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MLA 8th ed.

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OSCOLA 4th ed.

Leslie M Rose, "Teaching Gender as a Core Value in the Legal-Writing Classroom" (2011) 36 Okla City U L Rev 531

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TEACHING GENDER AS A CORE VALUE IN THE LEGAL-WRITING CLASSROOM

Leslie M. Rose*

I introduce gender into the writing course I teach in two ways: by consciously avoiding gender stereotypes in the problems I create and by teaching my students to use gender-neutral language.

I teach appellate advocacy. It is the third semester of our required legal writing program, and all students must take it in their second year of law school. I create a problem each semester for the students consisting of a short record that includes pleadings, motions, testimony, and a truncated trial-court opinion. Usually, the problem deals with an issue of criminal procedure or free speech. Students are assigned to represent the appellant or the appellee, and they spend the semester analyzing the issues raised by the problem and writing an appellate brief on behalf of their client. The course ends with an oral argument.

In developing the problem each semester, I try to create a scenario in which the majority of characters are women. Students are exposed to innumerable situations in law school in which all the players in the legal arena are men—judges, lawyers, plaintiffs, and defendants. Particularly in the first year, when most doctrinal courses begin with older cases to provide a historical perspective, women rarely appear in positions of power, if they appear at all. In the world I get to create, the judge and both attorneys are usually women. In criminal cases, either the defendant or one of the police officers is a woman.¹ Although in class we talk about the law and the issues raised by the problem, the focus of the course is not the substantive law but the process and skills involved

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1. As Professor Melissa Murray notes in her materials on teaching gender as a core value, “men predominate in most criminal-law casebooks—either as defendants, lawyers, or officials acting on behalf of the state.” Melissa Murray, *Teaching Gender as a Core Value: The Softer Side of Criminal Law*, 36 OKLA. CITY U. L. REV. 525, 526 (2011).

in effective written and oral communication.

I do not call students' attention to the gender of the characters unless it relates specifically to an argument one of the parties might make in their briefs. My goal is for the predominance of women to appear *normal* rather than special. By creating what I hope is a realistic scenario for students to work with for a semester, I am trying to balance what they see in their casebooks and to allow them to get used to women in all roles in the courtroom, to expect to see them there, and perhaps to notice when they are not there.

In addition, I try to create a balance in the race, ethnicity, and sexual orientation of the characters. Here, too, there is a level of invisibility—sometimes the names are revealing, and in other cases, they may not be. I know that my regular defense attorney, Janet Johnson, is African-American; that the prosecutor, Linda Martinez, is Latina; and that the trial judge, Evelyn Chasan, is my Jewish mother (using her pre-marriage name). In a recent problem, the female defendant had a wife, as shown in this excerpt from the testimony:

Q: Ms. Nesser, were you stopped by the police on June 6 of this year?

A: Yes.

Q: What were you doing at the time?

A: My wife, Gloria, and I were on our way home from a party. We were just up the block from our flat.

This fact was not relevant to the legal arguments in the case, and there was no reason to mention it in the briefs except as a background fact to create context in telling the story of the defendant's arrest. It was there in a matter-of-fact way. The only mention I heard about the inclusion of this fact was from another section in which a student wondered whether the defendant should be referred to as *Mrs.*

The other way in which I try to introduce gender as a core value in my writing class is by teaching my students to use gender-neutral language. The use of gender-neutral language fits naturally with the learning objectives for the course because it touches on issues of professionalism, as well as clarity and precision in writing style. I include information on the topic and techniques to avoid gendered writing in my course materials, and I correct the improper use of gendered generics when I critique student papers. I explain to students that gender-neutral writing is particularly important for legal writers

because the inappropriate use of masculine pronouns and nouns can communicate subtle sexism, distract the reader, and create ambiguity.

The consistent use of male-gendered generics to represent all people can have a psychological impact on women by making them feel excluded and by reinforcing traditional gender stereotypes—even when that effect is not intended. Social science research demonstrates that language is a social force that can have an impact on how women view themselves and are viewed by others.²

Most modern legal writing texts and style manuals recommend that writers use gender-neutral language, which is achieved by avoiding the use of *gendered generics* (the use of male or female nouns and pronouns to refer to both men and women). For example, gender neutrality could be achieved by referring to *members of Congress*, rather than *Congressmen*; by referring to *police officers*, rather than *policemen*; and by referring to *workers*, rather than *workmen*. While avoidance of male-gendered pronouns is more challenging, a number of effective alternatives exist. These include using plural nouns and pronouns (*pluralizing*), repeating the noun, using an article instead of a pronoun, using the relative pronoun *who*, using paired pronouns (*he* or *she*), and recasting the sentence to avoid the need for a pronoun.³ The most noticeable technique is paired pronouns; most style manuals recommend using the more *invisible* techniques whenever possible.⁴

I used to be surprised by the number of students who used masculine-gendered nouns and pronouns when their intent was to refer to people generally. Those who have some awareness tend to repeatedly use paired pronouns or *their* as a singular pronoun (although some scholars believe this is a good solution, it is still considered

