

THE PENILE CODE: THE GENDERED NATURE OF THE LANGUAGE OF LAW

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I. INTRODUCTION

pen•al (pēn'əl) *adj.* [[< Gr *poinë*, penalty]] of, for, constituting, or deserving punishment¹

pen•cil (pen'səl) *n.* [[< L *penis*, tail]] a rod-shaped instrument with a core of graphite, crayon, etc. that is sharpened to a point for writing, etc.²

pe•nis (pē'nis) *n.* . . . [[L]] the male organ of sexual intercourse³

My fingers rest uneasily upon the keyboard of my electronic pen as I reflect upon how to write a paper regarding Women and Law.⁴ I am sensitive to being male—a white, heterosexual male—thoroughly steeped (both culturally and academically) in the legal, philosophical, and theological heritage of the West.⁵ Feminist thought has taught me that all things said are said from a particular perspective.⁶ More profoundly, feminist thought has taught me that gender identity may well inform the very structure of thought from which one's perspective is articulated.⁷ In large measure, this

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¹ WEBSTER'S NEW WORLD DICTIONARY 434 (1990) (emphasis added).

² *Id.* (emphasis added).

³ *Id.* at 435 (emphasis added).

⁴ Contrary to my academic training and inclination, I will write in the first person. As much as I am able, I will thus refrain from disguising my personal voice as that of the anonymously authoritative "third person."

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⁶ See generally Martha Minow, *Justice Engendered*, 101 HARV. L. REV. 10, 57-74 (1987) [hereinafter Minow, *Justice Engendered*].

⁷ Feminist thought thus stands firmly (albeit critically) upon the ground provided it by the history of Western philosophy. From Descartes through Kant, Hegel, Nietzsche (especially Nietzsche, having been the first to declare that knowledge has to do not with the expression of truth, but with the possession of power) to both Heidegger and Wittgenstein, philosophy has been essentially the attempt to think thinking—to articulate the structure of thinking whereby humans experience, understand, know, judge, feel, and act in the world. See generally E.W.F. TOMLIN, *THE WESTERN PHILOSOPHERS: AN INTRODUCTION* (1967).

paper will be an inquiry into that claim. It will consequently be an inquiry that is perhaps informed by the very structure of thought into which it inquires. I am, after all, a man.

This inquiry will focus on the language of law. In the West, the law is written law; and it has been predominately written by men. Are these two facts related, and if so, how? Is it significant that the law is *pen*ned by those with a *penis*? Is there a structural relationship between the pen and the penis—a *penile code*? And if so, how has it framed the character of the law? These questions will govern my inquiry into the language of law.

"Legal language does more than express thoughts."⁸ Lucinda Finley suggests law is a realm of discourse that exercises an extraordinary influence over the construction of social reality.⁹ "[T]hose who seek to use law to help empower and positively change the status of a group such as women must, in their theory and practice, be concerned with the origins, nature, and structure of legal language and legal reasoning."¹⁰ This concern, expanded here to include not only the status of women but the status of men as well, will guide my own inquiry into the language of law.

One might well ask why I—as a man—choose to occupy myself with a feminist concern. It is certainly not because I feel the need to champion the cause of women. Women are quite well able to champion their own cause. Moreover, there is no need for men to speak for women—we have presumed to do that for long enough. Nor is it because I wish to add my voice in protest against the atrocities systematically practiced against women by men around the globe: African female genital mutilation,¹¹ Chinese abandonment of infant girls,¹² Serbian military strategies of rape,¹³ Indian bride-or widow-burning,¹⁴ Thai sexual slavery,¹⁵ world-wide domestic vio-

⁸ Lucinda M. Finley, *Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning*, 64 NOTRE DAME L. REV. 886, 888 (1989).

⁹ *Id.*

¹⁰ *Id.* at 890.

¹¹ See generally Nahid Toubia, *Female Genital Mutilation*, in WOMEN'S RIGHTS HUMAN RIGHTS: INTERNATIONAL FEMINIST PERSPECTIVES 224 (Julie Peters & Andrea Wolper eds., 1995); Hope Lewis, *Between Irua and "Female Genital Mutilation": Feminist Human Rights Discourse and the Cultural Divide*, 8 HARV. HUM. RTS. J. 1 (1995).

¹² See generally Sharon K. Hom, *Female Infanticide in China: The Human Rights Specter and Thoughts Towards An(Other) Vision*, 23 COLUM. HUM. RTS. L. REV. 249 (1992).

¹³ See generally HUMAN RIGHTS WATCH, 2 WAR CRIMES IN BOSNIA-HERCEGOVINA (1993); Madeline Morris, *By Force of Arms: Rape, War, and Military Culture*, 45 DUKE L.J. 651 (1996).

¹⁴ See generally Indira Jaising, *Violence Against Women: The Indian Perspective*, in WOMEN'S RIGHTS HUMAN RIGHTS: INTERNATIONAL FEMINIST PERSPECTIVES 51 (Julie Peters & Andrea Wolper eds., 1995).

lence,¹⁶ to name a few. Rather, my feminist concerns are prompted by the extraordinarily mundane yet myriad ways in which men exercise sexual authority over women—a sexual authority systematically reinforced by the law.

The fabric of our culture, both public and private, is interwoven with the subordination of the feminine to the dominance of the masculine. In a strong sense, the *meaning* of manhood is the *de-meaning* of womanhood. From this oppression of women, all men benefit in countless subtle and not so subtle ways. As a man, this is my privilege as well. I am profoundly distressed by this. Thus, in order to overcome it, I must understand it. Hence, my feminist concerns and the motive for this discussion.

I have divided my inquiry into three stages. First, I will reflect upon the epistemological structure of language as it pertains to the logic of the written word. Second, I will articulate a feminist critique of legal language. Third, on the basis of these epistemological and feminist critiques, I will offer a revisionary understanding of the sexual oppression ostensibly endemic to the language of law. My central thesis is that the sexual oppression exercised by men over women is coincident, if not confluent, with the logic of the written word, and that the law consequently manifests this sexually oppressive logic. In conclusion, I will propose a way to counter, if not overcome, this oppression.

II. THE OCULAR EPISTEMOLOGY OF THE PEN(IS)

*[T]he written letters bring death but the Spirit gives life.*¹⁷

In about the fifth-century B.C.E., the written word began to assume its status as the quintessential mode for the cultural communication of ideas.¹⁸ Writing became the paradigmatic form of

¹⁵ See generally HUMAN RIGHTS WATCH, *A MODERN FORM OF SLAVERY: TRAFFICKING OF BURMESE WOMEN AND GIRLS INTO BROTHELS IN THAILAND* (1993).

¹⁶ See generally Rhonda Copelon, *Intimate Terror: Understanding Domestic Violence as Torture*, in HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES 116 (Rebecca J. Cook ed., 1994); Joan Fitzpatrick, *The Use of International Human Rights Norms to Combat Violence Against Women*, in HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES 532 (Rebecca J. Cook ed., 1994); Kenneth Roth, *Domestic Violence as an International Human Rights Issue*, in HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES 326 (Rebecca J. Cook ed., 1994).

¹⁷ 2 *Corinthians* 3:6 (Jerusalem) (emphasis added).

¹⁸ Within a few decades of each other, the texts that founded most of the so-called modern world cultural/religious movements had been written: the Platonic Dialogues (Plato), see GREAT DIALOGUES OF PLATO (Eric H. Warmington & Philip G. Rouse eds. & W.H.D. Rouse trans., 1956); Jewish Prophecy (Ezekiel, Isaiah, Jeremiah), see MEYER WAXMAN, *A HANDBOOK OF JUDAISM* (2d ed. 1984); the Avesta (Zoroaster), see A.V. WILLIAMS JACKSON, *ZOROASTER: THE PROPHET OF ANCIENT IRAN* (1926); the Bhagavad Gītā,

expression. It remains so today. The communication of ideas must be written if it is to be taken seriously. The structure of the written word consequently governs not only what we say, but how we say it. More profoundly, it governs how we think.¹⁹ Our thinking is dictated by the pen.

