimes.com/1978/05/13/archives/another-sexist-bastion-falls-hurricanes-renamed-pressure-was.html> [<https://perma.cc/N5GP-PCXE>].

204. Nat'l Oceanic & Atmospheric Admin., *supra* note 198.

205. *Id.*; see Nat'l Oceanic & Atmospheric Admin., *Tropical Cyclone Names*, NAT'L HURRICANE CTR. & CENT. PAC. HURRICANE CTR. [hereinafter *Tropical Cyclone Names*], <https://www.nhc.noaa.gov/aboutnames.shtml#atl> [<https://perma.cc/2NTY-6FEZ>] (last visited Jan. 1, 2021).

206. See *Tropical Cyclone Names*, *supra* note 205.

207. Nat'l Oceanic & Atmospheric Admin., *supra* note 198.

208. Kiju Jung et. al., *Female Hurricanes Are Deadlier than Male Hurricanes*, 111 PROC. NAT'L ACAD. SCI. 8782 (2014); see also *Why We Respect a Man More—Even If It's a Hurricane*, DECODED SCI., <https://decodedscience.org/why-we-respect-a>

storms named after men more seriously and thus take greater precautions.²⁰⁹ And the choice of names raised the objection that the naming process reflected racial bias. Texas Congressperson Sheila Jackson-Lee, for instance, criticizes the names as “too white” and argues that the names should be more representative of all races.²¹⁰ Others argue that the names reflect the preferences of white men and that the naming process has been fraught with racism.²¹¹

The hurricane-naming debate reinforces the conclusion that the use of names for any purpose raises its own set of issues. Using names to reflect gender diversity raises questions of what sort of names are used. Sensitivity to gender issues can highlight a lack of sensitivity to racial and ethnic diversity.²¹²

The racial and ethnic implications of names are likely to grow in importance as names are increasingly unreliable indications of gender. People seek naming inspiration from sources such as places,²¹³ and many names that are now common are considered gender neutral,

man-more-even-if-its-a-hurricane/ [https://perma.cc/F439-QKRZ] (last visited Jan. 20, 2021) (discussing the impact of implicit gender bias on hurricane responses); Ed Yong, *Why Have Female Hurricanes Killed More People Than Male Ones?*, NAT'L GEOGRAPHIC (June 2, 2014), https://www.nationalgeographic.com/science/phenomena/2014/06/02/why-have-female-hurricanes-killed-more-people-than-male-ones/#close [https://perma.cc/R56R-9QM4] (discussing various arguments over why hurricanes with female names kill more people than hurricanes with male names).

209. Jung et al., *supra* note 208. Other scholars have disputed these findings and highlighted the study's flawed methodology. See Björn Christensen & Sören Christensen, *Are Female Hurricanes Really Deadlier Than Male Hurricanes?*, 111 PROC. NAT'L ACAD. SCIS. E3497 (Aug. 26, 2014); Eric Holthaus, *Hurricanes Named After Women Are More Dangerous? Not So Fast.*, RICHARD DAWKINS FOUND. FOR REASON & SCI. (June 6, 2014), https://www.richarddawkins.net/2014/06/hurricanes-named-after-women-are-more-dangerous-not-so-fast/ [https://perma.cc/SUK7-ZGKB] (identifying major flaws underlying the study).
210. Brandon Keim, *What's in a Hurricane Name?*, WIRED, (Aug. 26, 2009, 5:18 PM), https://www.wired.com/2009/08/hurricanename/ [https://perma.cc/6A6J-U35G].
211. Tao Tao Holmes, *Tropical Storms Were Once Named After Wives, Girlfriends, and Disliked Politicians*, ATLAS OBSCURA (Mar. 23, 2016), https://www.atlasobscura.com/articles/tropical-storms-were-once-named-after-wives-girlfriends-and-disliked-politicians [https://perma.cc/J2CW-8QPS] (noting that “the folks in charge of naming these storms [were] generally white, western men” and that “[n]aming choices have been fraught with racism and sexism, personal preferences and vendettas”); Jessie Daniels, *Is (Hurricane) “Sandy” a White Name?*, RACISM REV. (Oct. 29, 2012), http://www.racismreview.com/blog/2012/10/29/hurricane-sandy-a-white-name/ [https://perma.cc/N4SR-AS9B] (“The fact is that naming storms is a process that's steeped in both racism and sexism.”).
212. See *supra* notes 77–79 and accompanying text.
213. See *Place Names for Babies*, NAMEBERRY (Oct. 21, 2020), https://nameberry.com/list/334/Place-Names-for-Babies [https://perma.cc/6FA7-HMJW] (noting that the practice is so popular that place names represents a separate naming category); Karen Ruffini, *20 Gender Neutral Names Inspired by Places in the World*, TRAVEL & LEISURE (Sept. 25, 2017), https://www.travelandleisure.com/culture-design/gender-neutral-baby-names-inspired-by-places [https://perma.cc/LS5B-H4RC]

although studies show that few people perceive most of those names as truly unisex.²¹⁴ Names will assume a more neutral association as more people of both genders use them. Trends in baby naming—choosing place names and names that are intentionally ambiguous—will likely make more common names gender neutral.²¹⁵ Indeed, the idea that gender is a binary is debatable and likely will be outdated by the time a fourth *Restatement of Torts* goes to print.²¹⁶ The link between names and ethnicity, however, is unlikely to fade. The ongoing societal reckoning with endemic racism highlights the need to hear Black and other non-white voices and is likely to increase the use of names that reflect ethnic background and pride.²¹⁷

(listing twenty place names that double as gender neutral baby names, including Bristol, Aspen, and Brooklyn).

214. See Van Fleet & Atwater, *supra* note 19, at 122. The only common names perceived as truly gender neutral were “Chris, Lee, Pat, and Terry.” *Id.* at 121.

215. See sources cited *supra* notes 213. People now, however, are likely to view ambiguous or invented names as gendered. Van Fleet & Atwater, *supra* note 19, at 115–21.

Language itself is becoming more gender neutral. Gender-neutral identifiers are becoming increasingly accepted worldwide. See Miriam Berger, *A Guide to How Gender-Neutral Language Is Developing Around the World*, WASH. POST (Dec. 15, 2019), <https://www.washingtonpost.com/world/2019/12/15/guide-how-gender-neutral-language-is-developing-around-world/> (describing the development of gender-neutral language in seven languages, including English, Spanish, Arabic, Hebrew, and German). Evidencing this shift, Merriam-Webster’s 2019 Word of the Year was “they,” reflecting the need for a gender-neutral singular pronoun. “*They*” Is Merriam-Webster’s Word of the Year 2019, MERRIAM-WEBSTER, <https://www.merriam-webster.com/words-at-play/woty2019-top-looked-up-words-they> [<https://perma.cc/D53L-A82Q>] (last visited Jan. 20, 2021) (explaining how “they” became a word of the year). The American Psychological Association officially stated a preference for the use of they in professional writing to refer to a person of unknown gender. See Chelsea Lee, *Welcome, Singular “They,”* APA STYLE (Oct. 31, 2019), <https://apastyle.apa.org/blog/singular-they> [<https://perma.cc/UL4F-68AT>] (explaining the APA’s endorsement of they as a singular pronoun in the seventh edition of the *Publication Manual of the American Psychological Association*).

216. See *supra* note 16 (on non-binary identities). The *Restatement* process is a lengthy one, so a new *Restatement* that begins now is unlikely to be finalized for many years. See *supra* note 54.

217. Such a pattern followed the 1970s rise of the Black Power movement. The shift toward Black pride and resistance in response to claims of Black inferiority are believed to have sparked the sharp rise in distinct Black names during that time. See Fryer & Levitt, *supra* note 23, at 790 (explaining the shift from the 1960s, where Blacks and whites had relatively similar first-name naming conventions, to the 1970s, when distinctive Black names sharply increased); see also Tracy N. Anderson-Clark & Raymond J. Green, *Basking in Reflected Glory: The Election of President Obama and Naming Behaviour*, 40 ETHNIC & RACIAL STUD. 63, 64 (2017) (“African Americans have attempted to use the naming process to preserve their cultural heritage . . .”). Research indicates that names given to Black and white children began to diverge in the early 1970s, when a profound shift in naming conventions took place, especially among parents living in segregated neighborhoods. Fryer & Levitt, *supra* note 23 at 770. Researchers Anderson-Clark and

This increase in diverse names, however, is likely to make some people nervous, especially the older generation largely responsible for the *Restatements*.²¹⁸ There is likely to be a sense of damned-if-you-do—a fear that any attempt at using names will be criticized, a fear of using the “wrong” names, a fear of not going far enough,²¹⁹ a fear that the use of racially or ethnically identifiable names will be seen as stereotyping. There is likely to be discomfort in tackling the unfamiliar. These fears can lead to the conclusion that it is better to be safe and to use labels and generic identifiers because they are neutral.²²⁰ The problem is that they are not.

