

BECOMING WHAT WE PRETEND TO BE:
SIGNS OF VALUES IN THE CASUAL RHETORIC OF
AMERICAN CRIMINAL JUSTICE

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"We are what we pretend to be," Kurt Vonnegut wrote in introducing the story of a playwright who tries to serve two masters, "so we must be careful about what we pretend to be."¹ Vonnegut understood something about how language embodies signs of what we are, and how these signs may vary from the obvious or the literal. In the language we use as we go about our daily work, telling stories that attempt to define ourselves to others or to defend our sense of self, we reveal much about how we actually value the work we do and how it relates to what we are.

This article sketches the rhetoric common to a comparatively closed subculture, the American criminal justice system, and what that rhetoric reveals about the lawyers who practice within the American criminal justice subculture. Part I of the article marks off the boundaries of this subculture and explains why it is "closed" and distinct even from the civil law subculture. As the article walks those boundaries, it also observes some of the principal institutions and characteristics that define the subculture.

Part II of the article considers the rhetoric of the realm—meaning here simply the patois, the way people within the subculture commonly speak to one another, and specifically the casual boasting and storytelling that go with the practice of criminal law. Part II further explores what that lingo reveals about the values embedded within the subculture, and perhaps even reveals about a deeper structure. I draw modestly on semiotics, to suggest the linkage between language and values. Admittedly, the uncertain interpretation of signs in language is a reality that necessarily opens my arguments to debate.

Part III concludes that no matter the increase over the last decades in the percentage of American criminal justice system habitués who are female, the common rhetoric signifies value and legitimacy of behaviors and ideas associated with masculinity, and lack of value and legitimacy of those associated with femininity. Professionals in the criminal justice system often claim an aspiration to indifference to gender and sex (and to other

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1. KURT VONNEGUT, JR., *MOTHER NIGHT* v (Dell Publ'g Co. 1966).

characteristics unrelated to guilt or culpability); that is, an aspiration to equal treatment. Consciously, many believe their claim. But the very pretenses that criminal justice actors speak each day, in casual encounters common to courtrooms and courthouse coffee shops, maintain both a system and themselves within it that together exalt the archetypal male trait and ridicule the female.

I

American criminal justice is a "closed" system in the sense that it limits membership to those with fairly rigid qualifications, and then to the subset of those who obtain employment with one of a small number of institutions. Those with the most prominent roles in this subculture, lawyers and judges, must have law degrees and gain admission to the bar. Police officers and crime laboratory analysts—also important segments of this population—similarly have special training and pass background screening that assures some degree of selectivity. Collateral members of the clan, like probation agents, court clerks, and victim-witness advocates, all have some specific education or training and usually a career orientation.

In addition to those educational, training, licensing, and attitudinal limitations on admission, most members of the clan also belong to institutions that dominate the subculture's work. In the United States as in many nations, all prosecution is in the name of an abstract, collective citizenry. Prosecution therefore is the work of employees of public offices. To prosecute, one must be not just a lawyer; one must be employed by the District Attorney's office, the Commonwealth Attorney's office, the United States Attorney's office, or some similar public institution. Judges, too, almost never are *ad hoc* participants or free agents. They are employees of the state, excluded from private practice by their judicial office, and a relatively fixed cadre over time despite the theoretical threat of removal that elections present in many states. Judges do not come and go much, and with rare exceptions (*pro tem* positions or semi-retired judges called in to help in a workload crisis) they do not just pop in for one case or another. Police officers, special agents, and crime laboratory analysts also work for institutional law enforcement agencies. They are not part-time constables or other lone actors today, as a rule. Clerks, probation agents, and other collaterals all invariably work for the court itself or another state agency.

On the defense side, the institutional membership breaks down, but only at the edges. While private lawyers practice criminal defense, public defender offices represent the greater mass of the accused in most American jurisdictions.² Even lawyers in private practice often are in the public

2. A federal study showed that in felony cases in the nation's 75 largest counties in 1996, 82% of state court defendants had a public defender or court-appointed counsel by the end of their case. Caroline Wolf Harlow, *Defense Counsel in Criminal Cases*, BUREAU OF JUST. STAT. SPECIAL REP. (U.S. Dep't of Justice, Office of Justice Programs, Bureau of Justice Statistics, Wash., D.C.), Nov. 2000, at 1, available at

defender's thrall, for many are paid by the public defender (or by the state) to represent indigent clients whom the public defender's office cannot serve for one reason or another.³ So the institutional domination of all significant roles within the criminal justice subculture further closes the system to occasional participants or wanderers. Because the system is so nearly closed to occasional participants, lawyers on opposing sides likely will face each other repeatedly during a career. Especially in larger cities, civil lawyers are less likely to face each other time and again in a series of cases over the course of their careers. Civil lawyers often have new adversaries with almost every case.

I place outside the bounds of this system the vast groups of defendants, victims, complainants, and other citizen witnesses. For my purposes, they do not so much shape the system's culture as they are shaped by it. They are the raw material and inventory on hand for use of the system's workers. All of them play roles in forming other subcultures—of jails and prisons, or of therapy groups committed to alcohol and drug abuse treatment, anger, parenting skills, and what have you—and they help to form the culture of the broader community itself. But they form the subculture of criminal justice only indirectly as its dehumanized objects. They are “the defendant,” “the client,” “the victim,” and the like. In effect, the defendant is the ball, and the victim and witnesses the other necessary or useful equipment, that allows the professional participants in American criminal justice to play the game.