An examination of how the written word governs the way we think would properly comprise a lengthy philosophical treatise. Given the constraints of the present discussion, I will confine myself to a few specific remarks on the matter. For these remarks, I am indebted to the work of Walter J. Ong, S.J., who has written extensively on the cognitive dynamics attendant upon the various forms of communication (oral/aural, textual, printed, and telecommunicational).²⁰

Communication through the written word is one effected through ocularity. The written word is seen, not heard. The cognitive dynamics endemic to the written word are consequently governed by the logic of vision. Knowing becomes essentially a matter of seeing. Consider the various metaphors we use for understanding:²¹ insight, reflection, speculation, illumination, observation, exposition, idea (Latin *video*, to see²²), glimmering of, evidence, elucidate, explicate, clarify, represent, demonstrate, show, discern, analyze, distinguish, define, outline, envision, cast light on, far-sighted, etc. Consider as well the various metaphors we use for not understanding: obscure, clouded, unclear, indistinct, complicated,

see A.C. BHAKTIVEDANTA SWAMI PRABHUPĀDA, BHAGAVAD-GĪTĀ: AS IT IS (1972); the Buddhist Sutras, *see* ENTERING THE STREAM: AN INTRODUCTION TO THE BUDDHA AND HIS TEACHINGS (Samuel Bercholz & Sherab Chōdzin Kohn eds., 1993); the Tao-Te Ching (Lao Tzu), *see* A SOURCE BOOK IN CHINESE PHILOSOPHY (Wing-Tsit Chan trans., 1963); and the Sayings of Confucius, *see id.* *See generally* DAVID S. NOSS & JOHN B. NOSS, MAN'S RELIGIONS (7th ed. 1984). Prior to that, cultural/religious heritage was communicated largely through the mythologies and cosmogonies of oral tradition. *Id.* It is not coincidental that the emergence of religious/ethical sensibility arose with the advent of the written word. Nor is it coincidental that in the West, the modern revolutions—religious (Reformation), *see* TOMLIN, *supra* note 7; philosophical (Idealism), *see id.*; political (Democracy), *see id.*; economic (Capitalism), *see id.*; technological (Industrial), *see* GEORGE BASALLA, THE EVOLUTION OF TECHNOLOGY (1988); and literary (the novel), *see* J.M. COHEN, A HISTORY OF WESTERN LITERATURE (1963)—followed upon the advent of the printed word (hence, mass textuality and the beginning of common literacy).

¹⁹ *See generally* WALTER J. ONG, S.J., PRESENCE OF THE WORD (1967) [hereinafter ONG, PRESENCE OF THE WORD].

²⁰ *See id.*; *see also* WALTER J. ONG, S.J., INTERFACES OF THE WORD (1977) [hereinafter ONG, INTERFACES OF THE WORD]; WALTER J. ONG, S.J., ORALITY AND LITERACY (1982) [hereinafter ONG, ORALITY AND LITERACY].

²¹ ONG, INTERFACES OF THE WORD, *supra* note 20, at 133.

²² CASSELL'S LATIN DICTIONARY 641-42 (1959).

dark, hidden, elusive, scattered, shortsighted, etc. The logic of vision structures that which we understand as knowledge and meaning. Under the paradigm of the written word, knowledge is governed by the dynamics of vision—the ocular epistemology of the pen.

Within such an epistemology, knowledge is quintessentially a matter of explanation²³ (Latin *explanare*, to lay out on a surface²⁴). This laying out characterizes the mode of knowledge as well as the subject matter of knowledge. On the one hand, the written word, as the mode of knowledge, is constituted as a literal laying out. Words are laid out: strung together—articulated (Latin *articulare*, to join²⁵)—in terms of a particular grammatical and semantic order. On the other hand, the subject matter of knowledge is also constituted as a laying out. Vision has to do with surfaces: it directionally reflects one thing after another in an ordered succession of fixes.²⁶ Ocular knowledge is consequently a dissecting apprehension, characterized principally as definition (Latin *definire*, to draw a line around²⁷) and analysis (Greek *ana-liein*, to break into parts²⁸). As explanation, knowledge therefore takes the measure of things, laying them out in ordered succession. Entombed within the order of the written word, this measure of things becomes fixedly permanent—a text.²⁹

Ocular epistemology further exerts a profound impact on the nature of both the subject and object of knowledge. In essence, it serves radically to distinguish the subject from the object of knowledge.³⁰ The visual paradigm of knowledge places the viewed world

²³ ONG, INTERFACES OF THE WORD, *supra* note 20, at 122.

²⁴ CASSELL'S LATIN DICTIONARY, *supra* note 22, at 230.

²⁵ *Id.* at 59.

²⁶ ONG, PRESENCE OF THE WORD, *supra* note 19, at 129.

²⁷ CASSELL'S LATIN DICTIONARY, *supra* note 22, at 173.

²⁸ THE OXFORD DICTIONARY OF MODERN GREEK 10 (1982).

²⁹ ONG, PRESENCE OF THE WORD, *supra* note 19, at 136. Note the idiom of referring to a text as a "monument" to one's thought. Worthy of note also is the fact that when knowledge or understanding becomes fixed within textuality, it becomes abstract. This is because the written word must establish its own internal context of meaning. Unlike the spoken word, the written word cannot rely upon the circumstantial context of actuality that surrounds oral communication. ONG, PRESENCE OF THE WORD, *supra* note 19, at 116. In a sense, a text must comprise its own world. By its nature, a text is therefore an abstract body of meaning, abstracted from the world in which it was written.

³⁰ ONG, PRESENCE OF THE WORD, *supra* note 19, at 135. It might even be argued that the subject and the object of knowledge, as epistemological categories, are themselves generated by the logic of an ocular epistemology. That is, absent an ocular epistemology, knowledge may well not be structured in terms of a subject and object at all. Such a claim, of course, is philosophically problematic by virtue of the fact that

out in front of the viewer; the viewer is backed away from the viewed. No longer part of the viewed, the viewer becomes radically other than the viewed. The eye can only look upon what is other than itself. In effect, reality is objectified as external.³¹ As the external object of knowledge, reality is reduced to the seen: the explained; the defined and analyzed; the measured, ordered, and ruled.

Inasmuch as the object of knowledge becomes radically exteriorized within an ocular epistemology, the subject of knowledge is made ultimately to disappear.³² Able to see only what is other than itself, the eye distances itself from all that is seen. Vision therefore radically individuates the viewer. Under this visual paradigm, the subject of knowledge is consequently an individual *I*. Having individuated itself, the subject of knowledge is alienated from an objectified reality. The seeing *I* is backed away from the seen world. The individual *I* is consequently an abstract *I*. As an abstracted *I*, the subject of knowledge is lifted from the order of objective reality. The abstract individual *I* is consequently an autonomous *I*: not subject to the rule or measure of what is seen as other than itself. The abstract autonomous individual *I* is thus elided from reality. As elided from reality, the subject of knowledge becomes the universal *I*: characterized by no particularity; circumscribed by no definition; seeing but not seen. In ultima, the subject of knowledge disappears.³³

Ocular epistemology thus generates on the one hand an object of knowledge characterized by exteriority, and on the other hand a subject of knowledge characterized by a universally abstract autonomous individuality—the *I*. The paradigmatic form for the expression of such knowledge is the written word. And from the structure of the written word, the *I* acquires its linguistic character as author.³⁴ As author, however, the *I* would retain its universally abstract autonomous individuality. Indeed, the authority of a text

the subject/object distinction would itself be construed as an object of knowledge. But aside from this logistical difficulty, the argument would contribute little to the present discussion.

³¹ ONG, PRESENCE OF THE WORD, *supra* note 19, at 228.

³² ONG, INTERFACES OF THE WORD, *supra* note 20, at 121-22 (quoting Father Bernard Lonergan, *Consciousness and the Trinity*, Address Before the North American College in Rome (Spring 1963)).

³³ Hegel perhaps said it best when he offered his ultimate definition of the "I": "Ego is Ego, I am I." G.W.F. HEGEL, *THE PHENOMENOLOGY OF MIND* 219 (J.B. Baillie trans., Harper & Row 1987) (1807).

³⁴ When law is expressed, or written, it acquires a "relatively objective quality." ONG, PRESENCE OF THE WORD, *supra* note 19, at 229.

is wholly contingent upon this retention. The written word exercises authority to the extent that it reflects the order of objectified reality.³⁵ This is achieved, oddly enough, through the elision of the author. The author must disappear from the text. For the text to speak, its author must be silent.³⁶ An authoritative word is the universal word; abstracted from the context of its author; autonomously meaningful. Intrusion of the author into the fabric of a text detracts from its authority. True authorship is therefore achieved through the authority of the text itself. For thus does the authority of the text truly express its author: the universally abstract autonomous individual. The invisible *I* writes as an absent author.

Hence the ocular epistemology of the pen. The important thing to note here is that the epistemological structure of the written word dictates not only the character of the subject and object of knowledge respectively, but it dictates accordingly the character of textual authority—an explanatory fixation of the object of knowledge as authored by an elided subject of knowledge. The written word *pens* reality: fixes it, marks it, lays it out, and articulates it. By virtue of such *penetration*, the text exercises its authority, thereby absenting its author.

