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Sexism, Language, and the Law

Mary Ellen Griffith

Appalachia Research and Defense Fund

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SEXISM, LANGUAGE, AND THE LAW

MARY ELLEN GRIFFITH*

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I. INTRODUCTION

It seemed apparent to me that “the law’s favorite creature,”¹ a “reasonable man,” did not include women. I needed only to look at the historical role of women in the law to arrive at that conclusion. However, my statement to that effect during a discussion in my Feminist Legal Theory class met opposition, so I stopped to think about it.

Several weeks later, the idea that the language of the law excluded women surfaced again. The first time was in Legislation class, while reading *Commonwealth v. Welosky*,² where the court decided that “in using the word person in statutes concerning jurors and

* Legal Services Staff Attorney, Appalachian Research and Defense Fund; J.D., West Virginia University, 1988.

This article had its origins as a paper for Marie Ashe’s Feminist Legal Theory seminar at the West Virginia University College of Law. The author is deeply indebted to her for the opportunity and the inspiration to produce it. Special thanks to Este, Mimi and Brenda.

1. *West Virginia Public Employees Ins. Bd. v. Blue Cross*, 328 S.E.2d 356, 361 (W. Va. 1985).

2. *Commonwealth v. Welosky*, 276 Mass. 398, 177 N.E. 656 (1931).

jury lists [the legislature] confined its meaning to men."³ The second time I noticed the exclusion was in the Feminist Legal Theory class discussion on *Roe v. Wade*,⁴ when a comment was made regarding Blackmun's introduction to the history of abortion using "man's attitudes toward the abortion procedure over the centuries."⁵ The speaker felt that her attitudes as a woman were not included in Blackmun's opinion and that, in this context, man did not also mean woman.

These experiences reinforced my belief. Common usage illustrated that "man" did not include the female sex, and judicial decree made clear that "person" did not include women. I decided to investigate this language of the law that excluded women. As a starting point, I set out to find law's "reasonable woman." In search of this elusive character, I found much more than I anticipated. Included in my findings were an unyielding gender bias among male practitioners of the law; an interweaving of two patriarchal institutions, language and law; and a considerable body of feminist theory on both subjects.

Trekking through these amassed works, I sometimes wandered in the jungle of conflicting theories, frequently struggled through the swamp of intellectual verbiage, periodically rested on a plateau of momentary insight and finally came within reach of the peaks of syntheses and understanding. As I prepare to narrate my travels, I realize that, while my quest was not in vain, I still have only a glimmer of law's reasonable woman. While I am not ready to give up seeing her realized, I now feel the task is one of creation rather than discovery. As a result, the assignment I have undertaken is to explain her absence and to investigate the resources available to facilitate inclusion of women in the language of the law. To set the stage for my discussion of sexism and language, I will first provide a historical look at the absence of women in the language of the law by relating the results of a computer-assisted search for the reasonable woman in court decisions. I will then discuss the im-

3. *Id.* at 406, 177 N.E. at 660.

4. *Roe v. Wade*, 410 U.S. 113 (1973).

5. *Id.* at 117.

portance of language in social organization, and characterize the impact on women of sex differentiation and sexism in language, especially in legal writing. Finally, I will elucidate the deeper concern of feminist theorists regarding women's silence, alienation, and oppression. My conclusion is founded upon a feminism that embraces a commitment to change and a denial of the validity of man-made modes of thinking. I agree with Catherine MacKinnon when she says: "Feminism comprehends that what counts as truth is produced in the interest of those with power to shape reality and that this process is as pervasive, as it is necessary, as it is changeable."⁶

II. THE SEARCH FOR THE REASONABLE WOMAN IN THE LAW

In all that mass of authority there is no single mention of the reasonable woman.⁷

I began my search for the reasonable woman in the dictionary, Black's Law Dictionary. I found what I suspected I might find: nothing!! There is no entry for "woman." There is one for "man." He is defined as:

A human being. A person of the male sex. A male of the human species above the age of puberty. In its most extended sense the term includes not only the adult male sex of the human species but women and children.⁸

Thus, a basic premise of the law appears to be that it is unnecessary to recognize the existence of women. Acknowledgement as a subcategory of man is deemed sufficient in the basic legal reference book.

Both satisfied and dissatisfied with this discovery, I went to Lexis for a search of court decisions in hopes of finding not just a woman but a "reasonable woman." I framed the query to get any case that used reasonable (with a universal ending) within two words of wom*n (I used this spelling so the computer would search woman or women). I found nothing in a search of United States Supreme Court decisions. I reached a similar result in a search of West Virginia Supreme Court cases. A search of all the federal courts finally revealed

6. C. MacKinnon, *FEMINISM, MARXISM, METHOD AND THE STATE* 637 (1983).

7. PROSSER, *TORTS* (4th ed. 1971) (quoting A. HERBERT, *MISLEADING CASES IN THE COMMON LAW* 12-16 (1930)).

8. BLACK'S LAW DICTIONARY 865 (5th ed. 1979).

six cases which used the term "reasonable woman." I anxiously set out to see what the law would say about her.

In 1917, a young widow challenged an ante-nuptial agreement in which she exchanged her dower rights and all other rights in her fifty year-old husband's estate for \$50,000. In finding the agreement valid, the court said that a "reasonable woman" with full knowledge of a \$250,000 estate would have accepted the settlement, which secured a comfortable support for her life, over the uncertainty of claiming the whole estate.⁹ From the holding in this case, it appears that reasonable women are concerned about security and would willingly exchange their legal rights for financial support.

