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Abstract

The rules of evidence govern the admissibility of evidence in trials and determine the scope of meaning to be accorded to that evidence. This paper examines two American evidence rules and suggests that both rules incorporate ‘masculine’ norms of language usage. The evidence rule defining adoptive admissions provides that, when a person is confronted with an accusation of wrong-doing and fails to assertively deny it, the allegation is deemed to be admitted through silence. This rule presumes that one’s natural reaction upon an accusation would invariably be an explicit denial, such that silence can be fairly taken as a confession. Thus, this rule privileges assertive and confrontational modes of speech—all coded as ‘masculine’—and ignores the ways in which power asymmetries impact responses to accusation. Likewise, the evidence rule construing apology as an admission of fault denigrates expressions of emotional solidarity—coded as ‘feminine’—in favor of a presumption that penalizes those who say ‘sorry’ by presuming it means ‘I’m sorry I did something wrong’ rather than ‘I’m sorry that something bad has happened to you.’ Evidence rules such as these both channel and constrain the legal interpretation of language in ways that sustain gendered hierarchies of legal power.

Introduction

Scholars of language and gender have often observed that language usage and interactional style serve as key social practices for the indexing of gender identity. (Holmes 2006: 6-9; Eckert & McConnell-Ginet 2003: 305; Bucholtz 1999: 7). That is, certain linguistic practices are coded as ‘masculine’ or ‘feminine,’ and their deployment is one of the ways in which gender is performed by individuals. (Cameron 2006: 63-64). In addition, gendered language conventions form part of the disciplinary matrix through which gender norms of behavior and identity are socially enforced (Talbot 2003: 470-473; Eckert & McConnell-Ginet 2003: 87) and gender hierarchies maintained (Ochs 1992: 336-337). This article examines the way in which gendered norms of language usage are embedded within common law legal systems, specifically examining the American rules governing the admission of evidence in trials, and will suggest that the preference for ‘masculine’ modes of expression both reflects and reinforces the normative gender hierarchy.

Legal rules of evidence and the ‘reasonable man’

In the common law legal system found throughout the English-speaking world, it is the rules of evidence that determine what kind of testimonial evidence can be permitted in a
trial. The gold standard for admissible evidence is that it be both reliable and probative; hence the law’s preference for the testimony of direct observers over second or third hand reports of others’ observations in the hearsay rule, its requirement in the relevance rule that admissible evidence have some tendency, even if slight, to prove a material fact at issue in the trial, its restriction of opinion testimony to experts whose training and knowledge base gives confidence in the correctness of their opinions, and so forth. As a gatekeeper to ensure reliability and probative power in admitted testimony, however, the rules of evidence are grounded in assumptions about human nature and behavior that are empirically untested and frankly are often of dubious validity.

For example, utterances by those who are on their deathbeds are admitted at trial notwithstanding the general prohibition against out-of-court hearsay statements, based on the theory that no one would willingly die with a lie on their lips. (Federal Rule of Evidence 804 (b) (2); Dix et al. 2006: 514-515). But, as an empirical matter, is it really true that a person who believes that he is dying would be unwilling to lie under those circumstances, even to get revenge on an enemy? Similarly, what a patient says to a doctor for purposes of getting medical care is considered reliable evidence because the rules of evidence presume that no one would intentionally lie to a doctor. (Federal Rule of Evidence 803 (4); Dix et al. 2006: 481-482). Yet, how can we assume that patient representations to their doctors are true when we know that people have many incentives to be less than candid with doctors about their behavior - what they eat, how much they smoke and drink, whether they engage in risky sexual practices, how often they exercise, and the like. For obvious reasons, the presumptions underlying these rules are untestable, and upon reflection, seem implausible as a description of actual human motivation and behavior. Despite the strained plausibility of the justifications for these rules, these situations nevertheless lead to admissible testimony on the basis of beliefs encoded in law about how the ‘reasonable man’ behaves - including his speech practices. In other words, the ‘reasonable man’ might well lie from time to time, but never when he is on the verge of his heavenly judgment day. Likewise, the ‘reasonable man’ is presumed to always tell the truth to his doctor, even when it casts his lifestyle in an unflattering light.