Structurally, the American criminal justice system is adversarial. School children know that. This basic adversarial structure separates the American model from the inquisitorial model of continental criminal justice systems traceable to Roman law.⁴ But there is nuance. The adversarial system also is collegial in important ways. Because of the institutional dominance in criminal justice—the District Attorney's office usually confronts the Public Defender's office, which means that a given assistant district attorney often is matched against a familiar assistant public defender—the pool of lawyers is comparatively limited, and as a rule, lawyers do repeat business with one another. Prosecutor *X* comes to know Defender *Y*. They may like each other a great deal or not much at all, but either way, they tend to know where each other's children go to school and how the other's ailing mother is doing lately. The structural quality that emerges is a hybrid of the collegial and the adversarial: like the old Warner Bros. *Merrie Melodies* characters Ralph Wolf and Sam Sheepdog, who exchanged pleasantries at the time clock at the

<http://www.ojp.usdoj.gov/bjs/pub/pdf/decc.pdf>. In 1998, 66.4% of all federal felony defendants had a federal public defender or appointed counsel by the end of the case. *Id.*

3. Conflicts of interest and excessive case loads in public defenders' offices are the most common reasons for appointment of private lawyers to represent the indigent at public expense.

4. See 3 *ENCYCLOPEDIA OF LAW AND SOCIETY: AMERICAN AND GLOBAL PERSPECTIVES* 1096-97 (David S. Clark ed., 2007), for a concise description of the Roman origins of inquisitorial systems.

beginning and end of each shift and then spent their working hours in elaborate combat as Wolf tried to steal from the flock that Sheepdog tended.⁵

A further nuance of the adversarial structure lies in the comparison between American civil and criminal justice models. Again, both civil and criminal justice are adversarial in the most basic sense. But increasingly in recent decades, the American civil system presses resolutions short of trial in which each side gains something, or loses less than it might. Settlements of civil cases always have provided the possibility of win-win outcomes. Today, though, American courts actively encourage and participate in efforts to achieve such outcomes. "Alternative dispute resolution" is the vogue and has been for years.⁶ In many states, judges may order mediation.⁷ Judges even may serve as mediators, although usually not formally in cases that they may adjudicate in the end.⁸ Courts tend vigorously to enforce arbitration clauses in civil cases, where the parties contemplated the alternate forum of arbitration before things went south.⁹ A game theorist might say of civil cases that, although the setting in the end is adversarial, the game itself is *not* zero-sum. One side's win need not equal the other side's offsetting loss. That is true whether the game is symmetric (the strategies are unchanged by identity of the players because the value of an outcome is fixed) or asymmetric (the identity of

5. YouTube has some of these episodes, like *Ready, Woolen and Able* and *Woolen Under Where*. YouTube, <http://www.youtube.com> (search "Ready, Woolen and Able" and "Woolen Under Where") (last visited Oct. 18, 2009).

6. Courts have noted the growth of alternative dispute resolution (ADR). Commenting on amendments to various discrimination statutes in the 1990s, Judge Posner called these provisions "a polite bow to the popularity of 'alternative dispute resolution' and perhaps a mild sop to the judiciary, which has expressed alarm at Congress's relentless expansion of the jurisdiction of the federal courts." *Pryner v. Tractor Supply Co.*, 109 F.3d 354, 363 (7th Cir. 1997). Two other signs of the popularity of ADR are its "exponential[]" growth in international legal disputes, see Nana Japaridze, Note, *Fair Enough? Reconciling the Pursuit of Fairness and Justice with Preserving the Nature of International Commercial Arbitration*, 36 HOFSTRA L. REV. 1415, 1439 (2008), and the very existence of scholarly periodicals devoted entirely to the subject, like the *Journal of Dispute Resolution* and the *Cardozo Journal of Conflict Resolution*.

7. Appellate courts have permitted trial courts to order parties into mediation over claims that such orders improperly limit access to the courts and other challenges. See, e.g., *Short Bros. Constr., Inc. v. Korte & Luitjohan Contractors, Inc.*, 828 N.E.2d 754, 755-56 (Ill. App. Ct. 2005); *Fuchs v. Martin*, 845 N.E.2d 1038, 1041-42 (Ind. 2006); *Kentucky Farm Bureau Mut. Ins. Co. v. Wright*, 136 S.W.3d 455, 458-59 (Ky. 2004); *Decker v. Lindsay*, 824 S.W.2d 247, 249-51 (Tex. App. 1992). Of course, trial courts may not force parties actually to settle a case, or even to make a settlement offer. See, e.g., *Decker*, 824 S.W.2d at 250-51.

8. See, e.g., 28 U.S.C. § 455(a) (2006); see also § 655(b)(2).

9. See generally *Preston v. Ferrer*, 128 S. Ct. 978, 981 (2008); *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443-46, 449 (2006) (both recognizing and elaborating on a national policy favoring arbitration when contracting parties choose that form of dispute resolution).

the players alters strategies, because neither side knows exactly how the other values a particular outcome).¹⁰

In criminal cases, by contrast, the model remains closer to a zero-sum game. True, most criminal cases settle short of trial.¹¹ Plea bargaining is the norm and involves both charging and sentencing concessions.¹² So it is possible often for each side to come away perceiving itself rationally as a partial winner. But structurally, a distinction from the civil case remains. In most jurisdictions, judges are not acknowledged or open participants in alternate dispute resolution in criminal cases. Plea agreements typically do not bind judges, who ordinarily retain a free hand at sentencing.¹³ In many jurisdictions, judges face state strictures or judicial conduct code prohibitions on encouraging or participating in plea negotiations.¹⁴ Without this judicial imprimatur or encouragement, the specter of trial still looms larger for lawyers on both sides in criminal cases than for lawyers in civil cases. Prosecutors and criminal defense lawyers may not share their civil colleagues' expectations that most negotiation will lead to settlement.