It was not until 1969 that the courts again felt compelled to discuss the reasonable woman. In *United States v. Articles Consisting of 216 Bottles*,¹⁰ the federal Food and Drug Administration (FDA) confiscated a beauty product called Sudden Change which was advertised as "a face lift with out surgery."¹¹ Based solely on this claim by the advertisers, the FDA found the product to be a drug rather than a cosmetic. As a result, the product had to be tested and approved before it could be marketed.

The district court, disagreeing with the FDA's determination, reasoned that "constant exposure to puffing and extravagant claims" had induced "some immunity to the beautifier's hyperbole." Given this fact, the district court could not believe that the "potential buyer expected anything other than the possibility that she may look better."

On appeal, the circuit court agreed with the FDA's determination and overturned the district court decision. In making its determination that the FDA was correct in its efforts to protect the "ignorant, unthinking and credulous," the circuit court derided "the standard the court below applied . . . which appears to assume something like a 'reasonable woman' standard."¹² By rejecting a

9. *Suchor v. Gooch*, 244 F. 361 (4th Cir. 1917).

10. *United States v. An Article*, 409 F.2d 734 (2d Cir. 1969).

11. *Id.* at 737.

12. *Id.* at 741.

reasonable woman standard, the appeals court implied that women are ignorant, unthinking and credulous.¹³ (It is easier to understand now why she is so interested in security!)

The reasonable woman appeared again in the mid-seventies in a medical malpractice suit entitled *Bowers v. Garfield*,¹⁴ where a hysterectomy was performed. In this case, the court inquired as to what the objective standard required of a reasonable woman in the plaintiff's situation might be. Finally, I thought, the courts are beginning to recognize that reasonable women exist. Upon reflection, however, I could not help but wonder what standard was used in the hundreds of other cases involving medical malpractice on women patients.

In 1983, the reasonable woman (bracketed in quotes with no reference to the source quoted) appeared in a criminal case, *United States v. Ciammitti*.¹⁵ On appeal, she asserted a violation of 18 U.S.C. § 1309, which generally provides that any officer may break into a house to execute a search warrant if, after notice of his authority and purpose, he is refused admittance.

In upholding the conviction, the appeals court dismissed the dissent's concern that it was "unreasonable to expect Nora Ciammitti," "or any reasonable woman," "with four children sleeping in their bedrooms to have left the family room at 12:15 in the morning to open the front door in half a minute."¹⁶ In this case, the dissent recognized the concerns of a reasonable woman. The majority, however, not only dismissed these concerns but denigrated the concept by bracketing the term reasonable woman,¹⁷ thereby suggesting that it is an unnatural construction in legal writing, perhaps even an oxymoron.

Finally, two more cases came up on the computer screen. Both were 1986 sex discrimination cases and came from the same federal district of western Michigan.

13. *Id.*

14. *Bower v. Garfield*, 382 F. Supp. 503 (E.D. Pa. 1974).

15. *United States v. Ciammitti*, 720 F.2d 927 (6th Cir. 1983).

16. *Id.* at 933.

17. *Id.*

Two hundred years of federal court decisions, sixty-six years since the 19th amendment, twenty years since Second Wave Feminists raised the issue of sex discrimination in the law and in the language, and still “reasonable women” are found only infrequently in court decisions, and then in *dicta*. I agree with Adrienne Rich that “this is no semantic game or trivial accident of language.”¹⁸

The following quotation from Adrienne Rich, in which I substitute “law” for “education,” lays a foundation for the issues presented in this paper and suggests that language itself trivializes, insults, and excludes women:

What we have at present is a man centered [legal] system, a breeding ground not of justice but of masculine privilege. As women have gradually and reluctantly been admitted into the mainstream of the [law] they have been made participants in a system that prepares men to take up the roles of power in a man-centered society, that asks questions and teaches “facts” generated by a male intellectual tradition, and that both subtly and openly confirms men as the leaders and shapers of human destiny both within and outside the [law]. The exceptional women who have emerged from this system and who hold distinguished positions in it are just that: the required exception used by every system to justify and maintain itself. That all this is somehow “natural” and reasonable is still an unconscious assumption even of many who grant that women’s role in society is changing and that it needs to change. . . .¹⁹

Just because men and women are sitting in the same classroom, hearing the same lectures, preparing the same briefs; they are not receiving an equal education. They are not because the content of [law] itself validates men even as it invalidates women. Its very message is that men have been the shapers and thinkers of the [law] and that this is only natural. The bias of the [law] is white and male, racist and sexist; and this bias is expressed in both subtle and blatant ways.²⁰

III. THE IMPORTANCE OF LANGUAGE IN SOCIAL ORGANIZATION

Until we understand the assumption in which we are drenched, we cannot know ourselves.²¹

It has been said that the most distinctly human quality we can possess is the ability to communicate with each other by means of language. There is almost no aspect of our lives that is not touched

18. A. RICH, *ON LIES, SECRETS AND SILENCE* 127 (1979).

19. *Id.*

20. *Id.* at 241.

21. *Id.* at 35.

by language. We live in and by language. Language is unquestionably a powerful force. From the biblical story of Babel, wherein God destroyed the unity of human language, to Orwell's *1984*, in which language is seen as a perverted tool of oppression, this power has been recognized.²² The question of language and its political implications has absorbed writers and philosophers throughout history. In modern times language also has attracted the attention of scientists, and a whole field of scientific inquiry called linguistics has developed.