This article focuses on two evidence rules that are based on similar unexamined assumptions about behavior and language - one rule in which the law of evidence presumes that the ‘reasonable man’ must surely speak, thus construing silence as admissible evidence of wrong-doing, and another rule in which the law of evidence presumes that the ‘reasonable man’ will surely not speak, therefore construing particular language as admissible evidence of wrong-doing. In both cases, the evidence rules are premised on assumptions about how the ‘reasonable man’ will express himself - assumptions grounded in ‘masculine’ norms of language usage and interactional style. For example, the law’s imagined ‘reasonable man’ speaks directly, bluntly, and without qualification or mitigation. (Ainsworth 1993: 302-306, 315-317). He never shrinks from confrontation, regardless of the circumstances, and is ever alert for insulting or accusatory language from others which he will immediately and firmly rebut. He assumes that language is nothing more than a referential vehicle of communication, and so ignores its use as a mechanism for maintaining and repairing social relationships. (Ainsworth 2008: 14-15).
It is quite intentional that I use the term ‘reasonable man’ to describe the hypothetical person whose norms of behavior and language form the policy basis for the rules of evidence. The presumed nature of the ‘reasonable man’ is the touchstone in the common law for defining the kind of behavior that the law will protect or, if absent, penalize - whether substantively, as in tort and criminal law, or procedurally, as in the rules of evidence. The ‘reasonable man’ has a pedigree stretching far back into the English common law that spawned the modern American rules of evidence. (See e.g. Vaughn v. Menlove 1837). So ubiquitous is the ‘reasonable man’ as the measure of appropriate behavior in law that one writer claimed the ‘reasonable man’ “has had a greater impact on the Anglo-American system of jurisprudence than most of the renowned jurists of the last three centuries.” (Collins 1977: 312). As described by judges, he is the very model of male, middle class values and practices – ‘the man who takes the magazines at home and in the evening pushes the lawnmower in his shirt sleeves.’ (Hall v. Brooklands Auto Racing Club 1933: 224). In recent years, the all too apparent masculine identity of the ‘reasonable man’ has embarrassed many courts into substituting the term ‘reasonable person’ as a description of the required legal standard. His recent neutering into the ‘reasonable person,’ however, has appreciably altered neither his presumed behavioral preferences nor his preferred manner of expressing himself. (Bender 1988: 22; Cahn 1992: 1405). Instead, the use of this recent gender-neutral locution serves only to deflect questions about the universality of his behavioral norms and experiences. (Graddol & Swann 1989: 110). In fact, even the substitution of the term ‘reasonable woman’ in cases involving female actors has failed to dislodge the essential masculinity of the standard. (Forell 1994). As one legal scholar dryly concluded upon analyzing cases that had adopted the term ‘reasonable woman’ to be used in appropriate cases, ‘The reasonable woman is very much a man.’ (Estrich 1991: 846).

Adoptive admissions—when silence can be taken as a confession

The influence of the assumed characteristics of the ‘reasonable man’ in law can be seen in the workings of the rules of evidence. Specifically, under certain conditions, the rules of evidence will construe a person’s silence as though it were a confession to wrongdoing. Under Federal Rule of Evidence 801 (d) (2) (B), whenever someone is confronted with an accusatory statement under circumstances in which a ‘reasonable man’ would challenge the statement, and instead the hearer remains silent, that silence is admitted as a tacit adoptive admission of the truth of the accusation. As a predicate to admissibility, the person must have heard and understood the accusatory language, must have had an opportunity to respond, and the context must be one in which it would be expected that there be a response to the accusation. (Wigmore 1904: 102). Assuming that these threshold requirements are met, silence in the face of an accusation is treated identically to a confession to the charge. The assumption behind the rule is that, when confronted with an accusation of wrongdoing, the ‘reasonable man’ has one and only one response - an explicit, unequivocal denial.