Historically, men have held the pen. Characterized by the abstract autonomy and universal individuality of the invisible *I*, the absent author has nonetheless invariably been male. Ironically enough, this absention is seldom, if historically ever, remarked upon by men.³⁷ Rather, it has been remarked almost invariably by women; and, as Mary Daly notes, it is a remark that seems especially distressing to men. "Having penned women into the mirror world of their archetypes, the authorized authors have refused women the right to write saying to wayward women that to publish is to perish."³⁸ Why this distress? The remark poses a disturbing question: does gender inform the logic of the written word? Is the ocular epistemology of the pen informed by the penis? This question is addressed by the feminist critique of legal language.

³⁵ See *supra* note 29 and accompanying text. A text is authoritative to the extent that it internally and independently manifests the reality it lays out (i.e., explains). Structurally abstracted from reality, the authority of the written word is thus a function of its internal and independent coherence as adequate to the order of reality it scripts.

³⁶ Contrast this to the authority exercised by the speech of oral cultures: the authority of "we say." ONG, PRESENCE OF THE WORD, *supra* note 19, at 229.

³⁷ There is a reason for this. As will be discussed below, this remark obviates the abstract autonomy and universal individuality of the absented author. It provides him, horror of horrors, with a gender identity.

³⁸ MARY DALY, PURE LUST 121 (1984) [hereinafter DALY, PURE LUST].

III. ENGENDERED LAW

*Man fucks woman; subject verb object.*³⁹

The law is written. It is constituted as a realm of discourse in terms of which the social relationships of a culture are legally constructed.⁴⁰ Through its written word, the law therefore structures social reality, it lays it out and codifies it. Due to the fact that it enforces the social reality it structures, the law is a uniquely powerful form of discourse.⁴¹ Perhaps more than any other realm of discourse, the law thus manifests the logic of the written word.

In this section, I will first offer a philosophical critique of what may viably be construed as the governing language of the law, rights talk. I will then detail a feminist critique of rights talk. Through these respective critiques, I will demonstrate how the language of the law is gendered, both formally and substantively.

In many cultures, talk of rights has become the authoritative language of law.⁴² We have come to understand what the law means in terms of human rights. Rights talk dictates not only what the law is, but what the law should be. In some strong sense, law has become for us a function of rights talk. For contemporary jurisprudence, such rights are possessed by individuals,⁴³ and they are held by any one individual to the extent that they are held by all individuals. "Rights" are characteristically abstract, intangible, and therefore alienating. As such, rights talk requires that the "reproduction of [that] alienation [be] a condition of group membership," and one that applies equally to all.⁴⁴ Thus, intrinsic to the notion of human rights is the idea that they are equally held by all human beings.⁴⁵ The central claim of rights talk, in other words, is

³⁹ Catherine MacKinnon, *Feminism, Marxism, Method, and the State: An Agenda for Theory*, 7 SIGNS 515, 541 (1982) [hereinafter MacKinnon, *Feminism, Marxism, Method, and the State*] (emphasis added).

⁴⁰ Finley, *supra* note 8, at 888.

⁴¹ See Carol Smart, *Law's Power, the Sexed Body, and Feminist Discourse*, 17 J.L. & Soc'y 194, 196 (1990); see also Finley, *supra* note 8, at 888.

⁴² MARY ANN GLENDON, RIGHTS TALK 7 (1991).

⁴³ RONALD DWORKIN, TAKING RIGHTS SERIOUSLY xi (1978).

⁴⁴ Peter Gabel, *The Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves*, in JURISPRUDENCE: CONTEMPORARY READINGS, PROBLEMS, AND NARRATIVES 226, 226 (Robert L. Hayman, Jr. & Nancy Levit eds., 1994).

⁴⁵ "Government must not only treat people with concern and respect, but with equal concern and respect." DWORKIN, *supra* note 43, at 272-73. Dworkin distinguishes the right to equal treatment from the right to treatment as an equal. The latter right is the more fundamental, embodying an essentially moral claim; the former is a derivative economic right having to do with the distribution of societal goods. DWORKIN, *supra* note 43, at 273.

the claim to equality.⁴⁶ Rights talk dictates that all individuals equally possess certain human rights. "By 'rights' . . . [are meant] those rights which are alleged to belong to human beings as such and . . . to attach equally to all individuals . . ." ⁴⁷

In essence, then, rights talk speaks about the universality of the individual—the individual as such. Rights talk thus must construe the individual as an abstract individual.⁴⁸ The individual spoken by rights talk is an individual abstracted from any particular communal identity. Communal identity is subsequent to the essential being of the individual. How the abstract individual communally identifies himself or herself is consequently a function not of how he or she *ought* to do so (in proper accordance with its essential communal nature), but how he or she *chooses* to do so. The abstract individual is thus an *autonomous* individual.⁴⁹ What the abstract autonomous individual chooses to be is constrained only by his or her discretion.⁵⁰

Rights talk substantively speaks the abstract autonomy of the universal individual through the proclamation of two fundamental complementary rights: the right to privacy,⁵¹ and the right to self-

⁴⁶ DWORKIN, *supra* note 43, at 273.

⁴⁷ ALISDAIR MACINTYRE, *AFTER VIRTUE* 66 (1981).

⁴⁸ On the one hand, individuals are construed as abstractly given—given interests, needs, desires, etc. On the other hand, society is construed as the set of possible social relationships which are suited, more or less adequately, to individuals' requirements. Societal rules and institutions are accordingly construed as the means of permitting this fit between the individual and society. "The crucial point about this conception is that the relevant features of individuals determining the ends which social arrangements are held (actually or ideally) to fulfil[] . . . are assumed as given, independently of a social context." STEVEN LUKES, *INDIVIDUALISM* 73 (1973).

A "right" has three phenomenological dimensions. First, to the extent that individuals are represented as "having" rights, these rights signify social experiences that are merely possible rather than the experiences themselves. . . . Second, these rights are conceived as being granted to the individual from an outside source, from "the State" which either creates them (in the positivist version of the constitutional thought-schema) or recognizes them (in the natural-law version) through the passage of "laws." Thus, insofar as the individual emerges from his passive station to act and interact with others on the basis of his rights, he does so because he has been "allowed" to do so in advance. Third, intersubjective action itself is conceived to occur "through" or "by virtue of" the "exercise" of these rights.

Gabel, *supra* note 44, at 227.

⁴⁹ MACINTYRE, *supra* note 47, at 58.

⁵⁰ Such autonomy, however, is not arbitrary. It simply means that the behavior of the individual is ultimately that of the individual—not a function of social constraint beyond the control of the individual.

⁵¹ See LUKES, *supra* note 48, at 59-66.

In general the idea of privacy refers to a sphere that is not of

development.⁵² The right to privacy dictates that individual autonomy be respected by the various communal involvements of the individual. Privacy generates a host of protective rights—leave me alone.⁵³ The right to self-development dictates that the individual be allowed autonomously to pursue whatever mode of self-realization the individual should choose. Self-development generates a host of promotive rights—let me be me.⁵⁴ The complementary rights of privacy/self-development programmatically inform all communal involvements of the universally abstract autonomous individual: political,⁵⁵ economic,⁵⁶ religious,⁵⁷ and philosophical.⁵⁸

proper concern to others. It implies a negative relation between the individual and some wider 'public[,'] including the state—a relation of non-interference with, or non-intrusion into, some range of his thoughts and/or action. This condition may be achieved either by his withdrawal or by the 'public's' forbearance.

LUKES, *supra* note 48, at 66.

The modern pre-occupation with privacy stands in rather stark contrast to classical thought on the matter:

the privative trait of privacy, indicated in the word itself, was all-important; it meant literally a state of being deprived of something A man who lived only a private life, who like the slave was not permitted to enter the public realm, or like the barbarian, had chosen not to establish such a realm, was not fully human.

LUKES, *supra* note 48, at 59 (quoting HANNAH ARENDT, *THE HUMAN CONDITION* 35 (1959)).

For modernity, however, privacy does not denote a privation. In fact, "[s]imilar to property in its heyday, privacy was vaunted as a superright, a trump." GLENDON, *supra* note 42, at 60. The singularly American insistence upon the right to privacy is probably most directly attributable to the writings of John Stuart Mill, *see* JOHN STUART MILL, *ON LIBERTY* (Elizabeth Rapaport ed., Hackett Publishing Co., Inc. 1978) (1859). Although it did not enter the American vernacular until the late nineteenth century, it has since become the right in terms of which all other protective rights are understood. GLENDON, *supra* note 42, at 48-61. "It is the right to be let alone." *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

⁵² The right to self-development has primarily to do with the preservation of individuality as such. It is generally traceable to German Romantic notions of uniqueness. LUKES, *supra* note 48, at 67.

