

# The maleness of legal language

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## I. INTRODUCTION

LANGUAGE IS one of the most important determinants of reality. Some would say that it is the primary means by which we construct reality,<sup>1</sup> but others would go further and say that language makes us what we are.<sup>2</sup> Since reality is not experienced in the same way by every person, different societies and groups within a given society have different registers that they use to express their respective concerns, ideas, interests and perspectives. A particular register (that is, a specific stratification within an actually existent language system such as English), will obviously share many features of that system but it will also have its own specialized vocabulary, grammar and style.

Language is not used uniformly by all people nor is it equally accessible to everyone, and not all discourses or language registers are valued in the same way. The most powerful registers such as those used by law, medicine and religion, are controlled by and are fully accessible to a select group of highly trained people. The kind of English spoken by some Black Americans in Harlem could also be described as a specific register: it too is only fully accessible to a select group of individuals, although most people would ascribe to it a very different value than, for example, the register used by lawyers. Rather, use within a particular registry is impressed with social ideology: the linguistic structure of a text reflects, affects and helps to maintain the roles, purposes and ideologies of its participants or subjects.<sup>3</sup> As well, these structures assume meanings that impliedly express social and political values.

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1 See, e.g., D. Spender, *Man Made Language* (London: Routledge and Kegan Paul, 1980) at 139 wherein she outlines the theory of linguistic determinism and cites the best-known works.

2 See, e.g., D. Cameron, *Feminism and Linguistic Theory* (London: The MacMillan Press, 1985) chapters 5 and 6 for a review of the theories of structuralism. M. Ashe also discusses structuralism in "Mind's Opportunity: Birthing a Poststructuralist Feminist Jurisprudence" (1987) 38 *Syracuse L. R.* 1129.

3 See generally, P. Goodrich, "The Role of Linguistics in Legal Analysis" [1984], 47 *Mod.L.R.* 523 at 531.

Since Simone de Beauvoir said that men describe the world "from their own point of view which they confuse with the absolute truth,"<sup>4</sup> feminists in all disciplines have begun to show how male voices, perspectives, interests and ideas have prevailed in all thinking.<sup>5</sup> The task of determining how androcentric or "male as norm" thought has come to dominate is difficult because "...it is metaphysically nearly perfect. Its point of view is the standard for universality, its particularity the meaning of universality".<sup>6</sup> Can it be said that language, particularly the language of the legal register, shields a male subjectivity? Is the insidious message of the legal register, therefore, the superiority of the male and its politics, patriarchy?<sup>7</sup> These are two of the important questions that I will address in this article.

I will examine the thesis that grammatical features of the legal register such as pronouns, generics, lexicon, semantics and syntax trivialize, exclude and devalue women and characteristics associated with women. By analyzing the details of language as used in legal texts we can begin to see its pre-constructions and preferred meanings and to understand its historical and social genesis.<sup>8</sup> My modest goal in this paper is to collect together and to examine some examples from the legal register in order to begin to see what connections can be made between language, gender and oppression in the context of the legal register.<sup>9</sup>

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4 S. de Beauvoir, *The Second Sex* (New York: Knopf, 1953) at 10.

5 The idea of "male as (unstated) norm" has been considered in many law review articles. See, e.g.: M. Minow, "Supreme Court Forward: Justice Engendered" (1987), 101 Harv. L. Rev. 10; A. Scales, "The Emergence of Feminist Jurisprudence: An Essay" (1986), 95 Yale L. J. 1373; and K. Lahey, "... Until Women Themselves Have Told All They Have to Tell..." (1985) 23 Osg. Hall L.J. 519.

6 C. MacKinnon, "Feminism, Marxism, Method and the State: Toward Feminist Jurisprudence" (1983), 8 Signs 635 at 638-39. S. Rowbotham in *Woman's Consciousness, Man's World* (Baltimore: Penguin Books, 1973) at 32-33 makes a similar point when she says that "the language of theory -removed language -only expresses a reality experienced by the oppressors. It speaks only for their world, from their point of view ... language is part of the political and ideological powers of rulers".

7 I would define "patriarchy" as a political structure that values and rewards men more than women.

8 See P. Goodrich, *Legal Discourse: Studies in Linguistics, Rhetoric and Legal Analysis* (New York: St. Martins Press, 1987) at 204 for a more detailed explanation of this method of textual analysis.

9 Cameron, *supra*, note 2 at 7 suggests that the appropriate inquiry is as to the connections between language, gender and oppression and I will use this question throughout this article.

## II. GENDER

IT IS NECESSARY for me to touch on the issue of what is gender and the tension between simplistic reductive gender categorizations and the equally unacceptable assumption of no difference at all.<sup>10</sup> In this paper "gender" means the various psychological and social characteristics that are usually attributed to an individual according to biological sex. When a characteristic is described as "female" or "male", I mean that it is one usually attributed to women or to men respectively. Such attribution is not exclusive to one sex or the other as either sex may exhibit the gender characteristics of the other. I do not think that I am expressing preferences in this article for one set of characteristics over another although I think that the present legal system favours the male set over the female. Further, I would deny that there is anything deterministic or immutable about gender. But as long as gender has meaning, an analysis of the effect of gender categorizations will be necessary.

## III. METHODOLOGY

THIS ARTICLE is overtly political.<sup>11</sup> Its premise is the systematic suppression of women; its implicit politics, a criticism of patriarchy; and its prescription, a new gender sensitive language. Language like law is contingent and its genesis not natural or obvious. However, both language and law are so finely woven into our social fabric that isolation of discrete elements is difficult. I will use an interpretative critique in this article to bring into the open the hidden sexism of legal language.

The methodology of this article is feminist. From an epistemological perspective, this means that personal experiences, intuitions and emotional reactions are the primary or ovular sources. This technique is usually known as consciousness-raising because it brings to the level of consciousness or knowing, desires, experiences, fears and horrors that are suppressed in patriarchal society. In other words, the first step in consciousness-raising is to ask women how conventional thought and behaviour and language devalues us as women.

I will examine some expressions commonly used in the legal register to which I have reacted adversely because of their male gender specificity or preference. Many of the examples are from the readings

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<sup>10</sup> See generally: J. Flax, "Post Modernism and Gender Theory in Feminist Theory" (1987) 12 *Signs* 621; M.J. Frug, "Re-reading Contracts: A Feminist Analysis of a Contracts Casebook" 34 *Amer. U.L.R.* 1065, text accompanying notes 3-13.

