Feminist Legal Writing

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I. INTRODUCTION

Audre Lorde once wrote that the "*master's tools will never dismantle the master's house.*"[1] In other words, there is only so much change that those opposing the current social structures can achieve by working within the rules and confines of those same social structures. This is

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1. Audre Lorde, *The Master's Tools Will Never Dismantle the Master's House, in* THIS BRIDGE CALLED MY BACK: WRITINGS BY RADICAL WOMEN OF COLOR 98, 99 (Cherríe Moraga & Gloria Anzaldúa eds., 2d ed. 1983).

undoubtedly true. It presents a dilemma, however, for feminist legal advocates, whether scholars or lawyers, whose primary tool for resisting entrenched, sexist laws is writing—writing as and to lawyers, no less. As sociolinguists have long pointed out, language is one of the "master's tools"—language both reflects and consolidates existing social structures, including inequitable relations and power differentials.[2] Legal language is no different—indeed, it is, in many ways, the quintessential master's tool in that it is a language traditionally accessible only to the wealthy and powerful[3] and notorious for its conservatism and imperviousness to ideas that challenge its basic assumptions.[4]

Because feminist legal advocates must use legal writing to persuade their audience and push for change in the law, they must confront the dilemma of whether to follow legal writing conventions and risk altering or losing their feminist message or whether to break from convention and risk losing the legal audience. Feminist legal scholarship, in many different ways, has made great progress in dealing with this dilemma. The focus of this Article, however, is on several pieces of feminist legal scholarship that have confronted the dilemma by pushing the bounds of conventional legal language and legal writing. These pieces, by breaking what have become some of the most central rules of conventional legal advocacy, have created a legal writing genre that is simultaneously subversive and persuasive.

To lay the groundwork for the exploration of feminist legal writing, this Article first summarizes the traditions and conventions of persuasion and persuasive writing—how they are characterized in law and how they are taught in law school. It then summarizes a type of language in linguistic theory called "antilanguage," which is language created by groups in society that are outcasts or otherwise excluded from the dominant social class to rebel against the dominant class.[5] Analyzing several pieces of feminist legal scholarship that use unconventional writing techniques, this Article identifies a type of feminist legal antilanguage. This feminist legal antilanguage uses antilanguage techniques to persuade and to convey the author's substantive (feminist) message. This Article concludes that the writing of feminist legal

2. *See* ROGER FOWLER ET AL., LANGUAGE AND CONTROL 2, 190, 195 (1979).

3. It is a so-called "high language" or "language of power." 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, 893 (1989); Kathryn M. Stanchi, *Resistance Is Futile: How Legal Writing Pedagogy Contributes to the Law's Marginalization of Outsider Voices*, 103 DICK. L. REV. 7, 9 (1998) [hereinafter Stanchi, *Resistance*].

4. Finley, *supra* note 3, at 890; *see also* Stanchi, *Resistance*, *supra* note 3, at 26–29.

5. M. A. K. Halliday, *Antilanguages*, 78 AM. ANTHROPOLOGIST 570, 570 (1976).

antilanguage calls out for careful study, not only because it is unconventional and beautiful, but because its rhetorical power[6] suggests that advocates should consider and question the conventional wisdom that defines legal writing, persuasion, and persuasive writing.

II. THE CHARACTERISTICS OF CONVENTIONAL PERSUASIVE LEGAL WRITING

Most traditional legal scholarship—especially the legal scholarship advocating change in the law—is a form of persuasive legal writing. It sets forth a thesis or point of view and seeks to convince the reader using forceful writing and reasoning.[7] To persuade, legal scholarship, like brief writing and other types of persuasive legal writing, must be accessible to and attractive to its audience, which consists primarily of lawyers. To do this, it must, by and large, operate within the rules for persuasion prescribed by the community of legal discourse. Persuasive writing in law also requires not only a high degree of conventionality, but a delicate attention to the psychology and personality of the legal audience. Persuasion requires that the writer connect with the reader on a fundamental analytical, linguistic, and personal level.[8]

As languages go, persuasive legal writing is highly constrained—it

6. The words "rhetoric" or "rhetorical" have many diverse meanings, some of which are positive and some negative. *Compare* Paul R. Tremblay, *The New Casuistry*, 12 GEO. J. LEGAL ETHICS 489, 522 (1999) (stating that rhetoric has developed negative connotations) *with* Thomas Michael McDonnell, *Playing Beyond the Rules: A Realist and Rhetoric-Based Approach to Researching the Law and Solving Legal Problems*, 67 UMKC L. REV. 285, 293–94 (1998) (using rhetoric as a positive term). In this Article, rhetoric is meant to be a positive term meaning persuasive, the essence of excellent lawyering and advocacy. When modified by the word "classical," rhetoric means the formal "art or the discipline that deals with the use of discourse . . . to inform or persuade or motivate an audience." EDWARD P. J. CORBETT, CLASSICAL RHETORIC FOR THE MODERN STUDENT 3 (3d ed. 1990).

7. *See* Gerald B. Wetlaufer, *Rhetoric and Its Denial in Legal Discourse*, 76 Va. L. Rev. 1545, 1571 (1990). Wetlaufer compares the rhetoric of legal scholarship to legal advocacy and finds they are similar in their use of "deductive, syllogistic logic" to "control [the] reader at every point and essentially to compel her assent." *Id.* at 1571. *See generally* BRYAN A. GARNER, THE WINNING BRIEF: 100 TIPS FOR PERSUASIVE BRIEFING IN TRIAL AND APPELLATE COURTS (1999) (setting forth a methodology for drafting a persuasive legal brief); STEVEN D. STARK, WRITING TO WIN xvi (1999) (providing rules for more organized, persuasive legal writing).

8. *See* Drucilla Cornell, *Toward a Modern/Postmodern Reconstruction of Ethics*, 133 U. PA. L. REV. 291, 366 (1984–1985) (noting that "dialogue demands shared experience"); Joseph William Singer, *Persuasion*, 87 MICH. L. REV. 2442, 2458 (1989) (stating that "persuasion starts by creating a relationship between oneself and others").

has a somewhat rigid set of rules for discourse and argumentation that the writer must use to reach the audience.[9] In persuasive legal writing, there is some rhetoric that is acceptable, and some that is not; there are some argument techniques that are proper, and some that must be avoided. Most every lawyer knows the rules because mastery of these rules, also called "thinking like a lawyer," is the primary goal of law school training. Formalism is alive and well in both persuasive legal writing and law school pedagogy.

The many constraints of persuasive legal writing are closely related to the centrality of "audience" and "purpose" in legal writing. Because the primary goal of persuasive legal writing is to persuade the audience, it is essential that the writing be accessible to and convincing to the audience.[10] Although the target audience for legal scholarship can vary among judges, practicing lawyers, law professors, or all of the above, the audience usually consists of lawyers—people with legal training. The "rules" of legal rhetoric and writing taught in law school, rules adhered to by the legal audience, are, to a large extent, what constrain persuasive legal writing. The least risky strategy, the one most likely to persuade, is the one that has the qualities favored by the legal audience—the one that follows the rules.[11]

The stylistic conventions of persuasive legal writing are driven by the related notions of control and ease. First, the persuasive legal writer strives to control the reader's journey through the document as much as

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9. J. Christopher Rideout & Jill J. Ramsfield, *Legal Writing: A Revised View*, 69 WASH. L. REV. 35, 51, 59–60 (1994) (noting that legal writing takes place in a discourse that is complex and "highly conventionalized"); Wetlaufer, *supra* note 7, at 1558 (stating that a good lawyer's rhetoric of advocacy "operate[s] within a number of quite specific rhetorical conventions").

10. HELENE S. SHAPO ET AL., WRITING AND ANALYSIS IN THE LAW 239 (3d ed. 1995); *see also* ELIZABETH FAJANS & MARY R. FALK, SCHOLARLY WRITING FOR LAW STUDENTS 66 (1995); MARGARET Z. JOHNS, PROFESSIONAL WRITING FOR LAWYERS 199 (1998); RICHARD K. NEUMANN, JR., LEGAL REASONING AND LEGAL WRITING 274 (3d ed. 1998); MARY BARNARD RAY & JILL J. RAMSFIELD, LEGAL WRITING: GETTING IT RIGHT AND GETTING IT WRITTEN 25–28 (2d ed. 1993); NANCY L. SCHULTZ & LOUIS J. SIRICO, JR., LEGAL WRITING AND OTHER LAWYERING SKILLS 101 (3d ed. 1998).

11. Interestingly, the effectiveness and rigor of legal training hinders the use of unconventional rhetoric and argumentation in persuasive legal writing. Lawyers are trained to "think" a certain way, some of them become law professors and train others to "think" that way in a circular, recursive process that keeps the law (and persuasive legal writing and thinking) conventional and constrained. *See* Julius G. Getman, *Voices*, 66 TEX. L. REV. 577, 577–80 (1988); Duncan Kennedy, *Legal Education as Training for Hierarchy*, *in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 40, 53–58 (David Kairys ed., 1982); Stanchi, *Resistance*, *supra* note 3, at 21 n.83; Wetlaufer, *supra* note 7, at 1553 n.24 (listing sources). *See generally* Sandra Janoff, *The Influence of Legal Education on Moral Reasoning*, 76 MINN. L. REV. 193 (1991) (exploring whether a legal education changes a student's moral perspective).

possible so as to lead the reader to the desired conclusion.[12] The theory is that the more a reader has to struggle to interpret the text or the more interpretive options are given to the reader by the style of the text, the more likely it is that the reader will bring her own ideas to the text. When a writer's style allows or encourages the reader to bring her own ideas or conclusions to the text, the chances increase that these ideas or conclusions will vary from those that the writer is trying to advocate. Thus, a style that permits great reader leeway in interpretation is generally thought to be inconsistent with strong persuasive legal writing. Overall, the persuasive legal writer seeks to eliminate or narrow the gap between the text and possible interpretation.[13] Speaking of conventional legal writing, one commentator has said that it "looks primarily toward . . . the disciplines of closure and away from the disciplines of openness."[14]

Similarly, many of the constraints or "rules" of persuasive legal writing derive from the goal of making the audience comfortable, at ease, and highly receptive to the message of the document. The theory is that if the writer makes things easy for the reader and uses a style that avoids requiring the reader to do a great deal of work to understand the message, the reader's attention will be kept on the message of the document and the reader will not be distracted by her struggle to understand.[15] This also means that the reader is in a psychological state

12. *See, e.g.*, STARK, *supra* note 7, at 22–23. One author goes so far as to characterize this tactic as "coerc[ing]" the reader. Wetlaufer, *supra* note 7, at 1558.

13. One commentator has put it this way: "The lawyer's exposition will be clear, orderly, linear, and paraphrasable. His audience will never be 'lost' and will never need to ask 'what's the point?' or 'what is he driving at?' or 'where is he going?'" Wetlaufer, *supra* note 7, at 1558; *see also* MICHAEL R. SMITH, ADVANCED LEGAL WRITING: THEORIES AND STRATEGIES IN PERSUASIVE WRITING 98 (2002) (describing stylistic strategies of persuasive writing as "medium mood control"). Some commentators have argued that this quest of legal language is an empty or futile one, as no "language" can be completely literal or stable. *See* STANLEY FISH, DOING WHAT COMES NATURALLY 1–6 (1989). Perhaps, but in the culture of law, there is some significant agreement (whether it is "true" or not) about what is "clear" writing and what is not. Whether the people we call "skilled" or "good" lawyers are actually writing clearly, or we are all engaged in some kind of group cognitive dissonance, is not dispositive for the advocate. Whether our audience is fooling itself about what it believes is clear or not, the advocate must cater to that belief. Moreover, language is not a monolith—it can be viewed as a spectrum of instability in which no words have absolute literal or fixed meanings, but in which some words have greater stability than others. *See* Richard A. Posner, *Law and Literature: A Relation Reargued*, 72 VA. L. REV. 1351, 1360–62 (1986).

14. Wetlaufer, *supra* note 7, at 1572; *see also* SMITH, *supra* note 13, at 98.

15. *See* RUGGERO J. ALDISERT, WINNING ON APPEAL: BETTER BRIEFS AND ORAL

that makes her susceptible to the message of the document. Both of these conditions, attentiveness and psychological susceptibility, are generally viewed as favorable to the advocate. Along the same lines, the reader's discomfort and unease is viewed as unfavorable. The harder a reader has to work, the theory goes, the more likely it is that the reader will ignore or gloss over key ideas, or even stop reading. And a reader's negative reaction to the document or the writer (such as irritation, discomfort, or guilt) can alienate the reader from the writer's arguments or encourage the reader to stop reading the document.

The persuasive writer's twin goals of simultaneously controlling the reader and making her comfortable mandate that persuasive legal writing be direct, declarative, and simple. Thus, convention dictates that legal writing should say what it means in the most unadorned, unambiguous way.[16] Clarity is one of the most highly valued characteristics of persuasive legal writing.[17] Although people, even lawyers, can certainly differ about what clarity means, the conventional wisdom in law is that there is a real difference between clear legal language and, for example, literary language.[18] Legal language is said to be straightforward and specific; literary language is vague, ambiguous, and unconstrained.[19] Thus, to the extent analogies, metaphors or other rhetorical devices are used in legal writing, they should be simple and easy for the reader to understand.[20]

ARGUMENT 21 (rev. 1st ed. 1996); LINDA HOLDEMAN EDWARDS, LEGAL WRITING: PROCESS, ANALYSIS, AND ORGANIZATION 244–45 (1996); FAJANS & FALK, *supra* note 10, at 66–67; SMITH, *supra* note 13, at 98; STARK, *supra* note 7, at 40–41.

16. *See* GIRVAN PECK, WRITING PERSUASIVE BRIEFS 23–26 (1984); STARK, *supra* note 7, at 40–46; Wetlaufer, *supra* note 7, at 1558.

17. *See, e.g.*, Kristen K. Robbins, *The Inside Scoop: What Federal Judges Really Think About the Way Lawyers Write*, 8 LEGAL WRITING (forthcoming 2002) (manuscript on file with author) (documenting a survey of federal judges expressing a "strong, recurring and unmistakable cry" for clarity and conciseness).

18. *See* Posner, *supra* note 13, at 1360–78 (contrasting the legal writing of legislators with literary writing).

19. *See id*; *see also* GEORGE LAKOFF & MARK JOHNSON, METAPHORS WE LIVE BY 52–53 (1980) (contrasting "normal literal language" with "'figurative' or 'imaginative' language").