⁵³ For example, rights against various forms of government intrusion, *see, e.g.*, *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) and *Roe v. Wade*, 410 U.S. 113 (1973); religious commitments, *see, e.g.*, *Board of Educ. v. Grumet*, 512 U.S. 687 (1994).

⁵⁴ For example, rights to life and liberty, *see, e.g.*, *Meyer v. Nebraska*, 262 U.S. 390 (1923) and *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261 (1990); the freedom of speech, *see, e.g.*, *Texas v. Johnson*, 491 U.S. 397 (1989) and *R. A. V. v. City of St. Paul*, 505 U.S. 377 (1992); the right to association, *see, e.g.*, *Board of Dir. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537 (1987); the right to procreate, *see, e.g.*, *Poe v. Ullman*, 367 U.S. 497 (1961) and *Griswold v. Connecticut*, 381 U.S. 479 (1965); the right to education, *see, e.g.*, *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

⁵⁵ The form of political government programmatically appropriate to the idea of the abstract autonomous individual is a government whose authority is based upon the consent of its individual citizens—a democratized social contract whereby the government protects/promotes the interests of its individual citizens. LUKES, *supra* note

In speaking about the universally abstract autonomous individual, rights talk thus constructs a social reality of competing individuals perennially anxious of societal intrusion.⁵⁹ Inasmuch as law

48, at 79-87. This view, of course, has a long lineage traceable to Hobbes, *see* THOMAS HOBBS, *MAN AND CITIZEN* (Bernard Gert ed. & Charles T. Wood et al. trans., Hackett Publishing Company 1991) (1658 and 1642); Locke, *see* JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* (Peter Laslett ed., Cambridge University Press 1990) (1690); and Rousseau, *see* JEAN-JACQUES ROUSSEAU, *ON THE SOCIAL CONTRACT*, in *BASIC POLITICAL WRITINGS* (Donald A. Cress ed. & trans., Hackett Publishing Co. 1987) (1762).

⁵⁶ "Economic individualism implies a consequent presumption against economic regulation, whether by Church or State." LUKES, *supra* note 48, at 88 (emphasis added). This view received much of its controlling ideology from Adam Smith, *see* ADAM SMITH, *THE WEALTH OF NATIONS* (Edwin Cannan ed., Random House, Inc. 1937) (1776).

⁵⁷ *See* LUKES, *supra* note 48, at 94-99.

Religious individualism may be defined as the view that the individual believer does not need intermediaries, that he has the primary responsibility for his own spiritual destiny, that he has the right and duty to come to his own relationship with his God in his own way and by his own effort.

LUKES, *supra* note 48, at 94.

⁵⁸ Ostensibly beginning with Descartes (*see* RENE DESCARTES, *DESCARTES SELECTIONS* (Ralph M. Eaton ed., Charles Scribner's Sons 1955) (1911-12)), and receiving progressively sophisticated treatment through a lineage highlighted by Hume (*see* DAVID HUME, *ESSAYS: MORAL, POLITICAL, AND LITERARY* (Eugene F. Miller ed., 1987) (1777)), Kant (*see* THE PHILOSOPHY OF KANT (Carl J. Friedrich ed., Random House, Inc. 1993)), and Husserl (BARRY SMITH & DAVID WOODRUFF SMITH, *THE CAMBRIDGE COMPANION TO HUSSERL* (1995)), the structural criteriology of knowledge is held to reside within the individual.

⁵⁹ On the one hand, rights talk structures a bifurcation between the individual and the society in which the individual would exercise its self-protection/promotion. MACINTYRE, *supra* note 47, at 33. Rights are designed to preserve the individual against intrusion upon its autonomy. "The formal legal framework of modern democratic societies is the guardian of the abstract individual." LUKES, *supra* note 48, at 152-53. What rights talk guards against is intrusion upon individual autonomy by various and sundry forms of society, whether political, ethical, or religious. Rights talk speaks the autonomy of the abstract individual. Insofar as rights talk thus speaks, it protests against societal intrusion, hence a structural division between the individual and the society in which the individual would exist as such.

On the other hand, rights talk structures as well a divisiveness between members of a society. The fundamental complementarity between rights to privacy and rights to self-development diverges when they are respectively claimed by competing individuals. The self-promotion of one inevitably and invariably infringes upon the self-protection of another. Communal dialogue is replaced by the protest of competing claims, social accommodation by righteous indignation, mutual amelioration by trident self-assertion.

[R]ights talk, in its absoluteness, promotes unrealistic expectations, heightens social conflict, and inhibits dialogue that might lead toward consensus, accommodation, or at least the discovery of common ground. . . . Our rights talk is like a book of words and phrases without a grammar and syntax. Various rights are proclaimed or proposed. The catalog of individual liberties expands, without much consideration of the ends to which they are oriented, their relationship to one an-

speaks the substantive language of rights talk, it adjudicates social conflict by measuring the rights of claimants against each other. As Leslie Bender notes, rights talk therefore conduces to a jurisprudence of abstract universal principles.⁶⁰ In order to adjudicate the claims of competing rights, appeal must be made to principles that are independent of particular circumstances. "Legal language seeks universal applicability, regardless of the particular traits of an individual."⁶¹ Such adjudication is appropriately effected by a neutral judiciary on the basis of objective principles of law. Accordingly, the primary goal of adjudication is circumstantially to vindicate abstract universal rights; "law is conceptualized as a rule-bound system for adjudicating the competing rights of self-interested, autonomous, essentially equal individuals capable of making unconstrained choices."⁶² The language of law is spoken by a jurisprudential voice singularly universal and programmatically abstract.⁶³ Hence its formal character.

other, to corresponding responsibilities, or to the general welfare. Lacking a grammar of cooperative living, we are like a traveler who can say a few words to get a meal and a room in a foreign city, but cannot converse with its inhabitants.

GLENDON, *supra* note 42, at 14.

Rights talk generates a sociality resembling more a cacophony of discord than a community of discourse. Such discord, moreover, is not happenstance. It is structurally intrinsic to the moral discourse of rights talk. "The fact is that the . . . ideal of self-sufficiency cannot be successfully democratized. A large collection of self-determining, self-sufficient individuals cannot even be a society." GLENDON, *supra* note 42, at 74. The abstract autonomous individual that programmatically speaks rights talk is intrinsically non-social. Its governing social interest is self-interest. "Buried deep in our rights dialect is an unexpressed premise that we roam at large in a land of strangers . . ." GLENDON, *supra* note 42, at 77.

⁶⁰ Leslie Bender, *From Gender Difference to Feminist Solidarity: Using Carol Gilligan and an Ethic of Care in Law*, in *GENDER AND LAW* 592 (Katharine T. Bartlett ed., 1993).

⁶¹ Minow, *Justice Engendered*, *supra* note 6, at 45.

⁶² Finley, *supra* note 8, at 896.

⁶³ This abstract universalism of the law has recently come under rather severe critical scrutiny by non-Western writers whose cultures have been forced to endorse the rights talk of the West—a rights talk spoken by an international law that to date has been dictated by Western jurisprudence. "The prevailing human rights discourse . . . is abstracted from social history and thereby arrives at conclusions which make human rights both eternal in historical time and universal in social place." ISSA G. SHIVJI, *THE CONCEPT OF HUMAN RIGHTS IN AFRICA* 43 (1989). Such writers voice the suspicion that the abstract universalism of the West may very well be peculiar to the West. See generally Ziyad Motala, *Human Rights in Africa: A Cultural, Ideological, and Legal Examination*, 12 *HASTINGS INT'L & COMP. L. REV.* 373 (1989); Makua wa Mutua, *The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties*, 35 *VA. J. INT'L L.* 339 (1995); J.B. Ojwang, *Laying a Basis for Rights: Towards a Jurisprudence of Development*, in *AFRICAN LAW AND LEGAL THEORY* 351 (Gordon R. Woodman & A.O. Obilade eds., 1995); Raimundo Panikkar, *Is the Notion of Human Rights a Western Concept?*, 120 *DIOGENES* 75 (1982).

The language of law thus manifests the logic of the written word both formally and substantively. Formally, it codifies social reality in terms of the abstract universal jurisprudence of rights talk. Substantively, it speaks the language of abstract autonomous individuals universally possessing such rights. Historically, however, the authors of legal language have not so much been abstract autonomous individuals as they have been men. "Men have shaped it, they have defined it, they have interpreted it"⁶⁴ Feminist legal scholars therefore suspect legal language of expressing not so much an abstract universal jurisprudence as expressing the particularly masculine jurisprudence of its authors.⁶⁵ But inasmuch as the language of law speaks with the voice of authority, it effectively privileges the male perspective as authoritative. Feminists therefore further suspect that legal language disguises the male voice as the universal voice.⁶⁶ "Because it is embedded in a patriarchal framework that equates abstraction and universalization from only one group's experiences as neutrality, legal reasoning views male experiences and perspectives as the universal norm around which terms and entire areas of law are defined."⁶⁷ The abstract universal voice of legal authority is therefore suspected by feminists as being the distinctively male voice of its authors.⁶⁸

This feminist suspicion generates the perception that the logic of legal language is itself distinctively masculine. The language of abstract universality and autonomous individuality is construed as the linguistic penchant of men.⁶⁹ As such, it ostensibly serves distinctively masculine interests:

Legal language frames the issues, it defines the terms in which speech in the legal world must occur, it tells us how we

⁶⁴ Finley, *supra* note 8, at 892.