<sup>11</sup> As C. Boyle has stated, "There is not a dichotomy between political and non-political legal analysis. There is one between values explicitly and implicitly expressed." See her Book Review (1985), 63 *Can. Bar Rev.* 427 at 432.

compiled for use in a seminar on legal philosophy held at Columbia University Law School in the fall of 1987.<sup>12</sup> I will explain why I felt that the example either devalued or excluded me as a woman or failed to describe reality as I see it. The second step in consciousness-raising is group support, discussion, affirmation, reinterpretation of the experience and criticism. Feminists do not like to work alone; together we search for common experiences and patterns in order to understand how patriarchy functions. While no one has yet agreed with all the examples and explanations I give, this article could not have been born without the contributions of many.

The descriptive task begun in consciousness-raising<sup>13</sup> may be nurtured by an examination of various disciplines including history, linguistics, literary theory and psychology. The insights that these disciplines contribute help to form an answer to the question of whether systematic connections can be made between language and gender and the suppression of women. Frankly this paper may well suffer because I am a Jill of these disciplines but mistress of none. Not only am I unfamiliar with these disciplines, but since all feminist scholarship incorporates a "hermeneutic of suspicion"<sup>14</sup> I need to examine the masculinist assumptions, bias and ideas that permeate that work.<sup>15</sup> (I would define "masculinist" as the implicit acceptance of male superiority through the unexamined assumption of "male as norm". It is also sometimes used as an antonym to "feminist".) This problem underscores why feminists must work together; it takes too much time to reinvent the wooden spoon.

My article is feminist in method because it is evolutionary and inclusive. It is evolutionary in that, while it relies on your complicity in accepting the existence of gender specific categories it also seeks to un-

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12 K. Greenawalt, *Seminar in Legal Philosophy* (privately printed in New York: Fall, 1987.) I have these materials on file. These materials contain excerpts from the writings of approximately 40 legal theorists.

13 While I acknowledge the primacy of consciousness-raising, it cannot be the entire methodology of feminism. Consciousness-raising only affects the participants and those close to them. In order to affect societal transformation, feminists must adopt a broader methodology. Further, the insights coming from consciousness-raising can be better understood when, for example, they are understood in an historical context or tested by empirical analysis. See A. Bottemley, S. Gibson and B. Meteyard, "Dworkin, Which Dworkin? Taking Feminism Seriously" (1987), 14 J. of Law and Soc. 47 at 56.

14 E. Schussler Fiorenza, *In Memory of Her, A Feminist Reconstruction of Christian Origins* (New York: Cross Roads, 1986) at xxiii.

15 E.g., I hesitate to rely on Goodrich's methodology as outlined in *Legal Discourse*, *supra*, note 8, as he makes no references to the problem of gender and language in a book-length treatment of linguistics and law.

settle your ideas about gender. It is inclusive in that it shows how language is male but prescribes that it ought to be more female.

Besides addressing the issue of text, that is the straightforward material to follow, do I also need to address the issue of subtext that inevitably arises in this kind of discussion? By this I mean the subterranean, emotional text which may be seen as directly implicating or, at least, assuming the complicity of men in the processes to be described.<sup>16</sup> This text may also be seen as describing women as morally pure victims.<sup>17</sup> To what extent do or should we avoid or engage in a discourse of blame and guilt?

I cannot wholly avoid dialogues which may alienate some readers. Discourse is not an act that takes place in isolation; there are at least two active participants, the sender and the receiver. However I could control the extent of these effects through syntactical tools well known to users of the legal register. I could, for example, distance myself from these ideas and make my world appear more objective by using the passive form. When referring to women I could use "they" and "them" rather than "we" and "us".<sup>18</sup> Men might feel less directly indicted if I avoided using the word "masculist". But as I am self-consciously approaching language, I have written this paper in a more apparently subjective style. The effect is more provocative and, I hope, will challenge readers to examine the content of both texts. Having said this, I hope that it is clear that I do not intend to blame or exonerate any individual.

#### IV. PRONOUNS AND OTHER FALSE GENERICS

THE FIRST ISSUE to be discussed in any feminist analysis of language is the use of male pronouns when the referent is indefinite or inclusive of both women and men. This issue receives so much attention because of its pervasiveness and, more important, because it is one of the

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16 For a discussion of the dialectic of text and sub-text see: S. Aiken, K. Anderson, D. Dinnerstein, J. Lensink and P. MacCordale, "Trying Transformations: Curriculum Integration and The Problem of Resistance" (1987), 12 *Signs* 255 at 62-64.

17 J. Bethke Elshtain, "Feminist Discourse and its Discontents: Language, Power and Meaning", in N.O. Keohane et al. eds., *Feminist Theory: A Critique of Ideology* warn at 163 that using the language of "victim" conceals powerlessness and makes feminists lose their critical edge.

18 D. Spender in *Men's Studies Modified: The Impact of Feminism on Academic Disciplines* (Oxford: Pergamon Press, 1981) at 5 notes that using "they" to refer to women in juxtaposition to "we" is one example of the world view that constitutes humanity as men and women as other.

least subtle of sexist forms.<sup>19</sup> According to the masculist theory of marking, male pronouns can be marked or unmarked. The context is supposed to determine whether the referent is a male gender specific noun (marked) or a noun that includes men and women (unmarked).

Marking theory has not always been a "rule of grammar". It was the work of prescriptive grammarians from the 16th century onward to suppress the alternative use of "she" or "they". Ann Bodine has revealed that the authors of grammatical treatises appealed not to the laws of language but to the laws of nature. These authors stated that the generic masculine had the virtue of being first in the natural order and in propriety.<sup>20</sup> These men also said that the male pronoun was more comprehensive.

The connection between language, gender and the suppression of women is clear and present in the use of male pronouns. Use of the generic male pronoun perpetuates and conceals male domination at all levels of conceptualization and language.<sup>21</sup> I cannot assume that I have been included within the ambit of a particular passage; my presence is never a given. The subliminal message that I am not relevant or, even more alienating, that I am the "other" is constantly given and received. Take almost any legal text and count how often a male pronoun is used. You can begin then to realize how often I am told that maybe I am not included.

