

Evolving *They*

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The Roman god Janus must have been a grammarian. He presided over rituals recognizing the past and future, exits and entrances, beginnings and endings — all characteristics of ever-evolving grammar and word usage. If Janus were alive today, he'd be most excited about the pronoun *they* because more than any other essential word, it is in a period of change, with certain meanings fading and other meanings coming to light.

They (and *them*, *their*, and *themselves*) has for many centuries been used as a gender-neutral third-person-plural personal pronoun:

Daphne and Apollo ran through the laurel bushes; **they** were in love.

Janus would recognize that the historic use of *they* has been rigid, the reason for gallons of red ink spilled on millions of high-school, college, and law-school papers: “Pronoun–noun disagreement. *Court* is singular; *they* is plural.” But Janus is now presiding over a sea change in *they*'s usage toward a future of greater flexibility.

Embracing *They*'s Flexibility

Recently, English speakers have been enjoying greater flexibility by using *they* as a singular pronoun. More and more writing experts and guides (see below) are trumpeting that the once-plural-only pronoun may now be used as a singular pronoun (1) to replace *he or she*, (2) to refer to collective nouns, and (3) to respect gender identities:

- Not long ago: Everyone has *his or her* favorites.
 Now: Everyone has *their* favorites.
- Not long ago: The administration implemented the policy even though *it* did not fully research the consequences.
 Now: The administration implemented the policy even though *they* did not fully research the consequences.
 (Not only does this feel natural to most people, but there’s no denying that using *they* to refer to collective singular nouns is riding the wave to the future. No amount of red ink in margins will stop it.)
- Not long ago: Jamie is a transgender person. *He* can give us insight into this case.
 Now: Jamie is a transgender person. *They* can give us insight into this case.
 (This usage will grate on some ears. In fact, there’s discussion in the legal-writing community about whether to use *they*, *ze*, or *xe* as an appropriate gender-neutral pronoun; but that’s not what this article is about. In any event, consider the early resistance to nonsexist language, and consider the position of marginalized groups.¹)

The flexibility gained is in avoiding the clumsy *he or she*, capturing collective nouns with increased comfort, and respecting

¹ Stephanie Golden, *We Need the Singular ‘They’—and It Won’t Seem Wrong for Long*, Aeon (Feb. 28, 2018), https://aeon.co/ideas/we-need-the-singular-they-and-it-wont-seem-wrong-for-long?utm_source=Aeon+Newsletter&utm_campaign=2002ec964a-EMAIL_CAMPAIGN_2018_02_19&utm_medium=email&utm_term=0_411a82e59d-2002ec964a-69511265.

those who prefer a gender-neutral pronoun. Attorneys, as word-smiths, should embrace these changes, or at least begin to. After all, it's not as if this is the first time that word usage has naturally evolved. Take, as one of thousands of examples, the word *egregious*. It used to mean *distinguished*.² That's right: what now means *appalling* used to mean *exceptional*.

Additionally, other countries and texts have embraced the singular *they*. Canada says, "The use of the singular 'they' is becoming more common not only in spoken but in written English and can prove to be useful to legislative counsel in a legislative context to eliminate gender-specific language and heavy or awkward repetition of nouns."³ Australia has also recognized that using *they* and *their* "as singular pronouns is acceptable . . . to avoid excessive repetition of 'he or she'."⁴

Even a recent edition of the Bible uses singular *they* instead of the more traditional *he* where the original Greek or Hebrew version included a pronoun that could apply to both genders. The decision to go with singular *they* drew criticism, but the decision was based on an extensive study that couldn't be ignored. "The gender-neutral pronoun 'they' ('them'/'their') is by far the most common way that English-language speakers and writers today refer back to singular antecedents such as 'whoever,' 'anyone,' 'somebody,' 'a person,' 'no one,' and the like."⁵

² *Egregious*, Merriam-Webster Online Dictionary (2018), <https://www.merriam-webster.com/dictionary/egregious> (accessed July 18, 2018).

³ Canada.ca, *Legistics Singular "They"*, Department of Justice (accessed July 18, 2018), <http://www.justice.gc.ca/eng/rp-pr/csj-sjc/legis-redact/legistics/p1p32.html>.

⁴ *Style Guide for Use in Preparation of Manuscripts*, Federation Press, 4, <http://www.federationpress.com.au/StyleGuidelinesforFederationPress.pdf>.

⁵ Associated Press, *New Bible Draws Critics of Gender-Neutral Language*, Wash. Post, Mar. 17, 2011, http://www.washingtonpost.com/wp-dyn/content/article/2011/03/17/AR2011031703434_2.html.