⁶⁵ Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 58 (1988) [hereinafter West, *Jurisprudence and Gender*].

⁶⁶ Finley, *supra* note 8, at 897.

⁶⁷ Finley, *supra* note 8, at 897. Finley describes in some detail how the masculine perspective governs the law of torts, contracts, labor, and crime. See Finley, *supra* note 8, at 892-902. In understanding whether someone is negligent, how agreements should arise and be enforced, how a worker should be regarded and treated, and the appropriate response to criminal activity, the man's perspective is taken as "natural, inevitable, complete, objective, and neutral." Finley, *supra* note 8, at 892.

⁶⁸ Finley, *supra* note 8, at 897.

⁶⁹ "Universal and objective thinking is male language because intellectually, economically, and politically, privileged men have had the power to ignore other perspectives and thus come to think of their situation as the norm, their reality as reality, and their views as objective." Finley, *supra* note 8, at 893. See also Jennifer Nedelsky, *The Challenges of Multiplicity*, in GENDER AND LAW 878, 880 (Katharine T. Bartlett ed., 1993); West, *Jurisprudence and Gender*, *supra* note 65, at 590; Minow, *Justice Engendered*, *supra* note 6, at 33-45.

should understand a problem and which explanations are acceptable and which are not. Since this language has been crafted primarily by white men, the way it frames issues, the way it defines problems, and the speakers and speech it credits, do not readily include women. Legal language commands: abstract a situation from historical, social, and political context; be "objective" and avoid the lens of non[-]male experience; invoke universal principles such as "equality" and "free choice;" speak with the voice of dispassionate reason; be simple, direct, and certain; avoid the complexity of varying, interacting perspectives and overlapping multi-textured explanations; and most of all, tell it and see it "like a man"—put it in terms that relate to men and to which men can relate.⁷⁰

To the extent that legal language serves characteristically masculine interests, it disserves characteristically feminine interests. This point is readily made by the feminist critique of rights talk.

The controlling insight of feminist discomfort with rights talk is that rights universally inhere in human beings to the extent, and only to the extent, that a human being shares the fundamental sameness of humanity presupposed by rights talk.⁷¹ Rights talk systematically excludes from the ambit of equal regard those who differ from the essential sameness allegedly characteristic of human beings. To the extent that women fail to manifest this essential sameness of abstract autonomous individuality, rights talk fails to address them.⁷²

Mary Ann Glendon has observed that, contrary to the paradigm of abstract autonomous individuality, women in our culture concern themselves with the "values of care, relationship, nurture, and contextuality."⁷³ Because rights talk fails to address itself to this concern, it fails to speak to women. "Once again, the premise of a basic human nature, found in the abstract individual . . . risks excluding any who do not meet it."⁷⁴ As Robin West contends, women concern themselves with communal connection, men with individuated disconnection.⁷⁵ Rights talk serves the interests of the

⁷⁰ Finley, *supra* note 8, at 905.

⁷¹ MARTHA MINOW, MAKING ALL THE DIFFERENCE 147 (1990) [hereinafter MINOW, MAKING ALL THE DIFFERENCE].

⁷² Rights talk "presumes to address only autonomous, independent individuals who can separate themselves from others and enter freely, unencumbered, into an agreement about how to conduct private and public affairs." *Id.* at 150.

⁷³ GLENDON, *supra* note 42, at 174.

⁷⁴ MINOW, MAKING ALL THE DIFFERENCE, *supra* note 71, at 156.

⁷⁵ West, *Jurisprudence and Gender*, *supra* note 69, at 2-3. See also Nedelsky, *supra* note 68, at 880; Finley, *supra* note 8, at 905. This disparity between masculine and feminine interests is commonly characterized in feminist literature as the difference be-

latter, and therefore disserves the interests of the former.⁷⁶

To the extent, however, that women live within the legal culture authored by men, their distinctly feminine interests are subjected to the distinctly male interests that govern the language of the law. As Martha Minow argues, "[a] notion of equality that demands disregarding a 'difference' calls for assimilation to an unstated norm."⁷⁷ This unstated norm, of course, is the male norm ostensibly articulated by rights talk of the universal abstract autonomous individual. Inasmuch as the rights talk of law serves to structure social reality, female experience of this reality is mediated through male paradigms.⁷⁸ Ann Scales refers to this as the "episte-

tween an ethics of rights and an ethics of care. Nancy Levit, *Feminism for Men: Legal Ideology and the Construction of Maleness*, 43 UCLA L. REV. 1037, 1045 (1996).

⁷⁶ The discomfort of feminism with rights talk, then, is twofold. On the one hand, it has to do with the nature of equality presupposed by such talk.

An admirable commitment to universality and inclusion accompanies this idea, an idea that all individuals could be self-sufficient and that all individuals, if removed from context, would share a fundamental humanity. . . . All persons are equal because of this fundamental sameness—yet this sameness seems to be the emptiness left when we are each sheared of all that makes us different.

MINOW, MAKING ALL THE DIFFERENCE, *supra* note 71, at 152 (footnote omitted). Rights talk proclaims an essential humanity equally inherent in all human beings, speaking as if this essential humanity were universal. But this universality of essential human being, this sameness that allegedly characterizes us all, is particularly male. It programmatically excludes the female. "The presentation of a type of human being as though it described all human beings risks excluding any who do not fit or treating such misfits as deviant." MINOW, MAKING ALL THE DIFFERENCE, *supra* note 71, at 153. From the feminist perspective, equal rights talk serves to perpetuate the very inequality it speaks against.

On the other hand, the social divisiveness that rights talk structures into the society that speaks it seems uniquely unsuited to the concerns of women. "[R]ights talk disserves public deliberation not only through affirmatively promoting an image of the rights-bearer as a radically autonomous individual, but through its corresponding neglect of the social dimensions of human personhood." GLENDON, *supra* note 42, at 109. Historically, women are uniquely concerned with this social dimension:

Traditionally, it has been women who have taken primary responsibility for the transmission of family lore and for the moral education of children. As mothers and teachers, they have nourished a sense of connectedness between individuals, and an awareness of the linkage among present, past, and future generations. Hence the important role accorded by many feminists to the values of care, relationship, nurture, and contextuality

GLENDON, *supra* note 42, at 174.

Rights talk therefore fails to address itself to the interests that women typically exhibit in the essentially communal nature of their being human. Rights talk engenders a society that structurally ignores the female by virtue of its peculiarly male standard: abstract autonomous individuality.

⁷⁷ Minow, *Justice Engendered*, *supra* note 6, at 32.

⁷⁸ See DALY, PURE LUST, *supra* note 38, at 50.

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⁷⁷ Minow, *Justice Engendered*, *supra* note 6, at 32.

⁷⁸ See DALY, PURE LUST, *supra* note 38, at 50.

Rights talk functions structurally to oppress women.⁸⁴ Authored by men, legal language constructs a social reality ostensibly serving the distinctively masculine interests of universal abstract autonomous individuality. It consequently identifies the interests of care, context, connectedness, and community as being distinctly feminine characteristics while simultaneously diserving them.⁸⁵ This difference is structured, moreover, as a difference of inequality effected by the very terms of equality dictated by legal language. Those concerns characterized as feminine are consequently subverted to those concerns characterized as masculine. The gender inequality authored by legal language therefore reflects the sexual authority that men exercise over women. "As sexual inequality is gendered as man and women, gender inequality is sexualized as dominance and subordination."⁸⁶ Legal language therefore speaks a social reality structured in terms of sexual oppression: "sexual difference is a function of sexual dominance."⁸⁷ This dominance is exercised, and exercised exclusively, by men.⁸⁸

The language of law is therefore gendered, in terms of sex. MacKinnon supports this contention in calling attention to Kate Millet's central thesis in *Sexual Politics*.⁸⁹ Sex has political aspects which involve both power and domination.⁹⁰ Sexuality provides the relational paradigm between men and women in terms of which the gender inequality of social reality is articulated. "[Sex] is a pervasive dimension of social life, one that permeates the whole, a dimension along which gender occurs and through which gender is socially constituted . . ."⁹¹ Throughout feminist literature, sexu-

ity endorsed by rights talk as it is presupposed by rights talk. It is therefore not generally subject to legal challenge.