Language is accepted as crucial to the organization of human society. Thus, feminists concern themselves with language because it is seen as an instrument used to maintain male power.²³ Early feminist activity towards language sought to eliminate negative and stereotypical portrayals of women by advocating "non-sexist writing." A usage was seen as needing reform if it was either blatantly offensive or implied that humanity was male. Reform consisted of recasting expressions to make them neutral.²⁴

Recently, however, a new kind of concern with language has become more common among feminists. Some theorists warn that non-sexist language is an illusion. They stress that language is pervaded by sexism and that women are alienated from it because it is controlled by men.²⁵ Male dominance is seen as systemic and hegemonic. As a result, there is a growing sense that language itself cannot guarantee communication.

Over and over, women express a feeling of inhibition because of the inadequacy of words.²⁶ Deborah Cameron, in *Feminism and Linguistic Theory*, describes "alienation from language as an uneasy feeling that your words are not yours at all, they have been taken away and turned against you."²⁷ Catherine MacKinnon, in *Feminism, Marxism, Method and the State*, describes the feminist theory

22. D. CAMERON, *FEMINISM AND LINGUISTIC THEORY* 1 (1985).

23. *See id.* at 3.

24. *Id.* at 4.

25. *Id.*

26. *Id.* at 6.

27. *Id.*

of knowledge as inextricably tied to the feminist critique of power because the male point of view forces itself upon the world as its way of apprehending it.²⁸

Paulo Friere, the revolutionary Brazilian educator, while developing a literacy program for the poor of Recife in the early 1960's, recognized the connections between language, politics, and consciousness. By linking literacy to critical consciousness, his program became an effort to liberate the people and not simply an instrument to dominate them. For Friere, a critical consciousness is an intentionality towards the world. It does not merely reflect the world or reality. Rather, a critical consciousness transforms reality by acting upon it. Friere's work recognizes the way language forms our perceptions of the world and our intentions toward it.²⁹ Adrienne Rich, the feminist poet, recognizes, as Friere does, "the sense that language is power . . . that those who suffer most from injustice are the least able to articulate their suffering."³⁰

The relationship between language and world view has fostered among feminists the development of and debate about theories of language which address the silence, alienation and oppression women experience. Three areas of investigation have been identified by proponents of language theory. First, there is the study of sex difference: do men and women use language differently, and, if so, what does this mean? Second, the examination of sexism in language, its effects, and ways to eliminate it continue. Finally, this investigation looks at women's alienation and asks if this is the "oppressor's language" within which we cannot articulate our experience as women.³¹

IV. SEX DIFFERENCE IN LANGUAGE

The fear is not that we are different, the fear is that we are the same.³²

It is not surprising that sex differences have been found in language. What is interesting is that many feminists, including feminist

28. C. MACKINNON, *FEMINISM, MARXISM, METHOD AND THE STATE* (1983).

29. R. MACKIE, *LITERACY & REVOLUTION, THE PEDAGOGY OF PAULO FRIERE 2* (1981).

30. A. RICH, *supra* note 18, at 67.

31. D. CAMERON, *supra* note 22, at 6, 7.

32. R. MORGAN, *THE ANATOMY OF FREEDOM* (1982).

linguists, have expended more energy in studying sex difference in language rather than in criticizing it.³³ While feminists recognize the political dimension that the study of sex difference in any subject has and point out that many sex difference studies are simply elaborate justifications of female subordination or overt anti-woman propaganda,³⁴ there are now feminists who acclaim language differences as an expression of "woman's voice."

In a survey of studies carried out by feminist linguists, Deborah Cameron found two primary motives for studying sex differences. The first is to identify and legitimize a female mode of language use and to relate such language to the general notion of female culture. The second motive relates to the identification of the sexual power dynamic in language use, with the point being that even our speech behavior reflects and perpetuates patriarchal norms.³⁵

One problem easily identified with linguistic studies of speech difference (whether misogynist or feminist) is the problem of stereotypes in language. The tendency to stereotype has been given the name "folk linguistics." The term refers to that collection of beliefs about language which is accepted as common sense within a society. These beliefs serve both to regulate the linguistic behavior and to explain it to the ordinary language user. Some of them are fairly accurate; some are quite false. However, false stereotypes tend to persist as long as they reinforce important social inequalities. As long as women are subordinated to men, their language must be characterized as indicating natural subservience, a lack of intelligence and immaturity.³⁶

The reliance on stereotypes in linguistic studies is but one criticism of sex difference studies. Other criticisms target the methodology used to carry out such studies. The favored method is a comparative one in which the speech (or writing) patterns of the group being studied are described in terms of how they differ from the norm. The assumption, of course, is that white, middle-class

33. D. CAMERON, *supra* note 22 at 29.

34. *See id.* at 28.

35. D. CAMERON, *supra* note 33.

36. D. CAMERON, *supra* note 22, at 31-33.

male speech or writing patterns are the norm. As a result, the experiences of women (or ethnic groups or classes) are treated as deviations from the norm.³⁷ This methodology is also subject to criticism because researchers notoriously find what they set out to find. Thus, if they are looking for difference, that is what they will find. More important is the fact that researchers feel the need to explain how the non-standard deviates from the norm (white/male) but not vice-versa.³⁸

The interpretations of the data from these norm-deviation studies comprise the crucial problem in the politics of sex difference. Cultural stereotypes, rather than the nature of the phenomenon, determine the interpretations of linguistic difference. It is irrelevant to focus on whether the sex difference is natural or cultural if the explanation of the result fosters sex discrimination.³⁹

Lynn Schect Hefron, in *How Stereotypes About Women Influence Judges*,⁴⁰ cites a study by the Duke University Law and Language Project which found that a style of speech characterized by questioning intonations, hedges, and overly polite forms is used far more often by women than by men. This speech style was found to be more effective than an abrupt and commanding style in interpersonal relationships but was also found to be a less credible style in the courtroom. The difference in speech style scrutinized in this study is perceived as affecting women's performance in the courtroom. It is difficult, however, to relate this perception to the actual variation. Linguistic sex differences act simply as badges of femaleness and are valued negatively, irrespective of their substance. Explaining that rising intonations are learned, or can be credible, will have no effect on the irrational processes by which everything female is devalued whether it reflects women's behavior or not. If men used questioning intonations and hedges, abrupt speech would be said to be less credible. The point is that in our culture anything that marks a speaker out as female becomes a cause for complaint and proof of inferiority.