My personal experience is verified by sociological and psychological studies that reveal that the use of the male pronouns does not bring women into readers' minds. Men use and understand "he" more often in its marked or gender specific sense than its unmarked or generic sense. They are less likely to contemplate women as possible actors.<sup>22</sup>

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19 See W. Martyna, "Beyond The He/Man Approach: The Case For Non-Sexist Language", (1980) 5 Signs 482 at 483.

20 A. Bodine, "Androcentrism in Prescriptive Grammar" (1974), 4 Language in Society 129 (1974).

21 K. De Jong "On Equality and Language" (1985) 1 Can. J. W. and L at 122. R. West in "Gender and Jurisprudence" (1988) 55 U. of Chi. L.R. 1 at 2 notes that liberal legalism and critical legal theory are "essentially and irretrievably masculine" and therefore that the "...increasing use of the female pronoun in liberal and critical legal theory, although well-intended, is empirically and experientially false". It is not clear from the text whether her comments are rhetorical or prescriptive. While West's article is analytically illuminating, she seems to view 'male' and 'female' characteristics as exclusive to men and women respectively. As noted, I believe that members of either sex may exhibit the characteristics usually associated with the opposite sex. Hence the use of female pronouns is not necessarily experientially false. More importantly, the end effect of such a prescription, if that is in fact West's comment, is to polarize dialogue so thoroughly that communication between the sexes would be virtually impossible.

22 Martyna, *supra*, note 19 at 489.

Women are more likely than men to use "he and she" or "they" rather than "he" thereby clarifying whether we have been included.<sup>23</sup> When "he" is used in connection with a neutral noun such as "person" or "clerk", the described individual will be perceived as a man.<sup>24</sup> It seems clear then that the use of male pronouns exerts important subliminal influences on people's perception of women as secondary or marginal.<sup>25</sup>

The problems that arise in connection with generic nouns are even more acute. Throughout the texts studied in the legal philosophy seminar there are of course many references simply to "men" to which I must ask whether it includes women; to "people" to which I ask whether women are truly included; and to "men and women" to which I must ask why there is a specific reference to women. The context rarely provides an answer to these questions. Consider the following examples of seemingly generic or unmarked nouns, most of which are from the materials used in the legal philosophy seminar.

#### A. Aristotle's "Just Man"

At first blush, it appears that this usage is generic. However, a passage on "household justice" found near the end of the excerpt<sup>26</sup> suggests that Aristotle does not contemplate women as political actors. Unless readers pick up this clue, they would be unaware of Aristotle's systematic exclusion of women and mistakenly assume that women are included within the concept of "just man".

#### B. Hart's "Ordinary Citizen"

In a discussion on the morality of acts performed privately and the indecency of acts performed publicly, H.L.A. Hart discusses recent amendments to English prostitution law and says that

it has not made prostitution a crime but punished its public manifestations in order to protect the ordinary citizen who is an unwilling witness of it in the street from something offensive.<sup>27</sup>

The offensive act of which he speaks could refer to someone witnessing a prostitute and a customer bargaining over fees in a public place. If this is the case, Hart's ordinary citizen could refer to both women and

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23 *Ibid.*

24 Cameron, *supra*, note 2 at 69.

25 See Cameron, *supra*, note 2 at 79.

26 Aristotle, *The Nicomachean Ethics*, (ca. 336-322 B.C.) in Greenawalt, *supra*, note 12 at 418.

27 H.L.A. Hart, *Law, Liberty and Morality*, (1963) in Greenawalt, *supra*, note 12 at 622.

men as both could witness the event. Alternatively, Hart could be speaking of the offence to a particular man who is solicited by a prostitute and who finds such solicitation unwanted. Since this law was not used to punish men who sought the services of a prostitute, Hart did not have in mind the offence to uninterested women who are solicited by men seeking to pay money to have sex. If this alternative describes what Hart was talking about, and his example is ambiguous, then his ordinary citizen is a man. Hart's perspective on solicitation is not surprising as the legal system has long perceived prostitutes and not their customers as being the cause of prostitution or money for sex.

Hart's ordinary citizen is an example of how language that appears to include the experience of both men and women may be seen on closer examination to exclude the experience of women. Apparently gender neutral language may conceal a possibly male exclusive perspective. Hart, like many men, fails to realize that women are subject to unwanted solicitation by men for sex for money. The failure to perceive problems from alternative perspectives is one of the reasons why men and women, or in this particular case, prostitutes and johns, are not treated in the same way by the legal system.

### C. Rawls' "Rational Man"

In developing his theory of justice, John Rawls is concerned with the choices that rational men<sup>28</sup> would make in a hypothetical situation of equal liberty. To this end, he places his actors in an abstract, decontextualized void that he names the original position. He assumes that parties in the original position are rational and mutually disinterested; they are not concerned with one another's interests. The pursuit of individual liberty therefore is second only to the satisfaction of the most basic of human wants.<sup>29</sup> Social ties are useful only insofar as they further individual interests.

While the assumptions Rawls makes about the primacy of autonomy are accurate in relation to men, recent studies have shown that his assumptions about human nature are not accurate when applied to women.<sup>30</sup> Carol Gilligan and others<sup>31</sup> have shown that women have a

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28 J. Rawls, *A Theory of Justice*, (1972) in Greenawalt, *supra*, note 12 at 514.

29 *Ibid.*

30 For an example of a more developed critique, see, M. Matsuda, "Liberal Jurisprudence and Abstracted Visions of Human Nature: A Feminist Critique of Rawls' Theory of Justice" (1986) 16 N. Mex. L. R. 613. Robin West, *supra*, note 21, develops a rich analysis of the assumptions underlying what she describes as the masculine jurisprudence of liberal and critical legalism and cultural and radical feminism. She notes at 14 that



more relational and affiliational concept of self. We are less likely than men to be disinterested in the situations of others and social ties are ends in themselves and not the means to individualistic ends. By virtue of his assumptions, it is clear that Rawls' "rational man" is a man. He fails to consider what women in the original position might choose. The very foundation of Rawls' legal theory is considerably weakened when it is realized that it has excluded the preferences of half the population.