So long as power enforced by law reflects and corresponds—in form and substance—to power enforced by men over women in society, law is objective, appears principled, becomes just the way things are. So long as men dominate women effectively enough in society without the support of positive law, nothing constitutional can be done about it.

Id. at 239.

⁸⁴ As Kathryn Abrams remarks, the central claim of MacKinnon and the feminism that she represents is that "coercion is paradigmatic of heterosexual relations and constitutive of the social meaning of gender under gender inequality." Kathryn Abrams, *Ideology and Women's Choices*, in *GENDER AND LAW* 907, 908 (Katharine T. Bartlett ed., 1993).

⁸⁵ See Finley, *supra* note 8, at 905-06.

⁸⁶ MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE*, *supra* note 80, at 241.

⁸⁷ MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE*, *supra* note 80, at 130.

⁸⁸ MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE*, *supra* note 80, at 127.

⁸⁹ KATE MILLET, *SEXUAL POLITICS* (1970).

⁹⁰ *Id.* at xi.

⁹¹ MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE*, *supra* note 80, at 130.

ality is perceived as the exercise of male oppression over women: "the important difference between men and women is that women get fucked and men fuck: 'women,' definitionally, are 'those from whom sex is taken[]' . . ."⁹² Sexuality constructs women as objects for sexual use by men.⁹³ Sexuality is therefore constructed to serve male sexual interests.⁹⁴ Sex is penetration; sexual pleasure a function of erection and ejaculation.⁹⁵ Distinctly feminine sexual interests are subjected to distinctively masculine sexual interests. Men are the subject of sex; women its object.

The language of law therefore reflects the social reality of sex: male domination of women. "Male dominance is sexual."⁹⁶ The law is ostensibly authored by men to serve socially constructed male interests while the authority of law is exercised to disserve socially constructed female interests. "Male power is a myth that makes itself true."⁹⁷ Social reality is consequently constructed in terms of gender inequality. To the critical eye of feminism, men appear as the subject of this construction and women its object.⁹⁸ Those who have a penis wield the pen. Social reality is written accordingly.

⁹² West, *Jurisprudence and Gender*, *supra* note 65, at 13.

⁹³ "Being a thing for sexual use is fundamental to [women]." MacKinnon, *Toward a Feminist Theory of the State*, *supra* note 80, at 130. Although lesbian sexuality might seem to obviate this claim, it actually vindicates it—at least, from a general cultural perspective. "Lesbianism, when visible, has been either a perversion or not, to be tolerated or not." MacKinnon, *Feminism, Marxism, Method, and the State*, *supra* note 39, at 531. From a lesbian perspective, of course, sex between women is viewed quite differently as an expression of the wholeness of women as women, i.e., as not a function of men. Rather, sex is seen "as an act of self-assertion and solidarity between women, it responds to repression precisely by rejecting the degrading role imposed on women by men's definition of them as dependent, relative beings that exist not for themselves but for men." GINETTE CASTRO, *AMERICAN FEMINISM* 107 (1990).

⁹⁴ "[W]hat is sexual is what gives a man an erection. Whatever it takes to make a penis shudder and stiffen with the experience of its potency is what sexuality means culturally." MacKinnon, *Toward a Feminist Theory of the State*, *supra* note 80, at 137.

⁹⁵ MacKinnon, *Toward a Feminist Theory of the State*, *supra* note 80, at 137. MacKinnon notes that when someone announces (for whatever reason) they had sex three times, this means that the man had three orgasms. MacKinnon, *Toward a Feminist Theory of the State*, *supra* note 80, at 133. On the other hand, female sexual pleasure is generally understood as either "relatively unimportant . . . or mysterious. . . . Female sexual pleasure is constructed as unreliable or incomprehensible (or even voracious and insatiable) in a phallogocentric culture." Smart, *supra* note 41, at 202. "[W]omen are often understood to be guardians of what men most want, but of which they have little understanding." Smart, *supra* note 41, at 202. What men most want—sex—is "inconveniently located in women's bodies." Smart, *supra* note 41, at 202.

⁹⁶ MacKinnon, *Toward a Feminist Theory of the State*, *supra* note 80, at 127.

⁹⁷ MacKinnon, *Toward a Feminist Theory of the State*, *supra* note 80, at 104.

⁹⁸ "A theory of sexuality becomes feminist methodologically . . . to the extent it treats sexuality as a social construct of male power: defined by men, forced on women,

Hence the penile code: "Man fucks woman; subject verb object."⁹⁹

IV. BREAKING THE PENILE CODE

*Patriarchy is itself the prevailing religion of the entire planet, and its essential message is necrophilia.*¹⁰⁰

A governing presumption of the above feminist critique of the penile code is that the code is authored by men as the exercise of sexual authority over women. This presumption yields the picture of pre-textual man utilizing the text of law to oppress pre-textual woman. "Sexuality remains largely pre-cultural and universally invariant, social only in that it needs society to take socially specific forms."¹⁰¹ The sexuality of law—its constructed gender inequality—is thus construed as a function of pre-existent male interests exercising authority over pre-existent female interests. Legal language is thus presumed to articulate pre-linguistic sexual identity—an identity pre-structured in terms of the oppression of women by men.¹⁰²

Carol Smart has remarked:

It is, therefore, important for feminist theory to go beyond analyses of law which stop at the point of "recognition" that men (as a taken-for-granted biological category) make and implement laws whilst women (as a taken-for-granted biological category) are oppressed by them. We need instead to consider the ways in which law constructs and reconstructs masculinity and femininity, and maleness and femaleness, and contributes routinely to a common-sense perception of difference which sustains the social and sexual practices which feminism is attempting to challenge.¹⁰³

The suspicion voiced here is that the gender inequality constructed by legal language is not properly understood as a function of pre-linguistic sexual inequality. For feminist thought, this suspicion has devolved from the perception that the supposition of prelinguistic sexual identity in fact commits feminism to the same conceptual error of which it accuses the masculinism of legal language—namely, mistaking the perspectival for the universal, the partial for

and constitutive of the meaning of gender." MacKinnon, *Toward a Feminist Theory of the State*, *supra* note 80, at 123.

⁹⁹ MacKinnon, *Feminism, Marxism, Method, and the State*, *supra* note 39, at 541.

¹⁰⁰ DALY, *GYN/ECOLOGY: THE METAETHICS OF RADICAL FEMINISM* 39 (1978) [hereinafter DALY, *GYN/ECOLOGY*] (emphasis added).

¹⁰¹ MacKinnon, *Toward a Feminist Theory of the State*, *supra* note 80, at 132.

¹⁰² Smart, *supra* note 41, at 207.

¹⁰³ Smart, *supra* note 41, at 201.

the impartial, the subjective for the objective.¹⁰⁴ This is as much true, moreover, for the prelinguistic sexual identification of men as it is for that of women.

On the one hand, the supposition of a prelinguistic sexual identity for women presumes that all women—as women—exhibit a common, essential femininity.¹⁰⁵ But to many feminists, this essential femininity fails to account for the experience of a great many women.¹⁰⁶ Not only, however, does such an essentialized femininity illegitimately presuppose some sort of monolithic female experience; it further presupposes that this female experience is normative. As Martha Minow remarks, this latter presupposition uncritically endorses the traditionally male paradigm of knowledge whereby the perspective of the few is mistaken for the truth of the many:

Thus, feminists make the mistake we identify in others—the tendency to treat our own perspective as the single truth—because we share the cultural assumptions about what counts as knowledge, what prevails as a claim, and what kinds of intellectual order we need to make sense of the world.¹⁰⁷

In other words, such an essentialist perspective commits the same conceptual error of abstract universalism that feminism would accuse men of having committed.¹⁰⁸ “We risk becoming embroiled

¹⁰⁴ “[B]y urging the corrective of the women’s perspective, or even a feminist standpoint, feminists have jeopardized our own challenge to simplification, essentialism, and stereotyping.” Minow, *Justice Engendered*, *supra* note 6, at 62.

¹⁰⁵ ELIZABETH V. SPELMAN, *INESSENTIAL WOMAN* 3 (1988).

¹⁰⁶ Smart, *supra* note 41, at 200. Indeed, to many feminists, such an essential femininity looks suspiciously particular to the norm of womanhood advocated by the white, educated middle-class of the West. See Martha Minow, *Feminist Reason: Getting It and Losing It*, in *GENDER AND LAW* 872, 872 (Katharine T. Bartlett ed., 1993) [hereinafter Minow, *Feminist Reason*]; SPELMAN, *supra* note 105, at 3; Levit, *supra* note 75, at 1050; Annie Bunting, *Theorizing Women’s Cultural Diversity in Feminist International Human Rights Strategies*, 20 *J.L. & Soc’y* 6, 12 (1993).

