

VIVE NO DIFFÉRENCE

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Officially, the Ivy League is nothing more than an athletic conference. . . . These schools are not entirely the oldest, the best—or even ivy-covered. But in the public imagination, they are something very special.¹

Steve Lubet wants to pick a fight.² Rather than engage directly, I contest the contest between *in evidence* and *into evidence*. Two texts, Judith Butler's *Gender Trouble*³ and *The Official Preppy Handbook*,⁴ inform my critique. A critical reading of Lubet as interpreted through these texts reveals that Lubet reifies binarism by uncritically assuming that the distinction between *in* and *into* is somehow real in a pre-discursive naturalized way, rather than recognizing the cultural contingency of the grammatical distinction.⁵ In other words, Lubet has mistakenly asked whether *in* or *into* is the correct way to reference the admittance of evidence when the critical question is instead what systems of power are served by privileging either *in* or *into*. His discussion implicitly assumes some naturalized difference between *in* and *into*, yet truth be told (were truth not a structuralist fantasy), the relevant discussion asks not whether *in* or *into* is superior, but rather what political purposes are served by positing the superiority of either *in* or *into*.

Judith Butler suggests that gender is performative, rather than fixed or natural.⁶ In other words, gender is something a person does, rather than something s/he is as a biological or inevitable matter. Butler focusses on "the political stakes in designating as an *origin* and *cause* those identity categories that are in fact the *effects* of institu-

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¹ LISA BIRNBACH, *THE OFFICIAL PREPPY HANDBOOK* 86 (1980).

² Steven Lubet, *Into Evidence*, 81 *CORNELL L. REV.* 154 (1995).

³ JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* (1990).

⁴ BIRNBACH, *supra* note 1.

⁵ I build on the *oeuvre* of Sidney W. DeLong in *Jacques of All Trades: Derrida, Lacan, and the Commercial Lawyer*, 45 *J. LEGAL ED.* 131 (1995), in my application of postmodern analysis to Lubet's brief but rich essay. Like DeLong, I accept no responsibility for any errors or misconceptions in this essay.

⁶ BUTLER, *supra* note 3, at viii ("[G]ender is a kind of persistent impersonation that passes as the real.").

tions.”⁷ Similarly, I strive to investigate the political effects of Lubet’s binary between *into evidence* and *in evidence*. I suggest that he mistakes as grammatical gospel what is really a social construction. But the cultural contingency of grammar does not rob Lubet’s contest of meaning. Indeed, the stakes of the *in/into* contest are extraordinarily high: Lubet’s hierarchy between *in* and *into* reflects the larger hierarchies of all hegemonic influences.

The precise meaning of Lubet’s contest becomes more clear when one considers that both *in* and *into* are prepositions. At first glance, this seems either coincidental or a function of *in* and *into*’s nearly identical role in sentence structure. But there is more here than meets the eye. Consider the term *preposition*. Unpacked, it looks more like a combination of *prep* and *position*. Here, the significance of the *prep* part of the discourse is revealed by Lubet’s fascination with private law schools. His wistful references to Harvard,⁸ and his framing the relevant discourse as including only Harvard, Cornell, and Northwestern⁹ reveal his agenda as one of elite private-school privilege rendering the rest of the legal academy, indeed the entire practicing bar, as an Other to be appropriated for limitless use. Lubet is not alone in focussing on private education: as *The Preppy Handbook* makes clear, where one goes to school determines every nuance of success and failure in adult life.¹⁰ But once again, Lubet leaves the most important question unaddressed: the issue of precisely what skills law schools bestow upon students through the edification they receive there.

The *position* element of *preposition* further illuminates the hegemonic forces at work in Lubet’s discourse: why concern oneself with position except to strive for the upper position in a hierarchy? Specifically, why engage in the *in/into* debate unless one intends to win, and in doing so, vanquish one’s enemy? And what better enemy to vanquish than a trial advocacy colleague at the universally (were universality possible) esteemed Harvard Law School?¹¹

⁷ BUTLER, *supra* note 3, at ix.

⁸ “Who wouldn’t want to be associated with Harvard?” Lubet, *supra* note 2, at 155.

⁹ *Id.* at 159 n.42.

¹⁰ PREPPY HANDBOOK, *supra* note 1, at 46 (“If you do decide that you can stand the strain [of rigorous private school curricula], it’s important to choose the right school for you. Formative influences such as what sports you learn to play and to whom you lose your virginity can depend on where you prep. Choose carefully; you’re stuck with a Prep school for longer than you’re stuck with a spouse.”). Indeed, the entire *Preppy Handbook* focusses on the importance of where one goes to school as a determining factor in all life experiences, ranging from how and with whom to socialize, which breed of dog to own, what career to pursue, and, last but certainly not least, what to wear.

¹¹ Lubet cleverly masks his agenda by recommending Professor Murray’s casebook on Trial Advocacy. Lubet, *supra* note 2, at 154 n.1. As the psychoanalytic school has long made clear, one cannot take such a statement at face value. It is, instead, a clear challenge to Murray’s stature, as evidenced by the method (critique masked as humor) chosen to attack Murray’s position.