IV. IMPLICIT BIAS AND THE MYTH OF NEUTRALITY

The argument for using labels to identify individuals is that such descriptors eliminate the bias that names can trigger; labels are facially neutral, or so the argument goes. But facial neutrality has the opposite of its intended effect because what is neutral on its face is not neutral in fact. The label—be it the doctor or the mugger—leaves much information unsaid. People unconsciously fill in the blanks and subconsciously assume the actors to whom the labels refer have genders and races.²²¹ The human brain creates shortcuts and fills gaps based on socialization and experience.²²² The gap-filling is not neutral. The average reader who has grown up in the United States has absorbed the biases of the culture and will subconsciously picture the doctor as a Caucasian male and the mugger as an African-American male.²²³ The reader will assume that a nurse or a grade school teacher is a white female.²²⁴ The ingrained schema and implicit biases that

Green investigated whether the election of President Barack Obama accelerated the trend towards distinctive Black names. Anderson-Clark & Green, *supra*. The study found that feelings of increased ethnic pride following the election likely contributed to a rise in more distinctive Black names. *Id.* at 72–73. More recent studies suggest that there have always been distinctively Black names in the United States. In the 1920s, for instance, almost all men named Booker were African American. Trevon Logan, *A Brief History of Black Names, from Perlie to Latasha*, CONVERSATION (Jan. 23, 2020, 8:51 AM), <https://theconversation.com/a-brief-history-of-black-names-from-perlie-to-latasha-130102> [https://perma.cc/CT4N-SV2J].

218. *See supra* note 55 and accompanying text (discussing critiques of the ALI for lack of generational and other diversity).

219. *See supra* text accompanying note 211 (discussing criticism of hurricane names for lacking diversity) and notes 135–73 (discussing bar examiners’ struggles with diversity).

220. The switch to generic identifiers on the MBE reflects this fear. *See supra* text accompanying notes 151–58.

221. *See infra* text accompanying notes 229–44.

222. *Id.*

223. *See infra* notes 245–50 and accompanying text.

224. *See infra* notes 229–44 and accompanying text.

readers bring to an example means that the facially neutral examples reinforce, rather than combat, stereotypes.

A. The Myth of Neutrality

There's an old riddle. A father and son are in a terrible automobile accident that kills the dad. The son is rushed to the hospital for emergency surgery. The operation is about to begin when the surgeon screams, "I can't operate—that boy is my son!" How is that possible?²²⁵ This joke has been in circulation for decades, and even now very few people see the obvious solution that the surgeon could be the boy's mother.²²⁶ Another version of the riddle has the mother killed and her daughter rushed to the hospital; the nurse refuses to attend to the child exclaiming "that girl is my daughter[!]"²²⁷ Equally few people guess that the nurse might be the child's father.²²⁸ Gender schemas, generalizations that help to explain the world, lead people to assume that surgeons are male and nurses are female.²²⁹

People grow up with fixed ideas of gender roles. These ideas take shape very early and persist in the face of experience. Children and college students both struggled to figure out the riddle.²³⁰ Life experiences and professed beliefs did not change the results. People whose mothers were doctors struggled, as did self-described feminists.²³¹ Changes in society do eventually make headway. Some respondents posited a solution that the child may have had two fathers,²³² but that was almost certainly not an option in the early days of the riddle. But the gender stereotyping is unchanged.

The fixed gender roles persist even though the words "doctor" and "nurse" do not explicitly relate to gender and are not newer versions of

225. Deborah Belle et al., *"I Can't Operate, That Boy Is My Son!": Gender Schemas and a Classic Riddle*, 85 *SEX ROLES* 161, 162 (2021).

226. *Id.* at 167. About a third of female participants (thirty-six percent) and a fifth of male participants (nineteen percent) guessed that the surgeon could be the child's mother. *Id.* Of the 197 participants in the study, individuals aged seven to seventeen years old, only fifteen percent of the young people and fourteen percent of the college students guessed that the surgeon was the mother. Rich Barlow, *BU Research: A Riddle Reveals Depth of Gender Bias*, *BU TODAY* (Jan. 16, 2014), <http://www.bu.edu/articles/2014/bu-research-riddle-reveals-the-depth-of-gender-bias/> [<https://perma.cc/3D82-F4PG>] (summarizing study).

227. Barlow, *supra* note 226.

228. *Id.*

229. Belle et al., *supra* note 225, at 161–62.

230. Barlow, *supra* note 226.

231. Belle et al., *supra* note 225, at 170.

232. *Id.* at 168. Slightly more participants (thirty seven percent of women and thirty five percent of men) guessed that the surgeon was a same-sex father rather than a mother). There were also more fanciful options including guesses that the events were a dream or that the father in the accident is a priest. *Id.* at 166.

words that have traditionally had a gendered formation.²³³ It might be unsurprising that people have difficulty following a sentence that says that a woman was a fireman or that a mailman was female.²³⁴ The push for gender-neutral terminology such as fire fighter or mail carrier aims to eliminate the assumption that only men hold those jobs. The switch to neutral terminology does not eliminate the problem, however. Readers struggle to comprehend sentences that refer to female fire fighters just as they do with references to female firemen.²³⁵ Gender-neutral language for traditionally male occupations does not eliminate bias.²³⁶

The assumption that members of certain professions are male does not stem from the words themselves. The practical meaning of the words instead reflects the historic reality that men traditionally held, and hold, the jobs.²³⁷ That history in turn helps define the characteristics people see as necessary to succeed in the job, which in turn justifies continuing to hire men for the job and to see women as ill-suited to the position and thus poor at performing it.²³⁸ An employer might infer that being tall is a job requirement if only white men have been hired to fill a job.²³⁹ The persistence of viewing work as gender-typed perpetuates bias.²⁴⁰ Linguistic changes do not change the assumptions that individuals grow up with in a male-dominated society.

American law and society see men as the prototype and women as the “other.”²⁴¹ Males are considered the neutral standard or norm for

233. Terms such as “male nurse” carry gendered meaning; they signify that it is aberrant for men to hold the job. Heather M. Clarke, *Gender Stereotypes and Gender-Typed Work*, in *HANDBOOK OF LABOR, HUMAN RESOURCES AND POPULATION ECONOMICS* (Klaus F. Zimmermann ed., 2020), Clarke chapter, at 3 (ebook).

234. Lassonde & O’Brien, *supra* note 31, at 393, 395. The authors studied subjects’ difficulty that mentioned a member of a traditionally male profession before using a female pronoun to refer to that member. *Id.* at 390.

235. *Id.* at 391.

236. In addition to those discussed above, numerous studies show that people infer a specific gender when they encounter occupational titles. *See, e.g.*, Lynn S. Liben et al., *Language at Work: Children’s Gendered Interpretations of Occupational Titles*, 73 *CHILD DEV.* 810, 823–25 (2002) (finding that children between the ages of six and ten labeled doctors as men and nurses as women); David J. Reynolds et al., *Evidence of Immediate Activation of Gender Information from a Social Role Name*, 59 *Q.J. EXPERIMENTAL PSYCH.* 886, 901 (2006) (finding that participants inferred a specific gender when presented with an occupation).

237. *See* Clarke, *supra* note 233.

238. *Id.* at 10.

239. Title VII cases in the 1970s challenged height requirements as discriminatory and not work related. *See, e.g.*, *Dothard v. Rawlinson*, 433 U.S. 321 (1977); *Blake v. City of Los Angeles*, 595 F.2d 1367 (9th Cir. 1979).

240. *See* Clarke, *supra* note 233, at 8–9.