Another distinction between the civil and criminal justice systems does not hinge on the lawyers. Both criminal defendants and complainants may value a public trial more than civil litigants do. Typically, civil litigants bear their own actual costs of litigation; not so in criminal cases. In criminal cases, a public prosecutorial agency funds the victims' or complainants' side of the case with tax dollars. Likewise the taxpayer funds most of the litigation costs on the defense side through a public defender office or court compensation to appointed counsel (often not in parity to prosecution funding), because most criminal defendants are indigent.¹⁵ As opposed to civil litigants, neither side's

10. See Ariel M. Sasson, *Was "Getting to Yes" Possible at Waco? Revisiting the Propositions of "Principled Negotiation" in the Context of Barricade Incidents with High-Commitment Groups*, 1 CARDOZO J. CONFLICT RESOL. 2, III(C) (1999), <http://www.cojcr.org/vol1no1/article02.html> (citing Alvin E. Roth & J. Keith Murnighan, *The Role of Information in Bargaining: An Experimental Study*, 50 ECONOMETRICA 1123, 1123, 1138-41 (1982)).

11. In 2004, 97% of convictions in the nation's 75 most populous counties resulted from guilty pleas, not trials. Tracey Kyckelhahn & Thomas H. Cohen, *Felony Defendants in Large Urban Counties, 2004*, BUREAU OF JUST. STAT. BULL. (U.S. Dep't of Justice, Office of Justice Programs, Bureau of Justice Statistics, Wash., D.C.), Apr. 2008, at 1, 3, available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/fdluc04.pdf>.

12. See, e.g., FED. R. CRIM. P. 11(c)(1)(A)-(C).

13. See, e.g., FED. R. CRIM. P. 11(c)(3) and similar state procedural rules.

14. State court rules vary dramatically, with some states forbidding any judicial involvement in plea negotiations and other states tolerating or expressly inviting it. Wisconsin, for example, forbids judicial involvement. *State v. Williams*, 2003 WI App 116, ¶ 11, 265 Wis. 2d 229, 238-39, 666 N.W.2d 58, 62-63. New York accepts it. See generally *People v. Grier*, 709 N.Y.S.2d 607, 609-11 (App. Div. 2000) (holding that defendant was not prejudiced when the trial judge did not recuse herself after discussing with defense counsel whether the defendant would accept a plea agreement). Other states array themselves between the poles.

15. See *supra* text accompanying note 2.

principals in criminal cases generally have the disincentive of direct pecuniary cost.

Spared direct financial considerations, victims may value an airing of the dispute as a step toward justice. For his part, the defendant simply may want a jury to hear his side of the story—impoverished defendants especially may feel profoundly unheard—or he may perceive that so little gain is available by a guilty plea that the lottery of a jury looks comparatively attractive.

Also, lawyers tend to overlook the fact that both accuser and accused may be accustomed to resolving disagreements by fulmination, fist, or firearm. For these, a jury trial *is* alternative dispute resolution.

When a criminal case goes to trial, the outcome potentially is closer to a zero-sum game than a civil case would be. In the less common event of a not guilty verdict, double jeopardy bars a prosecution appeal; the case is over and the defendant's win is absolute.¹⁶ In the more common event of a guilty verdict on one or more charges, although the defendant has an appeal, appellate deference to jurors' determinations is nearly parallel (for different reasons) to the deference to an acquittal.¹⁷ It too is almost absolute. Moreover, the defendant usually must wait until after sentencing if he wishes to appeal.¹⁸ Often that means appealing while imprisoned. A belated reversal or remand on appeal does little to offset his loss, then. He already has served time.

For many defendants, at least looking forward from the day of the jury's verdict, possible lengths of imprisonment also do not spread themselves across a span ranging from near-win to ultimate-loss. Ten years at the moment of sentencing may look as bad as thirty years to the new convict. Any sentence appears a total loss, indistinguishable from a longer sentence. That perspective may be very different, of course, after ten years: the prisoner now sees a decided difference between release tomorrow and release in another twenty years. But the game, so to speak, is long over by then.

The American criminal justice system therefore is closed, its membership limited and exclusive, in important ways. Structurally, it is dominated by public institutions, by a tension between the collegial and the adversarial, and by its persistent flirtation with a zero-sum format. The closed quality fosters a lingo in which professional members become fluent. The structural characteristics shape the quality of that jargon or rhetoric.

16. See *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 569, 575-76 (1977); *Fong Foo v. United States*, 369 U.S. 141, 143 (1962); *United States v. Ball*, 163 U.S. 662, 669-671 (1896).

17. The classic case is *Jackson v. Virginia*, 443 U.S. 307, 311-313, 317 n.8, 319, 324, 326 (1979).

18. Ordinarily, appeals must await final decision or judgment, setting aside the limited realm of the collateral order doctrine. See, e.g., 28 U.S.C. § 1291 (2006). In a criminal case, the sentence (not the verdict) is the judgment.

II

A

Any closed system of people is a surrogate for a society, and in all such bounded systems or societies, a language develops. When the closed system is a subset of a broader society, as the criminal justice system is to the American polity, this may be no more than a specially adapted vocabulary within more general language conventions; a vernacular. Like any other subculture, the American criminal justice system has a vernacular or rhetoric that shapes the stories its professionals tell and the way in which they describe the events, large and small, of their professional lives. That rhetoric thus informs how they see one another and themselves, and how they wish to be seen.

The rhetoric has identifiable themes and qualities. The images that the argot invokes often coalesce around battle or warfare themes. These may be plain. For example, lawyers and judges speak often of a “battle of experts” in describing cases in which each side relies on retained consultants or witnesses in a given field essential to the lawsuit.¹⁹ The experts are not just “mine” and “yours,” or even just “opposing”; they are participants in a battle. Indeed, in an enlargement of the image they often are “hired guns,” as lawyers casually describe them.