#### D. "Reasonable Man"

The most important concept in law, its standard of the objective, excludes from its ambit women's conduct except in those instances where such conduct in a given situation would be the same as that of men. Dolores Donovan and Stephanie Wildman analyze the idea of the "reasonable man" in the criminal law context of self-defense and provocation.<sup>32</sup> They concluded that the standard of the "reasonable man" applies only to white middle class male techniques for self-defense and reactions to provocation. The standard fails to account, for example, for any behaviour that may be described as culturally female. Similarly, Leslie Bender reviews the standard of care required in tort negligence law, that of the "reasonable person".<sup>33</sup> She too concludes that this is another example of male naming and acceptance of the implicit male norm.

It should be clear that we cannot resolve the problem of androcentricity implicit in the notion of the reasonable man simply by changing the standard from that of the reasonable man to that of the reasonable person. This nominal change will not, by itself, make the concept more flexible and inclusive. While this is a necessary first step, there must also be a recognition by those using and applying the standard of the built-in bias of the present masculist reasonable man standard and an

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Underlying both radical and cultural feminism is a conception of women's existential state that is grounded in women's potential for physical, material connection to human life, just as underlying both liberal and critical legalism is a conception of men's existential state that is grounded in the inevitability of men's physical separation from the species.

31 See, e.g., C. Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (Cambridge: Harvard University Press, 1982), N. Chodorow, *The Reproduction of Mothering: Psychoanalysis of the Sociology of Gender* (Berkeley: Univ. of California Press, 1978) and D. Dinnerstein, *The Mermaid and the Minotaur: Sexual Arrangements and Human Malaise* (New York: Harper and Row, 1976).

32 D. Donovan and S. Wildman, "Is the Reasonable Man Obsolete: A Critical Perspective on Self Defense and Provocation", (1981) *Loyola L.A.L. Rev.* 435.

33 L. Bender, "A Lawyer's Primer on Feminist Theory and Tort", (1988) 38 *J. of Legal Ed.* 3.

understanding that the new standard requires that we view situations from different perspectives.

The problems that have been noted in relation to the use of male pronouns and generics amount to much more than an annoying use of language. Such usage leads to serious ambiguities. Because the legal register prides itself on clarity and precision, this reason alone should be sufficient to radically reform the practice. But more insidiously, the use of "he" and "man" and other unmarked generic forms also conceals an inherent bias in favour of the "male as norm" while hiding under the guise of a neutral inquiry. Once this bias is revealed, as for example in the case of Rawls' "rational man", the very foundation of certain ideas becomes questionable. Or, as happens with the example of the "ordinary citizen" and the "reasonable man", the exclusion of women, in situations where it might be different from that of men, may pervert the formation of a legal principle such as the rules on prostitution or provocation.

Solutions to the problems of gender exclusivity and ambiguity arising in relation to pronouns and generics are not easy to find given both the pervasiveness of the problem and the unwillingness of many women and men to recognize that a problem exists.<sup>34</sup> But the starting point must be an identification and understanding of the sexist effects of a linguistic practice. This foundation helps us to recognize when a particular usage has sexist implications.

## V. LEXICON AND SEMANTICS

MARY DALY HAS SAID that we have inherited a contaminated language.<sup>35</sup> Dale Spender states that every meaning is man-made and inevitably encodes a male point of view which is at odds with women's experiences.<sup>36</sup> In this part I will simply describe, by way of example, how the lexicon and semantics differentiate between men and women. In particular, I will consider the systematic devaluation of words associated with women, the use and effects of sexual stereotypes, how some metaphorical concepts personify or alienate women, the sexist etymology of some words and the need for new words to describe women's

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34 There are a number of sources on how to deal with difficult pronoun and generic problems. The best known of these is C. Miller and K. Swift, *The Handbook of Nonsexist Writing* (New York: Harper and Row, 1981).

35 M. Daly, *Gyn/Ecology: The Meta-Ethics of Radical Feminism* (Boston: Beacon Press, 1978) at 5. See also her *Websters' First Intergalactic Wickedary of the English Language* (Boston: Beacon Press, 1987).

36 Spender, *supra*, note 1 at 2.

experiences. As will be seen, the observations of Daly and Spender have some truth in the context of the legal register.

### A. Systematic Semantic Derogation

Consider the meanings associated with each word in these word dichotomies: bachelor/spinster; governor/governess; master/mistress; courtier/courtesan; king/queen; baron/dame; and sir/madame. Even the same words have different meanings depending on the sex of the referent: he is a professional/she is a professional; he is a tramp/she is a tramp. The idea of Holmes' "bad man"<sup>37</sup> takes on a different connotation if he becomes, instead, a "bad woman".<sup>38</sup> In every case, the female side of the dichotomy has an additional meaning that either has a negative sexual connotation or assumes female subservience. In the absence of the male counterpart, some of the words are best known in the devalued sense, for example, mistress and dame. I cannot think of any dichotomies in which the female word has not been assigned a devalued meaning; the same is not true of the male words.

It has often been said that male qualities include rationality, objectivity, detachment, abstraction, control, principles, aggressiveness, ambition, and autonomy. Notice that many of these words are also used to describe the desirable traits of the law.<sup>39</sup> Women, on the other hand, are emotional, subjective, attached, contextual, spontaneous, personal, passive, supportive and compassionate. Few of these words could be used to describe the law.

If a woman embodies male characteristics, a less valued or devalued word will be substituted for the more positive word used in relation to men: scheming, political, cold, conjectured, manipulative, aggressive, ambitious and selfish. (Note that words like aggressive and ambitious can have very different meanings depending on the sex of the referent.) Finally when female characteristics are attributed to a man the word used will not have a less valued connotation as happens when male characteristics are attributed to women. Rather, these words will often be positive: uninhibited, open minded, loyal, practical, easy going, contemplative, committed and considerate.

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37 O.W. Holmes, "The Path of Law" (1897) in Greenawalt, *supra*, note 12 at 3.

38 M.B. Hintikka and J. Hintikka, "How Can Language Be Sexist?" in S. Harding and M. Hintikka (eds.), *Discovering Reality: Feminist Perspectives on Epistemology, Metaphysics, Methodology and Philosophy of Science* (Boston: D. Reidel Publishing Co., 1983) discuss whether "good man" and "good woman" mean the same thing. They conclude that they do not.

39 F. Olsen, *The Sex of Law* (unpublished manuscript on file with me, 1984). The lists of words used in this paragraph were suggested by Olsen or in one of the other articles cited in these notes.