The United States has been slower to the game, but in recent years, singular *they* has caught up. Take the American Dialect Society, a group of keen grammarians that has held sway since 1889.⁶ They named singular *they* the Word of the Year for 2015.⁷ Around the same time, *The Washington Post* edited its style guide to allow for the singular *they*.⁸ And as of the 2017 *AP Stylebook*, the Associated Press allows the singular *they* in “limited cases” to avoid awkward or clumsy constructions.⁹

*Garner’s Modern English Usage*¹⁰ and the 2017 edition of *The Chicago Manual of Style*¹¹ have accepted singular-*they* usage to achieve gender neutrality — but these authorities caution against using it in formal writing because it’s still stigmatized.

At least one Justice on the U.S. Supreme Court has used the singular *they* in a recent opinion.¹² Other courts haven’t balked when *they* was used in documents to refer to a singular

⁶ *About the American Dialect Society*, ADS, <http://www.americandialect.org/>.

⁷ *2015 Word of the Year Is Singular “They,”* ADS, <https://www.americandialect.org/2015-word-of-the-year-is-singular-they>.

⁸ Bill Walsh, *The Post Drops the ‘Mike’ — and the Hyphen in ‘E-Mail,’* Wash. Post, Dec. 4, 2015, https://www.washingtonpost.com/opinions/the-post-drops-the-mike-and-the-hyphen-in-e-mail/2015/12/04/ccd6e33a-98fa-11e5-8917-653b65c809eb_story.html?utm_term=.a6e464899644.

⁹ Kristen Hare, *AP Style Change: Singular They Is Acceptable ‘in Limited Cases,’* Poynter (Mar. 24, 2017), <https://www.poynter.org/2017/ap-style-change-singular-they-is-acceptable-in-limited-cases/453356/>.

¹⁰ Bryan A. Garner, *Garner’s Modern English Usage: The Authority on Grammar, Usage, and Style* 735–36, 821–22 (4th ed. 2016) (“Disturbing though these developments may be to purists, they’re irreversible. And nothing a grammarian says will change them.”).

¹¹ University of Chicago Press, *The Chicago Manual of Style* 241, 359–62 (17th ed. 2017).

¹² *Lockhart v. United States*, 136 S. Ct. 958, 966 (2016) (Sotomayor, J.) (“Section 2252(b)(2)’s list is hardly the way an average person, or even an average lawyer, would set about to describe the relevant conduct if they had started from scratch.”).

antecedent. At most, a court smugly pointed it out in a footnote, but it had no bearing on the case.¹³

Finally — to the critics of modern *they* — if we told you that you regularly use another pronoun to refer to both singular and plural nouns, why not let *they* do the same? Can you think of the other pronoun? Hint: we used it — three times — in the previous two sentences, and you didn't even blink an eye. *You. They* is on the same track.

But Beware of *They's* Potential for Ambiguity

They has a storied past of causing ambiguity, so the modern writer must be vigilant. This caution is important to any attorney who reads statutes, drafts contracts and pleadings, plans estates, and gathers and analyzes evidence.

To better understand *they's* troubled past, we analyzed more than 80 cases in which the loose use of *they* was at least one issue in the case — and sometimes even determined the outcome. Below are a few of the ambiguous *theys* from those cases. In each example, the pronoun *they* is in **bold**, and the antecedents that this pronoun might refer to are underlined.

From Michigan, here's an example of an ambiguous *they* in an ordinance:

Mobile homes are permitted in Mobile Home Parks. **They** shall be permitted in Mobile Home Subdivision and Residential-Agricultural Districts . . .¹⁴

The issue became whether *they* referred to *mobile homes*, *Mobile Home Parks*, or both. The township eventually won this zoning

¹³ See, e.g., *State v. Fry*, 228 P.3d 630, 633 (Or. Ct. App. 2010).

¹⁴ *Lamotte Coach Light Corp. v. Twp. of LaMotte*, No. 240907, 2003 WL 22339169, at *1 (Mich. Ct. App. Oct. 14, 2003).

appeal after the Michigan Court of Appeals considered the context and decided that *they* referred to *mobile homes* only.

Similarly, the Eighth Circuit wrestled with an ambiguous *they* in this poorly drafted federal statute:

Except as otherwise specifically provided, a defendant who has been found guilty of an offense described in any Federal statute . . . shall be sentenced in accordance with the provisions of this chapter so as to achieve the purposes set forth in subparagraphs (A) through (D) of section 3553(a)(2) to the extent that **they** are applicable in light of all the circumstances of the case.¹⁵

The defendant argued that *they* was ambiguous because it was unclear whether *they* referred to *the provisions of this chapter*, *the purposes*, or the *subparagraphs*. The court rejected this argument and relied on the first few words of the statute — “[e]xcept as otherwise specifically provided” — to conclude that a mandatory minimum sentence applied. Fortunately, the court could resolve the ambiguity by referring to the provision’s greater context. But still, the ambiguous *they* caused avoidable litigation.