20. *See* PECK, *supra* note 16, at 21(stating that metaphors and similes should be in "concrete" language); SMITH, *supra* note 13, at 207–17 (cautioning against overuse of metaphor and use of obscured or "forced" metaphor); STARK, *supra* note 7, at 37–38 (suggesting that imagery should be used sparingly). Essentially, the recommendation on literary devices such as metaphors is that, in legal writing, their frequency and flourish must be tightly controlled. That is, they should be used temperately and the comparison should be obvious, not obscure. More obscure metaphors run the risk that the reader will bring his own perspective to the metaphor. *See* LAKOFF & JOHNSON, *supra* note 19, at 52–55. Metaphors also have what linguists call "entailments" that flow from the metaphor. *Id.* at 91. The more entailments a metaphor conjures, the more room there is to interpret the meaning of the metaphor. Thus, the metaphor of love as a river calls up the entailments of love as flowing, as pure, as beautiful. The more obscure the

Clarity in persuasive writing means that the reader has little or no room to reach conclusions other than the one advocated. This requires that the words used should be simple to comprehend and easily recognizable to other lawyers (thus, legal terms of art and jargon can be acceptable because the audience will almost uniformly comprehend them).[21] With a few exceptions, newly coined terms or overly complex words violate both the control and ease rules: they create ambiguity and may put off the reader who, feeling ignorant, has to run for the dictionary.[22]

The rules of control and ease also dictate the sparing use (if not complete avoidance) of certain poetic or rhetorical devices that encourage the reader's interaction with the text, and create a "gap" between the text and the possible interpretations.[23] These devices include the classical rhetorical schemes of repetition, rhythm, and inversion, which alter the usual or conventional semantic rules. Rhetorical schemes, like anaphora (repetition of the same word at the beginning of successive clauses or sentences), chiasmus (reversal of grammatical structures in successive phrases or clauses), and antimetabole (repetition of words, in successive clauses, in reverse grammatical order) are common in poetry, which generally invites readers to bring themselves to the text to interpret meaning.[24] However,

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metaphor, the more room the reader has to reach her own inferences. Even love as a river (a fairly straightforward metaphor) could, for some, call up entailments of danger: love could hurt you, or you could even drown and die in it.

21. One legal saying describes this as K.I.S.S. or "'keep it simple, stupid.'" Wetlaufer, *supra* note 7, at 1558.

22. PECK, *supra* note 16, at 23–26 (cautioning against the use of "pompous" and "trendy" jargon). Some lawyers refer to this stylistic tenet of persuasive legal writing as the "in your seat rule"—the reader should not have to leave her seat to comprehend and be persuaded by the document. If the reader must leave her seat to comprehend the document, the advocate runs the risk of losing her attention, insulting her, or irritating her, none of which help the advocate's cause.

23. *See* GÉRARD GENETTE, FIGURES OF LITERARY DISCOURSE 78 (Alan Sheridan trans., 1982) (defining poetry, in relation to prose, as a "gap" in relation to the norm of prose, as antiprose).

24. EDWARD P. J. CORBETT & ROBERT J. CONNORS, CLASSICAL RHETORIC FOR THE MODERN STUDENT 390, 394–95 (4th ed. 1999). A classic example of anaphora is: "It is a luxury, it is a privilege, it is an indulgence for those who are at their ease." *Id.* at 390 (quoting Letter from Edmund Burke to a Nobel Lord (1796)). Corbett refers to chiasmus as "the criss-cross" because it is marked by grammatical inversion in successive phrases or clauses, and illustrates by example: "It is hard to make money, but to spend it is easy." *Id.* at 394–95. Antimetabole is similar, but involves both repetition and grammatical inversion (for example: "One should eat to live, not live to eat"). *Id.* at 394 (quoting Jean-Baptiste Poquelin Molière, *L'Avare*).

despite the rhetorical power of these literary devices, the rules of persuasive legal writing discourage their use, except sparingly, because variation from conventional semantics can distract the reader, confuse the document's message, and relinquish interpretive control to the reader.[25]

For similar reasons, persuasive legal writing generally favors positive phrasing where possible. ("I am right" versus "you are wrong" or "I am not wrong.").[26] Thus, in a brief, the "question presented" is best if phrased to lead to the answer "yes" for the writer's client, and analogies are most persuasive if they are direct and positive. Here again, the writer strives to create in the reader a mental state that makes her most receptive to the writer's conclusion. Negation, such as use of "no" or "not," or the use of negative analogies, is presumed to be less attractive to the reader; quite simply, it is nicer and easier for the reader if a document makes her mentally say "yes" rather than "no." Positive phrasing gives the reader a positive, agreeable feeling; negative phrasing gives the reader a negative feeling. Positive examples and analogies give writing strength and confidence; negative examples and analogies appear defensive, even desperate.[27]

This is one reason why, although most persuasive writing must use some negation, rhetorical devices that are explicitly negative, such as paradox, sarcasm, and irony, are highly disfavored in persuasive legal

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25. *See* RAY & RAMSFIELD, *supra* note 10, at 137, 257 (stating that metaphor and idiom can be ambiguous and informal, and noting that repetition should be avoided unless required for accuracy, readability, or emphasis); SCHULTZ & SIRICO, *supra* note 10, at 331 (noting that devices such as metaphor and personification may be distracting); SHAPO ET AL., *supra* note 10, at 323 (suggesting that a persuasive legal writer can use metaphor, figurative language, and variations in tone and syntax, but not extensively). *But see* PECK, *supra* note 16, at 48–50 (recommending grammatical variation based on classical rhetorical techniques, as long as done artfully and with care); SMITH, *supra* note 13, at 228 (encouraging some use of figurative speech but warning strongly against overuse).

26. *See, e.g.*, ALDISERT, *supra* note 15, at 121 (indicating that effective statements of issues in briefs should be positive and psychologically inclined in favor of your client); JOHNS, *supra* note 10, at 169 (noting that affirmative language lends an assertive tone to persuasive writing); SCHULTZ & SIRICO, *supra* note 10, at 137 (stating that positive language is easier to understand and more likely to persuade); SHAPO ET AL., *supra* note 10, at 325, 328 (stressing the importance of clear and affirmative expressions in briefs).

27. *See, e.g.*, JOHNS, *supra* note 10, at 169 (suggesting that negative forms are weak and easily misunderstood because the reader must figure out the positive form and then negate it); RAY & RAMSFIELD, *supra* note 10, at 175 (indicating that negative statements are "easily misread" and "should be avoided"); SCHULTZ & SIRICO, *supra* note 10, at 137 (stating that negative language and qualifying words reflect insecurity and highlight vulnerable aspects of an argument); Laura E. Little, *Characterization and Legal Discourse*, 46 J. LEGAL EDUC. 372, 378 (1996) (noting that "direct negation has limited persuasive power").

writing.[28] In addition to being negative and therefore unappealing to the reader, these rhetorical devices also create ambiguity and are highly susceptible to misinterpretation in written language.[29] Irony, the use of a word or expression "in such a way as to convey a meaning opposite to the literal meaning" of the word or expression, requires the writer to know the beliefs, personality, and intelligence of her audience very well.[30] As a general matter, irony must be used with great caution (if at all) in persuasive writing because the adversary system makes it difficult to presume a commonality of beliefs between writer and audience, and because within the adversary system it is rare that other clues to ironic content (such as a personal relationship between speaker and listener) can be employed.[31]

Similarly, sarcasm, slang, and humor are generally disfavored in persuasive legal writing. Law is generally thought (by lawyers and judges) to be a solemn, formal, and dignified language, which is demeaned by overt rhetorical tricks, humor, and colloquial expressions.[32] Moreover,

28. *See, e.g.*, FAJANS & FALK, *supra* note 10, at 116 (suggesting that the deceitful use of language such as sarcasm, mock humility, or fake candor is likely to damage the author); RAY & RAMSFIELD, *supra* note 10, at 268 (arguing that the writer should not use sarcasm in legal writing because it is inappropriate and too easily taken literally, and noting that sarcasm is only effective when the audience already agrees "whole-heartedly with [the writer's] position"); SCHULTZ & SIRICO, *supra* note 10, at 313 (stating that sarcasm is always inappropriate in legal writing); SHAPO ET AL., *supra* note 10, at 321 (noting that sarcasm, heavy irony, and hyperbole are inappropriate in brief writing).

29. *See* GENETTE, *supra* note 23, at 83 (stating that the gap between poetry and prose carries out its poetic function as an "instrument of a *change of meaning*," switching from a "denotative," or intellectual reading, to a "connotative," or emotional reading); Herbert A. Eastman, *Speaking Truth to Power: The Language of Civil Rights Litigators*, 104 YALE L.J. 763, 819–21 (1995) (noting that irony, because its success depends on the commonality of assumptions between author and reader, is risky in legal writing), Wetlaufer, *supra* note 7, at 1572 (categorizing, among others, the disciplines of rhetoric and Saussurian linguistics as "disciplines of openness" that appeal to the emotions and imagination).

30. CORBETT, *supra* note 6, at 454–55; *see* Eastman, *supra* note 29, at 820 (noting that irony requires the reader to "peer through" the ironic statement and understand that the author means the opposite of what she said).

31. *See* SMITH, *supra* note 13, at 240 (warning that irony is not recommended for legal writing because it is "too oblique and leaves too much room for miscommunication and misunderstanding"); Eastman, *supra* note 29, at 819–21.

32. *See* ALDISERT, *supra* note 15, at 5 (noting that "ploys" that are effective with juries, such as appeals to pity, ridicule, and popular opinion, have no place in appellate courts); SCHULTZ & SIRICO, *supra* note 10, at 129 (legal writing is formal writing therefore colloquialisms, slang, contradictions, and personal pronouns such as "I" and "you" should be avoided); SHAPO ET AL., *supra* note 10, at 321–22; STARK, *supra* note 7, at 36 (lawyers should not inject themselves, or refer to their mental processes, in persuasive legal writing).

sarcasm creates, as one commentator put it, a "clash" in tone that is likely to alienate the reader; the "clash" of sarcasm tends to "raise eyebrows, but not consciousness."[33]

Finally, most everything about persuasive legal writing—structure, style, and substance—reflects the law's preference for rational, objective, logical reasoning over subjectivity and emotion. The most basic form of the advocate's argument is deductive, syllogistic reasoning—conclusion, proof, explanation, conclusion.[34] Convention strongly disfavors the use of "I" or any reference to the writer in a legal document.[35] Accordingly, the prescribed legal form purposefully leaves little room for personal narratives or appeals for sympathy and instead, gives the legal document an aura of authority and objective truth that leaves little room for doubt.[36] The form gives the lawyer maximum control over the reader and gives the reader extremely limited opportunity to interpret the text or stray from the message.[37]

Moreover, persuasive legal writing disfavors direct appeals to emotion; a good persuasive legal writer would never explicitly argue for an outcome based on sympathy.[38] Emotional arguments are thought to be the recourse of novice, untrained first-year law students, whose cries of "it's not fair" in response to judicial opinions are (theoretically) transformed by law school into reasoned, analytical proof. Outside the classroom, in both persuasive legal writing and speaking, direct appeals to emotion or sympathy are considered, at best, the last recourse of a lawyer who has nothing else to argue. At worst, they are considered evidence of poor lawyering skills and, depending on how they are made, possibly unethical. For example, addressing a jury or panel of judges in the second person, and inviting them to put themselves in the shoes of an unfortunate client, is considered so inappropriate that it is sometimes referred to as the "Golden Rule."[39] Appellate judges can be especially

33. SMITH, *supra* note 13, at 240 (stating that sarcastic or sardonic tone is inconsistent with the professional tone required of legal writers); Eastman, *supra* note 28, at 821.

34. *See* NEUMANN, *supra* note 10, at 90; SCHULTZ & SIRICO, *supra* note 10, at 37–39, 113; STARK, *supra* note 7, at 128–30; Wetlaufer, *supra* note 7, at 1558.

35. NEUMANN, *supra* note 10, at 402; Stanchi, *Resistance, supra* note 3, at 36; Wetlaufer, *supra* note 7, at 1558.

36. *See, e.g.*, SCHULTZ & SIRICO, *supra* note 10, at 130, 138; SHAPO ET AL., *supra* note 10, at 73–74, 217, 239–40, 252; Wetlaufer, *supra* note 7, at 1558.

37. *See* Wetlaufer, *supra* note 7, at 1558, 1568–72 (noting that deductive, syllogistic logic serves the lawyer's purposes of coercion and closure).

38. Kathryn M. Stanchi, *Exploring the Law of Law Teaching: A Feminist Process*, 34 J. MARSHALL L. REV. 193, 202–03 (2000) [hereinafter Stanchi, *Exploring*]; *see also* NORMAN BRAND & JOHN O. WHITE, LEGAL WRITING: THE STRATEGY OF PERSUASION 141–42 (1976) (calling direct appeals to emotion "fallacies" of argument").

39. Timothy J. Conner, *What You May Not Say to the Jury*, 27 LITIG., Spring 2001, at 36, 37.

impatient with emotional arguments, considering such arguments to imply that judges are susceptible to rash, irrational judgments as opposed to considered, reasoned ones.[40] If the centrality of audience means anything in legal writing, it certainly means that the writer should avoid insulting or angering her audience.

The law's distrust of overt emotion, however, does not mean that emotion plays no role in persuasive legal writing. Indeed, appeals to emotion, like pathos in Aristotelian rhetoric,[41] play a key role in persuasive legal writing. However, such appeals need to be subtle and couched in one of the semantic forms acceptable to the law. Thus, appeals to emotion can be disguised as or embedded in analogical reasoning to be more palatable to the legal reader who is programmed to dismiss them.[42] Often, appeals to emotion can be subtly embedded in the writer's characterization of facts—either the client's facts or the facts of precedent.[43] Emotion also plays an important role in the development of the critical "theory of the case" for a trial or appeal.[44] Traditional legal scholarship tends to follow this pattern as well; it is common for an article to begin with a strongly-worded factual example of the problem sought to be solved by the legal analysis in the article.[45]

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40. *See, e.g.*, JOHNS, *supra* note 10, at 202; NEUMANN, *supra* note 10, at 271–72, 277; RAY & RAMSFIELD, *supra* note 10, at 317 (noting that overly emotional tone destroys credibility); SHAPO ET AL., *supra* note 10, at 303; *see also* Draper v. Airco, Inc., 580 F.2d 91, 95 (3d Cir. 1978) ("[W]e do not expect advocacy to be devoid of passion.... [However,] there must be limits to pleas of pure passion and there must be restraints against blatant appeals to bias and prejudice.").

41. CORBETT, *supra* note 6, at 37, 86.

42. RONALD WAICUKAUSKI ET AL., THE WINNING ARGUMENT 88–91 (2001) (noting that advocates must appeal to the heart as well as the mind, but with subtlety and restraint, especially in addressing an appellate court). The authors note that appeals to emotion are most effective when combined with the logical reasons supporting the advocate's position. *Id.* at 91; *see also* SHAPO ET AL., *supra* note 10, at 301–07; SMITH, *supra* note 13, at 97 (stating that most lawyers use implied, not express, emotional arguments in a brief). The law's ambivalence toward emotional arguments is evident in one teaching text, which euphemizes appeals to emotion by referring to them as "motivating arguments"—thereby avoiding the word "emotion" and characterizing them using the legally acceptable term "argument." NEUMANN, *supra* note 10, at 271.

43. SMITH, *supra* note 13, at 96–97; Stanchi, *Exploring*, *supra* note 38, at 202–04.

44. The theory of the case is a set of facts chosen for both its emotional appeal and its usefulness in the logical argument. *See, e.g.*, NEUMANN, *supra* note 10, at 271–81; SCHULTZ & SIRICO, *supra* note 10, at 293–97; SHAPO ET AL., *supra* note 10, at 263.

45. FAJANS & FALK, *supra* note 10, at 58 (stating that "[t]he paradigm most common in legal scholarship is the *problem-solution pattern*").