Perhaps it could be said that the examples offered so far express sexism through purely emotive meanings and while the prescription would involve a reassessment of usage, there is nothing of particular linguistic interest in the examples. I think such an observation would be incorrect for it would ignore that it is the *female* side which is systematically devalued. If it can be said that there is a "process of systematic semantic derogation of words associated with women,"<sup>40</sup> then sexism as reflected in language cuts much deeper than emotive meaning. Spender has observed that *all* words associated with women acquire negative connotations because there is a "fundamental semantic 'rule' in our society that constructs male supremacy."<sup>41</sup>

I think these examples raise several of other questions, including: why has the male set of characteristics become personified in the law and the female side regarded as the opposite of what law ought to be? Is Fran Olsen correct in asserting that the law has a sex?<sup>42</sup> What are the implications of gendered character attributions on women in the profession of law?<sup>43</sup> While these are interesting and important questions, they are beyond the scope of this paper.

### B. Stereotypes

Since virtually all the references to human beings in the texts used in legal philosophy seminar are to men, specific references to women attract special attention. Just how am I represented in the casebook? With the sole exception of Kent Greenawalt's reference to a female law teacher and a female villager,<sup>44</sup> all the women in the materials are cultural stereotypes. (However, Greenawalt's women are given the suggestive names of Constance and Faith.) There are sex crime victims, wives (but few husbands<sup>45</sup>) and prostitutes. There is Oliver Holmes'

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40 Spender, *supra*, note 1 at 18.

41 *Ibid.*, at 18.

42 Olsen, *supra*, note 39.

43 See: C. Menkel Meadow, "Portia in a Different Voice: Speculations on Women's Lawyering Process" (1985), 1 Berkeley Women's L.J. 39 and "Excluded Voices: New Voices In The Legal Profession Making New Voices in Law" (1987) 42 U. of Miami L.R. 29.

44 K. Greenawalt, "Promise, Benefit and Need: Ties that Bind Us To The Law", (1984) in Greenawalt, *supra*, note 12 at 722.

45 The fathers that appear in the legal philosophy materials are fierce patriarchs. For example, H. Kelsen, "General Theory of Law and State", (1946) in Greenawalt, *supra*, note 12 at 184 uses the example of a mother telling her child to go to school "because your father has ordered it". He goes on to say that the general norm to be extracted from this statement is that "children ought to obey their father". The mother's authority is not considered.

Mrs. Quickly<sup>46</sup> who "would be sure to dwell upon [a client's white hat] along with the parcel gilt goblet and the sea-coal fire" rather than the contents of a contract. The implicit message is that women are silly. Next we have Greenawalt's beauty contestants<sup>47</sup> who are judged by men and juxtaposed against the example of "five experienced men". While the reference to the men is necessary because he is discussing Dworkin's reference<sup>48</sup> to the same class, the example of beauty contestants in this context makes the objectification of women even more apparent. The implicit message is that women are to stand around being pretty while men work.

Ronald Dworkin provides the most examples of women in stereotyped roles. The child who needs to be bused to school is a girl.<sup>49</sup> Does he use feminine pronouns when speaking of children to reinforce the idea of women as childlike? The archetype for his judge is the Greek hero, Hercules,<sup>50</sup> a curious choice given the more appropriate archetype, Athena, the Greek goddess of justice. Does he doubt the intellectual or rational capacity of women? While men are never afforded courtesy titles, "Mrs. MacPherson"<sup>51</sup> is never described simply as "MacPherson." What could be the possible relevance of her marital status in a legal text?

Finally Dworkin refers to "the timid lady on the streets of Chicago [who] is not entitled to just the degree of quiet that now obtains."<sup>52</sup> Why does he refer to her as "timid" when his style is otherwise free of gratuitous adjectives? Are we to assume that the gender specific reference is relevant and contributes to understanding? By referring to her as a "lady", a word which suggests a certain delicacy, and implying that her concerns are trivial (the noise), is he also commenting on the nature of women? This reference appears in a section on the enforcement of personal rights. Does he use a woman to describe the situations in which personal rights would not prevail because her sex facilitates somehow in understanding his point?

The stereotypes and linguistic structure that Dworkin uses reflects and expresses the roles, purposes and ideologies he ascribes to his subjects just as much as his more apparent content. According to Dworkin, we are childlike, dependent, passive and trite.

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46 Holmes, *supra*, note 37 at 2.

47 Greenawalt, "Discretion and Judicial Decision", (1977) in Greenawalt, *supra*, note 12 at 289.

48 R. Dworkin, "The Model of Rules" (1977) in Greenawalt, *supra*, note 12 at 247.

49 R. Dworkin, "Hard Cases" (1975) in Greenawalt, *supra*, note 12 at 319.

50 *Ibid.*, at 344.

51 *Ibid.*, at 358.

52 R. Dworkin, "Taking Rights Seriously" (1971) in Greenawalt, *supra*, note 12 at 792.

Undoubtedly there are stereotypical portraits of men in the seminar materials, but on the whole the range of characteristics attributed to the men represented is broader than the narrow range attributed to women. In a more equal world, the use of stereotypes would not threaten women because the assigned role would be recognized only for its usefulness in a particular context. But as matters now stand, sexual stereotypes reinforce the idea of the limited potential of women by describing them as unintelligent, dependent, passive objects. The systematic use of stereotypes conditions people to believe that women are not capable of doing things.

### C. Metaphors.

The use of metaphors, the experience of one thing in terms of another, is pervasive and affects not only how we speak but also how we think and act.<sup>53</sup> The purpose of metaphors is to facilitate understanding by describing those things that are unknown or difficult to describe in terms of things we know. The assumption is that the person receiving the information knows and understands the original reference in the same sense as the person communicating the information.

Consider for example, the metaphorical concept of WOMEN AS SEXUAL OBJECT as used in legal discourse: "piercing the corporate veil" and "raping the corporation". These notions have to do with control or dominance in the legal sense. The attribution of femaleness to the corporate body facilitates a male conceptualization of the action being described.<sup>54</sup> Rawls may have been using a variation of this metaphorical concept when he speaks of the "veil of ignorance" in developing his notion of the original position.<sup>55</sup> When covered by the veil and therefore on the female side, his subjects are unreal and unknowing; life only truly exists on the other side of the veil. In relying on these metaphorical concepts, the legal register perpetuates the idea of women as passive, submissive and ignorant.