Unpacking the prepositional nature of Lubet's contest reveals hierarchical undercurrents in the debate, leaving the implications of hierarchy unexplored. Lubet's seemingly harmless debate serves the overarching hegemonic cultural structure. Because grammar is foundational to gender hierarchy,¹² Lubet's distinction between *in evidence* and *into evidence* is perhaps as dangerous as the misogynist division between nature and culture. As Butler points out, this nature/culture division legitimates the domination of men over women, ultimately justifying itself by constructing itself as natural:

The binary relation between culture and nature promotes a relationship of hierarchy in which culture freely "imposes" meaning on nature, and, hence, renders it into an "Other" to be appropriated to its own limitless uses, safeguarding the ideality of the signifier and the structure of signification on the model of domination.¹³

If Lubet has his way, *into evidence* will steamroll *in evidence* out of existence, much as phallogocentric¹⁴ culture is destroying mother nature.¹⁵ This grammatical genocide may be rivaled only by the classist designation of *ain't* as a signifier of redneckness rather than a conjunction which is older than the Constitution itself.¹⁶ And everyone on the bottom side of hierarchy will suffer, because *into's* victory over *in* will further buttress the power all the haves exercise over the have-nots.

Thus the debate may appear to be about *in evidence* versus *into evidence*, but appearances can be deceiving. Unpacked, the *prep/prepositional* nature of the discourse reveals that the debate is in fact (to the extent that facts exist) a phallogocentric contest between Lubet and Murray. At issue is whose preposition is better. While he never makes it explicit, Lubet concludes that bigger is better. Who can ignore the significance of *into's* majestic four letters in comparison to *in's* measly two? Lubet reaches his conclusion by invoking the most

¹² See, e.g., BUTLER, *supra* note 3, at 10 (describing Irigaray's position that "the feminine 'sex' is a point of linguistic absence.").

¹³ BUTLER, *supra* note 3, at 37.

¹⁴ As the lone female (to the extent sex or any other identity is possible) in this symposium, I am bound to invoke phallogocentrism. I apologize for not doing so earlier. A future symposium could fruitfully explore the genesis of the *go* in phallogocentrism.

¹⁵ Mother Nature's cultural contingency does not prevent her from being steamrolled.

¹⁶ MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 25 (10th ed. 1993) (noting that *ain't* first appeared in English in 1778). *Webster's* further notes that "[a]lthough widely disapproved as nonstandard and more common in the habitual speech of the less educated, *ain't* [in the sense of a conjunction for "am not" and "has not"] is flourishing in American English. It is used in both speech and writing to catch attention and to gain emphasis." The usage note also quotes R.M. Nixon, "I am telling you—there ain't going to be any blackmail." Thus, despite its linguistic marginalization, *ain't* remains in active use, even in the highest echelons of power and erudition (Nixon was, after all, a lawyer).

authoritative Law of the Father: the Bible.¹⁷ Lubet claims that ideology does not determine the winner of the *in/into* battle, but ideology actually offers the key to the more important issue, the cultural stakes in the war. Compulsory heterosexuality and phallogocentrism undergird the debate,¹⁸ masking the contingency of language. For, in reality (if anything can be real), *in* and *into* are not different at all. The difference Lubet purports to examine is rather an artifact of power relations between dueling academics.

In sum, there is no real distinction between *in* and *into*: the actual contest is between Lubet and Murray for hegemonic influence in the academy. The power dynamic at work in the *in/into* debate, however, may be subverted. Butler suggests that gender binarism may be subverted by drag, in that gender identity is blurred when a man wears a dress. I similarly suggest that lawyers, students, and trial advocacy teachers subvert the false dichotomy between *in evidence* and *into evidence* by imagining and substituting new terms: *among evidence*, *around evidence*, or *between evidence*. The very multiplicity of these terms may serve to erode the power dynamics so painfully apparent in Lubet's discourse.¹⁹ Perhaps, with time, these power dynamics will be sufficiently eroded so that a litigant, rather than seek permission from the authoritarian judge, will declare as a fully articulate subject, *May it please everyone or no-one: the letter is evidence.*²⁰

¹⁷ Lubet, *supra* note 2, at 159 (citing *Deuteronomy* 29:11 ("And Moses called to all Israel and said to them . . . That you should enter *into* covenant with the Lord your God and *into* his oath which the Lord your God makes with you this day.")) (emphasis Lubet's).

¹⁸ Given the obvious association of *in* and *into* with heterosexual reproductive behavior, I hardly feel the need to further explicate the relevance of compulsory heterosexuality in Lubet's text.

¹⁹ Lubet himself prefigures this subversion in noting that some newspapers eschew both *in* and *into* in favor of the phrase *as evidence*. Lubet, *supra* note 2, at 158.

²⁰ Which is not to imply, of course, any prediscursive identity to evidence, or the letter, or anything for that matter.