Despite the law's superficial distrust of emotion, convention permits, even favors, placing emotional appeals in strategically significant positions in legal documents, such as the first paragraph of a brief.[46] If the writer chooses to highlight an emotional appeal structurally, however, the writer must be especially subtle about the appeal—she should avoid melodrama and hyperbole or she risks alienating the reader or losing credibility.[47] She should also avoid any words or narrative situations that might make the reader uncomfortable or disturbed.

In sum, persuasive legal language has explicit and fairly rigid conventions familiar to lawyers and attractive to the legal audience. These conventions dictate in large part how lawyers write, the substance of what they write, how the merit of legal scholarship is judged, and how writing and analysis are taught in law school. Many legal scholars have noted, however, that the conventions of legal language limit greatly the substance of legal writing, often to the detriment of outsiders.[48] Linguists have noted that when language fails in this way, the outsider group often creates a new language, which is based on the dominant language but is more reflective of outsider experience and is a linguistic way of flouting or opposing the conventions of the dominant language. Linguist, M.A.K. Halliday called this phenomenon "anti-language."[49] In the next section, this Article describes the sociolinguistic characteristics of antilanguage and shows how some feminist legal scholarship uses a kind of legal antilanguage to persuade.

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46. *See, e.g.*, EDWARDS, *supra* note 15, at 337 (stating that a "reader's attention level is greatest in the first few paragraphs"); FAJANS & FALK, *supra* note 10, at 103, 106 (noting that the introduction must establish "the human and social context out of which legal issues emerge"); NEUMANN, *supra* note 10, at 263, 265, 271–72, 274 (noting that motivating arguments go first because people tend to read most carefully in the beginning of a text); SCHULTZ & SIRICO, *supra* note 10, at 123 (arguing that a writer who does not get to the point immediately will lose the reader); SHAPO ET AL., *supra* note 10, at 263–64 (suggesting the writer start with a paragraph that elicits the reader's sympathy or antipathy).

47. *See* Stanchi, *Exploring*, *supra* note 38, at 202–04.

48. "Outsider" has become something of a term of art to mean people traditionally and historically excluded from the creation and practice of law. Mari Matsuda, *Affirmative Action and Legal Knowledge: Planting Seeds in Plowed-Up Ground*, 11 HARV. WOMEN'S L.J. 1, 1 n.2 (1988). The limitations of legal language to express outsider concerns and experiences have been noted by many feminist scholars. *See, e.g.*, Finley, *supra* note 3, at 893; Robin L. West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 15 WIS. WOMEN'S L.J. 149, 149–54 (2000) [hereinafter West, *Women's Hedonic Lives*]; *see also* CATHARINE A. MACKINNON, *Difference and Dominance: On Sex Discrimination (1984), in* FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 32 (1987) [hereinafter MACKINNON, *Difference*]. This thesis—that language is essential to systems of oppression—is not novel to feminist legal theory. *See generally* FOWLER ET AL., *supra* note 2, at 2 (noting that "sociolinguistic mechanisms" effectuate control by "the creation of an apparent 'natural world' in which inequitable relations and processes are presented as given and inevitable").

49. Halliday, *supra* note 5, at 570.

III. THE CHARACTERISTICS OF ANTILANGUAGE

Antilanguages are created by antisocieties (societies outside the dominant society) to manage reality and create "counter-reality"; they are languages that code a reality that is not real or important to the dominant class and therefore has no vocabulary in the dominant language.[50] Antilanguages are consciously oppositional to the dominant society—a linguistic rebellion.[51] It is characteristic of antilanguages that only those within the antisociety can fully comprehend them: their purpose is to solidify identity within the antisociety and exclude those in the dominant society.[52] However, because antilanguages are formed by groups that are both excluded by dominant culture and simultaneously forced to live within it, antilanguages are derivative of the dominant language.[53] Although by definition antilanguages are difficult for the dominant class to comprehend, antilanguages do not entirely reject the dominant language; the variation is usually "partial, not total."[54]

Antilanguages share common linguistic characteristics. The most basic feature of antilanguage is what linguists call relexicalization—the substitution of new words for old ones or the creation of words for particular things that have no word in the dominant language.[55] Relexicalization is important to antilanguage because it is a way of recoding—and sometimes transforming—reality.[56] Relexicalization can also serve to code or create words for something that has no specific word in the dominant language.[57] So, for example, the antilanguage of an underworld subculture may create a single word that means "to swallow a stolen thing to avoid detection."[58] In antilanguage, relexicalization tends to occur primarily in areas "central to the activities of the subculture and that set it off most sharply" from the dominant

50. ROBERT HODGE & GUNTHER KRESS, LANGUAGE AS IDEOLOGY 71–72 (2d ed. 1993); Halliday, *supra* note 5, at 570–71.
51. *See* Halliday, *supra* note 5, at 575.
52. HODGE & KRESS, *supra* note 50, at 71–72.
53. *Id.*; Halliday, *supra* note 5, at 571.
54. Halliday, *supra* note 5, at 571.
55. *Id.*
56. *See, e.g.*, FOWLER ET AL., *supra* note 2, at 33.
57. *See, e.g.*, Halliday, *supra* note 5, at 577.
58. *Id.* By using this example, which Halliday used in the original article outlining his antilanguage theory, the author does not in any way mean to suggest that outsider cultures are always or usually criminal or underworld cultures, although certainly that is how the dominant society treats many of them.

culture.[59] So, the same hypothetical underworld culture described above may use the established dominant word for "house" but may have forty different words for "police."[60] Thus, relexicalization defines the subculture—it is a window on the culture's priorities.

Although relexicalization is a hallmark of antilanguage, the linguistic form most characteristic of antilanguage is negation.[61] Negating some aspect of dominant reality is the simplest way of rejecting that reality and creating the counter-reality.[62] Negation is so central to oppositional language that linguists have noted that a "poet or any other user of a natural language can create an anti-world by using just one component of a standard grammar, negation, simply denying or inverting statements about reality."[63] Negation includes the use of negatives such as "no," "not," "none," "nothing" and the prefix "un." It can also take subtler forms such as irony, oxymoron, and sarcasm, or words meaning "less than," "weaker," or words of denial.[64] Linguists Gunther Kress and Robert Hodge use John Donne's poem, *A Nocturnal upon St. Lucy's Day, Being the Shortest Day,* as an example of the use of the tool of negation:

> 'Tis the year's midnight, and it is the day's,
> Lucy's, who scarce seven hours herself unmasks,
> The sun is spent, and now his flasks
> Send forth light squibs, no constant rays;
> The world's whole sap is sunk:
> The general balm th'hydroptic earth hath drunk,
> Whither, as to the bed's-feet, life is shrunk,
> Dead and interred; yet all these seem to laugh,
> Compared with me, who am their epitaph.[65]

In this excerpt from the poem, Donne uses components that Hodge and Kress characterize as direct negation, such as the prefix "un" ("unmasks") and the word "no" ("no constant rays"). The excerpt also uses many more subtle forms of negation, including "scarce" (less than the norm), "spent" (which here means finished, out of energy), "light squibs" (here contrasted with "constant rays," so meaning less than strong), "sunk" (referring to the world's "whole sap") and "shrunk, [d]ead and interred" (referring to life). Donne also uses oxymoron—the

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59. *Id.* at 571.
60. *Id.* These examples are paraphrased from Halliday's study of actual antilanguage culture, but were simplified for ease of the reader.
61. HODGE & KRESS, *supra* note 50, at 73.
62. *Id.*
63. *Id.*
64. *Id.* at 73–74. Hodge and Kress refer to words "like *scarce* and *light*" as "partial negatives." *Id.* at 74.
65. *Id.* at 72 (quoting JOHN DONNE, A NOCTURNAL UPON ST. LUCY'S DAY, BEING THE SHORTEST DAY).

day's "midnight" and life as "dead and interred."[66] The overall effect is profoundly negative, a picture of a day of death and darkness.

The form of negation that joins a negative with a positive, as with oxymoron and paradox, is a classic tool of antilanguage because it often can have the effect of imbuing that which is negative in the dominant culture with positive attributes ("Hell's angels" for example).[67] In antilanguage, the result is a rebellion encapsulated in one, short phrase: it takes something classified as negative in the dominant society and imbues it with positive traits, which rejects the disapproval of the dominant society. At the same time it uses the positive word, but negates it, which has the effect of both reflecting and rejecting the values of the dominant culture.[68] For example, the phrase "Hell's angels" reclassifies *hell* as positive and *angel* as negative, "incorporating the negative judgment of society and [the Hell's angels'] own positive judgment on themselves into a single ambiguous unit."[69]

Negation can also be used to defy or reject the traditional or conventional way that things and beings are classified in the dominant language. This type of negation, called "reclassification," is a common characteristic of antilanguages.[70] Reclassification is a way of linguistically expressing opposition to the dominant culture by attacking its classification system. In doing so, it rejects the "fundamental categories in the science/grammar of the dominant language" and creates an antiworld of opposite categories.[71] In the Donne excerpt, Donne's oxymoron of "day's" midnight and dead "life" defy the classification of positives and negatives that exist in English. In English, there is no such thing as the midnight of "day"; midnight occurs at night. Midnight also marks the boundary of two days and therefore cannot be said to belong to one day or the other.[72] Similarly, "life" cannot be "dead" in English. Something is either dead, or it is alive; it cannot be both. Thus, Donne uses language to create or describe an antiworld where what he describes can happen—life *is* dead and midnight *does* belong to day. The oxymoron, "Hell's Angels", is a similar type of reclassification.

66. *Id.* at 73–74.
67. *Id.* at 75.
68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.* at 74.

Another typical form of reclassification refers to humans in a way that classifies them as objects or as unreal.[73] An excellent example of this is contained in the last two lines of the Donne excerpt, where he writes that "all these seem to laugh, [c]ompared with me, who am their epitaph."[74] In English, both "who" and "laugh" always refer to an animate being, and "laugh" almost always refers to an activity of living human beings.[75] In Donne's antiworld, however, things are reclassified and reorganized so that our fundamental preconceptions are challenged: dead things "laugh" and animate things are inanimate (epitaphs). This kind of reclassification is a way of using language to turn what is known or sacred in the (dominant) world upside-down, thereby creating an antiworld that challenges the fundamental categories of the dominant world.[76]

The final characteristic of antilanguage identified by Halliday is use of metaphor. Because antilanguages create a new counter-reality, metaphorical modes of expression are the norm. This distinguishes antilanguages from dominant languages, where metaphoric expressions are frequent but are nevertheless a linguistic variation.[77] Because metaphors and metaphorical compounds are a way of "understanding and experiencing one kind of thing in terms of another,"[78] they are not simply an artistic embellishment in antilanguages, but are necessary to express the counter-reality of an antisociety. Thus, metaphors, rhyming alterations, and other linguistic variations are standard in antilanguages.[79] The use of paradox, irony, and oxymoron can fit within this category as well.

IV. FEMINIST LEGAL ANTILANGUAGE

This part of the Article examines examples of feminist legal writing that exhibit the characteristics of antilanguage and posits that the use of these devices makes the writing a legal antilanguage.[80] The techniques

73. *Id.* at 75.
74. *Id.* at 72, 75.
75. *Id.* at 75.
76. *Id.*
77. Halliday, *supra* note 5, at 579.
78. *See* LAKOFF & JOHNSON, *supra* note 19, at 5 (emphasis omitted).
79. *See* Halliday, *supra* note 5, at 578 ("It is this metaphorical character that defines the anti-language. An anti-language is a metaphor for an everyday language; and this metaphorical quality appears all the way up and down the system.").
80. The feminist legal scholarship discussed in this Article was chosen for its use of the rhetorical techniques that are common in antilanguage, that contravene the generally accepted rules of persuasive legal writing, and that, by doing so, add power and persuasive value to the feminist message of the scholarship. This Article does not mean to suggest that feminist legal scholarship not written in antilanguage is somehow less feminist, or that every scholar who uses these devices can be characterized as either feminist or as employing an antilanguage.

identified by Halliday as the general hallmarks of antilanguage, such as relexicalization, negation, use of metaphor, and reclassification, also violate some of the central conventions of legal language. Thus, their use is indicative of a legal antilanguage.

Relexicalization, for example, breaks from the conventions of persuasive legal writing because it purposefully creates distance between the text and the conventional legal reader, and thereby violates the rules of control and ease. Use of negation and reclassification in persuasive legal writing also places a text firmly outside convention. Negative phrasing and logic flout legal writing's convention that positive equals strength and negative equals weakness. It also rejects the conventional theory that readers prefer the positive and will be more susceptible to an argument phrased in the positive. Moreover, negation that creates ambiguity, such as oxymoron, irony, or paradox, violates both the rule against negativity and the rule against relinquishing interpretive control to the reader.

Finally, the extensive use of poetic devices and syntactical variation, as well as certain uses of metaphor and simile, defy the conventions of persuasive legal writing because they can make a text more difficult to interpret or understand, and thereby risk irritating or confusing the audience or leaving the audience too much room to interpret the document. Finally, while not part of Halliday antilanguage, the overt use of emotion and the use of first and second-person narrative standpoint in feminist legal writing are defiant enough of the rules of conventional legal writing to be indicative of a legal antilanguage. Overt emotion and a shifting-narrative standpoint perform essentially the same antilanguage function in legal writing that those techniques identified by Halliday perform in language generally: they resist the stylistic constraints of the dominant language by twisting or subverting the rules of the dominant syntax.[81]

81. Applying the linguistic theory of antilanguage to legal writing takes some liberties with the term as it is used in linguistics and anthropological literature. Nevertheless, the application works. Antilanguage is a term of art, but, as would be expected with any theory as applied to a thing as ever-changing and fluid as language, it is a flexible term. Antilanguages exist on a spectrum—small dialectical variations in the dominant language are a version of antilanguage, as are languages that employ so many of the variations associated with antilanguage that the transformation from the dominant language is almost total. *See* Halliday, *supra* note 5, at 580 (noting that there probably has never been such a thing as a total antilanguage, that is, one that is a completely distinct tongue from the dominant language).

Given what we know about antilanguage, it should not surprise us that characteristics of Halliday antilanguage and legal antilanguage appear in feminist legal scholarship. Feminist legal scholarship is a voice of feminist legal culture. Feminist legal culture, as wide and diverse and contradictory as it can be, is a legal "anticulture" in that it and its adherents are in many ways "outside" mainstream law and legal academia.[82] And, as with any antilanguage, in feminist legal scholarship we see a spectrum of linguistic choices, from pieces that use quite conventional legal writing and vary only slightly (if at all) from the constraints of typical persuasive legal writing, to other pieces that break all the rules, or break them in such a way as to take the language firmly outside the dominant legal language of law.[83]

The differences between feminist legal antilanguage and Halliday antilanguage are directly related to the dilemma faced by feminist legal advocacy of having to choose between subversive or persuasive language. That is, unlike Halliday antilanguage, which departs from the dominant tongue to insulate the anticulture and exclude the dominant class, the use of antilanguage in the feminist legal writing analyzed here serves a somewhat different purpose. Although feminist legal antilanguage can sometimes be insulating and exclusive,[84] the devices used in feminist antilanguage often serve as rhetorical tools—to convey, and persuade others of, the feminist message of the writing. Although the messages of the writings analyzed here vary greatly, in each piece the use of legal antilanguage is inextricably tied to the feminist message of the writing.