George Lakoff gives a particularly frightening analysis of the relationship between our metaphors for anger and for lust and notes that these metaphors often overlap.<sup>56</sup> For example, ANGER IS HEAT (i.e. I was boiling with anger) and LUST IS HEAT (i.e. you are hot). He states

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53 G. Lakoff and M. Johnson, *Metaphors We Live By* (Chicago: University of Chicago Press, 1980) at 38.

54 This analysis was suggested by Judy Greenberg as noted in K. Lahey and S. Salter, "Corporate Law in Legal Theory And Legal Scholarship: From Classicism to Feminism", (1985) 23 Osg. H.L.J. 543 at 555.

55 Rawls, *supra*, note 28. See also Matsuda, *supra*, note 30 at 616.

56 G. Lakoff, *Women, Fire And Dangerous Things: What Categories Reveal About The Mind* (Chicago: University of Chicago Press, 1987) at 409-413.

that the connection between these two metaphors has important social consequences as that they enter our<sup>57</sup> reasoning: anger and lust come to be seen as the same thing. Lakoff concludes that these metaphors actually provide a rationale for rape.

Another metaphorical concept well known to the legal register is ARGUMENT AS WAR.<sup>58</sup> Consider the following examples:

- i) her defence is weak
- ii) he attacked this argument
- iii) you can never beat them

The structure of the disagreements as created by the metaphorical concept also dictates the process or how those in the argument will act. Arguments, especially legal arguments, are seen as adversarial and often violent with clear victors and victims. Because women have been socialized to avoid conflict and seek reconciliation and harmony,<sup>59</sup> the pervasive use of ARGUMENT AS WAR alienates women from participation in legal discourse and entrenches a patriarchal or male perspective on legal reasoning and method.

We could of course conceive of argument in a different way. Consider the metaphorical concept of ARGUMENT AS DANCE:

- i) his argument does not jive
- ii) she never misses a beat
- iii) that leads me to

In my view, ARGUMENT AS DANCE creates a structure of agreement and cooperation and embraces the idea of a process that leads to a mutually satisfying conclusion.<sup>60</sup> In one legal philosophy seminar we consciously attempted to use ARGUMENT AS DANCE instead of ARGUMENT AS WAR in our discussion. Most people felt a real change in the dynamics of our interaction. We were less antagonistic and more willing to listen to each other. Tensions that had existed dissolved or at least were dealt with in a positive, constructive way.

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57 I would note that Lakoff does not comment on whether women use the same kind of metaphors as men do. The use of the pronoun "our" in this context therefore is ambiguous - does it refer to just men or to both men and women? More specifically, do both women and men reach the metaphorical conclusion of LUST AS ANGER?

58 Lakoff and Johnson, *supra*, note 59 at 4-5, and J. Penelope, "Language and the Transformation of Consciousness", (1984) 4 *Law and Inequality* J 379.

59 See, e.g., Gilligan, *supra*, note 31 at 164, M. French, *Beyond Power: On Women, Men and Morals* (New York: Summit Books, 1985) at 482.

60 This conclusion is suggested by Penelope, *supra*, note 58.

Finally, I would like to consider the pervasive use of sport analogies in legal discourse. Llewelyn,<sup>61</sup> Dworkin<sup>62</sup> and Hart<sup>63</sup> liken law to a baseball game. This does not assist those who are unfamiliar with the rules of the game or those who are uncomfortable with participation in sports in understanding the ideas being discussed. The analogy of sport as law excludes many women (and some men) from participation in the discourse and thereby limits its utility. If you have trouble seeing this point, consider how you might feel if a common metaphorical concept in law was CONTRACT AS RECIPE.

We should not view metaphors as a matter of mere language. When we use a metaphor to describe something, the metaphor and the thing become one: woman becomes object, sex becomes anger, argument becomes war and law becomes a game. Each of these metaphors has the effect of oppressing women by objectifying or alienating us, by structuring and legitimating violent actions or by excluding us from the discourse.

#### D. Etymology and Word Creation

The study of etymology yields some interesting examples of the connection between language and gender. It was a Jewish custom (and remains an Arabic custom) for men to swear mutual oaths by placing a hand on each other's testicles. Words like testament, testify and testimony find their root in this custom.<sup>64</sup> Women would have been precluded from making such oaths. The word 'rape' once simply meant to steal or to plunder; the victim was not the raped woman but rather it was her father or husband who was thought to have lost something.<sup>65</sup> But while etymology reveals examples of practices that once clearly suppressed women, it may be difficult to prove that the root meanings of words continues to affect the discourse today. Therefore I simply offer these examples and leave it to someone else to discover whether these word histories have a deeper continuing significance.

A more serious problem arises in connection with those experiences for which no descriptive word exists. Without a word to describe an experience, it might be difficult to imagine that the experience has a basis in reality. For example, in her classic feminist work *The Feminine*

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61 K. Llewellyn, "The Bramble Bush" (1930) in Greenawalt, *supra*, note 12 at 41.

62 R. Dworkin, "The Model of Rules" in Greenawalt, *supra*, note 12 at 258.

63 H.L.A. Hart, "The Concept of Law" (1961) in Greenawalt, *supra*, note 12 at 80.

64 R. Brasch, *How Did Sex Begin?* (New York: David MacKay Co., 1973) at 152 as cited in B. Walker, *The Women's Encyclopedia of Myths and Secrets* (San Francisco: Harper Row, 1983) at 793-94.

65 S. Brownmiller, *Against Our Will: Men, Women and Rape* (New York: Bantam Books, 1976) at 8-22 and 422-424.



*Mystique*,<sup>66</sup> Betty Friedan identifies "the problem that has no name." The problem, briefly, is the lack of utility attached to the work that homemakers do and the resulting frustration they feel. What word describes what homemakers do? When I refer to it as 'work' I am usually misunderstood. Friedan's problem is still unnamed.