¹⁰⁷ Minow, *Feminist Reason*, *supra* note 106, at 874.

¹⁰⁸ This has led some feminists to deny the possibility of a “feminist epistemology” altogether—inasmuch as such an epistemology would presuppose a universal and abstract access to the truth of matters, irrespective of the perspective of those seeking such access. Minow, *Justice Engendered*, *supra* note 6, at 64. As Audre Lorde remarks, “the master’s tools will never dismantle the master’s house. They may allow us temporarily to beat him at his own game, but they will never enable us to bring about genuine change.” Audre Lorde, *The Master’s Tools Will Never Dismantle The Master’s House*, in *THIS BRIDGE CALLED MY BACK* 98, 99 (Cherríe Moraga & Gloria Anzaldúa eds., 1983). As far as I can tell, much of this line of feminist thought has devolved from the deconstructionist philosophy of Jacques Derrida, as filtered through the historical writings of Michel Foucault. See Annie Bunting, *Feminism, Foucault, and Law as Power/Knowledge*, 30 *ALBERTA L. REV.* 829 (1992). “Deconstruction clearly rejects any essential category of woman.” Bunting, *supra* note 106, at 11.

in what we critique, entranced by what we would demystify."¹⁰⁹ In effect, by excluding those women who fail to exhibit the abstract universal character of what is essentially feminine, the supposition of a prelinguistic female sexual identity undermines the very devotion to care, connectedness, and community that it normatively advocates.¹¹⁰ For these reasons, feminism has become increasingly disenchanted with the notion of a prelinguistic sexual identity of women.¹¹¹

On the other hand, the supposition of a prelinguistic sexual identity for men presumes that all men—as men—exhibit a common, essential masculinity. Inasmuch as feminism has largely devoted itself to the distinctive interests of women, feminist inquiry into the distinctive interests of men has not been pursued to any great extent. "[A]part from the crucial role of culprit, men have been largely omitted from feminism."¹¹² Nevertheless, feminist thought has generally presumed a prelinguistic sexual identity of men distinctly antithetical to that of women.¹¹³ This antithesis, moreover, is generally assumed to exhibit the logic of domination. "Dominance eroticized defines the imperatives of its masculinity, submission eroticized defines its femininity."¹¹⁴ The same criticisms may be offered against the notion of prelinguistic male sexual identity as were offered above against the notion of a prelinguistic female sexual identity. Moreover, the supposition of a prelinguistic male sexual identity would seem particularly counterproductive to the feminist agenda, namely, to dismantle the structures of male oppression. If men are essentially oppressive, the only viable way to end male oppression would be to eliminate all men.¹¹⁵ The structures of an oppressive social reality can

¹⁰⁹ Minow, *Justice Engendered*, *supra* note 6, at 65.

¹¹⁰ "In theory, [feminism] demands that we make particularity, context, and diversity central, that we learn to be wary of generalization, that we pay attention to a multiplicity of voices and perspectives without assuming that they will fit into any preconceived category . . ." Nedelsky, *supra* note 69, at 881-82.

¹¹¹ Levit, *supra* note 75, at 1049.

¹¹² Levit, *supra* note 75, at 1038.

¹¹³ "The potential for material connection with the other defines women's subjective, phenomenological and existential state, just as surely as the inevitability of material separation from the other defines men's existential state." West, *Jurisprudence and Gender*, *supra* note 65, at 14.

¹¹⁴ MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE, *supra* note 80, at 130.

¹¹⁵ Or, to remove all men from all positions of power. Or, to have all women withdraw from any institutions of power dictated by men. At its logical extreme, this would entail not only that women remove themselves from all existing political-social-economic structures, but that women ultimately cease speaking the language that constructs them.

never be fixed if those who dictate them are essentially (hence, invariably and inevitably) oppressive.

In effect, moreover, prelinguistic sexual identity renders the essential identity of woman a function of the apposite sexual identity of men (and, of course, vice versa):

[D]iscourses which reproduce the taken-for-granted natural differences reinforce our 'experience' as men and women. They are also constantly drawn into a dualistic frame of reference whereby the concept of woman is meaningful only so long as there is a concept of man against which it can be formulated. Woman becomes what man is not.¹¹⁶

This is especially counterproductive to the feminist agenda of relieving women of their status of being the object of sexual oppression. If women are identified essentially in terms of sexual oppression, it becomes entirely unclear what an unoppressed woman would be. "The point is that self-evident difference is presupposed even though it may be the overcoming of this difference which is the goal."¹¹⁷ Prelinguistic sexual identity thus restricts the identity of women to their sexuality—a sexuality understood in terms of oppression. "Woman becomes the eternal victim because of her sex which is, in turn, a natural and self-evident attribute."¹¹⁸ Women are more—much more—than their sex. A feminism that would restrict feminine identity to sexuality is a feminism that does women a disservice.

The notion of prelinguistic sexual identity, then, whether for men or women, seems particularly unhelpful and philosophically problematic. The central question here is whether prelinguistic sexual identity exists prior to the linguistic construction of gender difference.¹¹⁹ A positive answer would identify distinctively masculine and feminine interests that dictate their linguistic construction as such.¹²⁰ Sexual identity is thus presumed to govern the linguistic construction of gender difference. Something prelinguistic, however, cannot be identified. Identification is a distinctively linguistic exercise. A prelinguistic sexual identity, in other words, is oxymoronic because it is understood in no other terms than in those dictated by linguistically constructed gender difference. Consequently, the linguistic construction of gender difference is not viably conceived as a function of prelinguistic sexual

¹¹⁶ Smart, *supra* note 41, at 204.

¹¹⁷ Smart, *supra* note 41, at 204.

¹¹⁸ Smart, *supra* note 41, at 208.

¹¹⁹ JUDITH BUTLER, *BODIES THAT MATTER* xi (1993).

¹²⁰ *Id.* at 5.

identity.¹²¹

The above perception has profound impact on the feminist critique of legal language. "Just as women have internalized stereotypes of inadequacy, men may have internalized the stereotypic images and behaviors of dominant norms."¹²² Distinctively masculine interests are as much a function of the linguistic construction of social reality as are distinctively feminine interests.¹²³ Legal language, in other words, is not properly conceived as a tool whereby the former dominates the latter. Language does not serve a prelinguistic scheme of sexual oppression. Rather, this language articulates a scheme of linguistically constructed gender difference.¹²⁴

Judith Butler therefore asks: "[i]f gender is a construction, must there be an 'I' or a 'we' who enacts or performs that construction?"¹²⁵ The perception here is that language is not dictated by a prelinguistic subjectivity. The subject is as much linguistically constructed as the object of language.¹²⁶ Man is not the prelinguistic subject of language, nor woman its object. In a sense, language speaks, and language speaks both man and woman.¹²⁷

But the critical question of this entire discussion still remains: why does language engender the sexual oppression of women by men? "Given the statistical realities, all women live all the time under the shadow of the threat of sexual abuse"¹²⁸—an abuse that language reinforces in myriad ways by subordinating distinctively feminine interests to distinctively masculine interests.

This reinforcement is due to the logic of the written word

¹²¹ *Id.*

¹²² Levit, *supra* note 75, at 1084 (footnote omitted). Levit argues "[t]o the extent that legal precedents shape gender difference, the message is inescapably clear: real men embody power; they are society's breadwinners, criminals, and warriors; and they feel no pain." Levit, *supra* note 75, at 1114.

¹²³ "Just as privilege is often invisible, so are the ways in which stereotypes trap members of dominant groups." Levit, *supra* note 75, at 1080-81.

¹²⁴ See generally, BUTLER, *supra* note 119.

¹²⁵ BUTLER, *supra* note 119, at 7.

¹²⁶ "Subjected to gender, but subjectivated by gender, the 'I' neither precedes nor follows the process of this gendering, but emerges only within and as the matrix of gender relations themselves." BUTLER, *supra* note 119, at 7. See Bunting, *supra* note 108, at 831, 835-37.

¹²⁷ An adequate understanding of this point would take us rather far afield into an inquiry of the writings of Martin Heidegger, for it is he who provided the philosophical foundation for this entire line of thought. "We leave the speaking to language." MARTIN HEIDEGGER, POETRY, LANGUAGE, THOUGHT 191 (Albert Hofstadter trans., 1971). Ludwig Wittgenstein may also be understood to have contributed to laying the same foundation. "Language must speak for itself." LUDWIG WITTGENSTEIN, PHILOSOPHICAL GRAMMAR pt. 1, ¶ 2, at 40 (Rush Rhees ed. & Anthony Kenny trans., 1974).