In the subsequent Sections, the following characteristics are used to analyze examples of feminist legal antilanguage: (A) relexicalization; (B) negation, including use of oxymoron, paradox, irony, sarcasm, and reclassification; (C) poetic devices, such as schemes of repetition and rhythm, syntactical inversions, and metaphor; and (D) first and second person narrative standpoint and overt appeals to emotion.

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82. In using the phrase "feminist legal culture," the author does not mean to "essentialize" feminism or feminist legal theory. Feminism is diverse and constantly changing. However, it is fair to say that many—including many feminist legal scholars—view feminists as "outsiders" and feminist legal theory as "outside" the mainstream of law. *See, e.g.*, Mari J. Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 14 WOMEN'S RTS. L. REP. 297, 298 (1992); Jean Stefancic, *The Law Review Symposium: A Hard Party to Crash for Crits, Feminists and Other Outsiders*, 71 CHI.-KENT L. REV. 989, 990 (1996).

83. Perhaps predictably, the tension between antilanguage and convention in feminist legal theory mirrors the substantive theoretical conflicts within feminist legal theory. The writing (the medium) is inseparable from the message (the substance). After all, the concept of feminist legal theory is itself something of an oxymoron. Unmodified, "legal theory" is understood as mainstream, conventional legal theory: that is, not feminist (perhaps even masculinist). Thus, a legal theory that is different, that is feminist, requires the modifier and creates something of a contradiction.

84. *See* Halliday, *supra* note 5, at 575.

A. Relexicalization

Relexicalization is a common tool of feminist legal writing and has accompanied (if not partially caused) the broadening of legal culture and the creation of new legal concepts or causes of action. Feminist legal scholars have long recognized the importance of "naming" experiences for which there are no words in legal culture as a way of validating women's experiences and making them real.[85] While Halliday antilanguage uses relexicalization to exclude the dominant class, however, relexicalization in feminist legal antilanguage is used primarily to bring concepts otherwise invisible to the dominant class of law to its attention.[86] Although relexicalization is used as a tool of advocacy, its use as a rhetorical tool nevertheless reveals the tension in feminist legal antilanguage between rebellion and persuasion.

For example, in her ground-breaking article on battering, *Legal Images of Battered Women: Redefining the Issue of Separation*, Martha Mahoney sets out to consciously change cultural and legal attitudes toward battered women by labeling as "separation assault" the violence that women commonly experience when they try to leave battering relationships.[87] Mahoney explains that despite the commonality of this experience:

> We have had neither cultural names nor legal doctrines specifically tailored to the particular assault on a woman's body and volition that seeks to block her from leaving, retaliate for her departure, or forcibly end the separation. I propose that we name this attack "separation assault."
>
> . . . As with other assaults on women that were not cognizable until the feminist movement named and explained them, separation assault must be identified before women can recognize our own experience and before we can develop legal rules to deal with this particular sort of violence.
>
> . . . [L]aw reform requires such an approach to simultaneously reshape cultural understanding.[88]

Persuasion is easiest when it can be accomplished through understanding based on shared experience; it is much more difficult to do through

85. *See, e.g.*, West, *Women's Hedonic Lives*, *supra* note 48, at 154 ("It is *hard* to talk about [women's] pain and pleasure . . . . Our language is inadequate to the task.").

86. *See id.* (noting that women "still lack the descriptive vocabulary necessary to convey the quality of the pain we sustain"). This use of relexicalization reflects the significant investment feminist legal theorists have in reaching, as opposed to alienating, members of the dominant legal culture.

87. Martha R. Mahoney, Legal Images of Battered Women: Redefining the Issue of Separation, 90 MICH. L. REV. 1, 9–10 (1991).

88. *Id.* at 6–7 (footnotes omitted).

communication of unshared experience.[89] In a legal culture where the power lies largely with white, heterosexual men, and the language is reflective of their experiences alone, new words are required to tell the story of women's experiences.[90] Each word or phrase, like "separation assault," is code for an experience, a way of sharing that experience with someone who has not had it, and ultimately, a way of persuading another of the validity of the experience.

Another example of this is Patricia Williams's concept of "spirit murder," a phrase she uses to describe the distinct and devastating injury of racism.[91] There is no word in either American or legal culture that describes the obliterating hurt of racism—that describes, as Williams writes, living in a culture of fear and hate, in a society with "disregard for others whose lives qualitatively depend on our regard."[92] Williams consciously uses the violent and loaded term "murder" to describe what racism does. Murder is an irreversible act of violence, an act universally deplored by society and in law (as racism should be); it is perhaps the most serious criminal act a person can commit.[93] Juxtaposed next to "spirit,"[94] the phrase evokes the purposeful killing of dreams, ambition, optimism, and hope. The relexicalized spirit murder is a way of communicating, of sharing, what racism is and does with those who have not experienced it.

In addition to giving voice to experiences not acknowledged by law, feminist legal writers also use relexicalization to bring to the law cultures and ethnicities historically excluded. In one piece of feminist legal scholarship, for example, Margaret Montoya brings Latina culture to the law and legal writing when she retells the case of *People v. Chavez*,[95] incorporating Spanish words into her discussion.[96] *People v. Chavez* is a case Montoya encountered in criminal law class in law school.[97] The case involved a Latina girl, Josephine Chavez, who was

89. *See generally* Singer, *supra* note 8.

90. *See* West, *Women's Hedonic Lives*, *supra* note 48, at 149, 154.

91. PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS 73 (1991). Williams notes that racism is only one form of spirit murder; "cultural obliteration, prostitution, abandonment of the elderly and the homeless, and genocide are some of its other guises." *Id.*

92. *Id.* The word "discrimination" does not even begin to cover the complexity and quality of pain inflicted by racism.

93. Note that analogizing racism to murder is also a kind of metaphor. *See infra* notes 170–87 and accompanying text.

94. This also makes the phrase something of an oxymoron. *See supra* notes 67–69 and accompanying text.

95. 176 P.2d 92 (Cal. Ct. App. 1947).

96. Margaret E. Montoya, *Máscaras, Trenzas y Greñas: Un/masking the Self While Un/braiding Latina Stories and Legal Discourse*, 17 HARV. WOMEN'S L.J. 185, 201–05 (1994).

97. *Id.* at 201.

charged with manslaughter after giving birth to a baby over the toilet in the bathroom of her mother's home.[98] Josephine hid the pregnancy from her family and, after giving birth without waking any family members, retrieved the baby from the toilet and hid the baby under the bathtub.[99] Montoya remembers the legal issue discussed in class as centering on whether the baby had been born alive for purposes of the California manslaughter statute.[100]

Montoya first reprints the facts from the *Chavez* opinion—facts related in a flat, sterile way, seemingly devoid of empathy and emotion, with no reference to Josephine's ethnicity and only passing reference to her gender and the extreme poverty in which she lived.[101] Montoya writes:

> I long to hear Josephine Chavez's story told in what I will call Mothertalk and Latina-Daughtertalk. Mothertalk is about the blood and mess of menstruation, about the every month-ness of periods or about the fear in the pit of the stomach and the ache in the heart when there is no period. Mothertalk is about the blood and mess of pregnancy, about placentas, umbilical cords and stitches. Mothertalk is about sex and its effects. . . .
>
> Latina-Daughtertalk is about feelings reflecting the deeply ingrained cultural values of Latino families: in this context, feelings of *vergüenza de sexualidad* ("sexual shame"). Sexual experience comes enshrouded in sexual shame; have sex and you risk being known as *sinvergüenza*, shameless. Another Latina-Daughtertalk value is *respeto á la máma y respeto á la familia. Familias* are not nuclear nor limited by blood ties; they are extended, often including foster siblings and *comadres y compadres, madrinas y padrinos* (godmothers, godfathers and other religion linked-relatives).
>
> Josephine Chavez's need to hide her pregnancy . . . can be explained by a concern about the legal consequences as well as by the *vergüenza* within and of her *familia* that would accompany the discovery of the pregnancy, a pregnancy that was at once proof and reproof of her sexuality. Josephine's unwanted pregnancy would likely have been interpreted within her community and her *familia* and by her mother as a lack of *respeto*.[102]

The words Montoya uses to describe the facts of *Chavez* are not new in the same way as "spirit murder" or "date rape" (they are and have long been part of the Spanish language), but they are both new words and new concepts for American law. One of Montoya's principal points in *Mascaras* is that American law and legal discourse have excluded Latina culture and cultural concepts (as well as Spanish words). Even while

98. *Id.*
99. *Id.*
100. *Id.* at 202.
101. *Id.* at 202–03.
102. *Id.* at 204–05 (footnotes omitted).

imposing on Josephine Chavez a criminal law based on the experiences of white men, the law regards Josephine's Latinaness and her womanness as irrelevant; they cannot be raised acceptably in legal discourse.[103] Montoya resists this through partial relexicalization—through a retelling of Josephine's story that weaves into the legal facts Spanish words and concepts (which bring with them Latina culture).

Relexicalization is useful as a feminist rhetorical tool because, in law, there is no remedy without damage, and there is no damage if there is no word for the hurt or pain. Moreover, the remedy will necessarily be inadequate if the word for the damage does not convey the full extent of the hurt. Consequently, the first step in crafting an adequate remedy is naming the experience. Thus, although it can be alienating and ambiguous, and therefore indicative of legal antilanguage, relexicalization sometimes serves rhetorical purposes and may sometimes be necessary to feminist advocacy.

B. Negation: Irony, Paradox, Sarcasm, and Reclassification

Like relexicalization, negation in feminist legal writing can be both an indicator of legal antilanguage and a tool of persuasion. Negation may often be the most accurate tool to describe women's experiences within patriarchy, which Robin West explicitly calls "profoundly negative."[104] The use of negative rhetorical devices such as oxymoron and irony may also be the product of writing (an exercise of power) about women's experiences of powerlessness. Speaking out or writing about one's feelings of forced silence or invisibility is something of a paradox. Interestingly, while the use in feminist legal writing of paradox, irony, sarcasm, and oxymoron might flout legal convention, these negative devices are also classical rhetorical figures of speech that in the past were common in persuasive writing and speaking.[105] The use of somewhat "out of fashion" rhetorical devices in feminist legal antilanguage is an example of how antilanguage draws from, but alters, the dominant language.[106]

Reclassification is a form of negation that can be quite useful to the feminist advocate. Feminist legal writing must frequently describe and

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103. *Id.* at 204.

104. Robin West, *Feminism, Critical Social Theory and Law*, 1989 U. CHI. LEGAL F. 59, 61.

105. *See* CORBETT, *supra* note 6, at 306, 454–57.

106. Legal advocacy was not always devoid of classical, even flamboyant, rhetoric. However, convention has changed (the *audience* has changed), and this is no longer a suggested or appropriate style. STARK, *supra* note 7, at 199 (characterizing the legal rhetoric of Clarence Darrow and William Jennings Bryan as "histrionic" and wryly suggesting that Prozac is the cause of today's more subdued rhetoric).

communicate experiences mostly unique to women to an audience largely comprised of people who have not had these experiences and whose vision of the world may not include such experiences.[107] Changing the way the world looks to someone entails classifying the world in a new or different way; thus, the writing will likely reclassify things and people.

Negation abounds in Catharine MacKinnon's definitive antipornography text, *Only Words*.[108] For a piece of legal advocacy, *Only Words* is a very negative text. MacKinnon uses paradox, oxymoron, irony, and sarcasm almost exclusively when she is describing women's reality, women's voices, and women's perspectives. This is common in antilanguage, where the issues central to the antisociety tend to be where the most drastic linguistic variation takes place.[109] In *Only Words*, the negation takes place within the confines of an otherwise fairly conventional and persuasive legal argument, illustrating the tension between persuasion and resistance in MacKinnon's feminist legal writing.

MacKinnon's legal argument uses a classical tactic of Aristotelian *logos* also commonly used in legal advocacy: statistics as evidence of a conclusion.[110] She also describes the history of the pornography debate—how it came to pass that pornography was cemented as a question of First Amendment protected free expression.[111] She uses a typical tool of legal argumentation—reformulating the question presented—to challenge the way the central legal question in the pornography debate has been framed.[112] She then uses basic legal analogical reasoning to show how her framing of the pornography debate is more consistent with other laws involving both speech and acts:

> *Saying* "kill" to a trained attack dog is only words. Yet it is not seen [in the law] as expressing the viewpoint "I want you dead"—which it usually does, in fact, express. It is seen as performing an act tantamount to someone's destruction, like saying "ready, aim, fire" to a firing squad. Under bribery statutes, saying the word "aye" in a legislative vote triggers a crime that can consist entirely of what people say. So does price-fixing under the anti-trust

107. *See, e.g.*, West, *Women's Hedonic Lives*, *supra* note 48, at 149–51.
108. CATHARINE A. MACKINNON, ONLY WORDS (1993).
109. *See supra* note 59 and accompanying text.
110. CORBETT, *supra* note 6, at 22–23; MACKINNON, *supra* note 108, at 7.
111. MACKINNON, *supra* note 108, at 8–9.
112. *Id.* at 11 (stating that under the "approach of current law, pornography is essentially treated as defamation rather than as discrimination"). Attempting to control the legal conclusion by reframing the legal question is one of the most basic weapons in the advocate's arsenal. *See* Little, *supra* note 27, at 392.

> laws. "Raise your goddamn fares twenty percent, I'll raise mine the next morning" is not protected speech; it is attempted joint monopolization, a "highly verbal crime." In this case, conviction nicely disproved the defendant's view . . . that "we can talk about any goddamn thing we want to talk about."[113]

This list of examples makes the framing of pornography as protected speech stand out as a peculiar exception. The antitrust example especially, coming as it does from a reported case, is a classic example of basic analogical legal reasoning.[114]

Within what looks in many ways (structurally and strategically) like a typical piece of persuasive legal writing, however, MacKinnon infuses numerous types of negation, primarily oxymoron, paradox, and negative analogy. For example, the oxymoronic concept of women's silent, unheard voices is a linguistic theme that runs throughout *Only Words* and indeed, through much of MacKinnon's other legal writing as well.[115] The negativity and ambiguity created by this paradoxical theme mark MacKinnon's language as a legal antilanguage and are the only ways for MacKinnon to explore her theme that women's voices are unheard and unhearable. Thus, MacKinnon describes women as living their whole lives "surrounded by [*a*] *cultural echo of nothing where your screams and your words should be.*"[116] Women's speech, she writes, using a negative simile, is "like shouting at a movie . . . . The action onscreen continues as if nothing has been said."[117]

The silence of women's voices is only part of women's existence in an anticulture, which MacKinnon describes in entirely paradoxical and oxymoronic terms, using "you" to refer only to women:

> You learn that language does not belong to you, that you cannot use it to say what you know, that knowledge is not what you learn from your life, that information is not made out of your experience. You learn that thinking about what happened to you does not count as "thinking," but doing it apparently does. You learn that your *reality subsists somewhere beneath the socially*

113. MACKINNON, *supra* note 108, at 12.

114. SMITH, *supra* note 13, at 258 (noting that analogical reasoning, also called "case comparison reasoning," involves comparing the facts of a precedent case to the facts of a new case) (citing LINDA HOLDEMAN EDWARDS, LEGAL WRITING: PROCESS, ANALYSIS, AND ORGANIZATION 4–8 (2d ed. 1999)).