2. Pat K. Chew & Lauren K. Kelley-Chew, *Subtly Sexist Language*, 16 COLUM. J. GENDER & L. 643, 644, 650 (2007).

3. See, e.g., ANNE CURZAN, *GENDER SHIFTS IN THE HISTORY OF ENGLISH* 79 (2003); ANNE ENQUIST & LAUREL CURRIE OATES, *JUST WRITING: GRAMMAR, PUNCTUATION, AND STYLE FOR THE LEGAL WRITER* § 6.4.2, at 148–50 (2d ed. 2005); BRYAN A. GARNER, *THE REDBOOK: A MANUAL ON LEGAL STYLE* § 12.5(n), at 315–16 (2d ed. 2006) [hereinafter GARNER, *THE REDBOOK*]; HELENE S. SHAPO ET AL., *WRITING AND ANALYSIS IN THE LAW* 220–21 (rev. 4th ed. 2003); BRYAN A. GARNER, *A DICTIONARY OF MODERN LEGAL USAGE* 800–01 (2d ed. 1995); EDWARD W. JESSEN, *CALIFORNIA STYLE MANUAL: A HANDBOOK OF LEGAL STYLE FOR CALIFORNIA COURTS AND LAWYERS* § 5:1, at 174–75 (4th ed. 2000); *PUBLICATION MANUAL OF THE AMERICAN PSYCHOLOGICAL ASSOCIATION* 66–67, 70–73 (5th ed. 2001).

4. See Bryan A. Garner, *Grammar and Usage*, in *THE CHICAGO MANUAL OF STYLE* 145, 233 (15th ed. 2003); GARNER, *THE REDBOOK*, *supra* note 3, § 12.5(p)–(q), at 317.

ungrammatical, particularly in formal writing). In researching an article on the use of gender-neutral language by the Supreme Court, I realized that I should not have been surprised. The models of legal writing that students are exposed to early in their law-school careers are filled with examples of male-gendered generics.

Law students learn the law and the language of the law from casebooks—casebooks filled with Supreme Court opinions. So, for example, when students begin constitutional law, they will read Chief Justice John Marshall's influential 1803 opinion in *Marbury v. Madison* and learn that: "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury."⁵ Alas, more modern opinions do not always provide better models. When students take criminal procedure, they are likely to read Chief Justice Roberts's 2008 opinion in *Melendez-Diaz v. Massachusetts*, in which he frames a constitutional right in language that excludes women: "The defendant *always* has the burden of raising his Confrontation Clause objection; notice-and-demand statutes simply govern the *time* within which he must do so."⁶

By training students to avoid gendered generics in their own writing, and to notice it in the writing of others, my hope is that any opinions they write, as judges or clerks, will provide better models for future students.

While the methods of teaching gender as a core value in a legal-writing classroom may be more subtle than those used in a doctrinal classroom, I believe they can, in their own way, be just as powerful.

5. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803). A gender-neutral rewrite would not change the meaning of this quote: "The very essence of civil liberty certainly consists in the right of [all] individual[s] to claim the protection of the laws, whenever [they] receive[] an injury." *Id.*

6. *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2541 (2009) (holding that affidavits of forensics experts are *testimonial* and thus subject to the Confrontation Clause of the Sixth Amendment). The sentence could easily be made gender neutral by making the noun plural: "The defendant[s] *always* [have] the burden of raising . . . Confrontation Clause objection[s]; notice-and-demand statutes simply govern the *time* within which [they] must do so." *Id.*

RECOMMENDED READING

Shirley S. Abrahamson, *Toward a Courtroom of One's Own: An Appellate Court Judge Looks at Gender Bias*, 61 U. CIN. L. REV. 1209 (1993).

Lorraine Bannai & Anne Enquist, *(Un)Examined Assumptions and (Un)Intended Messages: Teaching Students to Recognize Bias in Legal Analysis and Language*, 27 SEATTLE U. L. REV. 1, 33 (2003).

Pat K. Chew & Lauren K. Kelley-Chew, *Subtly Sexist Language*, 16 COLUM. J. GENDER & L. 643 (2007).

Judith D. Fischer, *Framing Gender: Federal Appellate Judges' Choices About Gender-Neutral Language*, 43 U.S.F. L. REV. 473 (2009).

Judith Resnik, *Asking About Gender in Courts*, 21 SIGNS: J. WOMEN CULTURE & SOC'Y 952 (1996).

Leslie M. Rose, *The Supreme Court and Gender-Neutral Language: Setting the Standard or Lagging Behind*, 17 DUKE J. GENDER L. & POL'Y 81 (2010).

BRYAN A. GARNER, *THE REDBOOK: A MANUAL ON LEGAL STYLE* § 12.5(n)–(p), at 316–17 (2d ed. 2006).

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CASEY MILLER & KATE SWIFT, *THE HANDBOOK OF NONSEXIST WRITING* (2d ed. 1988).