241. Valerie Purdie-Vaughns & Richard P. Eibach, *Intersectional Invisibility: The Distinctive Advantages and Disadvantages of Multiple Subordinate-Group Identities*, 59 *SEX ROLES* 377, 381 (2008).

the culture and women as the exception.²⁴² This suggests that readers of neutral examples are likely to perceive the actors as men²⁴³ unless there is something to trigger a female stereotype or make clear that the actor is a woman.²⁴⁴ The writer of a “neutral” example can do this easily. A writer who gives thought to the matter can tell the reader that an actor is female by using a female pronoun.

But American society is not only androcentric, it is also ethnocentric.²⁴⁵ Ethnocentrism means that individuals tend to define the norms of one’s social group as the universal standard.²⁴⁶ The socially-dominant ethnic group generally has the power to define its norms as the standard for society.²⁴⁷ This has led whiteness to be the social norm in the United States and leads people to view the prototypical citizen as white.²⁴⁸ This white norm governs when individuals discuss jobs, and it leads to assumptions about the race of people who hold certain jobs. Race and ethnicity are, like gender, strong predictors of a person’s success in the labor market.²⁴⁹ Individuals are then likely to assume that a person who is performing a job that whites typically perform is, in fact, white. That assumption controls unless something explicitly challenges it. There is no way to indicate race in a neutral example without explicitly addressing the topic.

The danger of perceived neutrality is twofold. The problem is not simply that the reader of a supposedly neutral example will assume that doctor or pedestrian is a white male, but that the reader will also draw negative associations and assume that a criminal or wrongdoer is Black. Americans draw a strong association between African Americans and criminality and violence.²⁵⁰ Blacks have been stereotyped as

242. *Id.* The dominant group’s experience controls and is seen as the societal standard. *Id.* at 380–81.

243. *Id.* at 378 (explaining androcentrism as “the tendency to define the standard person as male”). The argument that the “reasonable person” standard is a male standard follows the same logic—male decision-makers ascribe male characteristics to the typical “reasonable” person. *See supra* text accompanying notes 180–191.

244. *See* Lassonde & O’Brien, *supra* note 31, at 391 (explaining that explicitly referring to an actor as female improved reader comprehension of references to actors in a typically male job with a female pronoun).

245. Purdie-Vaughns & Eibach, *supra* note 241, at 378. American society is also heterocentric—it perceives the average person as heterosexual. *Id.*

246. *Id.* at 391.

247. *Id.*

248. *Id.*

249. *See* Angela Byars-Winston et al., *Race/Ethnicity and Sex in U.S. Occupations, 1970–2010: Implications for Research, Practice, and Policy*, 87 J. VOCATIONAL BEHAV. 54 (2015).

250. Kelly Welch, *Black Criminal Stereotypes and Racial Profiling*, 23 J. CONTEMP. CRIM. JUST. 276, 276 (2007) (“In American society, a prevalent representation of crime is that it is overwhelmingly committed by young Black men.”).

criminals throughout American history.²⁵¹ Americans also generally perceive Blacks as violent.²⁵² Media images and political rhetoric reinforce the stereotypes.²⁵³ This ingrained stereotype can then affect the language of people, even judges, who write about crime as well as those who read what they've written.²⁵⁴ "In fact, perceptions about the presumed racial identity of criminals may be so ingrained in public consciousness that race does not even need to be specifically mentioned for a connection to be made between the two because it seems that 'talking about crime *is* talking about race."²⁵⁵ Against this background, it would be surprising if the average reader of a "neutral" *Restatement* illustration of a tort in a high crime area did not picture a slum with predominantly African American residents.²⁵⁶

B. Implicit Bias

Neutrality is a myth because of implicit bias. Children learn to navigate the complex world by developing generalizations, and these become powerful forces.²⁵⁷ Implicit bias is subconscious and subtle, fostering negative associations with certain groups of people and generating negative evaluations of certain groups.²⁵⁸ Implicit biases are

251. *Id.* at 276–77.

252. *Id.* at 278.

253. *Id.* at 281–84; see, e.g., William J. Drummond, *About Face: From Alliance to Alienation. Blacks and the News Media*, 1 AM. ENTER. 22 (1990) (explaining that the news media consistently stereotypes Blacks as criminals); Melissa Hickman Barlow, *Race and the Problem of Crime in Time and Newsweek Cover Stories, 1946 to 1995*, 25 SOC. JUST. 149, 151 (1998) ("[T]alking about crime *is* talking about race."); MARC MAUER, RACE TO INCARCERATE (1999) (explaining that whites view criminality as inherent to Blacks).

254. Kastely, *supra* note 27, at 286.

255. Welch, *supra* note 250, at 276 (quoting Barlow, *supra* note 253).

256. See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 34 cmt. d, illus. 1 (AM. L. INST. 2010). This illustration, explaining when a hotel in a "neighborhood where significant violent crime existed" uses a type of easily defeated lock, a guest's sexual assault is within the scope of the hotel's liability, is considerably more neutral than an example in the *Second Restatement*, where language choices directly trigger racial imagery:

A, a young girl, is a passenger on B Railroad. She falls asleep and is carried beyond her station. The conductor puts her off the train in an unprotected spot, immediately adjacent to a "jungle" in which hoboes are camped. It is notorious that many of these hoboes are criminals, or men of rough and violent character. A is raped by one of the hoboes. B Railroad may be found to be negligent toward A.

RESTATEMENT (SECOND) OF TORTS § 302B cmt. d, illus. 10 (AM. L. INST. 1965); see also *id.* at § 449 (discussing liability to person who is put off train at night in a deserted area near construction camp inhabited by persons of "vicious character").

257. See Belle et al., *supra* note 225; *infra* text accompanying notes 262–263.

258. CHERYL STAATS ET AL., STATE OF THE SCIENCE: IMPLICIT BIAS REVIEW 2015, at 4–5 (2015), <http://kirwaninstitute.osu.edu/wp-content/uploads/2015/05/2015-kirwan-implicit-bias.pdf> [<https://perma.cc/GH76-FQQH>]. People harbor implicit biases

involuntary and beyond individuals' awareness or intentional control.²⁵⁹ They often contrast with people's declared beliefs. Most people believe that they do not carry implicit biases and that implicit biases do not affect their decision-making.²⁶⁰ The research shows that this is false.²⁶¹

These biases develop early. Children as young as three years old associate specific behaviors with gender, and grade-school children associate occupations with gender.²⁶² By the same token, children grow up absorbing images that associate African American men with criminality and violence.²⁶³ These biases, if left unchanged, remain as the child becomes an adult and affect the adult's actions.

Implicit bias has implications in many areas of society. Studies show how implicit bias causes disparities in health care, employment, and education.²⁶⁴ White patients, for instance, may receive quicker treatment and better pain management than minorities do.²⁶⁵ Race affects the rating and evaluation of job candidates and the perceptions of people's leadership abilities on the job.²⁶⁶ Race plays a role in school discipline and teacher perception of student ability.²⁶⁷

Employment decisions and educational judgments are comparatively low stress. The ability for reflection and review allows people who are aware of the problem of bias to work on preventing bias from influencing their decisions. But some jobs, such as policing, are inherently high stress, and stress puts people at greater risk for biased de-

based on a wide range of characteristics, not only race and gender. Biases exist based on sexual orientation, age, socio-economic status, weight, and accents. *Id.* at 1, 5.

259. *Id.* at 4. Implicit biases and stereotypes are related in that they both generate positive as well as negative associations. *Id.* While "stereotyping may be a deliberate process of which you are consciously aware," implicit bias transcends stereotyping because it involuntarily triggers an evaluation of an entire group. *Id.*

260. *Id.* at 5.

261. *Id.*

262. See Lassonde & O'Brien, *supra* note 31, at 388.

263. Welch, *supra* note 250, at 281–84 (discussing the prevalence of images of Black criminality in the media); see STAATS ET AL., *supra* note 258, at 40 (explaining studies that show that racial bias surfaces in very young children).