The lawyers often reserve the most glorious terms of warfare for themselves. In hallway or cafeteria chit-chat, they may refer to colleagues admiringly as a “warrior” or a “fighter.” Or, in a tacit allusion to a holy war or crusade with its implication of a purpose elevated above violence for mere spoils, they may call another lawyer a “true believer.” On occasion in that vein, lawyers will speak of another’s “zeal.” Formal ethical rules even pick up that idea.²⁰

Images of warriors and battle usually are casual and expressed orally, but may be written and even literary. An almost caricatured example of the literary should suffice. In the prologue to his biography of the eighteenth century English trial lawyer Sir Thomas Erskine, famed twentieth century American lawyer Lloyd Paul Stryker wrote:

This is the story of a man who believed in something—believed enough to fight for it. What he believed in was justice and liberty—the heritage of the Anglo-Saxon! For these he fought as only strong

19. Of course, the rhetoric of American criminal justice often is shared by civil lawyers, and vice versa. Civil and criminal law share more than enough to make their languages overlap substantially.

20. Both the old ABA Model Code of Professional Responsibility and the current ABA Model Rules of Professional Conduct include precatory aspirations of “zealous” representation of clients, the latter only in its preamble. MODEL CODE OF PROFESSIONAL RESPONSIBILITY AND CODE OF JUDICIAL CONDUCT EC 7-1, 10, 19, 36 (1980); MODEL RULES OF PROFESSIONAL CONDUCT Preamble 2, 8, 9 (2008). The former included a rule of duty to represent a client “zealously within the bounds of the law.” EC 7-1.

and brave men fight. His battlefields were the courts of justice of Great Britain. His weapons were the English laws, a tough and sinewy mind, a warm heart, courage, a commanding voice and presence, a genius for penetration into human character, a dauntless conviction in the justice of his cause, and a power never surpassed or even equaled to dominate and to persuade a jury of his peers.

...
 ...Let us see you panting in the dust and heat of the arena... Let us see you when you fought for justice to Queen Caroline in the House of Lords.²¹

In that florid²² passage, Stryker offers not just battlefields and the warrior's virtues (bravery, strength). He gives us still richer and more subtle images of physical combat: "sinewy" (applied to a mind at that, not to an arm); command (in voice and presence); domination; someone dauntless; and penetration as if by thrust of sword.²³

Stryker went a bit over the top, of course. But so common are allusions to battle and warfare in lawyers' descriptions of themselves and their work that the absence of these images is what stands out. Harper Lee's portrait of Atticus Finch is searing and durable in part, perhaps, because it departs so completely from the rhetorical formula. The judge explains to the state's key witness, who is wary of Finch's politesse, "That's just Mr. Finch's way... We've done business in this court for years and years, and Mr. Finch is always courteous to everybody. He's not trying to mock you, he's trying to be polite. That's just his way."²⁴ In fact, the scenes of Finch in the courtroom are devoid of bombast and combat. Scout finally offers the summation of her father as a lawyer: "He's the same in the courtroom as he is on the public streets."²⁵ Nothing there of the warrior at all, but instead a lasting, vivid, and enormously sympathetic picture of a lawyer. It may remain fresh and memorable in part because it so differs from the formulaic rendering.

Next, the frequent resort among the professional populace of American criminal justice to images of sexual buccaneering is distinguishable from the combat and warrior rhetoric. But the language of sexual buccaneering also is of a piece with combat rhetoric in a more general way. Here Camus provides a preface. Discussing capital punishment, he quotes the observation of Bela Just,

21. LLOYD PAUL STRYKER, *FOR THE DEFENSE: THOMAS ERSKINE, THE MOST ENLIGHTENED LIBERAL OF HIS TIMES, 1750-1823*, at vii-viii (1947).

22. Stryker was, by reputation, a florid man. Jacob A. Stein, *A New Case Has Arrived*, WASHINGTON LAWYER, Sept. 2004, at 48, available at http://www.dcbar.org/for_lawyers/resources/publications/washingtonlawyer/index.cfm (search "Search All Issues" for "A New Case Has Arrived" then follow "Legal Spectator: A New Case Has Arrived" hyperlink). He described himself that way to the jury in his summation on behalf of Alger Hiss. *Id.*

23. See STRYKER, *supra* note 21, at vii.

24. HARPER LEE, *TO KILL A MOCKINGBIRD* 182 (Warner Books 1982) (1960).

25. *Id.* at 199.

a priest who accompanied more than thirty condemned men, that “[t]he slang of the administrators of justice is quite as cynical and vulgar as that of the criminals.”²⁶

It is. Criminal lawyers often recount their exploits on cross-examination in terms of having their way with the witness. Sometimes, when the storyteller is relaying a loss or a hapless episode for succor from colleagues, it is the witness who had his way with the lawyer. In either event, the overtone of sexual dominance is obvious.

That overtone often becomes a verb when lawyers retell a judge’s treatment of them or their clients, and occasionally when the lawyer boasts of his own courtroom conquests. The verb usually connotes not just sexual dominance, but rape or something close. Usage of the verb follows a formula, but it applies to a variety of related problems. The client “got #%@*!!” by the judge, the prosecutor, the police; whomever. Sometimes the lawyer “got #%@*!!.” A lawyer boasting about a particularly successful witness examination or courtroom triumph over an adversary (including a judge) simply describes herself or himself on the giving, rather than the receiving, end of that experience. The variations include #%@*!! “over,” “up,” “me,” and so on.²⁷

Of course, these are rhetorical flourishes well known outside the subculture of criminal justice. But they thrive in that subculture among an educated elite, closely linked to other allegories of physical struggle and domination.

A final reference to sexual buccaneering is unique to criminal justice, although a bit more subtle. It is the vernacular for a judge who disregards the negotiated sentencing recommendation of a prosecutor after a guilty plea and imposes a more onerous sentence: “jumping the deal.” The phrase has enough ambiguity that the uninitiated might assume that it suggests only a mugging. But so predictably do lawyers link it to their standby verb, in elaborating the judge’s effect on the client, that the sexually assaultive connotation is what longtime inhabitants of the criminal justice system usually offer, subconsciously or not.

Whether with combat motifs or sexual ones, the signification of this casual jargon of criminal justice reflects either surface or buried disdain for, or dismissal of, the feminine. Most obvious is jargon that is overtly sexist, in the sense of displaying plain differences in terms for men and women who display the same trait. He is “tough”; she is “a bitch.”