37. See *id.* at 45.

38. *Id.* at 45.

39. See *id.* at 53-55.

40. Hefron, *How Stereotypes About Women Influence Judges*, 24 JUDGES J. Issue 1, at 12 (1985).

V. SEXISM IN LANGUAGE

I am saying that sexism and the English Language are unrelated. Between male and female the language is neutral.⁴¹

A noticeable change has occurred in attitudes about language in the past twenty years. Many people who would never have thought about the matter just a few years ago now believe in the existence of sexist and non-sexist language and expressions. Such awareness has come about largely because of pressure from the women's movement.

Of course, many institutions and individuals continue to use sexist language and to defend its use. However, it is now harder to deny that male bias exists. Nevertheless, sexist language is defended on the grounds that one should not tamper with grammar, that non-sexist forms are aesthetically inferior, or that proscribing language is something external and independent from the user.

Feminists who attack sex bias are scolded as foolish for wasting their time on grammar when equality for women is such a great cause. Women are told that it does not really matter. Obviously, however, it does matter to women. The litany of means by which English trivializes, insults and excludes women is familiar. The force with which formidable scholars, from the linguistics faculty at Harvard University⁴² to the American Bar Association, protest the use of non-sexist terminology indicates that the issue is threatening.

Last year, the ABA Journal came to the defense of legal writers who had been challenged as sexist when it published an article by Irving Younger which asserted that "the English language is sex neutral."⁴³ Lawyers were exhorted to stand their ground against suggested changes in the use of male pronouns as a generic (including both male and female) term. Younger explained that "we who assert a professional competence to think, speak and write clearly about complicated things . . . need a language undiminished, flexible, and

41. Younger, *The English Language is Sex-Neutral*, 72 A.B.A. J., June 1, 1986, at 89.

42. D. CAMERON, *supra* note 22, at 66.

43. Younger, *supra* note 41.

precise, qualities preserved only when we obey the rules by which the language works.”⁴⁴

The use of the masculine generic pronoun and Younger’s defense of its use are excellent examples of linguistic sexual inequity and sex bias being used in defense of sexism. In English, when reference is made individually to members of a sexually mixed group, the recognized solution is to resolve the indecision as to pronoun choice in favor of the masculine. The masculine is deemed “unmarked” or “neutral” and used to refer to both men and women, while the feminine is “marked.” “Correct” usage, therefore, is sex-specific.⁴⁵

Younger’s article suggested five justifications for legal writers to use when they were challenged as sexist in their use of marked/unmarked pronouns. Younger’s “defenses” echo a familiar refrain: usage is a quirk of language, not a tool of oppression; it is a linguistic rather than a political phenomenon; there are no adequate substitutes; language develops slowly, so we must leave it alone; and, because we have rules of usage, we must not violate them.⁴⁶

Casey Miller and Kate Swift, in *The Handbook of Non-sexist Writing*, prove wrong most of Younger’s arguments by tracing the history of the so-called generic “he.”⁴⁷ Deborah Cameron also found that those who would like to maintain the myth of masculine nouns as words of general reference were relying on popular belief, not on linguistic evidence.⁴⁸

Miller and Swift found no statement by early English grammarians that masculine pronouns are sex-inclusive when used in general reference.⁴⁹ The generic “he” was a late arrival in English, an invention of the grammarians themselves in an attempt to eliminate “they” as a singular pronoun, as in the invocation from Shakespeare, “God send everyone their heart’s desire.”⁵⁰ In order to achieve

44. *Id.*

45. See D. CAMERON, *supra* note 42.

46. Younger, *supra* note 41.

47. C. MILLER & K. SWIFT, *THE HANDBOOK OF NON-SEXIST WRITINGS* (1980).

48. D. CAMERON, *supra* note 22, at 50.

49. C. MILLER & K. SWIFT, *supra* note 47, at 35-36.

50. *Id.* at 36.

the important syntactical feature of agreement in number with a singular antecedent, grammarians dismissed as unimportant a lack of agreement in gender with a feminine antecedent. In 1850, an act of the English Parliament gave official sanction to the recently invented concept of the generic "he." Similar language in contracts and other legal documents helped reinforce this grammatical edict in all English speaking countries.⁵¹ So much for a "quirk of the language" and a "linguistic phenomenon which develops slowly."