The legal register "places great stress upon the legal signifier or legal word as an entity in itself."<sup>67</sup> Therefore, the birth of new words to describe experiences better known to women is important to recognition by the legal system of these experiences when appropriate. "Sexual harassment" and "sexism" are examples of words conceived by feminists<sup>68</sup> that have gradually received wider acceptance. These words have now been accepted into the legal register and have become legal entities with legal consequences. On the other hand, the legal register seems to have adopted the signifier "surrogate mother" to describe a woman who agrees to conceive and bear a child for its biological father. The word "surrogate" detracts from the fact that she is also the biological mother of the child by suggesting that she is external to the process.<sup>69</sup>

Of particular interest are the semantic implications of the expressions "domestic violence" and "wife battering". Why has the expression "domestic violence" prevailed in usage over "wife battering"? The former names neither the wife, nor by implication, the husband; it suggests that the problem is private (and therefore outside the realm of the law) and, as violence is a prevailing problem in our society anyway, there may be the suggestion that this is nothing special. "Wife battering" names the survivor, implicates the criminal and describes the crime that has been committed. The development of the term "domestic violence" itself was an important step in the broader societal recognition of the tragedy of men beating women in the home. Ultimately, however, the term is not strong enough to describe the true dynamics of most situations.

Feminists use the word 'survivor' to describe and empower those adults who have been subject to sexual abuse as children and who con-

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66 B. Friedan, *The Feminine Mystique* (New York: Norton, 1963).

67 Goodrich, *supra*, note 8 at 177-78.

68 See, e.g., C. Backhouse and L. Cohen, *The Secret Oppression: Sexual Harassment of the Working Women* (Toronto: MacMillan of Canada, 1978) and C. MacKinnon, *Sexual Harassment of Working Women: A Case of Sexual Discrimination* (New Haven: Yale University Press, 1979).

69 This example is from M. Eichler, "Foundation of Bias: Sexist Language And Sexist Thought" in S. Martin and K. Mahoney, eds., *Equality And Judicial Neutrality*, (Toronto: Carswell, 1987) at 26-27.

tinue to bear the emotional and physical scars of that abuse.<sup>70</sup> This word is not, however, widely used outside feminist circles. Perhaps as information on the continuing effects of child sexual abuse is more widely available, the word 'survivor' will also become better known. Should this happen, perhaps this word will join 'sexual harassment' and 'sexism' in the legal register. Survivors might then be eligible for compensation for the abuse suffered. But without a discrete word such as 'survivor' to serve as the legal entity, it would seem less likely that the experience will be seen as one deserving legal redress.

The problems noted in relation to the lexicon and semantics are of a different sort than those that arise in connection with the use of male pronouns and false generics. They are less obvious as their offensiveness is not in isolated usage but rather in their systematic insidiousness. Further whereas male pronouns and generics conceal an androcentric bias, the semantics of the legal register can be seen as more thoroughly misogynist. The words used to describe women construct an ideal of subservience or sexual usefulness. The roles we are ascribed and the language used to described legal processes impliedly expresses accord with patriarchal political values. The consequence is the exclusion of women as actors in the legal system except in very narrowly prescribed roles.

## VI. SYNTAX

SYNTAX IS THE arrangement of words in a sentence. Peter Goodrich has observed that the legal register uses a syntax of generalization the effect of which is to delete the context and specific identity of the involved actors. Use of the passive voice leads readers to the assumption of a straightforward, unproblematic continuity between concrete instances and abstract norms.<sup>71</sup> I have not used the syntax most commonly used in legal discourse in this article. For example, I have used "I" to iden-

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70 One reader of an earlier draft of this paper asked why I considered child sexual assault to be a "gender issue". It has been estimated that 38% of girls and 10% of boys are sexually abused by a dominant male from the family unit. Obviously then, many more women than men will have problems in their adult life. Further, some of the effects of child sexual abuse are passivity and a sense of helplessness. Since girls are socialized to be passive and dependent, sexual abuse would reinforce this socialization. Boys are usually socialized to be active and independent and therefore may have other ways of coping with the sexual abuse. Most importantly, child sexual abuse is a gender issue because in the vast majority of cases it is *men* who commit the offense. Feminism is concerned with the psychology and sociology of both men and women. See, generally, D. Russell, *The Secret Trauma: Incest in the Lives of Girls and Women* (New York: Basic Books, 1986).

71 Goodrich, *supra*, note 8 at 180.

tify, involve, and implicate myself with my work. Except for the well known syntactical devices of rhetorical questions and the appeals to authorities, I have not given myself many ways to exit from my project.

The syntactical techniques of passive or silent agents are used in legal discourse to euphemize or obscure interpersonal relationships, or to establish distance and impersonality. While my emphasis is on how these techniques contribute to the suppression of women, they are used more generally throughout legal discourse.

When we invert the order of a simple declarative sentence and delete the subject, we are using a passive agent syntax. Thus, the sentence "women are raped" omits the agent, namely, men. When written in an active voice this sentence becomes: "men rape women".

The excerpt from Hart cited earlier concerning the "ordinary citizen"<sup>72</sup> has two less obvious passive agents. Here is the excerpt rewritten with the agent inserted in brackets: "(Male legislators) have not made prostitution a crime but punished (women for) its public manifestation...". The original formulation obscures the inter-personal relationships in these two examples because it omits the agents. It is difficult to figure out who is doing what to whom. Once the text includes the gendered agents, the message becomes quite different. The hidden text of the suppression of women by men becomes more clear.

An agent may be deleted in order to give the effect of consensus or to give a proposition greater weight than it actually has. Consider this statement:

What determines when a being is human? When is it lawful to kill? These questions are linked in any consideration of the morality of abortion. (emphasis added)<sup>73</sup>

As Daly has noted, the author does not say *who links* these questions, he implies that they represent a general agreement about what are the central questions concerning abortion. The expression "any consideration" does not include the considerations of women who have had abortions. The quoted expression lacks the universality and authority than its author purports it to have as it does not allude to the concerns of an important class of female participants in the abortion debate.

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72 Hart, *supra*, note 27.

73 J.T. Noonan, Jr., "An Almost Absolute Value in History", in J.T. Noonan, *The Morality of Abortion: A Legal And Historical Perspective* (Cambridge: Harvard University Press, 1972) at 1, as cited by Daly, *Gyn/Ecology*, *supra*, note 35. For an introduction to feminist ethics, see: J.C. Tronto, "Beyond Gender Difference to a Theory of Care", (1987) 12 *Signs* 644.