Other common phrases transparently value the masculine and devalue the feminine. These include unflattering descriptions that also are familiar in the

26. ALBERT CAMUS, *Reflections on the Guillotine*, in RESISTANCE, REBELLION, AND DEATH 131, 148 (Justin O’Brien trans., Random House 1960) (1957) (quoting BÉLA JUST, *LA POTENCE ET LA CROIX, RÉCIT* (1954)).

27. If an entire case has gone very grimly, this versatile verb often will assume its noun formation, ordinarily behind the word “cluster,” which seems to take that adjectival form only to modify two English nouns: this one and bomb.

parlance of the broader culture, like labeling a male a "weak sister." But when a phrase like that occurs outside the criminal justice system, typically the people in conversation all are men or boys. In the criminal justice system, women may participate in those conversations with male colleagues. As a matter purely of head count, thanks in large part to the preeminence of public institutional offices, the ranks of those in American criminal justice no longer are so lopsidedly male. Although usually not a majority, women fill a significant number of the historically male jobs in criminal justice: prosecutors, defenders, probation agents, police officers, and judges.²⁸ Still the patois persists.

It persists in less obvious allusions to feminine traits, too. Words and phrases may apply uniformly or nearly so to both sexes, yet reveal differences in relative valuation of the masculine and the feminine. These are less obvious in the sense that the surface language is not sexist, but the embedded values are. Lawyers frequently complain that opposing lawyers "whine" to judges or juries. Police officers, prosecutors, judges, and occasionally defense lawyers speak derisively of "sob stories." Generally these are subconscious allusions to archetypal femininity. Considered consciously, the connection to traits identified with the feminine appears.

Still other common figures of speech in the criminal justice system allude to, and discount, feminine traits even more subtly. They do so by imagery that reduces the male to something close to female. The most common are castration references. Usually in the context of a story about a triumphant cross-examination, or maybe a rebuttal argument, the storyteller recounts how he or she removed the male gonads of the opponent. The exact method of such surgery varies creatively in the patois. Spiteful and improbable means of medical waste disposal often become part of the tale as well.

Other similar devaluing references to the feminine are peculiar to the justice system, if not just to criminal justice. Perhaps the most common is the verbal convention among lawyers of dismissing or belittling a noisome male judge behind his back by noting that not much should be expected of someone who "wears a black dress" to work.

A more elaborate convention of casual rhetoric reflects a dismissal of the feminine that is pervasive in American criminal justice. This is the mitigation that defense lawyers, prosecutors, and judges all perceive in the status of the accused as "just the girlfriend/wife" of another (usually male) perpetrator. Indeed, defenders of any experience understand the "girlfriend" argument as a quasi-defense in drug cases and sundry other offenses involving accomplices. The systemic truth that females are prosecuted in numbers well below their

28. For a broad overview, see AM. BAR ASS'N COMM'N ON WOMEN IN THE PROFESSION, A CURRENT GLANCE AT WOMEN IN THE LAW 2005 (2005), *available at* <http://www.abanet.org/women/ata glance.pdf>. The statistics showed women composing only 29.4% of all legal professionals, but 51% of law students who obtain a J.D. *Id.* at 1. Among federal courts and highest state courts, women accounted for approximately one quarter of the members. *Id.* at 3. By sex, new law school graduates entered jobs in government at about equal rates: 12.1% of male graduates went into government work, as did 11.9% of female graduates. *Id.* at 2.

share of the population, go to prison less often than men, and get shorter terms when they do go,²⁹ demonstrates the nearly uniform acceptance of this quasi-defense in group crimes.

The fact that American lawyers and judges believe women less culpable than men, in the main, suggests an important corollary to Vonnegut's observation. It is not just that we are who we pretend to be, as Vonnegut said.³⁰ In organized society there is a dialectic between self-presentation and what the collective other sees presented. There is a dynamic relationship between individual projection of identity and public perception of that individual's identity, each constantly informing the other. Here emerges the corollary: in part, others are who we pretend them to be. Women are less culpable because we believe or project that they are. Feminists years ago recognized in that phenomenon the implicit denial of a woman's moral agency.³¹

B

Posing the question what, if anything, this casual rhetoric signifies below its surface unavoidably means asking bigger questions and wandering out of the territory of American criminal justice. It means asking questions like "what is the human experience?" and, next, "what should be the human experience (or, what is the good life)?" These queries are two of the four that might be on

29. According to the U.S. Department of Justice, Bureau of Justice Statistics, as of June 30, 2008, the nation's total prison population (federal and state) was 1,610,584. HEATHER C. WEST & WILLIAM J. SABOL, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PRISON INMATES AT MIDYEAR 2008-STATISTICAL TABLES 3 (2009), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/pim08st.pdf>. Women made up 115,779 of those prisoners, or just under 7.2%. *Id.* at 5. For men, the imprisonment rate was 957 per 100,000 United States residents; for women, 69 per 100,000. *Id.* at 11. Women tend to fare better than men at each successive step of the criminal justice system. In 2000, of every 100 persons arrested for serious crimes about 22 were women. RITA J. SIMON & HEATHER AHN-REDDING, THE CRIMES WOMEN COMMIT: THE PUNISHMENTS THEY RECEIVE 91 (3d ed. 2005). That number dropped to 10 of every 100 of those convicted of a serious crime. *Id.* It dropped further to 6.6 of every 100 sentenced to state or federal prison. *Id.* Note, however, that the rate of female incarceration grew in the 1990s faster than the rate of male incarceration. MEDA CHESNEY-LIND & LISA PASKO, THE FEMALE OFFENDER: GIRLS, WOMEN, AND CRIME 139 (2d ed. 2004). The BJS study cited here confirms the continuation of that trend in the first decade of the twenty-first century. WEST & SABOL, *supra*, at 4-5.