Miller and Swift go on to point out that current usage demonstrates the inability of "he" to serve as a generic referent. This fact has been demonstrated in several systematic investigations of how people of both sexes use and understand personal pronouns. The studies confirm that in spoken usage, from the speech of young children to the conversation of university professors, "'he' is rarely intended or understood to include she."⁵² On the contrary, at all levels of education people whose native tongue is English seem to know that "he," "him," and "his" are gender-specific and cannot do the double duty asked of them.⁵³

This failure of masculine gender pronouns to represent everyone becomes clear when the referent of the pronoun is likely to be a woman. For example, "she" is employed in generalizations when referring to secretaries, nurses, or preschool teachers.⁵⁴ Theoretically, "he" should always work, but the inclination to switch to "she" in some cases demonstrates that the masculine gender pronoun is felt to be either inadequate or inappropriate. Why? Because, grammarians to the contrary, "he" brings a male image to mind and does so whether doctors, lawyers, editors, or acrobats are the subject. Like generic "man," generic "he" fosters the misconception that there exists a "standard human being" and that "being" is a male.⁵⁵

While it is relatively simple to illuminate the ways in which English insults, excludes, and trivializes women, and to describe the pa-

51. *Id.*

52. *Id.* at 37.

53. *Id.* at 37-44.

54. *Id.* at 37.

55. *Id.*

triarchal institutions and individuals that advocate continued sexist usage, it is much more difficult to address the question of whether we can eliminate sexist language through linguistic reform. Most feminists believe that sexist language is a bad thing, but this belief manifests itself in very different approaches to reform. Some consider language symptomatic and see sexist language as a manifestation of patriarchal society. These feminists believe that by pointing out the prejudices reform can proceed. Others support the idea that language causes women's oppression rather than being a symptom of it.

The targets of the reformist/symptomatic camp include generic masculine pronouns, sex-differentiated job descriptions, and the use of the word "girl" when referring to adult women. The causal group has expanded the parameters of what constitutes sexism in language, insisting that all words are sexist because their meanings are fixed by and for men and because they all embody male misogyny.⁵⁶

The question of whether linguistic sexism is a cause or an effect of women's oppression and the problem of defining the boundaries of sexist language ultimately link up with the linguists' debate on language and reality. That is, the question of who controls language and who is alienated from it.⁵⁷ Non-sexist language which reformers envision excludes neither women nor men. The process of making language non-sexist involves recasting words and sentences so that all terminology is neutral. The feminist response to sexist language is to refuse to tolerate its continued use. However, many feminists feel a need to go beyond theoretical reform and develop a more sophisticated analysis of the place of language in culture and, thus, in the oppression of women.

VI. SILENCE, ALIENATION AND OPPRESSION

Power constructs the appearance of reality by silencing the voices of the powerless, by excluding them from access to authoritative discourse.⁵⁸

56. See, D. CAMERON, *supra* note 22, at 75.

57. *Id.*

58. MacKinnon, *Pornography, Civil Rights & Speech*, 20 HARV. C.R.-C.L. L. REV. 3 (1985).

For radical feminist theorists there is no neutral language; the entire system is permeated by sexism throughout. Moreover, they perceive male language as a species of Orwellian thought control, for these theorists believe that it is through language that we construct our reality. Those who define the limits of language can make us see things their way.

Different approaches to this radical theory have been expounded. All of them, however, subscribe to some degree of linguistic determinism. Thus, each approach adheres to the fundamental idea that men control language and women are alienated from it. In fact, since it determines reality, language may actually alienate women from the female experience because it fails to encode that experience.⁵⁹

I will not attempt to explain the very exciting fields of critical theory, semiotics, and post-structuralism that form the framework of feminist linguistic theory. I will, however, try to illuminate the underlying theses and the arguments put forth to undermine them. My basic understanding comes from Cameron, *Feminist and Linguistic Theory*.⁶⁰

Linguistic determination, the idea that language determines perception and thus defines reality, assumes that people actively and selectively choose among the millions of stimuli that impinge on them at any moment in order to make sense of the world.⁶¹ The question then becomes: what part does language play in this interpreting/classifying process? Two possibilities are suggested. The first possibility is that language is simply a tool to be used, a servant of thought. If this is the case, there is no great problem about language. It reflects social conditions and can change in response to social change. The second possibility is that language channels our thoughts into ready-made classifications and, thereby, acts like a straight jacket into which thoughts must fit.⁶² Feminists and other progressives tend to embrace the second possibility.⁶³

59. D. CAMERON, *supra* note 22, at 93.

60. *See generally* D. CAMERON, *supra* note 22.

61. *Id.* at 93.

62. *Id.* at 94.

63. *Id.* at 95.

Several arguments have been made to undermine this thesis. Foremost is a belief in the universality of language as presented by Chomsky. If all languages are at bottom very similar because all speakers have the same mental apparatus, it becomes awkward to explain how the undeniably diverse perceptions of different communities are determined by language. The ability to learn a second language and the fact that language users can and do modify their language are also arguments against linguistic determinism.⁶⁴

The second assumption of feminist theories of language is control. The belief is that the deterministic powers of language can be and are exploited by the privileged group which controls language.⁶⁵ This suggests not only that powerful groups appropriate language, but that by doing so they are also able to exert subliminal control over their subordinates to maintain their own power. In *Man Made Language*, Dale Spender asserts the view that, through their control over meaning, men are able to impose on everyone their own world view. The result of this imposition is that women either are left without the ability to symbolize male reality (alienation) or are unable to speak at all (silence).⁶⁶

This view grants extraordinary power and control to language. The critics of this theory find fault with the belief that reality can be reduced to language. Determinists presume that oppression and suffering are mere words. In reality, such a presumption tends to invalidate women's true experiences in the world and tends to undervalue their everyday communications. It also opens another door for misogynist descriptions of female inadequacy. Without an analysis of power, linguistic theories of control can be used to disadvantage women.