Although a few courts have urged caution in assuming that silence should be necessarily be treated as though it were a confession (People v. Bigge 1939; State v. Clark 2008), the overwhelming judicial trend accepts these so-called adoptive admissions unreflectively. In fact, courts often apply the doctrine even when the predicate facts for
admissibility are doubtful. In some cases, it is unclear that the defendant actually heard the statement in question because he may not have been in the room when it was uttered (Alvarado v. State 1995) or he was in the back seat of a car when the statement in question was made between people in the front seat (U.S. v. Carter 1985). In other cases, the testifying witness was unable to remember whether or not the defendant remained silent upon hearing the supposedly accusatory statement, but the adoptive admission was used against the defendant anyway. (Comm. v. Braley 2007).

The problems with this doctrine are compounded by the fact that it is often applied in contexts in which the supposed link between the fact of silence and a presumed admission of guilt is extraordinarily thin. For example, in many cases, the purported accusation is not directly made to the accused, but merely made within his earshot in a conversation to which he is not a party. Apparently, the ‘reasonable man’ is expected to attend to any conversations that happen to be within his hearing and police them for direct or indirect accusations of wrongdoing. The ‘reasonable man’ must be alert for ambiguous language that could possibly be interpreted as an accusation against him, particularly if anyone uses pronouns of ambiguous referential scope such as ‘we’ (People v. Sneed 1995) or ‘they’ (People v. Riel 2000) in describing actions. Innocent sounding remarks that might conceivably have an incriminating implication must also be objected to or risk an admission to the incriminating interpretation. For example, in a conversation between two officers of a corporation, the words of one that ‘I’ll see if we can get anything for this work,’ were construed as possibly a suggestion that an illegal bid rigging be arranged, and the defendant’s failure to anticipate and object to that interpretation was considered an admission that he was aware of the illegal nature of the bid. (U.S. v. Basic Construction Co. 1983).

Failing to object to innocuous, non-accusatory statements can also result in adoptive admissions when later on those seemingly innocent statements turn out to be incriminatory. For example, being referred to as ‘John’ by a stranger without objection was held to be an admission that the defendant went by that name (State v. Wallingford 2001), and being present when a third party claimed that the defendant habitually carried a gun was held to be an admission that she was in possession of a gun at the time of the crime, despite that fact that the ‘admission’ in question occurred long before the crime ever took place. (State v. Browning 1997). Apparently the ‘reasonable man’ must be alert to the possibility that inaccurate statements made in his presence that may appear inconsequential could turn out to inculpate him for crimes that might occur at some time in the future.

The ‘reasonable man’ doesn’t ignore name-calling, so that when the defendant was called a ‘butcher,’ his failure to argue with the name caller was held to be an admission. (State v. Gorrell 1996). Similarly, when a corporate executive at a press conference was asked by a reporter if the corporation had been ‘cooking the books’ and responded by saying, “Next question, please,” the court found that his failure to deny the allegation constituted an admission on his part because the ‘reasonable man’ would have directly addressed the reporter’s claim without attempting to avoid it. (U.S. v. Henke 2000). It isn’t enough merely to react angrily to an accusation, as when a defendant told an accuser to ‘shut the f--- up.’ (State v. Gilmore 1999).
Even an explicit denial of an accusation may be insufficient if the defendant fails to repeat it often enough. For instance, in one case the defendant was asked if he had committed the crime, and he explicitly denied it. The questioner responded to the denial by telling him that a third party thinks that he did it, and the defendant reacted by turning his head and staring out the window. The court characterized his response not as shock or dismay that someone could think that he had committed the crime, but rather as an adoptive admission because he failed to reiterate the denial that he had made just seconds before. (*State v. Gomez* 2004).