30. See VONNEGUT, *supra* note 1.

31. See, e.g., BETTY FRIEDAN, THE FEMININE MYSTIQUE 127-28 (1963) ("The feminine protest, at its most straightforward, is simply a means of protecting women from the dangers inherent in assuming true equality with men. But why should any social scientist, with godlike manipulative superiority, take it upon himself—or herself—to protect women from the pains of growing up? Protectiveness has often muffled the sound of doors closing against women; it has often cloaked a very real prejudice, even when it is offered in the name of science."); see also *id.* at 71-72, 77-79, 104-11, 116-19, 181, 290; EMMA GOLDMAN, *Woman Suffrage*, in ANARCHISM AND OTHER ESSAYS 195, 198-99 (Reprint 3d rev. ed., Dover Publ'ns 1969) (1910) ("Since woman's greatest misfortune has been that she was looked upon as either angel or devil, her true salvation lies in being placed on earth; namely, in being considered human, and therefore subject to all human follies and mistakes.").

large, brightly painted roadside signs right above block letters reading, "Welcome! Now entering Philosophy." The four signs might face out in the cardinal directions from each side of that vast land. Because our approach is from, say, the south and the west, we miss the questions on the other two signs to the north and east: "Is there a God?" and "If not, what do we do?"³²

Venturing into philosophy here is unavoidable if we are honest or searchers for honesty, because it is immediately clear that the common jargon of American criminal justice does not mean at all what it suggests literally. There was no actual bloody battle; it was a courtroom. The judge did not actually come down from the bench, lift his robe, drop his trousers, and have carnal knowledge of the defendant or the lawyer—with or without consent. No one really rendered another a *castrato*, years too late for an operatic career, during a segment of cross-examination. Judicial garb is not on sale in the local dress shop, as we literally know the terms "robe" and "dress." We are pretending. In doing this, our rhetoric is familiar, sometimes comfortable, and regularly repeated. That familiarity and repetition suggests strongly that the rhetoric means something to those who speak and hear it. Not only does it mean something, we share an understanding at some level of what that meaning is, for today's listener is tomorrow's speaker, and vice versa. Something is encoded in the rhetoric that furthers our pretendings. And those in American criminal justice are in on the code.

In considering the signification of this rhetoric, the specific region within the Land of Philosophy that we cross into is the Confederation of Semiotics. One of our four welcome signs ("what is the human experience?") must be right there, probably placed in a profusion of other billboards, because this is the area in which the inhabitants all study signs.³³ The region of this confederation is sizeable and its own boundaries indistinct. Indeed, in this region lie overlapping and even shared territorial claims of Linguistics, Visual Arts, Literature, Sociology, Psychology, Education, and Anthropology.³⁴ Title is, to put it mildly, clouded. But the larger sovereign territory remains Philosophy, and on this the smaller jostling claimholders all loosely agree. The Confederation of Semiotics within covers an arid and in many ways inhospitable space within the Land of Philosophy. Semiotics seems largely overgrown with an almost impenetrable dry brush, the tangled branches of which taper outward into filaments thinner than split hairs that eventually crumble into dust.

32. The sachems of the Confederation of Theology, one region within the Land of Philosophy, are unified in their answer to the variation of what we do if there is a God: venerate and obey.

33. See DANIEL CHANDLER, *SEMIOTICS: THE BASICS 2* (2d ed. 2007); UMBERTO ECO, *A THEORY OF SEMIOTICS 7* (First Midland Book ed. 1979).

34. See generally CHANDLER, *supra* note 33, at 2-4.

The linguists who live in Semiotics say that language itself is a system of signs.³⁵ With this, the other semioticians heartily agree. Whatever their territorial disputes, on this point all are at peace (after all, most of the semioticians view the linguists as a subset of themselves).³⁶ But do the signs embedded in language have any fixed meaning? Or do they have meaning only in the mind of the perceiver? Only in the mind of the signmaker? A meaning that is wholly dependent upon the social structure in which maker and perceiver both exist? Multiple meanings, some so widely agreed as to approach fixed, but others so variable or debatable that perceivers must agree to disagree? No meaning at all? Some semioticians—openly or clandestinely—carry on that last joyless and mechanical affair with nihilism, who has no love, would see no one to give it to, and indifferently offers emptiness to all who come.³⁷

To their critics, semioticians are an affected bunch, lost in their own importance. They “‘tell[] us things we already know in a language we will never understand.’”³⁸ Little wonder that Vonnegut, an inhabitant of Philosophy but one who dressed in dungarees and modestly hid his ID card, traveled in regions well away from the Confederation of Semiotics.

Still, many inhabitants of Semiotics would have something to say about the language forms common in American criminal justice, as they would about language in any group or culture. What they might say is worth considering. Let's start with Umberto Eco, who has the virtue that he often is understandable by comparison to other semioticians. He writes:

Semiotics is concerned with everything that can be *taken* as a sign. A sign is everything which can be taken as significantly substituting for something else. This something else does not necessarily have to exist or to actually be somewhere at the moment in which a sign stands in for it. Thus *semiotics is in principle the discipline studying everything which can be used in order to lie*.³⁹

This definition of semiotics suggests that perhaps Vonnegut is not that far distant after all. The ways in which we pretend to be something—whether to lie or to convey the truth—offer signs: for what we think, for what we want others

35. See, e.g., NOAM CHOMSKY, *LANGUAGE AND MIND* 61, 102-03, 106-07 (3d ed., Cambridge Univ. Press 2006) (1968).

36. CHANDLER, *supra* note 33, at 7-8.

37. See SCOTT SIMPKINS, *LITERARY SEMIOTICS: A CRITICAL APPROACH* 203 (2001) (quoting and discussing Jean-Francois Lyotard's argument that “[s]emiotics is nihilism”). As with most clandestine affairs, few admit this one. But in general, post-structuralist semioticians like Jacques Derrida may be suspected, fairly or not. See *id.* at 49, 190-95; see also WILL SLOCOMBE, *NIHILISM AND THE SUBLIME POSTMODERN* 82, 100 (William E. Cain ed., 2006) (Literary Criticism and Cultural Theory: A Routledge Series).