264. STAATS ET AL., *supra* note 258, at 17–26 (health care), 27–31 (employment), 32–37 (education).

265. *Id.* at 17–26. A well-reported instance of disparate treatment occurred in the case of Dr. Susan Moore, a Black doctor who asserted racial disparities in her treatment for COVID-19. John Eligon, *Black Doctor Dies of Covid-19 After Complaining of Racist Treatment*, N.Y. TIMES (Dec. 25, 2020), <https://www.nytimes.com/2020/12/23/us/susan-moore-black-doctor-indiana.html> [<https://perma.cc/V88L-TPTW>]. In a widely circulated Facebook video, Dr. Moore stated, "I put forth and I maintain if I was white, . . . I wouldn't have to go through that." *Id.* Two weeks after the video, Dr. Moore died from COVID-19. *Id.*

266. STAATS ET AL., *supra* note 258, at 27–31.

267. *Id.* at 32–37; see also *infra* text accompanying notes 298–303 (discussing bias in education).

cision-making. Studies have identified conditions that function as risk factors for biased decision-making: emotional states such as anger or disgust can exacerbate bias,²⁶⁸ situations that do not require or allow for careful thought can lead biased expectations to affect interactions,²⁶⁹ and triggers such as tiredness, stress, and distractedness.²⁷⁰

Given the triggers, it is not surprising that implicit bias permeates law enforcement and the legal profession. The danger may be clearest in policing, where officers often are trained to perceive danger.²⁷¹ This heightened perception of danger coupled with unchecked bias in policing has led to numerous egregious and well-publicized incidents of police violence.²⁷² Bias leads to more police stops of Black citizens and an increased perception of fear associated with these Black citizens.²⁷³

The problems are not only an issue in law enforcement. Jurors may be upset or disgusted by a crime, triggering prejudice. Jurors' implicit bias can lead to negative perceptions and harsher treatment of Black persons.²⁷⁴ Studies suggest that bias within the legal profession is a factor in entrenching a predominantly white male judiciary, finding that lawyers rate women and minorities as less suited to judgeships and are less likely to recommend women and minority judges for re-

268. PAMELA M. CASEY ET AL., NAT'L CTR. FOR STATE CTS., *HELPING COURTS ADDRESS IMPLICIT BIAS* 9 (2012), https://www.nccourts.gov/assets/inline-files/public-trust-12-15-15-IB_Summary_033012.pdf?q_DMMIVv0v_eDJUa1ADxtw59Zt_svPg1 [<https://perma.cc/CR33-P3W5>].

269. *Id.* at 7.

270. *Id.* at 8.

271. See generally Jordan Blair Woods, *Policing, Danger Narratives, and Routine Traffic Stops*, 117 MICH. L. REV. 635, 637 (2019) ("Every year, police conduct tens of millions of traffic stops. The dominant narrative in policing is that each one of these stops is not just highly dangerous but also potentially fatal." (footnotes omitted)); Hope M. Tiesman et al., *Law Enforcement Officers' Risk Perceptions Toward On-Duty Motor-Vehicle Events*, 38 POLICING 563, 563 (2015).

272. See *From Eric Garner to George Floyd: Recent U.S. Police Killings of Black People*, CBS NEWS (June 2, 2020), <https://www.cbc.ca/news/world/police-killings-recent-history-george-floyd-1.5593768> [<https://perma.cc/7CJ9-SD6E>] (discussing instances of well-publicized police killings of Black Americans such as George Floyd, Breonna Taylor, Eric Garner, Michael Brown, Tamir Rice, Alton Sterling, and Philando Castile). Over the course of a Black man's life, he has a one in 1,000 chance of being killed by police. Frank Edwards et al., *Risk of Being Killed by Police Use of Force in the United States by Age, Race—Ethnicity, and Sex*, 116 PROCS. NAT'L ACAD. SCI. U.S. 16793, (2019) ("Black women and men . . . are significantly more likely than white women and men to be killed by police.").

273. CASEY ET AL., *supra* note 268, at 6–7, 9–11.

274. *Id.* at 17–18; see Bide Akande, *Implicit Bias and Clients: An Overview*, 18 A.B.A. COM. & BUS. LITIG. 14 (2016) (discussing studies showing bias at all stages of criminal proceedings). Bias also has an impact on damage awards in tort cases. See Ronen Avraham & Kimberly Yuracko, *Torts and Discrimination*, 78 OHIO ST. L.J. 661 (2017); MARTHA CHAMALLAS & JENNIFER B. WRIGGINS, *THE MEASURE OF INJURY: RACE, GENDER, AND TORT LAW* (2010).

tention.²⁷⁵ This danger of deferring to negative assumptions can, of course, extend to lawyers' dealings with clients.²⁷⁶ Lawyers' jobs involve stress, heavy caseloads, and pressurized decision-making. All are risk factors for biased decision-making.²⁷⁷

C. Implicit Bias and Names

It does not take face-to-face interaction to trigger implicit bias—it can be sparked by the sight of a person's skin color²⁷⁸ or can even surface without any visual cues at all. Names function as racial identifiers. People associate certain names with a particular race and gender, meaning names can be an important source of biased decision-making. Changing one letter on a resume, for example, as frustrated job-seeker José Zamora did to turn José into Joe, can have a dramatic impact on employment opportunities.²⁷⁹ People may not consciously discriminate based on names, but the name has an impact. As Zamora observed after going from zero responses to a full inbox, "Sometimes I

275. See Rebecca D. Gill et al., *Are Judicial Performance Evaluations Fair to Women and Minorities? A Cautionary Tale from Clark County Nevada*, 45 L. & Soc'y REV. 731, 738 (2011) ("While the underlying racial stereotypes are different from those underlying gender bias, 'the consequences of skewed racial distributions for the social psychology of stereotyping and outgroup bias are similar to those resulting from gender imbalance, as are the resulting barriers to career advancement.'" (quoting William T. Bielby, *Minimizing Workplace Gender and Racial Bias*, 29 CONTEMP. SOCIO. 120 (2000))); Debra Cassens Weiss, *Female Lawyers with Masculine Names May Have a Better Shot at Judgeships*, A.B.A. J. (Sept. 3, 2009, 1:45 PM), https://www.abajournal.com/news/article/female_lawyers_with_masculine_names_may_have_a_better_shot_at_judgeships_st [<https://perma.cc/JQ2P-RC4F>].

276. Bias can affect litigation strategy. For instance, lawyers are more likely to recommend Chapter 13 bankruptcy to clients whom they perceive as Black and Chapter 7 than to those they see as white. See Jean Braucher et al., *Race, Attorney Influence, and Bankruptcy Chapter Choice*, 9 J. EMPIRICAL LEGAL STUDS. 393 (2012). Bias can affect dealings with clients, and lawyers may treat clients differently depending on the client's race—for instance, lawyers may be more likely to berate minority clients. See, e.g., Andrea D. Lyon, *Race Bias and the Importance of Consciousness for Criminal Defense Attorneys*, 35 SEATTLE U. L. REV. 755 (2012); see also DENISE PETERSON, RECOGNIZING AND CORRECTING IMPLICIT BIAS IN MEDIATION (STATE BAR OF TEX. 2019) (discussing methods to overcome bias in alternate dispute resolution).

277. CASEY ET AL., *supra* note 268, at 8.

278. A study of identical baseball cards offered in identical eBay auctions found that the cards fetched much lower prices when a Black hand held them than when a white hand did. Ian Ayres et al., *Race Effects on eBay*, 46 RAND J. ECON. 891, 910 (2015).

279. Cate Matthews, *He Dropped One Letter in His Name While Applying for Jobs, and the Responses Rolled in*, HUFFPOST (Nov. 3, 2014), https://www.huffpost.com/entry/jose-joe-job-discrimination_n_5753880 [<https://perma.cc/4HXY-M25U>] (describing a job applicant who "whitewash[ed]" his name from José to Joe).

don't think people know or are conscious or aware that they're judging—even if it's by name—but I think we all do it all the time.”²⁸⁰

Numerous studies show that resumes with names that sound African American receive a comparatively poor reception.²⁸¹ One study explored reactions to fictitious job applications, finding that applicants with African-American names were much less likely to receive the opportunity for an interview.²⁸² The study found that applications for people with white-sounding names received fifty percent more callbacks than applications by people with African American-sounding names.²⁸³ The study also showed that the high quality of an applicant with an African American-sounding name did little to increase that applicant's chances of getting a call back, nor did an address in a well-off neighborhood.²⁸⁴ The authors concluded that a white-sounding name yielded the callbacks that an additional eight years of experience would for an African-American.²⁸⁵ This discrimination is especially invidious because it is not the sort of discrimination that anti-discrimination laws such as Title VII are likely to combat.²⁸⁶ Names

280. *Id.*; Angela Onwuachi-Willig & Mario L. Barnes, *By Any Other Name?: On Being “Regarded As” Black, and Why Title VII Should Apply Even if Lakisha and Jamal Are White*, 2005 WIS. L. REV. 1283, 1300 (discussing Guillermo using William on a resume and Tyree going by Ty). The same sort of bias can follow from female names. Female entrepreneurs, for instance, found that they accomplished more when operating through a make-believe male cofounder. Contractors and contacts responded promptly to the invented male but did not take the real business-woman seriously. Libby Kane, *2 Women Entrepreneurs Who Invented a Fake Male Cofounder Say Acting Through Him Was ‘Like Night and Day’*, BUS. INSIDER (Aug. 30, 2017, 2:20 PM), <https://www.businessinsider.com/witchsy-founders-created-fictional-male-cofounder-2017-8> [<https://perma.cc/HJL9-XBWG>]. The bias can also benefit some individuals. A study showed that female lawyers with masculine sounding names had better odds of obtaining judgeships than counterparts with feminine-sounding names. Weiss, *supra* note 275.