Recorded telephone conversations are particularly problematic because the conversant’s inability to see the other person’s facial expressions or body language can create a false impression of acquiescence to an accusation. In one such case, a defendant’s silence during a recorded jailhouse telephone conversation to a friend’s reading of a newspaper account of the details of the crime was admitted as an adoptive admission on the theory that the ‘reasonable man’ would have objected during the recitation of the newspaper’s version of the crime. (*U.S. v. Higgs* 2003). In another case involving a recorded jailhouse conversation, the defendant was told by the other party to the conversation that the police had asked that party ‘twelve times’ whether he had seen the defendant shoot the victims, to which the defendant replied, ‘Oh man, twelve times.’ From this response, the court found that, by not denying that he was the shooter, the defendant had adopted the substance of the police belief that he was the shooter, despite the fact that the party making the statement to the defendant gave no indication that he shared that police belief. The ‘reasonable man’ apparently would not express shock in the persistence of a false police theory of the case or empathy for the grilling that his friend had undergone, but would instead respond by explicitly telling the other party that the police were wrong in their suspicions. (*People v. Davis* 2005).

Being present while someone plans a crime or brags about past crimes can result in adoptive admissions that one is or was involved in those crimes in the absence of overt disassociation. For example, in one case, the defendant nodded his head while someone at a party boasted about the crimes he, the braggart, had committed. Although the braggart did not link the defendant to those crimes in the telling, by nodding his head, the defendant was held to have signified that he too had participated in them. (*U.S. v. Price* 2008). In another case, a racketeering kingpin was present in the defendant’s home where he ordered a third party to commit arson. Remaining silent here was considered an admission of the defendant’s culpability in the arson plot, said the court, since ‘an innocent man would not let others sit in his house and plan arson.’ (*U.S. v. Manzella* 1986: 545). Apparently the ‘reasonable man’ doesn’t fear the physical consequences of confronting those with the power to do him serious harm. In another case, a defendant who said he could not object to inaccurate inculpatory statements made by a Mexican Mafia boss because of his fear of the boss nevertheless was saddled with those statements as adoptive admissions. (*Paredes v. State* 2004). Power imbalances may inhibit the possibility of a denial of accusatory statements in other contexts as well. In one case, the statements made by a judge in the course of a plea agreement describing a crime were later held to constitute adoptive admissions by the pleading defendant because he had not objected to the judge’s characterization of the crime at the hearing. Apparently the
‘reasonable man’ doesn’t mind jeopardizing a plea agreement and risking a higher sentence by interrupting the judge and objecting to the way in which the judge described the crime. (U.S. v. Miller 2007).

As cases like this show, the law insists that the ‘reasonable man’ not only confronts accusations made directly to him but also must be alert for any statements that he might overhear made to anyone else that might impugn him, directly or inferentially, with regard to bad acts that have occurred or that might occur in the future. Failing to defend his reputation with an explicit denial in any of those situations will be treated as the legal equivalent of a confession. Because it is treated as a confession, it will be sufficient to sustain a conviction even where there is little or no other evidence of guilt of the crime in question. (See e.g. Commonwealth v. Braley 2007; State v. Tolliver 2001).

Would the ‘reasonable man’ exercise the right to remain silent?

The principle behind the adoptive admission rule of evidence can become a particularly cruel trap for anyone who is being investigated by the police on a criminal matter. Under the long-standing Miranda rule, upon arrest, an arrestee will be reminded of the fact that, under the U.S. Constitution, he has the right to remain silent but that anything you say can be used against you later in court. The Supreme Court recognized that, having told a suspect that he has the right to remain silent and warned him that anything he does say can be used in evidence against him, it would be unfair to then use his silence as substantive evidence of guilt through the adoptive admissions rule. (Wainwright v. Greenfield 1986). Since the adoptive admissions rule by its own terms requires that the context of the interchange be one in which it would be natural for the accused to affirmatively deny the accusation, it might appear that the adoptive admissions rule could have no application at all in a Miranda-governed interrogation system, with its guarantees of the right to remain silent. Yet, surprisingly, in a number of American jurisdictions, this is not the case, and a failure to respond to police accusations runs the risk of inadvertently adopting them by silence.