Determination and control are the foundation on which feminist theories of women's silence, alienation and oppression are built. In as much as these theories emphasize the difficulties women have in talking about their experiences, they have opened the door to a greater understanding of the nature and power of language in con-

64. *Id.* at 99, 100.

65. *Id.* at 100.

66. See generally SPENDER, *MAN MADE LANGUAGE* (1980).

trolling women's lives. However, the point at which such theories stress the lack of authenticity of women's language, without an inquiry into the underlying power relationship, is the point at which they become a theoretical hall of mirrors from which there is no escape.

Recognizing that women's lives are constrained by the language they use to describe reality is not the same as succumbing to an all-powerful determinant. Recognizing that male dominance of the language silences and alienates women is not the same as accepting oppression. To do so is to confuse the myth with the power that justifies it.

Women do not resort to silence or counterfeit expressions of their experience because it is impossible for them to do otherwise. Rather, they elect to use modes of expression that men can understand because that is the best way of getting men to listen. It is not impossible for women to encode their experience, but to do so is socially unproductive and politically inexpedient.⁶⁷ The problem is not one of language, but one of power.

A recognition of the imbalance of power between men and women focuses attention on the nature of the oppression. Oppression, like language, is constructed by and for human beings and is not immutable. It is this notion that appears to be lost in determinist theories. As Brittan and Maynard suggest in *Sexism, Racism and Oppression*, the oppressor's power may seem so overpowering that the oppressed find conformity unavoidable and abandon any attempts of rebellion.⁶⁸

To succumb to the principle of determinism is to accept the proposition that oppression is so complete that intentionality and purposefulness are reduced to nothing. For feminists to adopt this perspective in order to explain how language silences, alienates, and oppresses us is to renounce the feminist thesis that the personal is political, which implies the possibility of conflict, struggle and change.

67. D. CAMERON, *supra* note 22, at 112-13.

68. See generally A. BRITTAN & M. MAYNARD, *SEXISM, RACISM AND OPPRESSION* (1984).

That language is a resource of the powerful and a tool of oppression cannot be doubted. However, to explain oppression on the basis of the kind of language people use implicitly encourages oppression. Such explanations do not require anyone in a privileged position to change or give up anything. Friere reminds us that the interests of the oppressors lie in changing the consciousness of the oppressed, not the situation that oppresses them. The more the oppressed can be led to adapt to the situation, the more easily they can be dominated.⁶⁹

Thus, feminist linguistic theory must go beyond simply drawing connections between language and consciousness and between language and oppression. It must suggest a linguistic practice that confronts the idea that we are inevitably controlled by language.

VII. INCLUDING WOMEN IN THE LANGUAGE OF THE LAW

I don't think ladies should be lawyers. I believe that you should be at home raising a family.⁷⁰

From a feminist viewpoint, the law reinforces the prevailing order. The legal perspective, despite its facade of neutrality and objectivity, is defined by the male perspective. Moreover, the law carries the authority of the state and, thus, has the power to make man's point of view synonymous with reality. The example given earlier of Parliament's edict on the use of "he" as a generic term illustrates this power as it applies to language. This recognition of the law's actual power suggests that a change in the law would rectify the inequities arising from a male-dominated language and legal order. If it was the law that instituted the generic "he," then the law can be used to institute sex-neutral usage. "Reasonable women" would thus make their appearance in court decisions.

The earlier quote from Adrienne Rich, stating that the content of the law validates men as it invalidates women in both subtle and blatant ways, illustrates the reasons that edicts of law will not bring

69. R. MACKIE, *supra* note 29, at 54.

70. Remark made by Circuit Court Judge Arthur Cieslik to an attorney appearing at a pre-trial conference, July 1986.

about the necessary changes in language or the law. Roberto Unger, in *Law and Modern Society*, also questions the capability of the law to serve as a means of change: “[The law] . . . though sufficiently vital to help legitimate the social order may never become strong enough to help transform it.”⁷¹ This is not to suggest that the law is any more determinative than language. The point is that language and the law are inextricably entwined as powerful male institutions. For change to come about, we must confront the language of the law both at the theoretical level and in our everyday practice. Feminism suggests both the theory and the practice for erasing sexism from the language of the law. Like the “critical consciousness” required to transform the lives of Latin American peasants in Friere’s work, feminist “consciousness-raising” requires not merely reflection but change through action. The feminist acceptance of the necessity of change, not just in the world but in one’s self, combines a self-reflection which negates the male perspective of women’s experience as invalid and a recognition of the exigency of action towards change. David Cole, writing in the *Harvard Women’s Law Journal*, describes the validity of this course:

To abolish an established social institution which is deeply rooted in the interests of some social class will require more than a change in the form of consciousness of the oppressed; it will require a long course of political action. Until that course of action has been brought to successful completion, the institution will continue to exert its baleful influence on even enlightened agents, restricting their freedom and frustrating their desires.⁷²

The feminist linguists provide the necessary tools for analyzing our linguistic practice and for understanding the nature of male domination of language. However, it is through self-reflective action that women will transform the language of the law. This action will involve changing the identity of the speakers of the language, the content of what is related, and the descriptive terminology used. When women become the speakers, describing women’s reality with their own expressions, a female way of apprehending the law will

71. R. UNGER, *LAW IN MODERN SOCIETY* 213 (1976).

72. Cole, *Getting There, Reflections on Trashing From Feminist Jurisprudence and Critical Theory*, 8 *HARV. WOMEN’S L. J.* 59 (1986) (quoting R. GUESS, *THE IDEA OF A CRITICAL LEGAL THEORY HABERMAS AND THE FRANKFURT SCHOOL* 72, 74-75 (1981)).

become intrinsic to the idea of how the law works and what justice means.