281. *See generally* Daniel Widner & Stephen Chicoine, *It's All in the Name: Employment Discrimination Against Arab Americans*, 26 SOC. F. 806 (2011); David Hausman, Note, *How Congress Could Reduce Job Discrimination by Promoting Anonymous Hiring*, 64 STAN. L. REV. 1343 (2012).

282. Bertrand & Mullainathan, *supra* note 38.

283. *Id.*

284. *Id.*

285. *Id.*

286. *See* Onwuachi-Willig & Barnes, *supra* note 280, at 1287. A person may, however, succeed in a Title VII suit if an employer persists in addressing the employee by an Americanized “nickname” instead of the person's given name. *See El-Hakem*, 415 F.3d 1068 (9th Cir. 2005) (finding that employee named Mamdouh could state Title VII claim against manager who refused to use his given name and substituted the western nickname Manny). The employee testified:

My name is Mamdouh, and it's pronounced Mamdouh, and I want you to call me Mamdouh. My name means things to me. It is part of my *entity*. It is part of my *personality*. It is my name. I carry it for 44 years. And it's part of my *religion*, and I need to be used and called by the name Mamdouh, which is the name I'm given by my parents.

are used as a proxy for race, but name discrimination is not illegal.²⁸⁷ People with certain names are seen as Black, and that has an impact on their chances of succeeding in life.²⁸⁸

Names are not only a proxy for race in employment. Names can affect lawyers' dealings with their clients. For example, a study shows that bankruptcy attorneys were more likely to recommend Chapter 7 to clients with names that led the lawyers to think they were white and Chapter 13 to those with Black-sounding names.²⁸⁹ Lawyers recommended Chapter 7 to "Todd and Allison" but Chapter 13 to "Reggie and Latisha."²⁹⁰ Indeed, lawyers are more likely to respond to e-mails from potential clients whose names sound white.²⁹¹

The harm associated with names can start well before a person²⁹² is old enough for a job hunt. Students with non-American names frequently encounter teachers who persist in mispronouncing their names. This failure to learn how properly to address a student is a sign of disrespect that can hinder academic progress.²⁹³ Mispronouncing a name is a microaggression that negates the student's identity.²⁹⁴ Mutilating a person's name sends a message that "[i]t's your

Brief of Defendants-Appellants/Cross-Appellees at 6–7, *El-Hakem v. BJY, Inc.*, 415 F.3d 1068 (9th Cir. 2005) (No. 03-35514), as discussed in Andrew M. Milaz, *But Names Will Never Hurt Me?: El-Hakem v. BJY, Inc. and Title VII Liability for Race Discrimination Based on an Employee's Name*, 16 TEMP. POL. & CIV. RTS. L. REV. 283, 285 (2006).

287. Onwuachi-Willig & Barnes, *supra* note 280, at 1286. There are other proxies for race, such as voice. *Id.* at 1308–12.
288. *Id.* Another study shows discrimination against non-white individuals who are not Black but have "blacker" sounding names. Aura & Hess, *supra* note 23, at 217.
289. Akande, *supra* note 274, at 15–16; see Onwuachi-Willig & Barnes, *supra* note 280 and accompanying text.
290. See *supra* text accompanying note 289.
291. Libgober, *supra* note 39 (describing experiment using names Brad and Laurie McCarthy and Darnell and Latoya Jackson); see also EMMA BIENIAS ET AL., IMPLICIT BIAS IN THE LEGAL PROFESSION (2017) (detailing bias in all aspects of the legal profession).
292. The bias does not only extend to people. The web site, WeRateDogs changed the name of a dog from the Arabic Kanan to the American George because the site thought George would be more popular. See Ryan Secard, *WeRateDogs Has a Problem with Ethnic Names*, STUDY BREAKS (July 6, 2018), <https://studybreaks.com/thoughts/weratedogs-names-problem/> [<https://perma.cc/M2G7-6ECM>].
293. Corey Mitchell, *Mispronouncing Students' Names: A Slight That Can Cut Deep*, EDUCATIONWEEK (May 10, 2016), <https://www.edweek.org/leadership/mispronouncing-students-names-a-slight-that-can-cut-deep/2016/05> [<https://perma.cc/YN9L-TT5D>] (discussing the My Name, My Identity campaign).
294. Rita Kohli & Daniel G. Solorzano, *Teachers, Please Learn Our Names!: Racial Microaggressions and the K–12 Classroom*, 2012 RACE, ETHNICITY & EDUC. 1, 4. The article explains that microaggressions are slights that are painfully obvious and hurtful to the person receiving them, but that may not be the person saying them may not intend. *Id.* at 5–8. An example is a person who says that a person's

fault for having a weird name.”²⁹⁵ Mispronunciation is a problem that non-American students and those for whom English is not a first language face, but the problem extends to American students whose names are not familiar to their teachers.²⁹⁶ African-American and Hawaiian students, for instance, may have names that link to their ancestry.²⁹⁷ The same failure to honor the person’s identity persists.

The prejudice against people with certain names stems from both racial and socioeconomic prejudice. At least in the school setting, a perception that students have low socioeconomic status leads school officials to expect less of the children, reducing the students’ cognitive performance.²⁹⁸ One researcher found that educators linked names with certain characteristics²⁹⁹ to low socioeconomic status and uneducated parents. Students with names that, in educators’ opinions, sounded like they were given by uneducated parents were less likely to be referred to programs for gifted students, to be promoted, and to perform well on standardized tests. These names correlated with race in that white children sometimes had names with one of the characteristics, but children whose names had two or more of the characteristics were almost exclusively Black.³⁰⁰ The study found that a boy with the name Dwayne, a name given almost exclusively to Black children, with no attributes of low socioeconomic status is estimated to have two-thirds to three-quarters of a national percentile lower mathematics or reading scores than would a boy with an equally common name, Drew, that is given almost exclusively to whites.³⁰¹ “But all names with a high ‘Blackness’ index are not created equal: A boy named ‘Damarcus’ is estimated to have 1.1 national percentile points lower math and reading scores than would his brother named ‘Dwayne.’”³⁰² Damarcus, in turn, would have three-quarters of a percentile ranking higher test scores than his brother named Da’Quan.³⁰³

The effect of treating names that are not common to the white majority as “other” and less worthy permeates and poisons the national

name is long and asks if they have a nickname. *Id.* at 8. *See supra* note 286 (discussing misnaming in the workplace).

295. Mitchell, *supra* note 293 (quoting a former teacher regarding colleagues’ attitudes).

296. Kohli & Solorzano, *supra* note 294, at 17.

297. *Id.* at 17–18.

298. Figlio, *supra* note 23.

299. *Id.* These characteristics are: (1) the name begins with one of a number of prefixes, such as “lo-”, “ta-”, and “qua-”; (2) the name ends with one of a number of suffixes, such as “-isha” and “-ious”; (3) the name includes an apostrophe; and (4) the name has is particularly long, with several low-frequency consonants. *Id.*; *see also supra* note 23 (discussing characteristics of typically Black names).