The Miranda warnings, as the Supreme Court recently acknowledged, are part of the cultural fabric of the country and familiar to almost all Americans. (Dickerson v. U.S. 2000: 443). Consider, then, the situation in which someone is confronted by the police but not read the Miranda rights because the police have not yet made the decision to formally arrest the suspect. Under those circumstances, it would be unsurprising to discover that the suspect would be aware that he has the right not to respond to police questioning, either from earlier police encounters in which he had been Mirandized, or from general cultural knowledge of Miranda. If the suspect fails to respond to police accusations, his silence could well be motivated by the realization that anything he says could be used against him, so that the wisest course is to say nothing at all.

Nevertheless, the Supreme Court has permitted the prosecution to use evidence of pre-arrest, unwarned silence on the part of a suspect to be used to impeach his credibility if he later takes the stand at trial. (Jenkins v. Anderson 1980). Even post-arrest silence can be used for impeachment as long as the record does not show that Miranda warnings were actually given. Despite the fact that most people are already aware that they have the right
to remain silent in the face of police accusations, they are not justified in relying on the right to remain silent, says the Court, unless they can prove that the *Miranda* warnings had actually been read by the time of the police confrontation. (*Fletcher v. Weir* 1982).

One question that the Supreme Court has left open is whether a person’s silence in the face of police questioning can be used not merely to impeach but as an adoptive admission, which would constitute substantive evidence of guilt. In other words, since an adoptive admission is treated as though it were an affirmative confession, can silence in the face of police accusations be treated as though it were a confession to the truth of those allegations? The federal circuits have split on whether silence in the face of police accusations can be used as substantive evidence of guilt. The Fourth, Fifth, Eighth and Eleventh Circuits have held that silence in the face of police accusations by arrestees who have not yet been read *Miranda* warnings can be used by prosecutors as substantive evidence of guilt; the Seventh, Ninth, and DC Circuits have held that it is constitutionally impermissible to use that silence as affirmative proof of guilt. A similar split in the circuits courts exists with respect to pre-arrest police accusations, with the First, Sixth, Seventh, and Tenth Circuits holding that silence in the face of police accusations cannot be used as substantive evidence of guilt, whereas the Fifth, Ninth, and Eleventh Circuits have concluded that before arrest, a person declines to answer police questions at peril of adopting any allegations by silence. (Skrapka 2006: 374-387; Ryan 2007: 908-913). Thus, despite the knowledge of virtually all Americans that they have the right to remain silent when confronted by the police, exercising that right in some jurisdictions can lead to the highly unexpected and fundamentally unfair possibility that such silence will be construed as a confession.

As this analysis shows, the law of evidence can turn a person’s silence into speech - that is, by presuming that the ‘reasonable man’ would speak to rebut a direct or even inferential accusation of wrongdoing if it were untrue, such that it is fair to construe a failure to respond as though it were actually a confession to the accusation. In short, because the law’s ‘reasonable man’ would speak to confront an accusation, we all now have a duty to speak, under pain of having our silence construed as an admission of guilt or liability.

**Would the ‘reasonable man’ say he was sorry?**

In other situations, however, the ‘reasonable man’ is constructed as someone who would not speak, and the person who instead chooses to speak is disadvantaged under the evidence rules. One such case is when someone uses language that sounds as though it were an apology. The evidence rules construes language such as ‘I’m sorry’ to be an admission that the speaker is at fault for the negative circumstance being commented upon. As such, ‘I’m sorry’ becomes admissible as a declaration against interest under Federal Rule of Evidence 804 (b) (3), and serves as a confession of fault. In short, the ‘reasonable man’ never says ‘I’m sorry’ unless he intends to confess that he is at fault, recognizing that this may lead to legal consequences.