115. Part of MacKinnon's dominance theory is that feminism must be the voice of women's silence (itself an oxymoron). Catharine A. MacKinnon, *Feminism, Marxism, Method and the State: Toward Feminist Jurisprudence*, 8 SIGNS 635, 639 (1983) [hereinafter MacKinnon, *Feminism*].

116. MACKINNON, *supra* note 108, at 3 (emphasis added).

117. *Id.* at 6; *see also id.* at 8 (noting that the pornography question was framed "in the absence of the words of sexually abused women, in the vacuum of this knowledge, in the silence of this speech").

> *real*—totally exposed but invisible, screaming yet inaudible, thought about incessantly yet unthinkable, "expression" yet inexpressible, beyond words.[118]

This excerpt contains many examples of what Hodge and Kress call direct negation: the word "not" and the negative prefixes "un"and "in" are used a total of ten times in three short sentences. Other more subtle forms of negation also appear, such as the words "subsist," "beneath," and "beyond," which are all used in this excerpt to mean "less than" and to highlight the lower position of women existing (subsisting) under male dominance.

This same excerpt also uses another form of negation, reclassification, to describe the antiworld that women experience as life under patriarchy. In the excerpt, certain fundamental categories of the dominant (male) culture—what is expressed is language, what is known is truth, what is experienced is real, and what is spoken is heard—are reclassified. In dominant culture, these statements are so true that they are not worth saying. However, in the world of women, language is *not* language, reality is *not* real, knowledge is *not* knowledge, and sounds are inaudible.[119]

Similarly, in *Feminism, Marxism, Method and the State*, MacKinnon uses both reclassification and oxymoron to describe what feminism does:

> Feminism claims the voice of women's silence, the sexuality of our eroticized desexualization, the fullness of "lack," the centrality of our marginality and exclusion, the public nature of privacy, the presence of our absence. This approach is more complex than transgression, more transformative than transvaluation, deeper than mirror-imaged resistance, more affirmative than the negation of our negativity.[120]

This list of almost entirely oxymoronic phrases demonstrates how male dominance is so "metaphysically nearly perfect"[121] that within it women are not yet "real" or fully human; they are objects, barely visible and inaudible. They are "sex" itself or sexual property fought over by men.[122] Feminism reverses this world—turns it upside-down so that

118. *Id.* at 6 (emphasis added).
119. *See* MACKINNON, *Difference*, *supra* note 48, at 39. Speaking of women under male dominance, MacKinnon writes: "You aren't just deprived of a language with which to articulate your distinctiveness, although you are; you are deprived of a life out of which articulation might come." *Id.*
120. MacKinnon, *Feminism*, *supra* note 115, at 639.
121. *Id.* at 638.
122. MACKINNON, *supra* note 108, at 9 (noting that, when women become "real," they will change from being "sex" to being "human being[s] gendered female").

marginality is central, silence is voiced, absence is present. Thus, MacKinnon's language reclassifies women (as not hearable or sexual, lacking the traits that all humans have) as well as the world (as a place where such paradoxes are commonplace), making her writing, and her message, powerful—not in spite of, but because of, its eerie negativity.

Patricia Williams also makes use of reclassification and paradox to demonstrate to her readers the crazy and upside-down world created by racism and sexism. In her discussion of the Tawana Brawley case,[123] Williams notes that Tawana disappeared, silenced, among the shouting voices of the black men who were speaking for her and the white men who were trying to discredit her (and her spokesmen).[124] In a classic version of reclassification that recalls the John Donne poem analyzed by Hodge and Kress, Williams describes Tawana in this context as a human being who has been almost completely obliterated and negated:

> Tawana Brawley herself remains absent from all this. She is a shape, a hollow, an emptiness at the center. Joy Kogawa's "white sound":
>
> > There is a silence that cannot speak.
> > There is a silence that will not speak.
> > Beneath the grass the speaking dreams and beneath the dreams is a sensate sea. The speech that frees comes forth from that amniotic deep. To attend its voice, I can hear it say, is to embrace its absence. But I fail the task. The word is stone.[125]

Williams's words "absent," "hollow," and "emptiness" are all words of negation, and Williams uses them to show how the various forces of the world worked to make Tawana Brawley, a young, victimized black girl, into a nothing—not merely not a person, but a void. The poem itself is also filled with negation and paradox, and it reinforces the negation and reclassification in Williams' writing.

Later, Williams' description of the Brawley incident is a nearly textbook definition of reclassification: "untruth becomes truth through belief, and disbelief untruths the truth. The world turns upside-down; the quiet, terrible, nearly invisible story of her suffering may never emerge from the clamor . . . ."[126] Using reclassification and paradox, Williams shows the reader a world where human beings are ethereal nothings, where truth is untruth and the whole world is upside-down. In

123. Tawana Brawley was a fifteen-year-old black girl who, in late 1987, was found in a vacant lot, partly naked, in a garbage bag, with dog feces and urine on her body and the words "KKK" and "nigger" etched into her torso. She became the center of a media and social controversy when she identified several white men, including the district attorney of Wappinger Falls, New York (where she lived) and a police officer, as the men who had assaulted and raped her. WILLIAMS, *supra* note 91, at 169–71.

124. *Id.* at 170–74.

125. *Id.* at 175 (quoting JOY KOGAWA, OBASAN epigraph (1981)).

126. *Id.* at 176.

this way she paints a vivid picture—again far more vivid and troubling than conventional prose would be—to show the reader (really to have the reader almost experience herself) what the world is for a fifteen-year-old black girl raped and horribly abused (over and over) by white men and white culture.

In another chapter of *The Alchemy of Race and Rights*, Williams uses a more subtle, but still effective, version of reclassification. She offers to the reader a vignette about a "lone black man" who shoots several young white students on an elevator, intending, he says, to murder them, because he claims that he could tell from the students' "body language" and "shiny eyes and big smiles" that they meant to hurt him.[127] She then tells her reader that "with minor character alterations," the vignette is really the story of Bernhard Goetz, a white middle-aged man who shot four young, unarmed African-American men in a New York City subway station when they approached him and, according to him, tried to panhandle money from him.[128] Goetz became something of a vigilante hero among many white residents of New York City, who identified with Goetz's instantaneous fear of being alone in the subway with four young black men.

In this story, Williams reclassifies the categories "black" and "white." In doing so, Williams compels her white readers to realize how race affects their interpretation of the event. Through this racial reclassification of the world, Williams turns the white world upside-down for a moment, to show, quite effectively, that race matters (no matter what the law or anybody else says) and to force her white readers to confront their own racism. It is a very persuasive rhetorical device, with a far greater impact than if Williams had written an analytical piece arguing that identification with Goetz is racist, that those who do identify with Goetz do so partially because of their fear of black people, and that therefore the Goetz verdict was racist and so on.[129] Yet, it is a

127. *Id.* at 76.

128. *Id.* at 76–77. Williams writes that the vignette is a pastiche of Goetz's own words from his videotaped confession. *Id.* at 77.

129. After a trial, Bernhard Goetz was acquitted of all charges, including four counts of attempted murder, and convicted only of a minor weapons charge. *Goetz Cleared in Shooting: Convicted of Illegally Owning a Gun*, MINNEAPOLIS STAR & TRIB., June 17, 1987, at 1A. Goetz reportedly fired four shots, noted that one of his victims was still alive, and then shot him again, saying "You seem to be all right. Here's another." *Id.* Goetz partially paralyzed and brain damaged one of his victims, *id.*, who later sued him civilly and won a forty-three million dollar judgment. *Goetz Will File for Bankruptcy*, ASSOCIATED PRESS, Apr. 28, 1996, 1996 WL 4422188.

device that probably would not be acceptable in conventional legal writing. From a linguistic and advocacy perspective, the question is, why is this unacceptable if it would work to persuade where other methods might fail?[130]

In addition to reclassification and oxymoron, negation in feminist legal writing often takes the form of irony and sarcasm. In Susan Estrich's *Rape*,[131] for example, Estrich's narrative breaks two cardinal conventions of legal advocacy: it is a first-person subjective story,[132] and it is infused with irony and sarcasm. In describing her initial encounter with the police, she explains: "They asked me if he took any money.... He did take money; that made it an armed robbery. Much better than rape. They got right on the radio with that."[133] Similarly, in describing her experience looking at mug shots, Estrich states: "No one had ever told me that if you're raped, you should not shut your eyes and cry for fear that this really is happening. You should keep your eyes open focusing on this man who is raping you so you can identify him when you survive."[134] Finally, in discussing the subject that led to the title of the piece, Estrich writes:

> I learned, much later, that I had "really" been raped. Unlike, say, the woman who claimed she'd been raped by a man she actually knew, and was with voluntarily. Unlike, say, women who are "asking for it," and get what they deserve. I would listen as seemingly intelligent people explained these distinctions to me, and marvel; later I read about them in books, court opinions, and empirical studies. It is bad enough to be a "real" rape victim. How terrible to be—what to call it—a "not real" rape victim.[135]

This paragraph demonstrates an especially artful use of irony—and more than a bit of sarcasm—placing this part of Estrich's text within the definition of legal antilanguage. The first three sentences set out the

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130. Perhaps some lawyers and judges might be tempted to refer to Williams' method as a "trick," a not-quite-above-board method of deceiving the reader as a means to an end. However, this begs the question. Much of conventional legal advocacy involves some deception—substituting "misled" for "lied," or using the passive voice to conceal the actor, among many, many others—to reach the greater goal of advocacy and zealous representation of the client. Williams' method might be different in some substantive way, but we need to ask how it is different and why we are allowed to use some deceptive or psychologically manipulative devices and not others.

131. Susan Estrich, *Rape*, 95 YALE L.J. 1087 (1986).

132. In the law, such an account is generally thought to convey bias, not particular knowledge. It is also thought to be too emotional for legal analysis. Estrich addresses this convention later in the piece and tries to retool her narrative as ethically responsible, if not necessary: "I cannot imagine anyone writing an article on prosecutorial discretion without disclosing that he or she had been a prosecutor. I cannot imagine myself writing on rape without disclosing how I learned my first lessons or why I care so much." Estrich, *supra* note 131, at 1089.

133. *Id.* at 1087–88.

134. *Id.* at 1088.

135. *Id.*

distinction about which Estrich wants to make a point. The reader gets a subtle clue of the intended irony by the repetition (the classical anaphora) of words in the second and third sentences as well as the colloquial "say" interjected into the sentences. However, Estrich leaves no doubt about her feelings by combining the quotation marks around the "really" in the first sentence and the "not real" in the last, the reference to "seemingly intelligent people" and the author's reaction ("marvel"), and the interjected, somewhat derisive, "what to call it." In this short, highly effective paragraph, Estrich makes her point clearly and persuasively, while breaking some of the cardinal rules of advocacy.

MacKinnon is also well-known for her use of irony and sarcasm. Like Estrich, she reserves some of her strongest irony and sarcasm for her rebuttal of arguments she disagrees with, flouting yet another convention of traditional legal writing.[136] The frequently repeated title phrase, *Only Words*, is MacKinnon's ironic encapsulation of the propornography logic.[137] MacKinnon also treats other feminist theories with sarcasm, describing feminist equality theory as having a "paradigm trauma" whenever women are relegated to a "second class" under a male standard and "refuse to smile about it."[138] Critiquing the law created by the equality and difference paradigms, MacKinnon notes:

> The special benefits side of the difference approach has not compensated for the differential of being second class.... We [women]... get protected out of jobs because of our fertility. The reason is that the job has health hazards, and somebody who might be a real person some day and therefore could sue—that is, a fetus—might be hurt if women, who apparently are not real persons and therefore can't sue... are given jobs that subject our bodies to possible harm. Excluding women is always an option if equality feels in tension with the pursuit itself.... Take combat. Somehow it takes the glory out of the foxhole, the buddiness out of the trenches, to imagine us out there. You get the feeling

136. Most advocacy texts caution legal writers against use of these devices when responding to an opponent's argument, where it is both most tempting and, at least as conventional wisdom has it, least effective. *See, e.g.*, FAJANS & FALK, *supra* note 10, at 116 (noting that the "deceitful use of language," such as sarcasm, mock humility, or fake candor, is likely to damage the author); RAY & RAMSFIELD, *supra* note 10, at 268 (suggesting the avoidance of sarcasm in legal writing because it is inappropriate and too easily taken literally); SCHULTZ & SIRICO, *supra* note 10, at 313 (stating that "[s]arcasm is always inappropriate" in legal writing); SHAPO ET AL., *supra* note 10, at 321 (indicating that "heavy irony [and] hyperbole... are inappropriate in brief-writing").

137. MacKinnon further diverges from legal convention by placing the ironic phrasing of the opposing side's argument in the prominent title position.

138. MACKINNON, *Difference*, *supra* note 48, at 36.

> they might rather end the draft, they might even rather not fight wars at all than have to do it with us.[139]

The irony and sarcasm in MacKinnon's and Estrich's writing are clear examples of negation. The use of these negative devices certainly places those parts of the texts outside the conventions of legal writing. The use of the devices does create some distance between author and her audience, evidenced by the sometimes inexcusably harsh responses to MacKinnon's and Estrich's writing, especially from men.[140] Irony combined with sarcasm sounds angry and condescending; use of these tools can be alienating. Artfully used, however, as they are in both pieces, irony and sarcasm can also be powerful and attention grabbing. Moreover, as used by MacKinnon and Estrich, neither irony nor sarcasm creates ambiguity; no intelligent reader is likely to think that MacKinnon believes women are not "real persons" or that Estrich believes acquaintance rape is not "real rape," so the conventional worry that irony is risky because of possible misinterpretation seems misplaced.

It is hardly surprising that, as the language (antilanguage) of an anticulture, feminist legal writing makes use of negation. Women's existence under patriarchy is not only negative, but women's experiences are often paradoxical: the world often looks upside-down to us. Things that the dominant world views as "good" or "pleasurable" may be "bad" and "painful" to us.[141] Thus, our writing will be paradoxical, oxymoronic, ironic, and sometimes sarcastic; it will often reclassify so-called fundamental truths about the world. It will often sound negative. Despite legal convention, however, these characteristics do not make this type of feminist legal writing poor writing; they make it antiwriting, a writing of resistance. Why should these techniques have no place in conventional legal advocacy?

C. Poetic Devices: Metaphor, Figures of Speech, and Rhythm

Figures of speech and other poetic rhetorical devices are also a part of feminist legal antilanguage. Feminist legal antilanguage makes frequent use of figures of speech involving repetition and syntactic inversion.

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139. *Id.* at 38 (footnotes omitted).

140. *See* Estrich, *supra* note 131, at 1089 (noting that she has been harassed as a result of her conscious and open discussion of her rape); Carlin Romano, *Between the Motion and the Act*, 257 NATION 563, 563 (1993) (threatening to rape MacKinnon because he is "uncertain whether she understands the difference between being raped and being exposed to pornography"); Richard Grenier, *The Real 'New McCarthyism,'* WASH. TIMES, Jan. 24, 1994, *available at* 1994 WL 5503153 (comparing MacKinnon to Adolf Hitler).

141. *See* West, *Women's Hedonic Lives*, *supra* note 48, at 149.