¹²⁸ MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE, *supra* note 80, at 149.

whereby language in general, and legal language in particular, quintessentially articulates itself. I suggest it is due, in other words, to the ocular epistemology of the pen. As discussed above, the epistemological structure of the written word dictates not only the character of the subject and object of knowledge respectively, but dictates accordingly the character of textual authority. This character is reflected through an explanatory fixation of objectivity as authored by an elided subjectivity—a subjectivity characterized as universal abstract autonomous individuality and an objectivity characterized as an externality over which the authority of the written word is therefore exercised. As shown throughout our (written) history, men have held the pen whereby women have been penned. Man pens woman. As author, man is engendered by the logic of the written word into the role of subject; woman is engendered into the role of object. Hence the linguistic construction of gender difference.

But what makes this linguistic construction of gender difference sexually oppressive? The written word *pens* reality: fixes it, marks it, lays it out, and articulates it. By virtue of this *penetration*, the text exercises its authority and thereby engenders an objectivity in apposition to a consequently suppressed subjectivity. The written word absents its author through the imposition of its authority. Yet it is precisely through the imposition of this authority of the written that the absent author ostensibly imposes his word upon reality. The absent author thereby presents himself: a presence effected through the authority of the written word. As Mary Daly so remarkably notes: “[i]t is important to remember that in patriarchy women are vehicles that incarnate the male presence.”¹²⁹ This is the governing structure of sexual oppression engendered by the linguistic construction of gender difference: “male omnipresence is in reality an omniasence that depends upon women for its incarnations”¹³⁰ As subject, man imposes himself upon woman as object. In effect, the logic of the written word generates a narrative mythology of the suppressed self seeking to realize itself through embracing the other than itself.¹³¹

¹²⁹ DALY, *PURE LUST*, *supra* note 38, at 143. She otherwise refers to this as manifestation of male absence. DALY, *PURE LUST*, *supra* note 38, at 146. (The term “manifested” was suggested to Mary Daly by Eleanor Mullaney in a 1980 conversation. DALY, *PURE LUST*, *supra* note 38, at 146 n.44).

¹³⁰ DALY, *PURE LUST*, *supra* note 38, at 146. Note the implicit theological overtones.

¹³¹ “Every story that begins with original innocence and privileges the return to wholeness imagines the drama of life to be individuation, separation, the birth of self, the tragedy of autonomy, the fall into writing, alienation; i.e., war, tempered by imaginary respite in the bosom of the Other.” Donna Haraway, *A Manifesto for Cyborgs*:

My contention, then, is that the logic of the written word—the ocular epistemology of the pen—linguistically constructs gender difference in terms of sexual oppression by virtue of the fact that distinctively masculine interests are engendered by the logic of subjectivity and distinctively feminine interests are engendered by the logic of objectivity.¹³² Textual authority is consequently exercised over women by those who ostensibly author the text, namely men. Hence, the epistemological structure of the penile code.

However, the penile code conduces to a grand illusion. Textual authority is exercised by the logic of the written word, not by those who author its text. Subjectivity is as much a construction of the logic of the written word as is objectivity. The subject does not dictate the logic of the written word. Rather, the logic of the written word dictates the character of the subject vis-à-vis the dictated character of the object. The author of a text does not author its authority. Although the author seems epistemologically derivative, an illusion is invariably created to the contrary. Those holding the pen always claim the authority of the words penned. Inasmuch as the pen has historically been held by those wielding a penis, men have arrogated this authority to themselves. "Having assumed authorship, [men] claim authority, using the divine . . . authority legitimating their atrocities."¹³³ This claim constitutes the crux of the feminist critique of language in general, and of legal language in particular; for it is by exposing the illusory character of this claim that the penile code may be broken.

V. CONCLUSION

*Is my own understanding only blindness to my own lack of understanding?*¹³⁴

The sum and substance of the above discussion is that because men have authored the law, they arrogate to themselves the authority of the law. This arrogation, moreover, is an illusion propagated by the logic of the written word. Men do not dictate this logic. Rather, it dictates us. It linguistically constructs the charac-

Science, Technology, and Socialist Feminism in the 1980's, in *COMING TO TERMS: FEMINISM, THEORY, POLITICS* 173, 200 (Elizabeth Weed ed. 1989).

¹³² Hence Daly's contention that the governing agenda of "phallocracy" is to expose women, to render the mystery that woman is (to man) safe and unthreatening. DALY, *PURE LUST*, *supra* note 38, at 62.

¹³³ DALY, *PURE LUST*, *supra* note 38, at 121.

¹³⁴ LUDWIG WITTGENSTEIN, *ON CERTAINTY* ¶ 418, at 54e (G.E.M. Anscombe & G.H. von Wright eds., Denis Paul & G.E.M. Anscombe trans., Harper & Row 1972) (emphasis added).

ter of subjectivity as well as the character of objectivity. Men have been scripted in terms of subjectivity, women in terms of objectivity. Given the epistemological dynamic of the relationship between these linguistic constructs, language structures a gender difference articulated in terms of sexual oppression. The authority of legal language is exercised accordingly—the penile code.

Perhaps the most disturbing consequence of this ocular epistemology of the pen is that it is essentially necrophilial. The logic of the written word is a logic of death. Entombed within the order of the written word, the linguistic construction of reality becomes permanently fixed, still, lifeless. Language is a corpus, executed in the spill of ink, monumentalized through its texts.

The sexual oppression engendered by the penile code is accordingly necrophilial: “death [becomes] the ultimate sexual act, the ultimate making of a person into a thing.”¹³⁵ In ultima, the logic of the written word dictates death. This is as much true, however, for the elided subject of the written word as it is for its *penetrated* object. Through the imposition of his illusory textual authority, the absented author becomes unequally incarnate in the lifelessness of his objectified victim.

So where is it written that man must exercise authority over women? Nowhere, really. It is rather the logic of the written word that ostensibly dictates such an exercise of authority. Nevertheless, this dual sentence of death imposed by the penile code upon both its subject and object is neither inevitable nor inviolate. Its dictation of authority devolves from a grand illusion—an illusion of authority exercised by men over women. Illusions can be broken—must be broken, if we are ever to live together equally as men and women.

The illusion of authority ostensibly dictated by the penile code may be broken, however, only if both its subject and object dis-illusion themselves of its authority: women, through dis-illusioning themselves of the exercise of authority over them; men, through dis-illusioning themselves of the exercise of authority by them. Because the one dis-illusion is a function of the other, the penile code may not adequately be broken independently by either women or men.

For their part, women have already made significant in-roads against the penile code. They have done so, ironically enough, by writing. As authors, women violate the logic of sexual oppression

¹³⁵ MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE, *supra* note 80, at 140.

historically endemic to the written word—not so much by virtue of writing about women, but by virtue of writing *as women*. Women voice themselves as women. To the extent that women voice themselves as women, they resist elision into the universally abstract autonomous individuality of the absented author to which the logic of the written word would otherwise subject them. If women are to dis-illusion themselves of the authority ostensibly exercised over them by the penile code, they must speak in a different voice—their own voice.¹³⁶ Women must hold the pen in their own hand, and write *as women*. Only then may women be heard to speak with the authority of women. Thus, by assuming the mantle of their own authority as women, women dismantle the authority ostensibly exercised over them by men.

For their part, men have made few inroads against the penile code. This is not surprising, given the fact that men occupy the more comfortable role in its exercise of authority over women. Men would seem to have little incentive to break the penile code. However, men are as much subjected to the oppressive logic of the written word as women are objectified by it. As dictated by the penile code, the exercise of male authority over the female elides the identity of men. The logic of the written word engenders in men the universally abstract autonomous individuality of the absent author. We are consequently alienated from ourselves as men. We speak not with the authority of men, but with the authority of authority—an authority exercised by the logic of the written word. We will break the penile code only by writing *as men*. To the extent that we write *as men*, we eschew the universally abstract autonomous individuality to which we have historically been subjected. In order to dis-illusion ourselves of the abstract authority ostensibly exercised by us, we must speak with our own authority *as men*. By thus assuming the mantle of our own authority as men, we dismantle the authority apparently exercised by us over women.

The penile code may be broken, then, by women writing *as women*, and men writing *as men*. This is historically difficult for women and conceptually difficult for men. Women must raise their voice against the illusion imposed upon them that they have no authority to speak. Men must lower their voice against the illusion that they speak with the universal and autonomous authority of the abstract author. Most importantly, both women and men must hear each other speak. Only then will women and men speak

¹³⁶ See CAROL GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT* (1993).

respectively as women and men, break the penile code, and help end the sexual oppression of women by men.