The law’s construal of apologetic language as though it were an admission of wrongdoing betrays an impoverished conception of the pragmatics of such language. “I’m
“Sorry” is language that can have a myriad of meanings, depending on context. (Lakoff 2003; Blum-Kulka, House & Kaspar, 1989; Fraser 1981). It can, of course, be a confession of wrongdoing, coupled perhaps with an expression of remorse on the part of the speaker. This is the construction that the law’s ‘reasonable man’ gives to apologetic language. But it is by no means the only meaning that can be attached to such an utterance. Saying ‘I’m sorry’ can also be an expression of empathy completely divorced from any connotation of fault for the unpleasant situation that provoked the expression - as when a friend says ‘I’m so sorry’ upon hearing of another’s bereavement. By acknowledging the discomfort of the addressee’s circumstances, ‘I’m sorry’ is a way to build relational ties through an overt expression of sympathetic understanding. ‘I’m sorry’ can also be a pure expression of non-empathetic regret without any implication of wrongdoing on the part of the speaker, as in ‘I’m sorry I ever met you.’ A person might say ‘I’m sorry’ to try to defuse a hostile, even potentially violent, situation. In fact, in a dangerously violent confrontation, a weaker party might have little other recourse than to desperately try to placate the other with apologetic expressions, irrespective of any actual fault on the part of the apologizer. Even in situations without that kind of extreme power disparity, saying ‘I’m sorry’ can be an effective way to put an end to an argument or a dispute when more substantive response would only serve to prolong the disagreeable interchange. In that way, ‘I’m sorry’ can become a linguistic resource to smooth over disputes or problems.

Yet the law of evidence always permits the construal of language such as ‘I’m sorry’ to be an admission that the speaker is at fault for the negative circumstance being commented upon. As such, ‘I’m sorry’ becomes admissible as a declaration against interest under Federal Rule of Evidence 804 (b) (3). That is so because the ‘reasonable man’ never says ‘I’m sorry’ unless he intends to confess that he is at fault, recognizing that this may lead to legal consequences.

Apologies are seen in the law as the language of weakness. (Cohen 1999: 1024; Weissenberger 2003:195-196; Lazare 2004: 78; Kador 2009: 14-15). They put the speaker in a doubly vulnerable position with respect to the addressee, both because they appear to acknowledge fault for an action and in addition because the addressee might choose not to accept the proffered expression of regret (Exline et al. 2007). Those who are powerful can afford to fail to apologize even when in the wrong, whereas those who lack power may apologize despite not being in the wrong. Apologies are a linguistic performance of submission, and their absence where warranted acts as a linguistic exercise of dominance. Not surprisingly, speech acts that are associated with dominance, like other social acts of dominance, come to seem naturally ‘masculine’ in nature, and those associated with submission come to be interpreted as essentially ‘feminine.’ (Holmes 1995: 174-176). At its base, then, apologetic language is coded as ‘feminine’ - weak, emotional, diffident; whereas resisting the use of apology is seen as ‘masculine’ - strong, self-controlled, and self-confident. To avoid being put into a “one-down” position in an interaction, ‘real men’ are socialized to avoid apology (Pavlick 2002: 852).

Folk wisdom has it that women apologize so commonly as to become nearly a verbal tic, whereas men apologize only under the kind of extreme duress that would provoke them to ask for directions when driving. (Lazare 2004: 16; Tannen 1994: 45-46,
Does this folk belief reflect actual speech practices? Scholars who have examined the question of whether patterns in the use of apologies are gender-linked have found significant empirically measured differences between males and females in the forms, frequency, and pragmatic functions of their apologetic language. (Holmes 1989; Holmes 1995: 156-164, 185-186; Meyerhoff 2000). Assuming that the gender differences in usage observed by Holmes and others more generally hold true in most contexts, then the law of evidence penalizing expressions of apologetic language might in fact be causing disproportionate harm to women.