Sally Anne Payton, Professor of Law at Michigan University School of Law, in an address to a 1984 Women and Law Conference, suggested that one way to change the language of the law was to change the identity of the people telling the stories.⁷³ She also implied that this would change the view of law as being built on male-identified qualities such as aggression, rationality, and authority.⁷⁴ Her identification of female-identified traits such as intuition, perception, feeling and judgment as being equally important affirms the contention that male-identification is both the cause and the result of male dominance of the law.⁷⁵

Her description of the authority of common law decision-making illuminates the falsity of the notion that the law consists only of inherently male-identified characteristics.

It is the kind of authority that does not speak until it is asked to speak. It is thus essentially passive. It is an authority that does not control what it will speak about, but is required to speak about everything brought to it, if only to decide that it will not speak. It is thus receptive. It is an authority that is required to listen before speaking, and its speech, when it comes, is required to be informed by what it has heard. It is thus expected to be understanding. Finally it is an authority that has at its own command no instrument of force to carry out its will, but rather must rely on the executive offices of government to enforce the law. It is thus institutionally dependent. Passive, receptive, understanding, dependent. . . .⁷⁶

Self-reflection requires a challenge to the view of law as necessarily a male domain. The presence (in increasing numbers) of women in the legal profession will facilitate a change in the identity of the story teller, but, in order to change the identity of the institution from male dominated, women must also change the content of the stories brought to the law.

73. Address by Sally Anne Payton, Professor of Law at Michigan University School of Law, at the Women and Law Conference (1984).

74. *Id.*

75. *Id.*

76. Payton, *Releasing Excellence: Erasing Gender Zoning From The Legal Mind*, 18 *IND. L. REV.* 629, 735 (1985).

As the kinds of cases (stories) brought before the courts change, as the law is forced to think about new disputes raising new issues, the legal institution will change.

If there is a single factor that contributed more than any other to the explosion of legal change in the 1960's and 70's it was that people had never been heard from before, ethnic minorities, patients, clinics, consumers, welfare recipients, prisoners, women, and school children gained access to [the courts].⁷⁷

Efforts like those of Andrea Dworkin and Catherine MacKinnon in *American Booksellers Association v. Hudnut* help to change not only the stories the law hears, but also the very language it hears.⁷⁸

It is also true that not just the subject of the story but the descriptive terminology must change to alter the language of the law. Julia Penelope, in *Language and Transformation of Consciousness*, describes how language reveals our conceptual framework. She recommends that we learn to hear ourselves as we speak, to monitor our language use as we describe events and individuals.⁷⁹ By identifying the descriptions that promote male-identified behaviors and ways of thinking, it will be possible to eliminate such language from our usage.⁸⁰

As a first step, Penelope suggests eliminating certain metaphors such as "Argument is War."⁸¹ By accepting the identity relationship of this metaphorical concept, we think of arguments as inherently violent conflicts. The process of arguing and debating different perspectives is thus perceived as a war. Our legal system is built around this concept. The meanings of "plaintiff" and "defendant" exemplify this metaphor in the legal context.⁸² Plaintiffs are those who prosecute an action. The term defendant implies an attitude of defense; such persons need only stand and repel the assaults of the adversary.⁸³

77. *Id.* at 641.

78. *American Booksellers Association v. Hudnut*, 598 F. Supp. 1316 (S.D. Ind. 1984), *aff'd*, 771 F.2d 323 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986), *reh'g denied*, 475 U.S. 1132 (1986).

79. Penelope, *Language and Transformation of Consciousness*, 4 L. & INEQUALITY; A. J. OF THEORY & PRACTICE 379, 383 (1986).

80. *Id.*

81. *Id.* at 385.

82. *Id.* (quoting *McFadin v. Sims*, 309 Mo. 312, 328, 273 S.W. 1050, 1053 (1925)).

83. Penelope, *supra* note 79, at 385 (quoting *Henderson v. Applegate*, 203 S.W.2d 548, 552 (Tex. Civ. App. 1947)).

Penelope suggests that the conception "Argument is Dance" would create a very different system. Instead of conceiving ourselves as combatants or enemies, we would be partners working together to create an artistic and pleasant event. We would not argue to win but to create from the different points of view an integrated composition.⁸⁴

By rethinking the largely unconscious ways in which language reflects and perpetuates patriarchal values, we can act to change the way we perceive the law and ourselves as participants in the legal system. The process of finding new metaphors and different descriptive terminology will help us reshape not only what we think but how we think.

As women become the speakers of the law by bringing their concerns, previously unheard, before legal tribunals and by using expressions of their reality to describe these concerns, a change in the language of the law becomes possible. The "reasonable woman," missing from the law for so long, is beginning to emerge as a creation of the self-reflective action of women.