For further proof that *they* can be confusing, consider that at least five cases involved search warrants that had purposefully used *they* to mislead readers about the referent’s identity.¹⁶ And courts have said that using *they* to refer to multiple possible antecedents “lack[s] trustworthiness,”¹⁷ is “objectionable,”¹⁸ is

¹⁵ *United States v. Villar*, 184 F.3d 801, 802 (8th Cir. 1999) (quoting 18 U.S.C. § 3551(a)).

¹⁶ *State v. Zamora*, 430 So. 2d 274, 277 (La. Ct. App. 1983); *Lewis v. State*, 242 S.E.2d 725, 726 (Ga. Ct. App. 1978); *Peters v. City of Biloxi, Miss.*, 57 F. Supp. 2d 366 (S.D. Miss. 1999); *Ledbetter v. State*, 380 S.E.2d 313 (Ga. Ct. App. 1989); *United States v. Sampson*, No. 4:CR-07-389, 2010 WL 1505904, at *3 (M.D. Pa. Apr. 13, 2010).

¹⁷ *People v. Johnson*, No. B178314, 2006 WL 802838, at *3 (Cal. Ct. App. Mar. 30, 2006).

¹⁸ *State v. Byrd*, 512 N.E.2d 611, 622 (Ohio 1987).

“indiscriminate,”¹⁹ leaves matters “virtually in the field of conjecture,”²⁰ and leads to “confusion and uncertainty.”²¹

In short, ambiguity lurks when *they* follows two or more people or things.

Tips to Avoid Ambiguous *They*

They’s future is bright. But as we enjoy *they*’s new flexibility, what can we do to avoid the “confusion and uncertainty” of *they*’s past? Here are practice tips to avoid ambiguous-*they* problems:

- Ask, “Who’s *they*?” When gathering evidence — whether in trial with a witness, in an affidavit, or in an interview — you should see a red flag every time *they* is used. Ask the speaker to clarify whom *they* refers to.
- Follow the instruction in the Michigan *Legislative Drafting Manual*: “When using pronouns, take care that the pronoun clearly refers to the proper antecedent.”²²
- Before submitting a drafted document — like a pleading, contract, or will — search for *they* in the document using Ctrl + F (or, for Mac, Command + F), and test its clarity.
- When you find a *they* that could refer to two or more antecedent nouns, try repeating the antecedent noun or reconstructing the sentence.²³ Consider this clause from a will that became the point of contention:

I give, devise and bequeath to my son Bryan and to my daughters Ruth and Anna Widdowson my residence in the City of Carrollton, each of them to hold their

¹⁹ *Brabazon v. Joannes Bros. Co.*, 286 N.W. 21, 27 (Wis. 1939).

²⁰ *Id.*

²¹ *Id.*

²² Legislative Council, State of Mich., *Legislative Drafting Manual* 83 (2009).

²³ Robert D. Eagleson, 5 *Scribes J. Legal Writing* 87, 94 (1994–1995).

interest therein so long as he or she remains single and when all are married then the same to be sold and the proceeds thereof to be divided equally between all of my heirs, including my said two grandchildren, **they** to share and share alike equally.²⁴

The bolded *they* is ambiguous because it could have referred to one antecedent, the other antecedent, or both antecedents. The one it refers to determines whether the proceeds from the home sale transfer per capita or per stirpes.

Repeating the antecedent noun, *heirs*, in the final clause — instead of using *they* — would have saved costly litigation. Or the drafter could have reconstructed the clause like this:

~~I give, devise and bequeath to my son Bryan and to my daughters Ruth and Anna Widdowson my residence in the City of Carrollton, each of them to hold their an interest therein so long as he or she remains while single. and When all are married, then my Personal Representative must sell my residence and equally divide the proceeds the same to be sold and the proceeds thereof to be divided equally between all of my heirs, including my said two grandchildren, they to share and share alike equally.~~

In this revision, eliminating *they* might be the best way to avoid ambiguity. And as a bonus, did you notice the other pronoun foul? The drafter referred to the three heirs' interest as *their* interest but then, just five words later, referred to them as *he or she* — creating inconsistency and ambiguity by switching from the plural *their* to the singular *he or she*. Now, that blunder might not be fatal like the ambiguous *they* was, but it illustrates the care that drafters must apply to their craft.

Janus was on to something. He understood the past and future, beginnings and endings. Grammar and word usage are no

²⁴ *Widdowson v. Widdowson*, 278 Ill. App. 522, 524 (1935).

different. Even they evolve. Now it's *they's* turn. Onward, with care but not qualms.