300. Figlio, *supra* note 23.

301. *Id.*

302. *Id.*

303. *Id.*

discourse. A teacher who treats a student's name as a joke not only sends a message that the child is inferior but it also teaches classmates that it is okay to make fun of a person's name and disrespect others.³⁰⁴ "When [white] students are taught to tease the unfamiliar, rather than embrace or celebrate an exposure to something new, it can create a climate of racial hostility for those who are not part of the majority."³⁰⁵ This belittling the unfamiliar then continues into adulthood, infecting politics and perpetuating racial bias. Then-Senator David Perdue, for instance, butchered then-Senator Kamala Harris's name at a campaign rally in 2020, drawing laughs for saying, "KA-MA-la, KA-ma-la, Kamala-mala-mala. I don't know, whatever."³⁰⁶ Individuals with non-traditional names recoiled in the aftermath, recalling their own experiences with being dismissed or taunted because of their names.³⁰⁷

There are two ways to avoid the discrimination that names trigger. One possibility is to change the name. The job applicant can "whiten" their name³⁰⁸ or the child, or their parents, can substitute a familiar name for the child's given one.³⁰⁹ The other path is to emphasize the importance of names and to increase the familiarity of names that now sound like those of the "other." Exposure is a way to combat implicit bias; people became less biased when they are more familiar with something.³¹⁰

V. THE POWER OF NAMES: THE REASON TO EMBRACE DIVERSITY

Names are central to a person's identity. "As a baby, identity and self-concept are developed through a family's repeated use of a child's

304. Kohli & Solorzano, *supra* note 294, at 12–13.

305. *Id.* at 13. One could make the same argument about an employer who misnames an employee. See Milaz, *supra* note 286 (discussing Title VII claim against employer who addressed employee by Americanized "nickname").

306. Rowalda Abdelaziz, *Parents of Color Speak Out After Sen. Kamala Harris' Name Is Mocked*, HUFFPOST (Oct. 21, 2020), https://www.huffpost.com/entry/david-perdue-kamala-harris-name-mocked-parents-of-color-experiences-naming-children_n_5f8f4f7ec5b61c185f44f115 [https://perma.cc/YN3Z-L959].

307. *Id.*

308. See Matthews, *supra* note 279 (discussing job applicant who changed his name from José to Joe on his resume); *supra* text accompanying notes 281–88 (discussing name discrimination in employment).

309. Kohli & Solorzano, *supra* note 294, at 2–3, 11–13 (discussing students who went by Americanized names in response to teachers' insistence or mispronunciation). Imposing a familiar substitute name or nickname is untenable, partly because children can suffer damage from name-directed microaggression before they are old enough to speak up, *id.* at 8–9, and because parents should not have to forego giving children names with cultural significance to appease aggressors, see *infra* notes 312–24 and accompanying text (explaining naming choices).

310. See *infra* notes 331–33 and accompanying text.

name.”³¹¹ A name is one of the first words a child learns to say. The significance of this identifier has led to the argument that parents should not “burden” children with names that will trigger prejudice or make the child’s life more difficult. Doing this, however, comes at the cost of hiding one’s culture and heritage. The better course is to work to appreciate and respect all names, to increase familiarity with all names. Familiarity helps to eliminate bias.

A. The Power of Names

One does not have to look far for evidence on the impact of names. A “Dear Abby” column a few years ago created an uproar by suggesting that parents should give children common names to enable them to blend in. A man of Indian heritage wrote to the columnist because his wife wanted to give their future children Indian names and the writer, signing his inquiry Making Life Easy, feared that “unusual” names would make the children’s lives difficult.³¹² Dear Abby³¹³ agreed, saying that “[p]opular names in one country can cause problems for a child living in another one.”³¹⁴ Because a name that sounds beautiful in one language may be grating or difficult to pronounce and spell in English, Dear Abby wondered why parents would “saddle a kid with a name he or she will have to explain or correct with friends, teachers and fellow employees from childhood into adulthood?”³¹⁵

An uproar followed. Twitter users accused the columnist of “promoting cultural genocide”³¹⁶ because of how names are often rooted in

311. Kohli & Solorzano, *supra* note 294, at 4 (citing WILLIAM SEARS & MARTHA SEARS, *THE BABY BOOK: EVERYTHING YOU NEED TO KNOW ABOUT YOUR BABY FROM BIRTH TO AGE TWO* (2003)).

312. Abigail Van Buren, *Couple Must Choose Between Practical and Unusual Names for Children*, DEAR ABBY (Sept. 13, 2018), <https://www.uexpress.com/dearabby/2018/9/13/1/couple-must-choose-between-practical-and> [<https://perma.cc/93CJ-TU8T>] (showing the original letter from Making Life Easy and Dear Abby’s response).

313. Originally written by Pauline Phillips under the pen name Abigail Van Buren, the syndicated “Dear Abby” column has been authored since 1987 by Phillips’ daughter, Jeanne Phillips. Mark Memmott, *‘Dear Abby’ Dies; Pauline Phillips Was Adviser to Millions*, NAT’L PUB. RADIO (Jan. 17, 2013), <https://www.npr.org/sections/thetwo-way/2013/01/17/169625513/dear-abby-dies-pauline-phillips-was-adviser-to-millions> [<https://perma.cc/H4XV-82PN>].

314. Van Buren, *supra* note 312.

315. *Id.*

316. @SikhFeminist, TWITTER (Oct. 16, 2018), <https://twitter.com/SikhFeminist/status/1052274923983527942> [<https://perma.cc/Z25T-GXZV>] (responding to “Dear Abbey”); Noor Brara, *Actually, “Dear Abby,” I Like My “Foreign Name” Just Fine*, *Thanks*, VOGUE (Oct. 17, 2018), <https://www.vogue.com/article/dear-abby-foreign-names-for-children-twitter-reactions-whitewashing> [<https://perma.cc/S4ED-WCFE>] (describing the outraged Twitter reactions to the “Dear Abby” column).

and derived from a person's heritage or religion.³¹⁷ People noted that children who looked different could be teased, no matter the child's name. The "solution isn't to give kids Anglo names to appease white supremacy;" rather, the approach should be to "hold racist kids who bully" accountable.³¹⁸ Commentators with non-traditional names wrote to explain not only the problems their names had caused but also why they were glad their parents chose names that did not hide their identities.³¹⁹

Names do not just happen. Parents often struggle in naming their children.³²⁰ Names may reflect religion and religious tradition.³²¹ Names may signal ethnicity and indicate a bond with ancestors.³²² Names may honor relatives.³²³ Parents may pick names because of the way it sounds or following a trend.³²⁴ Ultimately though, the name a parent gives a child or an adult chooses for themselves³²⁵ is a

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317. See @_sen_sharmila, TWITTER (Oct. 17, 2018), https://twitter.com/_sen_sharmila/status/1052543309774766082 [<https://perma.cc/2YEZ-DL9P>].
318. @Sil_Lai, Twitter (Oct. 16, 2018), https://twitter.com/Sil_Lai/status/1052316633614692352 [<https://perma.cc/Q2NK-SS8U>].
319. Sahaj Kohil, *Dear Abby, Here's What It's Really Like To Have a 'Foreign' Name in America*, HUFFPOST (Oct. 18, 2018, 5:25 PM), https://www.huffpost.com/entry/dear-abby-response-letter_n_5bc8c7a1e4b0d38b58760a85 [<https://perma.cc/75XC-GFJG>].
320. Kaitlyn Quinn, *What's in a Name: A Response to 'Dear Abby'*, STUDY BREAKS (Oct. 29, 2018), <https://studybreaks.com/thoughts/response-dear-abby/> [<https://perma.cc/W3TH-4E6C>] ("What Phillips fails to consider is how much thought parents put into naming their children and how much those foreign names can mean to the parents.").
321. K.M. Sharma, *What's in a Name?: Law, Religion, and Islamic Names*, 26 DENVER J. INT'L L. & POL'Y 151 (1998) (discussing Islamic naming practices); Kohil, *supra* note 319 (discussing Sikh naming practices).
322. Jami Nakamura Lin, *Does My Child's Name Erase My Identity?*, N.Y. TIMES (May 5, 2020), <https://www.nytimes.com/2020/05/05/parenting/baby-name-family-history.html> [<https://perma.cc/LBP2-PPDD>]; Katherine Reynolds Lewis, *Baby Names: Should It Matter If They Indicate Your Race?*, WASH. POST (Oct. 19, 2015), <https://www.washingtonpost.com/news/parenting/wp/2015/10/19/baby-names-should-it-matter-if-they-indicate-your-race/> [<https://perma.cc/7UH2-U7J2>].
323. Lin, *supra* note 322; see also sources cited *supra* notes 22, 286 (discussing the practice of naming children after relatives).
324. Mallory Hightower et al., *Analyzing Influences on U.S. Baby Name Trends*, SMU DATA SCI. REV., 2019, at 2, <https://scholar.smu.edu/cgi/viewcontent.cgi?article=1118&context=datasciencereview> [<https://perma.cc/32F6-29T3>]; Jonah Berger et al., *From Karen to Katie: Using Baby Names To Understand Cultural Evolution*, 23 PSYCH. SCI. 1067 (2012). Pop culture icons, new technology, and natural disasters also play a part in the popularity of baby names. *Id.*; see also sources cited *supra* notes 320–23 (discussing other reasons babies are named after people).
325. Lin, *supra* note 322 (discussing adults who have replaced American names with those indicating ethnic background). Famously, former President Obama went by Barry before changing to use his birth name in 1980. Richard Wolffe, *When Barry Became Barack*, NEWSWEEK (Mar. 22, 2008, 10:26 AM), <https://www.newsweek.com/when-barry-became-barack-84255> [<https://perma.cc/D9FM-MWGL>].

mark of identity. A person should not be held back in education or profession because a name is deemed different.