**Linguistic ideology of gender in law**

Even in the absence of fuller empirical data demonstrating that women use apologies in different ways than the ‘reasonable man,’ however, it is clear that the linguistic norms in law act as they so often do to privilege supposedly ‘masculine’ linguistic behavior and to penalize supposedly ‘feminine’ linguistic behavior. To fully appreciate the consequences of legal rules that operate in this fashion, one must see them as embedded in a much larger ideological framework – that of language ideology and its role in constructing and policing the concept of social identity. In describing the ways in which language ideologies maintain hierarchies of identity, Michael Silverstein defines language ideologies as ‘invokable schemata in which to explain/interpret the meaningful flow of indexicals. . . .[T]hey constitute rationalizing, systematizing, and indeed more importantly, naturalizing schemata’ for the creation and maintenance of systems of identity, including gender identity (Silverstein 1998: 129). Language ideologies serve to organize socially, culturally, and historically mediated concepts and beliefs about differences in language use and invest those differences with meaning. (Blommaert 2005: 253; Kroskrity 2004). It is in part, then, through ideologies of language usage that gender as a social category is both constructed and deployed. (Silverstein 1985).

Ideologically mediated ideas about ‘masculine’ and ‘feminine’ linguistic usage not only come to define ‘appropriate’ gendered behavior through repeated association between linguistic practice and gender (Bucholtz 2001: 75) but also reinforce the assumedly natural link between linguistic usages and the identity of those who use language in that way through the process of iconization (Gal & Irvine 1995). That is, linguistic ideology both preserves that gender is an entirely natural and necessary category with concomitant linguistic attributes (Eckert & McConnell-Ginet 2003: 35) and also that it must be normatively policed by what Mary Bucholtz (2001: 75) calls an ideologically rigid if functionally often flexible set of ideas about gender and language. While linguistic ideologies of gender are particularized historically and culturally and also vary based on other axes of identity such as race and social class, the presumed connections between gender and language use nevertheless help to reinforce the concept of gender as a social ‘fact’ - its naturalness, its inevitability, and its necessity – and of gender hierarchies as well. (Cameron 2003: 452). By privileging ‘masculine’ language usage over ‘feminine’ usages, ideologies of language and gender in law are part of a larger ideological apparatus reinforcing those gender hierarchies.

The tracks of this linguistic ideology of gender can be seen in law as the linguistic behavior of the ‘reasonable man’ is enshrined within the laws of evidence in its
presumption that apologetic language be construed as admission of fault. The ‘reasonable
man’ - being self-regarding, autonomous, and individualistic - has no need to use such
language to maintain or repair his relationships or to placate those with power or to
express emotional solidarity. Its only use for him is - when absolutely necessary - to admit
wrong-doing. It is this impoverished interpretation of apologetic language that causes
insurance companies to remind those it insures never to say ‘I’m sorry’ when they are in
an accident. (Robbenolt 2005: 1012). In fact, some insurance contracts actually void
coverage to policy holders who use apologetic language after an accident. (Bartels 2000:
153).

Apologies in medical malpractice cases

Doctors have long appreciated that, in cases of bad patient outcomes, apologetic
expressions on their part to patients or their families - whether intended as merely
sympathetic or actually acknowledging some degree of responsibility for the harm - could
be used as evidence against them in malpractice litigation. As a result, they are warned to
avoid any kind of empathetic response to the afflicted patients and family members and to
refuse to admit the possibility of mistake or misjudgment on their part. (Taft 2005a: 58).
Partly as a result of perceived physician stonewalling, aggrieved victims of medical
mistakes often file lawsuits out of frustration in an attempt to find answers as much as to
get monetary compensation for the harms themselves. (Taft 2005a: 77-78; Robbenolt
2005: 1015-1017). Ironically, doctor silence - a tactic designed to reduce the possibility of
liability - actually promotes lawsuits. Because of this, there is currently a growing move to
create an exception to the rule that apologies are admissible as admissions of fault in the
context of medical malpractice cases. More than half of American jurisdictions in recent
years have enacted special exceptions to the rule construing apologetic language as
admissions of fault in the case of doctors faced with bad patient outcomes. (Todres 2006:
686). In such states, doctors can freely use apologetic language without fear that it will
come back to haunt them in a future trial. In the words of one doctor who lectures
nationally on the desirability of protected medical apologies, ‘Nothing is more effective in
reducing liability.’ (Taft 2005a: 63).