Moreover, a substantial amount of the description and argumentation is metaphorical. Part of this has to do with Halliday's theory that antilanguage, as derivative of the dominant language, makes use of metaphor to translate the experiences of its speakers, for whose experiences there is no direct language in the dominant tongue. This certainly may be partially at the root of the degree of poetry, metaphor, and simile in feminist legal writing. The prevalence of metaphor and simile may also be rhetorical—an attempt to connect with the audience and to liken women's experiences (with which the audience may not be familiar) to something that the audience does understand.[142] The use of poetic devices of repetition and inversion also gives the writing rhetorical power by adding rhythm and emotion to the work.[143] It may also be that the use of poetry, which has held a special place in the history of feminism,[144] is a political choice.

Despite their place in classical rhetoric, the extensive use of poetry and complex metaphor and simile mark a text as legal antilanguage because their use usually breaks the clarity and ease rules of persuasive legal writing. Poetic devices can often make the writing inaccessible to the reader who is busy or unwilling to work to understand. The poetic quality of feminist legal writing also relinquishes interpretive control to the reader. Poetry creates a gap between words and interpretation that challenges the reader, who frequently must read sentences several times and think to decipher the layers of meaning.[145] Metaphors and similes can have the same effect if their references are obscure, or their analogies not obvious. Syntactic inversion often makes for complex,

142. *See* Singer, *supra* note 8, at 2455–56 (arguing that analogy, not straight narrative, is what speaks to people who otherwise have no shared experience). Metaphor and simile can be seen as poetic forms of analogizing or comparing.

143. Rhetorical schemes of repetition are deliberate methods used to establish a "marked rhythm" in the work, both for emphasis and for a "strong emotional effect." CORBETT & CONNORS, *supra* note 24, at 391. The schemes of repetition are rare in prose writing, in part, because they are thought to "spring[] spontaneously from intense emotion." *Id.* at 392.

144. Bernard J. Hibbitts, *Making Sense of Metaphors: Visuality, Aurality and the Reconfiguration of American Legal Discourse*, 16 CARDOZO L. REV. 229, 334 n.614 (1994) (noting the centrality of poetry to feminism and the dedication of many women's law journals to feminist poetry); *see generally* THIS BRIDGE CALLED MY BACK: WRITINGS BY RADICAL WOMEN OF COLOR (Cherríe Moraga & Gloria Anzaldúa eds., 2d ed. 1983).

145. Consider the examples from MacKinnon *infra* notes 156–64 and accompanying text.

difficult-to-read sentences.[146] Feminist legal writing employing poetic devices creates the impression that the writer has deliberately chosen to challenge the reader to struggle to understand. The message seems to be that the dedicated reader who rises to the challenge will be rewarded with a greater sense of meaning and knowledge than he may have obtained through more straightforward legal prose. As anyone who has taught law school knows, knowledge and understanding worked for and self-won are both long-lasting and more meaningful to the student.[147]

For sheer proliferation of poetic devices, no feminist legal work equals MacKinnon's *Only Words*.[148] *Only Words* makes such extensive use of poetic devices that it is impossible to catalogue them all. The artful use of poetry and classical rhetoric in *Only Words* gives the piece a power, beauty, and rhythm unusual in legal writing. For example, there are no fewer than ten examples of classical rhetorical schemes of repetition in the first fifteen pages of *Only Words*, most frequently when MacKinnon is describing women's experiences in pornography.[149] Describing how pornography makes the abuse of women continuous and permanent, MacKinnon uses both "anaphora"[150] and "epistrophe,"[151] as well as another scheme of repetition called "polysyndeton," which is the deliberate, successive use of several conjunctions.[152] She writes: "You always know that the pictures are out there somewhere, sold *or* traded *or* shown around *or* just kept in a drawer. . . . What *he felt* as *he watched* you as *he used* you is always being done *again* and lived *again* and felt *again* through the pictures . . . ."[153]

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146. *See* CORBETT & CONNORS, *supra* note 24, at 391–92 (noting that schemes of repetition are common in poetry because poetry is a form of language focused on expression that is marked by a significant gap between writer intent and reader comprehension).

147. This is the theory behind one of the most common forms of law school teaching, the Socratic method. Mary Kate Kearney & Mary Beth Beazley, *Teaching Students How to "Think Like Lawyers": Integrating the Socratic Method with the Writing Process*, 64 TEMP. L. REV. 885, 887 (1991).

148. This is perhaps less than surprising, given that *Only Words* began (ironically) as a series of speeches. MACKINNON, *supra* note 108, at v. The work begs to be read aloud.

149. *Id.* at 3–18.

150. Anaphora is the "repetition of the same word or group of words at the beginnings of successive clauses." CORBETT & CONNORS, *supra* note 24, at 390.

151. Epistrophe is the "repetition of the same word or group of words at the ends of successive clauses." *Id.* at 391.

152. *Id.* at 388.

153. MACKINNON, *supra* note 108, at 4 (emphasis added). The repetition of "he" is anaphora. The repetition of "or" and "and" is polysyndeton. The repetition of "again" is epistrophe. Throughout this section of the Article, italics appear in the quotations to help the reader see the repetition and the inversion; often the italics parallel the quoted source's original italicized emphases.

Just a few pages later, in describing the history of how the pornography debate was framed in law, MacKinnon again uses a long series of anaphora:

> A long time before the women's movement made this information available, *in the* absence of the words of sexually abused women, *in the* vacuum of this knowledge, *in the* silence of this speech, the question of pornography was framed and debated—*its* trenches dug, *its* moves choreographed, *its* voices rehearsed. *Before* the invention of the camera . . . *before* the rise of a mammoth profitmaking industry of pictures and words acting as pimp; *before* women spoke out about sexual abuse . . . the question of the legal regulation of pornography was framed as a question of the freedom of expression of the pornographers and their consumers.[154]

And again, on the next page:

> *Before*, each woman who said she was abused looked incredible or exceptional; *now*, the abuse appears deadeningly commonplace. *Before*, what was done to her was sex; *now* it is sexual abuse. *Before*, she was sex; *now*, she is a human being gendered female—if anyone can figure out what that is.[155]

As MacKinnon's argument evolves, her prose becomes even more poetic and complex. When she explains the convoluted and insidious relationship of pornography and speech and sexual abuse, she uses both schemes of repetition and grammatical inversion:

> *Protecting pornography* means *protecting sexual abuse as speech,* at the same time that both *pornography* and its *protection* have deprived women *of speech,* especially *speech* against *sexual abuse*. . . . The operative definition of censorship accordingly shifts from *government silencing* what *powerless people* say, to *powerful people* violating *powerless people* into *silence* and hiding behind *state power* to do it.[156]

Similarly, the First Amendment and pornography's valuation of the consumer's sexual gratification over the need to stop the abuse of women is accomplished through an extended, complex series of repetitive schemes:

> Because the purveyor is protected in sending, and the consumer in receiving, *the thought or feeling*, the fact that an unintended bystander might have offended

154. *Id.* at 8 (emphasis added). Note that in addition to anaphora, there are several oxymorons here ("vacuum of this knowledge," "silence of this speech"), as well as some personification ("pictures and words acting as pimp"). *See supra* notes 61–76 and accompanying text (discussing negation and reclassification).

155. MACKINNON, *supra* note 108, at 9 (emphasis added).

156. *Id.* at 9–10 (emphasis added and in original). Within this paragraph, anaphora and epistrophe are combined with a scheme of inversion, chiasmus. CORBETT & CONNORS, *supra* note 24, at 394–95.

> *thoughts or* unpleasant *feelings* is a mere externality.... That the First Amendment protects this process of interchange—*thought to thought, feeling to feeling*—there is no doubt.
>
> ... Whatever damage is done through such words is done not only through their context but through their *content*, in the sense that if they did not *contain* what they *contain*, and *convey* the meanings and *feelings and thoughts* they *convey*, they would not evidence or actualize the discrimination that they do.[157]

Note in these excerpts how the poetry gives the sentences great rhetorical power, but also makes them complex and challenging to read. *Only Words* is not an easy read on any level, but the many levels of complexity in MacKinnon's sentences compel the reader to look closely.

Another common classical scheme used throughout *Only Words* is "antimetabole," which involves repetition and grammatical inversion, and the related scheme of "chiasmus," which involves only grammatical inversion.[158] Antimetabole and chiasmus add not only rhythm but a certain "magic" to writing—one that makes the writing memorable and gives it impact.[159] Both of these schemes "have the air of the 'neatly turned phrase' ... that figures in most memorable aphorisms."[160] They are also, interestingly, often used to reinforce "antithesis," which is a classical rhetorical scheme of construction in which contrasting ideas are juxtaposed for effect.[161] Antithesis can also be categorized as a type of negation in that it compares things that are *not* like one another. MacKinnon frequently uses antimetabole and chiasmus in her logical reasoning: "In *pornography, pictures and words* are *sex.* At the same time, in the world *pornography* creates, *sex* is *pictures and words.* As *sex* becomes *speech, speech* becomes *sex.*"[162] MacKinnon offers another extraordinarily intricate and extended series of repetitions and inversions:

> [T]he First Amendment has grown as if a *commitment to speech* were no part of a *commitment to equality* and as if a *commitment to equality* had no implications for the *law of speech*.... Fourteenth Amendment *equality ... has grown as if equality* could be achieved while the First Amendment protected the *speech of inequality*, meaning whenever *inequality* takes an expressive form, and without considering *equal* access to *speech* as central to any *equality* agenda.[163]

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157. MACKINNON, *supra* note 108, at 11–14 (emphasis added).
158. CORBETT & CONNORS, *supra* note 24, at 394–95.
159. *Id.*
160. *Id.* at 394.
161. *Id.* at 382–83, 395. Antithesis is related to the classical topics of dissimilarity and contraries. *Id.* at 96–97 (discussing topic of difference), 105–06 (discussing topic of contraries). The topics are "general heads or categories" that suggest "general strategies of development" of arguments. *Id.* at 86. They are basically a list of ways to argue or develop ideas, such as similarity, difference, degree, or cause and effect. *Id.* at 84–87.
162. MACKINNON, *supra* note 108, at 26 (emphasis added).
163. *Id.* at 71–72 (emphasis added).

She also uses the two schemes so that what the reader may perceive (or wants to perceive) as the line between sex and sexual abuse is confused and blurred: "I am not ultimately sure why this is the case, but it has something to do with the positioning of *sex words* in *sexual abuse*, in *abuse* as *sex*, in *sex* as *abuse*, in *sex*."[164]

Schemes of repetition and inversion also appear in the feminist writings of Robin West and Patricia Williams. In *Women's Hedonic Lives*, for example, Robin West uses an extended and elaborate combination of the classical rhetorical devices of anaphora, epistrophe, and polysyndeton to describe women's knowledge of and experience of male violence:

> *I hear* about the date rapes of students . . . my male colleagues do not. The story is always prefaced by, *"Don't tell anyone."* *I hear* (*men don't*) about marital violence. It is always prefaced by: *"Don't tell anyone; he'd* kill me" (*which might be true*) *or "don't tell anyone, he'd* lose his job" (*which is hardly ever true*) *or "don't tell anyone,* I'd be ashamed" (*which is always true*). *I hear* women's memories of early sexual abuse. *"Don't tell anyone."* I draw this simple inference: Women and men have wildly different "ignorant" intuitions about the amount of danger, violence and fear in women's lives because *women live it and men don't and women tell other women and not men.*[165]

West again uses schemes of repetition and inversion to describe her own experience in a battering relationship:

> Pleasures *were for others.* Sensuality *was for others.* "Personal welfare" *was for others.* Subjectivity *was for others.* . . . *I learned* to view this as both *natural* and as *naturally inarticulable*, meaning *I learned* not just *to lie*, but *to* be a *lie*, *to* embody *lying*, *to* have no entitlement to either truth or language. *I learned to be for another's violence and to* view it as my reason for *being*, *and I learned* not *to* think about it much.[166]

And again, in describing the result (or "lesson") of battering on the victimized woman: "If *you are going to be at all*, you *are going to be for him.* And *you are going to be*, so *you are going to be for him.*"[167]

Patricia Williams's use of repetition and inversion, like West's, gives emotion and passion to her writing. In her discussion of the Tawana Brawley case, she confronts the popular argument that no crime was committed against Tawana, although Tawana was found catatonic,

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164. *Id.* at 58 (emphasis added).
165. West, *Women's Hedonic Lives*, *supra* note 48, at 164–65 (emphasis added and in original).
166. *Id.* at 167 (emphasis added and in original).
167. *Id.* at 168 (emphasis added and in original).

mutilated, and smeared with excrement:

> This much is certainly worth the conviction that Tawana Brawley has been the victim of *some unspeakable crime. No matter* how she got there. *No matter* who *did it* to her—and even if she *did it* to herself. Her condition was clearly the expression of *some crime against her, some tremendous violence, some great violation that challenges comprehension.*[168]

Williams uses similar rhetorical tools to point out the qualitative difference in the stereotypes of white and black women. The following series of sentences contain not only schemes of repetition, but also a scheme of construction, antithesis, as well as extended simile and metaphor:

> *White women* are prostitutes; *black women* are *whores. White women* sell themselves, in implied Dickensian fashion, because they are jaded and desperate; *black women whore* as a way of being, as an innateness of sootiness and contamination, as a sticky-sweet inherency of *black womanhood* persistently imaged as overripe fruit—so they *whore,* according to this fantasy-script, as easily as they will cut your throat or slit open said deep sweet fruit, spitting out afterwards a predictable stream of blood *and* seeds *and* casual curses.[] *Black women whore* because it is sensual *and* lazy *and* vengeful.[169]

The pastiche of rhetorical schemes in this passage give it not only beauty, poetry, and rhythm, but a power and passion that it would not have in more straightforward prose. The writing may not be as simple and clear as convention would dictate, but it has a richness and vividness not typical of legal writing.

In addition to grammatical schemes of construction, repetition, and inversion, feminist legal antilanguage is rich with metaphor and simile.[170] Often, the metaphors dominate the text, or their analogies are obscure or unconventional, separating them from the use of these devices in conventional legal writing.[171] Sometimes, the use of metaphor in feminist

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168. WILLIAMS, *supra* note 91, at 169–70 (emphasis added). A similar, but even lengthier, stream of repetition and parallelism appears on page 173 in Williams' illustration of how Tawana Brawley's story became drowned out by "all the thunder and smoke of raucous male outcry, curdling warrior accusations, the flash of political swords and shields." *Id.* at 173. In the extended sentence on page 173, the word "by" is used to begin six successive clauses. *Id.*

169. *Id.* at 175 (emphasis added and in original).

170. This is consistent with Halliday's hypothesis that antilanguages will use metaphor as the "norm" of expression. Halliday, *supra* note 5, at 579 ("[W]e should *expect* metaphorical compounding, metatheses, rhyming alterations, and the like to be among its regular patterns of realization.").

171. The use of metaphor in conventional legal writing is a well-occupied field. *See, e.g.*, HAIG BOSMAJIAN, METAPHOR AND REASON IN JUDICIAL OPINIONS (Robert K. Burdette ed., 1992); Hibbitts, *supra* note 144, at 234–35 & n.33; Laura E. Little, *Hiding with Words: Obfuscation, Avoidance and Federal Jurisdiction Opinions*, 46 UCLA L. REV. 75, 105–07 (1998) (analyzing use of metaphor, synecdoche, and metonymy in federal jurisdiction opinions).

legal antilanguage is so extended as to be more like allegory or parable than metaphor, or is made negative through the use of negative words or analogies or through sarcasm or irony.