38. Ellen Seiter, *Semiotics, Structuralism, and Television*, in *CHANNELS OF DISCOURSE, REASSEMBLED* 31, 31 (Robert C. Allen ed., 2d ed. 1992) (quoting film professor Atholl Douglas “Paddy” Whannel, who seemed to have a Scottish sensibility about such things). The author first saw this quotation in CHANDLER, *supra* note 33, at 10.

39. ECO, *supra* note 33 (italics in original).

to think, and possibly for something deeper, like who we are if Vonnegut has it right. In all events, though, the words themselves are substitutes for something else in the semiotics of language.

Even simple-seeming signs may be very complex and connote a constellation of meaning. Eco illustrates the point. "The white stick of the blind – a positive presence which constitutes itself as pertinent against the absence of the stick, as a signifier without articulations – represents blindness in general, requesting the right of way, postulating understanding on the part of bystanders."⁴⁰ He adds, "As a system the stick is quite simple (presence vs. absence), but its communicational use is very complex."⁴¹ It is a veritable "*content nebula*," as Eco calls it.⁴² All of that from a cane or stick of a certain color, brandished but not explained. The stick may be used to tell the truth. The person holding it in fact is blind, so the stick is useful not only as a tool for her but also as a sign for others. Or the white stick may be used to lie. She is not blind, but wishes for whatever reason that others will think she is.

The means of pretending at issue in this article are words: chatter, casual conversation, boasting, storytelling. Spoken words⁴³ may be more complex than things that may seem simple signs at first, like the white cane. They are articulations, and are strung together in ways or with emphasis and non-verbal cues that multiply the signification. So what exactly do these words signal?

Well, first, there necessarily must be some relation between expression—spoken words in this case—and content. Again, to both speaker and listener, the words mean something; the expression has content. Whether they have the same meaning to both is a later question, but the words have *some* content for both. That relation of expression to content is a sign. Or, as one original settler of Semiotics, Ferdinand de Saussure, defined it classically, the sign is the correspondence between signifier (sound pattern) and signified (concept).⁴⁴ Umberto Eco put the same idea this way: "A sign is always an element of an *expression plane* conventionally correlated to one (or several) elements of a *content plane*."⁴⁵ Setting aside Eco's fondness for matrices and charts and hence his reference to planes, he means that the sign is what links expression to content or meaning.

Now that later question. Does the expression, the signifier, have the same meaning (the same thing signified) to both speaker and listener, source and receiver? Enter culture. The expression may have the same meaning if both speaker and listener belong to the same culture. Borrowing from Claude Lévi-

40. UMBERTO ECO, SEMIOTICS AND THE PHILOSOPHY OF LANGUAGE 21 (First Midland Book ed. 1986).

41. *Id.*

42. *Id.*

43. In the terminology of semiotics, oral speech is *parole*, and distinguished from language, *langue*, which is a more general concept. CHANDLER, *supra* note 33, at 8-9.

44. CHANDLER, *supra* note 33, at 14; *see also* F. DE SAUSSURE, COURSE IN GENERAL LINGUISTICS 66 (Charles Bally & Albert Sechehaye eds., Roy Harris trans., Duckworth 1983) (1972); ECO, *supra* note 33, at 48-49.

45. ECO, *supra* note 33, at 48.

Strauss,⁴⁶ Eco gives an example involving men and women, who at one level are mere physical bodies. "However," Eco explains,

if the woman were merely the physical body with which the husband enters into sexual relations in order to produce sons, it could not then be explained why *every* man does not copulate with *every* woman. Why is man obliged by certain conventions to choose one (or more, according to the custom) following very precise and inflexible rules of choice? Because it is only a woman's symbolic value which puts her *in opposition*, within the system, to other women. The woman, the moment she becomes 'wife,' is no longer merely a physical body: she is a *sign* which connotes a system of social obligations.⁴⁷

Those within the same culture understand the "wife" sign similarly: specifically, they share an appreciation of a complex set of rules for which the sign stands. Similarly, in the criminal justice subculture, professional inhabitants understand that the language embodies signs that connote a rich content.

As Eco's adopted Lévi-Strauss example suggests, the complex of content that the sign connotes may run deep, both personally and socially. The meaning represents values: the speaker's and his society's to the extent that he shares what those surrounding him hold dear, as he probably does in large degree.

But the coalescence of the meanings, and the similarity of the values these meanings reflect, also may suggest something even more basic, and deeper, than values. The pattern or coalescence of meaning—the core content, in other words—may be what a structuralist semiotician calls "deep structure."⁴⁸ To return to the familiar, Lévi-Strauss argued that myths have a universality across cultures. Further, we can reduce myths to a small number of themes if we abstract away trifles, like names or settings. Collectively, myths help us make sense of the world in which we live, and our relationship to nature and animals. But according to the structuralist Lévi-Strauss, the real meaning "was not to be found in any individual narrative but in the patterns underlying the myths of a given culture. Myths make sense only as part of a system."⁴⁹ By breaking myths into essential constituent units, which he names *mythemes*, Lévi-Strauss "saw the possible combinations of mythemes as being governed by a kind of underlying universal grammar which was part of the deep structure of the mind

46. The great social anthropologist who is a founder of structural anthropology. See EDMUND LEACH, CLAUDE LÉVI-STRAUSS 1, 15 (Frank Kermode ed., rev. ed. 1974). Lévi-Strauss died one month short of his 101st birthday on October 30, 2009. See Edward Rothstein, *Claude Levi-Strauss, 100, Dies; Altered Western Views of the 'Primitive,'* N.Y. TIMES, Nov. 4, 2009, at A28.