VIII. A SHORT STORY IN THE LANGUAGE OF THE LAW

Vivienne Rabidue was the office manager and credit manager at Osceola Refining Company, rising from the ranks to become the only salaried woman on the staff.⁸⁵ Her duties included supervising other Osceola employees and maintaining relations with Osceola's customers.⁸⁶ Unlike the male salaried employees, Ms. Rabidue did not receive the "perks" associated with her position. Her supervisor refused to let her take customers to lunch, the normal procedure for credit managers, because "it would be improper for a woman to take a man to lunch." He also told a co-employee that "Vivienne is doing a good job as credit manager, but we really need a man on that job because she can't take customers to lunch." Furthermore, Ms. Rabidue's employer perceived her as extremely willful

84. Penelope, *supra* note 79, at 386.

85. Rabidue v. Osceola Ref. Co., 805 F.2d 611, 623 (6th Cir. 1986) (Keith, J. dissenting).

86. *Id.* at 624.

and abrasive and continually told her to “tone down” what he perceived as her irascible and aggressive personality.⁸⁷

Prior to and throughout the time Ms. Rabidue was employed, she and the other female employees were exposed daily to displays of nude or partially-clad women in common work areas of the plant.⁸⁸ One poster, which remained on the wall for eight years, showed a prone woman who had a golf ball on her breasts with a man standing over her, golf club in hand, yelling “fore”.⁸⁹ A co-worker, the supervisor of the computer division, regularly spewed anti-female obscenities. He referred to women as “whores,” “cunts,” “pussy,” and “tits.” He specifically used these terms to describe Ms. Rabidue and had remarked that “all that bitch needs is a good lay.”⁹⁰ In addition, he routinely refused to follow the directives issued by Ms. Rabidue as office manager and directed other employees to ignore the procedures she set.⁹¹ When Ms. Rabidue filed written complaints to management about this behavior on behalf of herself and other female employees, who feared losing their jobs if they complained directly, the Osceola vice-president did not reprimand or fire the man, because the company needed his computer expertise.⁹² In response to subsequent complaints, another supervisor gave him a “little fatherly advice,” warning him that his conduct was not appropriate if he yearned to become “an executive-type person.”⁹³

After seven years as office manager and credit manager, Ms. Rabidue was discharged from her job as a result of her “opinionated personality and her inability to work harmoniously with co-workers and customers.” In dismissing Ms. Rabidue’s Title VII offensive work environment sexual harassment action, the court applied the standard of a reasonable person’s reaction to a similar environment.⁹⁴ The court further determined that proper assessment of the

87. *Id.*

88. Rabidue, 805 F.2d at 615.

89. *Id.* at 624.

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.* at 620.

employment environment would include consideration of the background and experience of not only the plaintiff, but also her co-workers and supervisors, and what the plaintiff's expectations were upon voluntarily entering the environment.⁹⁵

The dissenting judge in this case felt the reasonable person standard failed to account for the wide divergence between most women's views of appropriate sexual conduct and those of men. He suggested that "unless the outlook of the reasonable woman is adopted the defendants as well as the courts are permitted to sustain ingrained notions of reasonable behavior fashioned by the offenders, in this case men."⁹⁶ His opinion also questioned the criteria the court considered pertinent in assessing the employment environment, stating that "the majority suggests through these factors that a woman assumes the risk of working in an abusive anti-female environment. Moreover the majority contends that such work environments somehow have an innate right to perpetuation and are not to be addressed by Title VII."⁹⁷

Here, at last, appears some recognition of a reasonable woman! True, it is a lone dissent in what must be thousands of court decisions reported in 1986. Still, the nature and the quality of Judge Keith's opinion reflect not just the words "reasonable woman," but also the concerns of women silenced and alienated by the language of the law. As the voices of women are heard in courts across the country, man-made language will be less able to deny the reasonable woman (or unreasonable women!!!).

95. *Id.*

96. Rabidue, 805 F.2d 611, 627 (Keith, J. dissenting).

97. *Id.*

POST SCRIPT

In this paper I have evaded the heart of feminist linguistic theory [perhaps of all feminist theory] by avoiding a confrontation with male/female duality recurrent in patriarchal thinking.

I reel under the weight
of the words
epistemology

phenomenology

ontology

semiology

Stopping to interpret
sentence after sentence

“feminist criticism questions
the semiotics of the ideologies
of our historical moment”

[why not just say, the symbols of our current beliefs?]

My understanding must come from outside the theoretical
my sense of feminism demands this

Not only is the personal political
the political, the theoretical is personal
Somewhere in my gut!

I'll know

Yet the words are attractive/beckoning

I go further/searching

for coherence/understanding. If language is inherently patriarchal
are we doomed

forever

to relive the oppression of our mothers?

If it is not

why is it so difficult to speak?

or hear?

Why do I always come back to
either/or

male/female

Is the split inevitable?

Is all thought binary?

[I responded positively to Levi-Strauss when I read his works for Legal Anthropology. Maybe the binary oppositions felt right in my gut; maybe it was because he talked about cooking instead of fighting.]

If so

Is binary thought inherently
phallogocentric?

Is binarism the product
of centuries
of male dominance?

or

Has male dominance
over the centuries
privileged particular
binary values? What about the assertion
that binary thought
is carefully taught

We attentively teach our babies
hot/cold

 day/night

 good/bad

 boy/girl

Knowing that it does not explain
the full reach

active/passive

misses the action

in passive non-violent resistance

hot/cold

isn't it really a continuum,

hot/warm/cool/cold?

Lost

Confused

I felt constrained

channeled

forced to choose

one approach/one theorist

over another

I had started up a spiral staircase
understanding evolved
in ascending circles one foot always
on the last rung,
a question
the next step
not an answer but an
opposition.
Perhaps
binarism is implicit
in my understanding
But it does not entail
a strict opposition
Either/or
black/white
constrained by an appreciation of grey
Reformism is simple-minded.
Radical theory is obtuse.
Is this an inkling
of the "female voice"
Certainly not
a retreat to biological determinism
nor a simplistic acceptance of
binary opposition
and its acquiescence
in hierarchy.
An awakening
Consciousness of the Power
of the Word
to transform
Of an uncompromising stake
in re-creating
equality.