But names do hold people back. Names can harm children and young adults as they grow up by triggering bias in their teachers. Names can make it more difficult for a person to obtain a job. The legal profession is not immune. Bias associated with names can harm lawyers and their clients. The cure is not to force people to change or hide their names. The cure is not to pretend the issue does not exist by eliminating use of names. The first step to the cure is to eliminate bias.

B. Familiarity Reduces Implicit Bias

Names generate bias. How can society eliminate that bias? The focus can turn to eliminating bias once the fact of bias is accepted. The study of how to eliminate implicit bias is just beginning.³²⁶ Combating bias requires more than vague instructions to avoid biased outcomes or to act in an egalitarian matter.³²⁷ Individuals must understand the phenomenon of bias and take concrete steps to try to undo it. A person must become consciously aware of bias, then act to minimize it to the greatest extent possible.³²⁸

There are numerous studies of approaches to eliminating bias. Techniques include meditation, individuation training, diversity training, taking others' perspectives, exposure to counter-stereotypical examples, and intergroup contact.³²⁹ There is no magic bullet to eliminating bias, but all steps involve awareness of the problem and conscious action to minimize bias and bias-induced behavior. This requires individuals to act "based on a rational assessment of the situation rather than on stereotypes and prejudice."³³⁰

Exposure to diversity is one step that helps to counter bias. "Increased contact with counter-stereotypes—specifically, increased ex-

326. CASEY ET AL., *supra* note 268, at 4 ("Compared to the science on the existence of implicit bias and its potential influence on behavior, the science on ways to mitigate implicit bias is relatively young . . .").

327. *Id.*

328. STAATS ET AL., *supra* note 258, at 39. Importantly:

"The key isn't to feel guilty about our [implicit] biases—guilt tends toward inaction. It's to become consciously aware of them, minimize them to greatest extent possible, and constantly check in with ourselves to ensure we are acting based on a rational assessment of the situation rather than on stereotypes and prejudice."

Id. (alteration in original) (quoting Neil Franklin, *Bias Is Universal. Awareness Can Assure Justice*, N.Y. TIMES (Sept. 2, 2014, 12:13 PM), <https://www.nytimes.com/roomfordebate/2014/09/01/black-and-white-and-blue/bias-is-universal-awareness-can-assure-justice> [<https://perma.cc/8DDK-GTD9>]).

329. *Id.* at 39–43. For a detailed list of steps that both individuals and organizations can take, see CASEY ET AL., *supra* note 268, at 5–21.

330. STAATS ET AL., *supra* note 258, at 39 (quoting Franklin, *supra* note 328).

posure to stigmatized group members [who] contradict the social stereotype—can help individuals negate stereotypes, affirm counter-stereotypes, and ‘unlearn’ the associations that underlie implicit bias.”³³¹ Exposure can come from role models or observing counter-stereotypes, but also from imagining them.³³² Practice making counter-stereotypical associations is also valuable.³³³ What all these approaches have in common is an awareness of differences and work to combat negative associations. They are not color-blind.

Colorblindness does not eliminate bias. It perpetuates bias. Importantly, “[t]he popular ‘color blind’ approach to egalitarianism (i.e., avoiding or ignoring race; lack of awareness of and sensitivity to differences between social groups) fails as an implicit bias intervention strategy.”³³⁴ Colorblindness generates greater implicit bias than do strategies that acknowledge race.³³⁵ Colorblindness maintains the status quo of white privilege.³³⁶ Because whiteness is the norm in American culture and law, an insistence on colorblindness helps to reinforce this baseline.³³⁷ As Professors Armstrong and Wildman put it, it is necessary to “counter colorblindness with color insight.”³³⁸ Conscious awareness of differences is necessary to combat implicit bias against those who differ from the norm.

C. The Role of the *Restatements*

Names can help combat color-blindness and work toward color insight. Legal writing that presents actors as unnamed embodiments of broad categories—the doctor, the assailant—reinforces bias because the reader will picture the actors through the lens of implicit bias.³³⁹ The doctor will likely be a white male and the assailant will likely be a Black male.³⁴⁰ The author might refer to the doctor as a “she” or a nurse as a “he” to counter gender-assumptions, but the absence of names makes it impossible to correct assumptions about race and religion while still focusing on the substantive point. Using names, a

331. CASEY ET AL., *supra* note 268, at 12.

332. *Id.* (citations omitted). Decreased exposure to stereotypes is also important. *Id.* at 13.

333. *Id.* at 12 (citation omitted).

334. *Id.* at 5.

335. *Id.* (citation omitted). Acknowledging race allows comparing and differentiating group members. “By defining individuals in multiple ways other than in terms of race, implicit bias may be reduced.” *Id.* at 6 (citations omitted).

336. Armstrong & Wildman, *supra* note 27, at 648–49.

337. *Id.* at 649.

338. *Id.* at 639.

339. *See supra* section IV.B.

340. *See id.*

characteristic that people use as a proxy for race,³⁴¹ can alter the image.

The use of diverse names is a step to eliminating bias by making the names more familiar. A name generates bias because it is different or foreign or because the hearer associates the name with an object of prejudice. Careful use of names can help to dispel these biased assumptions. This is evident in examples that consciously dispel gender stereotypes by having women in stereotypically male roles—like Sandra laying tile.³⁴² Use of names with racial, religious, and class associations can send the same counter-stereotypical messages. D’Andre and LaToya can be doctors; Muhammad and Moshe can operate machinery. Enhancing familiarity and giving counter stereotypical examples help to counter bias.³⁴³

Using names and consciously using diverse names helps lawyers and law students gain familiarity with those names, something that can help to understand and eliminate bias in law and the legal profession.³⁴⁴ The legal profession has tried to encourage diversity and

341. See *supra* section IV.C.

342. RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2 cmt. i, illus. 11 (AM. L. INST. 1998); see *supra* text accompanying notes 331–83.

343. Imagining counter-stereotypical examples and gaining exposure to such examples are techniques for eliminating implicit bias. See CASEY ET AL., *supra* note 268, at 12. Conscious use of diverse names and counter-stereotypical examples can also serve a remediation function; emphasizing diversity in response to the history of racism and other bias in the *Restatements* and law generally. The reporter of the *Third Restatement of Intentional Torts to Persons*, Professor Jonathan Cardi, is trying to do this, explaining that he is attempting to use counter-stereotypical examples. “[I]f the illustration referenced a doctor, I would make it a woman, a nurse would be a man; a criminal John, his citizen-arrester Jamal.” E-mail from Jonathan Cardi, *supra* note 99; see also *supra* note 109 (explaining Professor Cardi’s attempts to promote diversity).