47. ECO, *supra* note 33, at 26.

48. See CHANDLER, *supra* note 33, at 100, 232-33.

49. *Id.* at 117.

itself."⁵⁰ Such deep structures underlie the various forms of language and life, as the structuralist semioticians would have it.⁵¹

At very least, the common features of the figurative speech of criminal justice—its combat, sexual buccaneering, and derogation of the feminine—suggest valuation of that which is archetypally male. All of these motifs lie toward the male, not the female, end of a spectrum of gender. Yes, the spectrum is complex, even at its polar extremes; gender is complicated and a product not so much of biology as of culture and individual identity. If male and female are opposing poles of that spectrum, they only are in much the same way that Arthur Koestler offered the Yogi and the Commissar as opposing poles of another human spectrum.⁵² Each pole is a constellation of characteristics, and further gradations occur in the spectral span between the ends that make the middle span more complex and ambiguous still. But even so, we can say generally that images of warring, or the reckless debauchery and derring-do of the buccaneer, belong near the male end of the spectrum. If the tacit endorsement of value goes to that archetypally male end, then on even the most complex binary spectrum, a corresponding lack of value is implied as to the female reaches.

Yet other figures in the rhetoric of criminal justice signify devaluation of the archetypally feminine more clearly, even if not always consciously. When the judicial robe becomes a "dress," it (like the person in it) no longer commands respect. It and he are objects of ridicule. The very linkage to the feminine degrades the object linked. This devaluation is swift and relatively undisguised. The same is true of castration imagery. Neutered by the triumphant lawyer, the unfortunate opponent is now, at least symbolically, less male. He has been demoted to a status closer to female. Given the brutality (again, archetypally male) of the imagined emasculation, this is doubly an undesirable status that he now occupies. Throughout, the rhetoric carries signs that maleness or masculine traits have favorable and valued meaning, and femaleness or feminine traits an unfavorable and devalued meaning. Indeed, the rhetoric makes the feminine ridiculous. If there is a deeper structure still for the semiotician to seek, perhaps it is that the mind, as it shapes culture and culture in turn shapes it, holds criminal justice as fundamentally masculine. The feminine has no important place in it. Criminal justice is, at some deep level, an expression that is understood as a manifestation of masculinity or even just

50. *Id.*

51. Not all semioticians agree with the premise that deep structures exist or are worth pursuit. Post-structuralists, or deconstructionists, reject the hope that a science of semiotics could reveal any objective deep structure. *Id.* at 232-33. Among others, Jacques Derrida and Michel Foucault would be in this general encampment within the Confederation of Semiotics and the disciplines that overlap it. *See id.* at 233.

52. *See* ARTHUR KOESTLER, *The Yogi and the Commissar*, in *THE YOGI AND THE COMMISSAR AND OTHER ESSAYS* 13, 13 (Collier Books 1961) (1945). Koestler offered a not entirely successful analogy to the spectrum of solar radiation, from infrared to ultraviolet, to suggest the spread of intellectuals of his day from the introspection and mysticism of some to the coldly authoritarian qualities of others. *See id.* at 13-14, 16-17, 19-20.

maleness. No wonder the wife or girlfriend is assumed less culpable and benefits from a quasi-defense of gender status in conspiracies and other group offenses. She is irrelevant to, or an interference with, the deep nature of the whole undertaking. Masculinity may be the universal, accepted grammar of criminal justice. It is legitimate; it *is* law. Femininity may be illegitimate in criminal justice; literally outside the law.

III

If my observations about the common rhetoric, the vulgar slang, of American criminal justice have arguable weight, it is tempting at first to ask why the significant numbers of women in the ranks of criminal justice institutions do not by their mere presence refute those observations. The answer, I suppose, is that both men and women inhabit the same closed system or subculture. Individually, we no more create or control that culture than the strongest swimmer creates or controls the water in which she swims. Within the professions of American criminal justice, women wish to succeed at least as much as men, as success is measured within these realms. Succeeding in part means pretending in the stories we tell, in the discourse we have with colleagues. More pointedly, it means pretending to be or do the things that signify value or success.

As we pretend, so then we become. That is true if Vonnegut had it about right. It is also the semiotician's point that expression becomes content through mediation of signs. This means men becoming the expression of the masculine traits their pretenses reveal. Indeed, it means women becoming the same expression of masculine traits.

None of that changes the normative truth that the influx of women into prosecutors' and defenders' offices, into the judiciary, and into police departments, is good. That influx also may be transformative in important ways. For example, perhaps the visible role of women advances the aspiration to equal justice, meaning justice that sex and other immutable or irrelevant characteristics do not affect. Over time, aspiration—like any other form of pretending—edges toward reality. In the dialectic between individual identity and societal perception of the individual, each shapes the other to some extent. Although the swimmer does not create or control the water, she does affect it for a time; she affects its chop, its roil, its flow. If she swims with many, the combined effect is greater.

But the influx of women to the criminal justice professions in recent decades cannot mask the underlying values that remain firmly embedded, and that the rhetoric signifies. It certainly should not lull us into believing that the values will change as a matter of course just because surface demographics change. The arrival of more women does not bid us to forego inquiry into the structures and values concealed behind the marble facades of criminal justice, but revealed in the chatter of its corridors. In other words, the increasing prominence of women in the institutions of criminal justice ought not provide just another reason to continue to pretend to be as we always have been. Perhaps we should pretend to be something else.

Or perhaps the rhetoric of lawyers will remain just as Camus quoted the priest: fully as cynical and vulgar as the slang of the prisoners themselves.⁵³ If so, the values and structure signified remain the same, too. In that event, Vonnegut again would know what to say. "So it goes."⁵⁴

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53. See CAMUS, *supra* note 26.

54. KURT VONNEGUT, *SLAUGHTERHOUSE-FIVE OR THE CHILDREN'S CRUSADE passim* (Dial Press Trade Paperback 2005) (1969). The narrator repeats the phrase often, usually in commenting on events affecting Billy Pilgrim.