One might wonder if this trend towards insulated apology means that the law’s
‘reasonable man’, with his abhorrence of apology, is losing his grip over the rules of
evidence. Not at all, as it turns out. The ‘reasonable man’ knows how to protect his own
interests. The legislative move to insulate doctors’ apologies from use at trial has been
promoted as part of a package of laws designed to make it harder for patients to sue -
shortening time limits for filing suits and limiting compensation for lawyers who represent
injured patients - and to limit compensable damages regardless of the severity of the
injury. (Todres 2006: 693-696). Thus, the doctors’ apologies being protected under these
new laws are not being excluded from use at trial because of a desire to promote empathy,
or maintain human relationships, or mitigate power imbalances. Rather, these laws are
being promoted as an instrumental means to reduce medical malpractice liability and to
free doctors from the consequences of admitting mistakes. Tellingly, in some states, not
only are doctors’ apologies excluded from evidence, but even specific admissions of
malpractice by medical personnel are also barred from use at trial. (Taft 2005b: 602).
Language of this sort, articulating the factual responsibility for harm caused,
acknowledging fault, and expressing regret for the harm, is much closer to the kind of canonical apology that unambiguously confesses responsibility for the unjust suffering of another (Smith 2008: 140-142), and is the kind of expression that legitimately ought to have legal effect.

Conclusion

As these two examples from the American law of evidence suggest, language ideology that indexes some language usage as ‘masculine’ and other usage as ‘feminine,’ coupled with legal doctrines and practices that privilege masculine usage, can disproportionately be detrimental to women. Social pressure to conform to ‘appropriate’ gender norms in linguistic usage (Talbot 2003: 470-473) means that ‘masculine’ language will be used more often by men and ‘feminine’ language more often by women. Thus, legal rules privileging masculine language and penalizing feminine language will have a tendency to disadvantage women as a group, and the extent of disadvantage for those using ‘feminine’ discursive conventions is by no means trivial. Such rules can make the difference between being found civilly liable or not, or being convicted of a crime or not.

Moreover, as part of larger ideological structures, law both reflects existing power relations and serves to maintain and reinforce those hierarchies. Gendered legal doctrines and practices both create and sustain gender inequality in the law. Much work in feminist legal theory has critiqued substantive areas of law, pointing to doctrines that perpetuate gendered subordination through overtly discriminatory practices. This case study of two evidence rules suggests that subordinating practices in law may also be found in non-substantive, supposedly gender neutral legal rules such as the rules of evidence. As Eve Sedgwick reminded us, gender-based oppression often occurs in contexts that are not ‘explicitly gendered at all.’ (Sedgwick 1990:34)

In this examination of the facially neutral rules of evidence, the impact of linguistic ideology of gender can be seen in its assumptions about how reasonable speakers do and ought to speak. The law’s assumptions about how the ‘reasonable man’ expresses himself are themselves based in linguistic ideology and thus incorporate ideologically grounded ideas about language use and gender. Recent work by language and gender scholars has focused on the significant role of language ideology in the production and maintenance of gender as a social category. As this study illustrates, law and the legal system constitutes a discursive and normative resource for the enactment and articulation of linguistic ideology that helps to both create and maintain gender hierarchy. Thus, future language and gender research should consider legal doctrines and practice as a significant situs of investigation for the linguistic production and policing of the social category of gender.

References:


Cases and Court Rules Cited:


Federal Rule of Evidence 803 (4).

Federal Rule of Evidence 804 (b) (2).


*State v. Henke*, 222 f.3D 633 (9th cir. 2000).


U.S. v. Miller, 478 F.3d 48 (1st cir. 2007).