MacKinnon uses metaphor and simile in *Only Words* for a number of rhetorical purposes: sometimes to emphasize the gender divide created by patriarchy and solidified by pornography, sometimes to shock. Parts of *Only Words* are explicitly gender segregated by MacKinnon's use of synecdoche, a figure of speech in which a part is used to stand for the whole.[172] This explicit gender segregation is what sets MacKinnon's use of synecdoche apart from conventional legal writing, which encourages gender neutrality. MacKinnon uses the feminine pronouns singular (she, her) or the second person singular (you, your) to refer to all women and the masculine pronoun singular (he, him, his) to refer to all men:

> *He* has them.... What *he* felt as *he* watched *you* as *he* used *you* is always being done again and lived again and felt again through the pictures—*your* violation *his* arousal, *your* torture *his* pleasure. Watching *you* was how *he* got off doing it; with the pictures *he* can watch *you* and get off any time.[173]

MacKinnon also uses simile and synecdoche to shake the reader loose from his preconceptions. In describing how, during the Clarence Thomas hearings, Anita Hill's testimony made her (not him) look dirty, MacKinnon uses both synecdoche and a startling and distasteful simile that would be way out of bounds in conventional legal writing:

> What happens when you put the real language of sexual abuse in a Senate confirmation hearing?... It, and you, are treated as if you do not belong, *as if you pulled down your pants and defecated in public.* You are lowered by proving your injury. He is not.[174]

MacKinnon also uses metaphor and simile to illustrate her theory of dominance, which argues that patriarchy is purposefully constructed to keep women oppressed. Thus, when she describes how the legal arguments surrounding pornography have been framed, she notes: "A long time before the women's movement made... information [about sexual abuse] available... the question of pornography was framed and debated—*its trenches dug, its moves choreographed, its voices*

172. CORBETT, *supra* note 6, at 445.

173. MACKINNON, *supra* note 108, at 4 (emphasis added). Note that there are other schemes of repetition in this passage as well, including anaphora, epistrophe, and polysyndeton.

174. *Id.* at 65–66 (emphasis added). Note here again the use of the second person singular and the male singular pronoun.

rehearsed."[175] In one sentence, MacKinnon depicts the pornography debate as simultaneously a war (with trenches dug) and a preordained (literally) song and dance (already choreographed and rehearsed). She thus reveals the "debate" of pornography to be anything but the free and open "marketplace" of ideas connoted by the word "debate." Rather, MacKinnon conveys to the reader that the idea of a "pornography debate" is an oxymoron because it is a debate whose result has already been purposefully decided and orchestrated. The debate itself (like a dance) is just "for show." Another vivid metaphor used by MacKinnon to illustrate dominance is the image of men's feet on women's necks.[176] Far more vivid and troubling than a more conventional description of oppression or sexism, this metaphor calls up the physicality of male dominance over women (and how it is maintained by physical force). It illustrates colorfully why women are silent (we have heavy feet on our larynxes) and, often, scared.

Patricia Williams's use of metaphor is even more extensive and challenging to the reader than MacKinnon's. Williams purposefully sets out to challenge her readers by consciously refusing to follow the linear structure of conventional legal writing.[177] Her writing extends the use of metaphor in a way that frequently approaches allegory or parable.[178] Allegory, and especially parable, often leave the reader to interpret the meaning or lesson conveyed, giving the reader an interpretive power unheard of in conventional legal writing.[179]

In chapter four of *The Alchemy of Race and Rights,* entitled "Teleology on the Rocks," and subtitled "(or Spirit-Murdering the Messenger)," Williams writes of racism and sexism in law school using a variety of similes and an extended metaphor describing law school as another planet:

> My abiding recollection of being a student at Harvard Law School is the sense of being invisible. I spent three years wandering in a murk of unreality. I observed large, mostly male bodies assert themselves against one another *like* football players caught in the gauzy mist of intellectual slow motion. I stood my ground amid them, watching them deflect from me . . . *as if* I were a pillar in a crowded corridor. Law school was for me *like* being on another planet, full of alienated creatures . . . .
>
> Perhaps there were others who felt what I felt. Perhaps we were all aliens, all silenced by the dense atmosphere. . . .

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175. *Id.* at 8 (emphasis added).

176. MACKINNON, *Difference*, *supra* note 48, at 45 ("Take your foot off our necks, then we will hear in what tongue women speak.").

177. *See* WILLIAMS, *supra* note 91, at 7–8.

178. *See* CORBETT, *supra* note 6, at 444–45. An allegory is "an extended or continued metaphor." *Id.* at 444. Parable is "an anecdotal narrative designed to teach a moral lesson" and is "[c]losely allied" with allegory. *Id.* at 445.

179. *See id.* at 445.

> When I became a law professor, I found myself on yet another planet: a planet with a sun as strong as a spotlight and an atmosphere so thin that my slightest murmur would travel for miles . . . .[180]

In the next paragraph, Williams tells a story which seems to have little connection to the previous paragraphs (which are all about her feelings while in law school), except that the experience happened to a friend of Williams' while both Williams and the friend were in law school. In the story, Williams's friend, also a black woman, is terrorized at gunpoint by a SWAT team in Florida because she refused to pay for a glass of sour milk served to her in a restaurant outside Miami.[181] Williams's friend was in Florida during Christmas break from Harvard Law School.[182] She had asked for another glass, but was ignored; when she refused to pay, a patrolman who was in the restaurant ordered her to pay (and drew his gun).[183] It was only after some give and take with the patrolman that Williams' friend noticed that she was surrounded by a SWAT team, in full gear and guns drawn. During all this, the milk stayed in the glass, with "curdle hanging on the sides."[184]

At superficial glance, it is not clear what this story is doing in a book about law, in a chapter about law school, or in a chapter about "teleology" that goes on to discuss, among other things, the Howard Beach incident and Bernhard Goetz.[185] Moreover, Williams never tells her reader outright why she is inserting the story or what the story "means."[186] Such an overt surrender of control to the reader would be most unusual in any kind of persuasive legal writing (as would the use of parable generally). But it is worth asking whether convention's banishing of extended metaphor and parable is closing off a potentially persuasive tool. Williams's use of it works on the reader—even, or especially, the lawyer reader—in a number of ways. First, the reader cannot help but be shocked and outraged at the racism in the story. Williams tells it artfully and it is an appalling story. We may know, intellectually, that there is racism in our society, but this story shows us,

180. WILLIAMS, *supra* note 91, at 55–56 (emphasis added). The italics highlight the words of simile.

181. *Id.* at 56–57. This description does not do the story (or Williams' expression of it) much justice, but it is a bit too long to reproduce in full here. It is worth reading in the context of the whole chapter, if not the whole book.

182. *Id.* at 56.

183. *Id.* at 56–57.

184. *Id.* at 57.

185. *Id.* at 55–79.

186. This is typical of parable. *See* CORBETT, *supra* note 6, at 445.

vividly and graphically, its depth, its tenacity, and its violence.[187]

However, to label Williams's use of parable as a method of playing to emotion misses its simultaneous appeal to the reader's intellect and logic. A natural reaction to this story is to wonder what the story is *doing* in the book. Most lawyers are intellectually curious enough to react to this story by *thinking* about what it means and why Williams placed it where she did. It is a puzzle, an intellectual challenge; if we lawyers do anything, we like to think we are good puzzle solvers and that we can figure most things out. Thus, it is worth wondering whether this device, which convention suggests demands too much from the reader, might work on the legal audience more successfully than conventional prose in some contexts. The lure of Williams's prose should at least lead us to ask whether it is possible that legal convention underestimates the willingness and astuteness of the legal audience.

Williams also uses the legal antilanguage tool of allegory to achieve a conventional persuasive end: to make complex legal concepts clearer or simpler. To demonstrate how "neutrality" and "original intent" are problematic constitutional principles, Williams tells the reader a story about the Rockettes.[188] The Rockettes, a female dance troupe noted for its uniform high kicking, consisted, until 1987, of all white women.[189] The director of the Rockettes defended the "all-white line" by noting that the hallmark of the troupe was uniform, mirror images and that "[o]ne or two black girls" would destroy the image of "precision" and would be "distract[ing]."[190] In this passage, Williams is explicit about her purpose: she writes that when she read the director's statement she "saw allegory—all of society pictured in that one statement."[191]

Williams also is explicit in this chapter about the point of the Rockettes story: to reveal the inherent bias in "neutral[ity]" and the impossibility of applying a "colorblind" constitutional paradigm in the context of a society with a long and deep history of racism.[192] Williams's use of the Rockettes allegory, among other effects, demonstrates the racism inherent in a colorblind standard to lawyers who could miss or

187. This is one way that Williams shows her readers that what she calls "spirit murder" has a very real, violent quality to it. Much of the time, racism is deadly.

188. WILLIAMS, *supra* note 91, at 116–17. This is not the only example of Williams' use of narrative to illuminate. *See* Kathryn Abrams, *Hearing the Call of Stories*, 79 CAL. L. REV. 971, 1001 (1991).

189. WILLIAMS, *supra* note 91, at 116.

190. *Id.*

191. *Id.*

192. *See id.* at 117. Williams states that the "example of the Rockettes is a lesson in why the limitation of original intent as a standard of constitutional review is problematic, particularly where the social text is an 'aesthetic of uniformity'—as it appears to be in a formalized, strictly scrutinized but colorblind liberal society." *Id.*

deny it by focusing on the complex, intellectualized legal stories in the case law. Even for lawyers schooled in reading case law, it is easier to see (literally and figuratively) racism in the maintenance of an all-white Rockettes line than in a court decision disallowing minority set-asides in government contracts.[193]

Finally, Susan Estrich also uses extended metaphor and simile throughout her article, *Rape*. Throughout Estrich's otherwise fairly conventional piece of legal writing,[194] she continuously likens the law of rape, especially its requirements of resistance and force, to "'boys' rules' applied to a boys' fight."[195] This metaphor is unconventional in two ways: first, its extensive use is unusual for legal writing; second, and even more unconventional, is its disparaging, negative tone. The analogy implies that rape law's view of force and resistance is silly, superficial, simplistic, and crude. Estrich describes the use of force traditionally enforced in rape cases as what "schoolboys do on the playground: Force is when he hits me; resistance is when I hit back."[196] When a woman says "no" and cries in response to rape, the law does not recognize this as legal resistance because it "is the reaction of 'sissies' in playground fights," and the law defines force "solely in schoolboy terms."[197] Through the metaphor, Estrich makes her point not only about the gender unfairness created by the law (schoolboys versus sissies) but also about the absurdity of the law. Although the tone of the metaphor and the repetition of it bring parts of *Rape* closer to legal antilanguage and away from convention, it also allows Estrich to do so much more memorably and effectively than a direct statement.

The writing of the feminist legal scholars analyzed here is a kind of law poetry. The poetry of the writing is both what marks it as an antilanguage and what gives the writing much of its force. Although

193. *See id.* at 117–18. Williams compares her Rockettes story briefly to the Supreme Court decision in *City of Richmond v. Croson*, 488 U.S. 469, 470 (1989), in which the Supreme Court held that a plan requiring contractors awarded city contracts to subcontract a certain amount of the contract to minority business enterprises was unconstitutional discrimination based on race.

194. Conventional legal writing is conventional in writing and expression, but not necessarily in substance. That is, Estrich's ideas about rape might be radical, but her writing looks more like usual legal reasoning and writing than, for example, that of MacKinnon or Williams.

195. Estrich, *supra* note 131, at 1091. Sometimes the comparison is done by simile, sometimes by metaphor. *Id.* at 1095, 1105, 1111–12, 1155.

196. *Id.* at 1105.

197. *Id.* at 1111–12.

convention does not usually characterize it as such, poetic devices can be persuasive on a number of levels: they can make writing more emotive, more memorable and, quite simply, more beautiful than conventional legal advocacy. The use of poetic devices is also a way to make impact—to insist, through repetition, to catch the reader's attention (through repetition and grammatical inversion) and to make the reader see and hear about experiences that are (probably) beyond the reader's scope of experience. It appeals to the reader's intellect and emotion at the same time to make the reader both feel and think about the author's point. Finally, the aphoristic quality of the poetry is "catchy"—it can serve to embed the thoughts and feelings into the reader's consciousness.

D. Narrative Standpoint and Emotion

Feminist legal antilanguage is both more personal and, similarly, more unabashedly emotional than conventional legal writing. Perhaps this is a conscious reflection of that old feminist axiom, "the personal is political." It also might be a natural byproduct of the use of consciousness raising as a feminist legal method.[198] Whatever the cause, feminist legal writing pushes legal advocacy beyond conventional persuasion's uneasy relationship with subjectivity and emotion. The primary rhetorical vehicles for this are feminist legal writing's use of first-person narrative, firmly disallowed in conventional legal writing, and feminist legal writing's explicit appeals to emotion through use of the second person, in violation of legal convention's "Golden Rule."

Feminist legal writing uses first-person narrative for many different reasons.[199] This Article, however, is concerned primarily with the use of first-person narrative as a tool of rhetoric—as a way to persuade the reader. As a rhetorical tool, first-person narrative is often seen as an appeal to emotion more than an appeal to reason, though there are elements of reason embedded as well.[200] Sometimes, however, feminist

198. *See* Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 863–67 (1990).

199. For excellent analyses of the storytelling movement in feminist and other legal writing, see generally Abrams, *supra* note 188; Jane B. Baron, *Resistance to Stories*, 67 S. CAL. L. REV. 255 (1994).

200. In fact, one of the subtexts of feminist writing (and this Article) is that the law's stark separation between emotion and reason is mistaken; in fact, human emotion and reason are intertwined and entangled in a way that makes them impossible to separate, especially as bases for decision making. Because they are so intertwined, it makes little sense to try to separate, categorize, and value rhetorical writing tools based on whether they appeal to reason or emotion. *See* Baron, *supra* note 199, at 277–80; *see generally* Martha Minow, *Feminist Reasoning: Getting It and Losing It*, 38 J. LEGAL EDUC. 47 (1988); Martha L. Minow & Elisabeth V. Spelman, *Passion for Justice*, 10 CARDOZO L. REV. 37 (1988).

legal writers use the first person to do something qualitatively different from, for example, a highly sympathetic or emotional third-person account (which is not rare in legal writing). For example, some feminist legal writers use the first person to establish their character or competence to speak on a legal subject—a classic "ethical appeal" or ethos, which is one of the three Aristotelian modes of persuasion.[201] Similarly, because the authors of feminist legal scholarship are mostly women who have succeeded in the profession of the law, they write from a position of established credibility. Thus, the first-person standpoint can serve to neutralize the skepticism that the legal audience may harbor toward feminist arguments or women's accounts of sexism or misogyny. Other times, however, first-person narratives accomplish a purpose similar to the advocate's purpose in writing a persuasive statement of facts. Instead of trying to persuade a court to adopt the client's view of the facts, first-person narrative compels the audience to see circumstances or rules from the author's perspective, through the author's lens of experience.[202]

The rhetorical value of first-person narrative as an ethical appeal is evident in the feminist writing of both Susan Estrich and Martha Mahoney. Estrich begins her ground-breaking article, *Rape*, by describing the facts of her own rape.[203] Apart from the first-person standpoint, this is a fairly common persuasive legal device: start with strong facts that will bring the reader to your side. But the first-person standpoint adds to Estrich's credibility as a person qualified to critique rape law; she knows the law's deficiencies because she has experienced them.[204] Estrich explicitly cites this as a reason for her first-person account.[205] However, in addition to establishing her competence to critique the way the law

201. CORBETT, *supra* note 6, at 37. The other two are appeal to reason (logos) and appeal to emotion (pathos). *Id.* Quintilian thought the ethical appeal to be the most effective and necessary kind of persuasive device. *Id.* at 80.