344. See generally Linh Nguyen Littleford & Susan A. Nolan, *Your Sphere of Influence: How To Infuse Cultural Diversity into Your Psychology Classes*, AM. PSYCH. ASS’N (May 2013), <https://www.apa.org/ed/precollege/ptn/2013/05/cultural-diversity> [<https://perma.cc/DR78-KVKP>] (encouraging instructors to use researchers’ first and last names to highlight diversity in “gender, race and ethnicity, culture and age” and to use names of diverse ethnic and religious backgrounds on exams and in class to benefit students). Studies show that students report learning more content in courses that include diversity. *Id.*; see, e.g., Joelle D. Elicker et al., *Do Student Perceptions of Diversity Emphasis Relate to Perceived Learning of Psychology?*, 37 TEACHING PSYCH. 36, 36 (2010). Researchers found that an emphasis on diversity promoted students’ belief that they understood and could apply concepts taught:

The inclusion of multiculturalism in the classroom may facilitate learning in several ways. First, it may increase the extent to which diverse students are able to see the personal relevance of concepts. Second, providing multiple examples of psychological concepts facilitates the development of richer, more accurate concept networks. Third, presentation of multiple and diverse examples fosters critical thinking as students reconcile how psychological phenomena operate in different cultural contexts.

equality; law schools must strive for diverse faculty and students,³⁴⁵ and legal employers must not discriminate in hiring.³⁴⁶ But bars against discrimination and encouragement of diversity only go so far. They do not help a student whose name professors consistently mispronounce.³⁴⁷ They do not help an applicant whose resume is rejected because their name is José instead of Joe or DaMarcus instead of Drew.³⁴⁸ Embracing and recognizing different names is part of a conscious pursuit of diversity.

The use of diverse names in the *Restatements* will not end discrimination or change the legal profession—the illustrations play a minimal role in lawyers' and law students' lives. But that should not lead one to understate the *Restatements'* influence. *Restatements* are an integral part of law and its development. All courts rely on the *Restatements*.³⁴⁹ It is doubtful that there is any single piece of legal authority, aside from a case such as *Marbury v. Madison*,³⁵⁰ with which more judges, lawyers, and law students are familiar. *Restatements* are one of the first sources law students use to learn about the law and perhaps the only source that students encounter in their first weeks of law school that they will turn to throughout their careers. *Restatements* are an example of legal writing and a space where lawyers talk and read about how the law affects people. Those who write, read, and talk about the law should do so in a way that recognizes and embraces the diversity of society.

As with any change, conscious efforts to use diverse names may generate some questions and discomfort. Writers and readers may struggle to embrace the unfamiliar. The use of names can open a writer up to charges of bias.³⁵¹ A writer might be afraid to use a minority name in a criminal law example³⁵² or fear that any attempt to

Id. (citations omitted).

345. See MODEL RULES OF PRO. CONDUCT r. 8.4(g) (AM. BAR ASS'N 2020).

346. *Id.*

347. See *supra* text accompanying notes 293–97.

348. See *supra* text accompanying notes 281–88.

349. See Elizabeth Laposata et al., *The Tobacco Industry Influence on the American Law Institute's Restatement of Torts and Implications for Its Conflict of Interest Policies*, 98 IOWA L. REV. 1, 5–6 (2012) (explaining that over 150,000 published cases from all fifty states and over 850 Supreme Court cases had cited *Restatements* by 2001 and that most citations were to the *Restatement of Torts*); see also Elson, *supra* note 55, at 625 (discussing the influence of the American Law Institute); Joslin & Levine, *supra* note 24, at 623 (discussing the influence of the *Restatement of Torts*).

350. 5 U.S. (1 Cranch) 137 (1803).

351. History bears out that attempts to reflect diversity can generate criticism for not going far enough. See *supra* text accompanying notes 210–11 (discussing criticism of hurricane names for not being adequately diverse).

352. This was a concern underlying the move away from names on the MBE. See *supra* text accompanying notes 152–70. It would certainly be possible to use diverse names in a bigoted manner by using diverse names for all wrongdoers, but

use diverse names requires equal representation of every nationality.³⁵³ A person might fear accusations of pandering from illustrations featuring Black professionals and gay couples.³⁵⁴ These fears are misguided for two primary reasons. First, they suggest that the writer is embracing diverse names as a favor to minorities and not out of an effort accurately to represent the society about which they are writing.³⁵⁵ Second, these fears insinuate that writers should shy away from anything that raises uncomfortable discussions of inequalities in society.³⁵⁶ Insight into bias is impossible without directly confronting the fact of race,³⁵⁷ which can make white people uncomfortable. Such discomfort is better than promoting the status quo.

Colorblind neutrality is not neutral. Use of generic labels furthers stereotypical thinking and hides the diversity of society. The avoidance of diverse names helps to convey a message that people with certain names are different, are “the other.” A conscious effort to embrace diverse individuals and to use their names can commence the conscious elimination of bias. The embrace of diverse names in the *Restatement of Torts* can influence drafters of other *Restatements*, judges, attorneys, law professors, students, and others who learn about the law. This comfort with diversity can then transcend the legal sphere to applications in society at large.³⁵⁸

that should not mean that it is improper to use such names in all discussions of wrongdoing. Many people discussed in torts illustrations are necessarily tortfeasors. The more diverse names there are, the less the occasional use of such a name to refer to a wrongdoer will stand out.

353. This was another concern prompting the use of labels in the MBE. *See supra* text accompanying notes 169–70 (explaining a fear that using Asian names would require a use of names from every Asian country).
354. The total absence of commentary on the use of names in the *Restatements* up until now suggests that those thoughts are not being shared publicly. The lack of any questioning of the use of diverse names in the *Third Restatement* also suggests an openness to diversity. *See supra* note 92 (discussing conversation with the reporter). The absence of commentary on the names, on the other hand, may reflect a failure to appreciate the importance of the change. *See supra* note 191.
355. For example, the concern that using Asian names requires using names of every Asian nationality suggests that the use of a particular name is a favor that the writer is bestowing on members of that nationality and that the treats must be allocated equally. *See supra* text accompanying notes 169–70. But the use of diverse names is more important as a message to the white majority, and names from Asian nationalities help to send that message of diversity.
356. One cannot confront and ameliorate bias by silence. *See supra* section V.B.
357. *See id.*
358. *See supra* text accompanying notes 304–07 (discussing how making fun of names sends a message that people with names that are not familiar to the majority are “other,” which generates a culture of disrespect and poisons public discourse).

VI. CONCLUSION

Names raise big and important issues involving race, gender, religion, sexuality, and class. Parents choose a name because it reflects gender or because it is gender neutral; some parents choose names to send a religious message or to convey ethnic pride, among countless other reasons.³⁵⁹ Other names are identified with race or class.³⁶⁰ The power of names has led legal writers to steer clear of them in an effort to project neutrality and avoid offense.³⁶¹ Bar exam writers favor labels instead of names, and until recently, *Restatement* illustrations all used labels or letters.³⁶² The *Third Restatement of Torts* broke this mold, using names. Not only did it use names, but it used names that began to indicate the diversity of the society to which the law applies.

The drafters of the *Third Restatement* made the right choice. Drafters of other *Restatements* should follow their lead, as should other legal writers.³⁶³ Labels are not neutral. The use of seemingly neutral labels leads readers to picture the actors in ways that reflect and confirm their own implicit biases: doctors are men, nurses are women, and everyone is white, straight, and Christian.

Perpetuating implicit biases furthers discrimination against those who do not share characteristics that conform to biased assumptions. This discrimination is not necessarily conscious or overt, but it is real, nonetheless. There is discrimination in giving a student a nickname instead of using a name the teacher finds difficult to pronounce;³⁶⁴ there is discrimination in assuming José's resume is less compelling than Joe's.³⁶⁵ Having to pronounce an unfamiliar name to discuss an example in a *Restatement* or seeing a person with a previously unusual name work as a successful professional in an illustration are small but necessary steps to countering and defeating such bias. As exposure to diversity and counter-stereotypical examples helps to combat implicit bias, conscious use of names that accurately reflect

359. See *supra* text accompanying notes 217, 319–23.

360. See *supra* text accompanying notes 298–303.

361. See *supra* text accompanying notes 152–70.

362. See *supra* sections II.B. (bar exams), section II.A (*Restatements*).

363. This includes bar examiners. Absent discovery of compelling evidence that use of names harms a group of examinees, the reasons the bar examiners have relied on to support the use of labels are insufficient. See *supra* text accompanying notes 152–70 (discussing those reasons); *supra* Part V (explaining why those reasons are insufficient). The possibility that historically disadvantaged groups perform better on exams that reflect diversity is a reason to include diverse content. See *supra* note 158.

364. See *supra* text accompanying notes 293–97 (discussing students who are misnamed); see also *supra* note 286 (explaining discrimination against employees by managers who do not address them by their given names).

365. See *supra* text accompanying notes 281–88 (discussing name discrimination in employment).

society is a step that everyone, including the legal community, can take to help reduce that bias.