The final syntactical example I would note is that of a passive or inactive object.<sup>74</sup> Lord Devlin asks "whether a man should be allowed to take more than one wife..."<sup>75</sup> Implicit in this sentence is the notion that women are not active when it comes to the question of whether to marry. Like oranges in a grocery, we are taken.

I think that the connections between language, gender and oppression is well established in the context of passive agent syntax and passive object syntax. These syntactical techniques can be used to hide androcentric thought and to obscure situations in which gender is a relevant characteristic. The effect is the appearance of inclusion, universality and rationality. The reality is the exclusion of women's experiences and concerns. More importantly, this linguistic structure uncritically supports the exercise of power that ignores or oppresses women.

## VII. TOWARDS A CONCLUSION

EVER SINCE I BEGAN studying law, I have had a growing uncomfortableness about what the language of legal discourse seems to say or imply about me as woman. But like most good women law students I avoided raising these issues because they did not seem to be quite on point: language was not a legal problem. When I returned to law school to do a master of law degree and had the opportunity to write a more theoretical paper rather than a paper on doctrine, language seemed an obvious choice. My original plan was to pull together a list of examples from the legal texts - a sort of glossary - and let their obviousness speak for itself.

The paper is well on its way in achieving its original plan, although that has now become its first goal. While the list of examples can be expanded and improved upon, I have said enough to show that the legal discourse systematically excludes, devalues, trivializes and ig-

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74 It should be noted that there are other syntactical examples that suppress important information but since I have not yet found specific references in legal texts, as they relate to women, I will just note these forms. A passive adjective such as "untreated menopause" suggests that menopause is something that needs to be treated. When this form is used in connection with a masculine pronoun, e.g., the doctor who will do the treating, the scenario becomes one of a man treating a woman for something that does not need to be treated. See Eichler, *supra*, note 68 for a discussion of how a law commission report on artificial insemination is given an androcentric perspective through these kinds of forms. Other forms include nominalized passives (making a thing (a noun) out of a process (a verb) and the use of automatic figurative registers such as standardized descriptions or quotations to give authority to and distance from work. See, generally, Goodrich, *supra*, note 8 at 180.

75 Lord Devlin, "The Enforcement of Morals", (1959) in Greenawalt, *supra*, note 12 at 611.

nores women. Obviously there will be disagreement with what I have and have not included. Hopefully, a dialogue will continue. For now, I will begin to formulate some conclusions.

Deborah Cameron has said that like a wolf whistle, a sexist remark has significance beyond the immediate offence it gives. Not only is it a manifestation of an unacceptable misogyny but it is also the mechanism by which misogyny is constructed and transmitted.<sup>76</sup> One can hope that the worst stereotypes are behind us now. This statement is probably too optimistic, however, as long as expressions like "raping the corporation" are current and if law professors continue to insist in classroom dialogues to refer to women only as wives or sex crime victims. This language so fundamentally alienates women that we cannot participate in the discourse without first denying ourselves.<sup>77</sup>

The original emphasis in writings on women and language focused on "non-sexist" language.<sup>78</sup> Simply stated, writers were to substitute sex-specific terms with generic terms. As was noted earlier,<sup>79</sup> the exclusive use of unmarked masculine pronouns and generics has the effect of excluding women from the readers' mental landscape. Such an exclusion leads to an androcentric view of the world: women are invisible and irrelevant.

By making the important switch to non-sexist language, women come into focus. This is an important first step. However, there is, however, a problem with thinking that if we use the pronouns "he" and "she" interchangeably and if we refer to policemen as police officers, no further change or analysis is required. Inherent in such a reformist theory is that we ought to reduce some forms of oppression and then, by implication, we legitimate the remaining forms. We must also refuse to accept stultifying stereotypes and alienating metaphors. We need to examine word choices for sexist semantic implications. Non-sexist language also requires that expressions used to describe women have a parallel meaning when used in reference to men. For example, if we speak of a "working mother" we should speak also of a "working father".

The obvious intent of these kinds of changes is to ensure that the content of legal discourse is changed to ensure the inclusion of women. I have stated in this paper that language contributes very significantly to androcentricity in law. We cannot assume that androcentricity is

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76 Cameron, *supra*, note 2 at 7.

77 See Menkel Meadow, *Excluded Voices*, *supra*, note 43, wherein she discusses alienation and assimilation of voices, including the female voice, that are excluded from legal discourse.

78 See, e.g., Martyna, *supra*, note 19.

79 See text accompanying notes 19-25.

avoided by substituting "reasonable person" for "reasonable man". While the kinds of changes in language that I suggested help change how women are perceived in the legal system, law makers must then be willing to adopt new perspectives that come with that change. Otherwise the end effect will simply make women into honorary men. Analogical reasoning – the meta-metaphor<sup>80</sup> – will bind the law to androcentricity unless law-makers struggle against it.

There is a problem with stopping at a prescription for non-sexist language. If we use a generic term to describe a sex specific situation, another form of sexism is created. Thus, even if Rawls' "rational man" was styled as a "rational person," this character would still be a man. However, now that fact would be even less apparent. The language that we use must be sensitive to gender when the sex of the referent is a socially significant variable.

In this paper I have tried to show how finely sexist usage is woven into the fabric of legal language. Many of these problems can be redressed by using non-sexist language. However, some problems such as the problems associated with semantics and syntax, require a more heightened sensitivity to their oppressive effect because of the social construction of dominance by men. This sensitivity requires that we probe deeply into meaning. What is not being said? What actors are not named? What are readers being encouraged to imply? Is male dominance encouraged or assumed?

The elimination of sexist language is critical to the elimination of sexism. The first step is to understand how it is expressed in language. To paraphrase Richard Scrutton, each of us inherits in language the sexism of many generations. To rehabilitate this repository of human experience is to alter our most fundamental perceptions.<sup>81</sup> Finally, we must care about what we say and be willing always to challenge, monitor, and change our language.

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80 The expression "meta-metaphor" is from C. MacKinnon, *Feminism Unmodified: Discourses On Life And Law* (Cambridge: Harvard University Press, 1987) at 9.

81 Richard Scrutton's original sentence had of course a very different meaning as he was arguing for the use of "he" as a generic pronoun: "Each of us inherits in language the wisdom of many generations. To mutilate this repository of human experience is to alter our most fundamental perceptions." As quoted, in its original form in Cameron, *supra*, note 2 at 79.