202. The object of this is to try to get the audience to "see the world from the standpoint of the oppressed" as urged by Professor Mari Matsuda. Matsuda, *supra* note 82, at 299.

203. Estrich, *supra* note 131, at 1087–88.

204. *See* Abrams, *supra* note 188, at 983–84. First-hand knowledge makes a witness in law quintessentially competent to testify on a subject. It is the preferred source of knowledge. *See* 2 JOHN HENRY WIGMORE, EVIDENCE § 657(a) (1979); 1 KENNETH S. BROUN ET AL., MCCORMICK ON EVIDENCE §§ 10, 69 (John William Strong ed., 4th ed. 1992).

205. Estrich, *supra* note 131, at 1089 ("I cannot imagine myself writing on rape without disclosing how I learned my first lessons or why I care so much.").

handles rape victims, Estrich uses her own experience to lend credibility to the accounts of other rape victims. For example, she tells her audience about her reaction to her own rape to counter those in the legal audience who might view rape victims as weak, stupid, or unreasonable for failing to fight back:

> For myself, it is not at all difficult to understand that a woman who had been repeatedly beaten, who had been a passive victim of both violence and sex during the "consensual" relationship, who had sought to escape from the man, who is confronted and threatened by him, who summons the courage to tell him their relationship is over only to be answered by his assertion of a "right" to sex—a woman in such a position would not fight. She wouldn't fight; she might cry.... Hers is, from my reading, the most common reaction of women to rape. *It certainly was mine.*[206]

Martha Mahoney uses a similar device to challenge her audience's stereotypes of battered women. At the beginning of her article on the legal images of battered women, Mahoney tells her reader that she herself is a "battered woman":

> One of these stories [of domestic violence] is my own. I do not feel like a "battered woman." Really, I want to say that I am not, since the phrase conjures up an image that fails to describe either my marriage or my sense of myself. It is a difficult claim to make for several reasons: the gap between my self-perceived competence and strength and my own image of battered women, the inevitable attendant loss of my own denial of painful experience, and the certainty that the listener cannot hear such a claim without filtering it through a variety of derogatory stereotypes. However, the definitions of battered women have broad contours, at least some of which encompass my experience....[207]

Like Estrich does with rape victims, Mahoney injects her personal experience into her legal analysis to attack the predominant image of what a battered woman is (that is, not including a law professor) and to undermine the stereotype of the battered woman as "different, exceptional, 'other.'"[208]

Another rhetorical goal of feminist personal storytelling is to try to force the reader to see circumstances or law from the author's perspective. In this way, first-person narrative in feminist legal scholarship functions in much the same way as statements of facts in persuasive writing or in compelling first-person testimony. The goal of converting the reader's perspective is a well-settled, uncontroversial goal of legal advocacy; first-person narrative simply changes the source of the information. That is what makes it both controversial and compelling.[209]

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206. *Id.* at 1111 (emphasis added) (footnote omitted).
207. Mahoney, *supra* note 87, at 8 (footnotes omitted).
208. *Id.* at 14–15.
209. Self-reference is viewed as inappropriate in law practice and persuasive legal

As any lawyer knows, good storytelling is a powerful rhetorical tool. It can make the reader think about things differently and can force the reader to acknowledge another perspective. Like all compelling fact narratives, personal stories appeal to readers emotionally, and that works. Whatever else critics say about personal narrative, one of the primary critiques seems to be that it is *too* difficult to argue against, in part, critics argue, because its personal emotional pull insulates it from effective attack.[210]

Patricia Williams explicitly declares her purpose of altering the reader's perspective in the beginning of *The Alchemy of Race and Rights*:

> I am interested in the way in which legal language flattens and confines in absolutes the complexity of meaning inherent in any given problem . . . .
>
> . . . .
>
> . . . Legal writing presumes a methodology that is highly stylized, precedential, and based on deductive reasoning. . . . I am trying to create a genre of legal writing to fill the gaps of traditional legal scholarship. I would like to write in a way that reveals the intersubjectivity of legal constructions, that forces the reader both to participate in the construction of meaning and to be conscious of that process.[211]

To this end, Williams tells the reader stories of her life. She tells the reader what it is like to be a black, female, commercial law professor, how her students react to her, how the law school administration responds to student complaints about her, how a white teenager condescendingly refuses her entrance to a posh store in New York City (and her efforts to publish the story in a law journal), and her family history.[212] It is almost impossible to read Williams's work and not see her perspective—her writing forces you to see and experience it. Whether the reader feels a sense of familiarity with the story ("that

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writing, and it is quite controversial within legal scholarship as well. *See, e.g.*, Daniel A. Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807, 835–36 (1993); Mark Tushnet, *The Degradation of Constitutional Discourse*, 81 GEO. L.J. 251, 251–52 (1992). Upon close inspection, it is difficult to see the material difference between a first-person account and a lawyer's recitation of what is usually the *client's* first-person account (with all the inherent bias and memory-faultiness of any first-person account). *See* Abrams, *supra* note 188, at 1002; Baron, *supra* note 199, at 280–85 (analyzing problems of "truth" in legal storytelling).

210. *See* Farber & Sherry, *supra* note 209, at 836. Of course, lawyers attack the narratives of other lawyers' clients all the time, and this is considered part of the debate of litigation.

211. WILLIAMS, *supra* note 91, at 6–8.

212. *Id.* at 17–19, 21–48, 216–36.

happened to me, too!") or a sense of surprise ("do things like this really happen?"), Williams's work requires the reader *to consider* her perspective, even if that perspective is ultimately rejected.

Feminist legal antilanguage is also marked by use of the second-person narrative standpoint to persuade the audience, in open defiance of legal advocacy's Golden Rule. Like feminist writing in the first person, feminist writing in the second person has a number of purposes (and effects): to shock or jar the reader, to force the reader to engage another viewpoint, and to force the reader to think and reflect. For example, in *Only Words,* MacKinnon frequently directly addresses the reader by using the second person ("you" or "your"), including in the opening paragraph:

> Imagine that for hundreds of years your most formative traumas, your daily suffering and pain, the abuse you live through, the terror you live with, are unspeakable—not the basis of literature. You grow up with your father holding you down and covering your mouth so another man can make a horrible searing pain between your legs. When you are older, your husband ties you to the bed and drips hot wax on your nipples and brings in other men to watch and makes you smile through it. Your doctor will not give you drugs he has addicted you to unless you suck his penis.[213]

By compelling the reader to put herself in these awful scenarios, MacKinnon ensures that the reader will respond emotionally to her work; whatever else it is, it is jarring, disturbing, and memorable. The standpoint also forces the reader to live the hurt and misogyny of pornography. MacKinnon does not allow her readers to abstract themselves from the abuse and indulge in the denial that such experiences are not relevant because they happen to "others."[214] The standpoint is a way to force the reader to experience the situation of the "other."

In addition to the narrative standpoint, this paragraph (like much of MacKinnon's writing) is visceral and relentlessly graphic. Both the narrative standpoint and the vivid description of disgusting acts of abuse make clear that MacKinnon wants to make her audience uncomfortable.[215]

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213. MACKINNON, *supra* note 108, at 3.

214. *See* Mahoney, *supra* note 87, at 8.

215. The narrative standpoint, however, seems deliberately constructed to make men uncomfortable. (My research assistant, Peter J. Isajiw, who is male, pointed this out to me.) The "you" MacKinnon addresses anticipates a female audience, not only because the "you" MacKinnon is speaking to experiences things that are characteristic of women's, not men's, lives, but also because *Only Words* is otherwise an explicitly gender-marked text. This is not an easy thing to do in English, so it is safe to assume MacKinnon did it on purpose. *See* DWIGHT BOLINGER, LANGUAGE—THE LOADED WEAPON 87–88, 93 (1980) (noting that gender-marking is harder to do in English than in some languages which require all nouns to be gender marked). MacKinnon accomplishes this by using words such as "husband" and the pronouns "he," "him," and "his" whenever she is referring to men. "You" and "your" refers to women. *See supra* notes 118–19 and accompanying text.

Legal convention would characterize this prose as inflammatory; others might say it is almost violent. But it is hard to imagine what audience could read this paragraph and think that the described acts are acceptable male entertainment. It is no mistake that MacKinnon opens her book with this "theory of the case." It gets the audience to pay attention to her immediately and creates an enormous emotional incentive to agree with her arguments.

Patricia Cain also directly addresses the reader in her feminist writing, although she uses the second person in a different way than MacKinnon. Cain addresses the reader to try to get the reader to think and reflect on Cain's thesis. In the middle of *Grounding the Theories*, which is otherwise written in a fairly straightforward way, Cain redirects Marilyn Frye's challenge to heterosexual women to the legal audience:

> Why don't women turn you on? Why aren't you attracted to women?... I want heterosexual women to do intense and serious consciousness-raising and exploration of their own personal histories and to find out how and when in their own development the separation of women from the erotic came about for them. I would like heterosexual women to be as actively curious about how and why and when they became heterosexual as I have been about how and why and when I became lesbian.[216]

Cain then has an entire section of the article devoted to "silence," in which she directs the reader to "[e]ngage in self-reflection."[217] As a way of guiding the reader, Cain anticipates the reader's response in brackets and asks, among other things: "Did she really mean that? Am I supposed to sit here and consider lesbianism as a possibility?... Why not?... And if I do consider it, but choose men anyway, is my choice more authentic? What about tomorrow? Do I choose again?"[218] Cain breaks the Golden Rule by explicitly instructing the reader to ask herself "why am I not a lesbian?" The violation of the Golden Rule is necessary to Cain's thesis because society's presumption of heterosexuality makes women's heterosexuality a "nonchoice" that is "natural" and needs no exploration or explanation. Cain's work seeks to undermine or at least question the heterosexual presumption and to make heterosexual women question it. Cain's direct invitation to the reader creates a potential for

216. Patricia A. Cain, *Feminist Jurisprudence: Grounding the Theories*, 4 BERKELEY WOMEN'S L.J. 191, 209–10 (1990) (quoting Marilyn Frye, *A Lesbian Perspective on Women's Studies*, *in* LESBIAN STUDIES 194, 196 (M. Cruikshank ed. 1982)) (footnote omitted).
217. *Id.* at 210.
218. *Id.*

self-discovery that makes possible a serious change in the reader's view of both law and culture. The personal and emotional impact on the reader makes Cain's writing much more powerful and memorable than a direct statement that "heterosexuality is considered normal and not the product of choice."

As a rhetorical strategy, shifting narrative standpoint is indicative of feminist legal antilanguage. None of the narrative shifts described would be acceptable in conventional legal writing. However, first-person narrative can be a valuable persuasive tool for establishing the writer's ethos. Much like establishing the first-hand knowledge of a witness, first-person narrative can establish the competence of the writer to speak on the subject. The use of the second-person standpoint—the Golden Rule standpoint—is unquestionably effective; its rhetorical power is, in fact, the source of its banishment from legal discourse. However, its effective use in feminist antilanguage should lead us to ask, why?

V. CONCLUSION

The purpose of this Article is not simply to show the radical beauty of feminist legal writing, although I hope it does. Feminist legal (anti)writing is beautiful: it is vivid, it is poetic, it is descriptive and metaphorical, and it has a depth that one rarely sees in conventional legal writing. It is also radical, negative, angry, and emotional. The scholarship analyzed here breaks away from legal convention not only substantively and methodologically, but linguistically—it is in some ways a different kind of legal writing. But, like all antilanguages, feminist antilanguage breaks the rules within the context of the dominant legal language and culture. It is, in many ways, derivative or reactive. Relexicalization, negation, poetry, and shifting standpoint are noteworthy in feminist legal writing because they are not acceptable in conventional legal writing. As rhetorical devices, they might have intrinsic power on their own, but they derive significant force from their status as antilanguage devices.

Whatever the source of the power, feminist antilanguage, without doubt, has power. It is not just beautiful, but functional. Thus, in part, feminist legal antilanguage may challenge legal writing's construction of persuasive writing as almost entirely function without beauty—a convention that is a marked change from classical notions of persuasion and rhetorical excellence. Feminist legal antilanguage also challenges the academy's insistence on the divide between legal writing and legal doctrine or substance: feminist legal writing shows us the force of radical writing to illustrate radical substance. Form does not merely follow substance; it *is* substance. Negation is a rhetorical tool; it is also useful to describe a predominantly negative experience. Paradox and

irony are tools that express paradoxical and ironic experiences.

Feminist legal antilanguage also challenges legal readers and writers to ask whether the culture of legal writing has been too narrowly constructed. The radical rhetorical tools of feminist legal writing should make us wonder whether we have underestimated the legal audience's ability and willingness to read and be persuaded by certain tools. Why is negation considered not persuasive? Why are irony and relexicalization frowned upon? Why is it acceptable to use certain "emotional" techniques and not others? Certainly, the constraints and rules of legal writing are reifying: as students, we learn to write to an audience with certain characteristics; as lawyers and judges, we become that audience, and then we teach others (law students and lawyers) to cater to that audience; and then those we teach become that audience, and on and on in an endless loop.

The constraints of legal writing, and the persuasive value of rhetorical tools, are not necessarily elemental or natural. They are created and validated by legal culture. That means that they are not permanent—they can be challenged and questioned. Feminist legal antilanguage ought to force us to ask why certain things are accepted in advocacy but others not and whether these rules of writing are biased. Ultimately, we need to ask what (or who) is the source of these persuasive writing rules. It only begs the question to note that some things are persuasive and other things are not; that is just the way it is. Why are some tools not persuasive, why do they not reach the audience, not persuasive *to whom*?

Some have argued that it is erroneous to insist that "what works [is] . . . what ought to work" in persuasion.[219] But why should we not ask why "what ought to work" does not "work"? If Stanley Fish's theories tell us anything, it is that language is the product of the culture, that if the community of culture believes something to be persuasive, it *is* persuasive; if the community believes something to be grammatical, it *is* grammatical.[220] So, saying that we should not confuse "what works" with what "ought to work" denies our role as lawyers, judges, and law professors in *defining* what works. We should not stop asking.

And, perhaps, we ought not stop trying. Perhaps it is too risky to use even a little feminist legal antilanguage in conventional legal writing. Perhaps use of feminist legal antilanguage in conventional legal writing

219. Singer, *supra* note 8, at 2444.
220. *See* FISH, *supra* note 13, at 194–95.

is dangerous because it allows the appropriation of feminist language by the dominant culture. However, if lawyers' and judges' notions of what is persuasive can change, then advocates can (and should) broaden their array of tools, especially when they are trying to explain the dilemmas, poetry, and paradoxes in women's experiences. Judges are busy, but most of them are also very smart and dedicated. If they dedicate themselves to reading and understanding legal antilanguage (and I argue that they should—it is their duty to listen and understand, even if it takes a bit of work), then maybe change in law is possible, even through the use of the "master's tool" of advocacy writing.