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Publication Date

2006-03-27

Peer reviewed

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Word Count: 11,300

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Repression and Denial in Criminal Lawyering

By Susan Bandes*

For criminal defense attorneys, being asked to justify defending “those people” is such a predictable part of the job it may as well be included in the job description.¹ Laypeople “want to find out how criminal lawyers can represent people who hurt other people.”² Scholars are interested in the same question, albeit in more sophisticated garb. For scholars, “the central question of legal ethics arises....because lawyers are sometimes asked or required, in their role as lawyers, to do things that strike all conscientious people...as morally suspect.”³ Yet this is a topic that fascinates mostly laypeople and scholars.⁴ Defense attorneys, as a rule, are

* Distinguished Research Professor, DePaul College of Law. I would like to thank Phyllis Crocker, Tom Geraghty, Andrea Lyon, Jeffrie Murphy, Catherine O’Grady, Michelle Oberman, John Robertson, Carol Sanger, Austin Sarat, David M. Siegel, Marjorie Silver, Abbe Smith, Ann Southworth, David Wexler, and the faculties of the Chicago-Kent, Emory, Loyola/Chicago, Northwestern, Notre Dame, University of Arizona, University of North Carolina, and Rutgers/Camden law schools for their insightful comments on earlier drafts of this article. I also received valuable comments when presenting versions of this paper at the Law, Culture and Humanities conference at Georgetown University, the Law and Society Annual Meeting in Budapest, Hungary, the Law and Society Midwest Retreat at the University of Wisconsin, Madison, and the annual conference of the International Association of Law and Mental Health in Paris, France. Finally I owe thanks to the DePaul Law School and deans Tere Foster and Glen Weissenberger for their support.

¹ See Abbe Smith, *Defending Defending: The Case for Unmitigated Zeal on Behalf of People Who Do Terrible Things*, 28 Hofstra L. Rev. 925, 933 (2000) (defending defending is an endless pursuit); Barbara Babcock, *Defending the Guilty*, 32 Cleveland State L. Rev. 175 at 175 (1983-84).

² See Abbe Smith, *Rosie O’Neill Goes to Law School: The Clinical Education of the Sensitive New Age Public Defender*, 28 Harv. Civ. Rights Civ. Liberties L. Rev. 1, 47 (1993).

³ Rob Atkinson, *A Skeptical Answer to Edmundson’s Contextualism: What We Know We Lawyers Know*, 30 Fla. U. L. Rev. 25, 27 (2002).

⁴ See e.g. the classic exchange between William H. Simon, *The Ethics of Criminal Defense*, 91 Mich. L. Rev. 1703 (1993) and David Luban, *Are Criminal Defenders Different?*, 91 Mich. L. Rev. 1729 (1993) on the ethics of zealously defending those accused of crimes.

comfortable with their ethical obligation to offer a zealous defense and do not find the question, as posed, very interesting.⁵

Indeed, the question as posed is interesting more for what it assumes, and for what it leaves out, than for what it asks. What do we talk about when we talk about criminal defense attorneys and the work they do? There are certain conversational paths, within certain realms of discourse, which are exceedingly well-trod. Most prominently (aside from garden-variety discussions of doctrine and strategy) there is a rich and well established discourse about the ethics of criminal defense, which encompasses questions about the ethics of defending those accused of heinous crimes, and about the tactics used in doing so.⁶ The debate on this set of questions is often contentious, but its status as a proper focus of academic discourse is not challenged.

A separate though related conversation needs to occur. Its topic is *how, in an emotional sense*, one defends people accused of terrible crimes, and what toll such defense takes. Are there certain thoughts, concerns, doubts, or feelings that a criminal defense lawyer must put aside, temporarily or personally, in order to do the work properly? What emotions do criminal lawyers need to deny or repress, or in some way place at a safe remove? On what level of awareness does the denial occur, and how permanent is it? What are the costs, temporary and more permanent, professional and personal, of failing to face these emotions?

⁵ See e.g. letter from attorney Tom Geraghty to Susan Bandes, Feb. 7, 2003, referring to the ethical dilemmas discussed by Luban, Simon et al as “role differentiated behavior, but it’s pretty easy role differentiated behavior for most lawyers to engage in without much inner conflict.” For an incisive critique of the usual debate about role differentiated behavior, see Ted Schneyer, *Moral Philosophy’s Standard Misconception of Legal Ethics*, 1984 *Wisconsin L. Rev.* 1529.

⁶ See e.g. Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 *Human Rights* 1 (1975); Gerald J. Postema, *Moral Responsibility in Professional Ethics*, 55 *NYU L. Rev.* 63 (1980); William H. Simon, *Ethical Discretion in Lawyering*, 101 *Harv. L. Rev.* 1083 (1988).

The emotional costs of lawyering are rarely considered worthy of mainstream legal discussion. To the extent the topic of emotional adaptation is broached, either in the criminal defense context⁷ or more broadly,⁸ its locales tend to be psychology journals, clinical law publications, and seminars on legal education or legal writing.⁹ This marginalization is problematic. Questions about how we lawyers do our jobs cannot be neatly divided into intellectual and emotional spheres, or into doctrinal, strategic, ethical and emotional quadrants.

⁷ For example, Abbe Smith has written extensively and thoughtfully on this topic. See e.g. Smith, Rosie O'Neill Goes to Law School, *supra* note 2; Smith, Defending Defending, *supra* note 1; Abbe Smith, Can You Be a Good Prosecutor and a Good Person?, 14 *Georgetown Journal of Legal Ethics* 355 (2001). Some of her students have written on the subject as well. See e.g. Robert Rader, Confessions of Guilt: A Clinic Student's Reflections on Representing Indigent Criminal Defendants, 1 *Clinical L. Rev.* 299 (1994).

⁸ Andrew Watson and others with training in psychology have long tried to bring discussions of lawyers' and law students' emotional health into the mainstream. See e.g. Andrew Watson, The Quest for Professional Competence: Psychological Aspects of Legal Education, 37 *Univ. Cinn. L. Rev.* 91 (1968); John Mixon and Robert P. Schuwerk, The Personal Dimension of Professional Responsibility, 58 *Law and Contemporary Problems* 87 (1995); Amiram Elwork and G. Andrew H. Benjamin, Lawyers in Distress, *Journal of Psychology and Law*, Summer 1995; Marjorie Silver, Emotional Intelligence and Legal Education, 5 *Psychology, Public Policy, and Law* 1173, 1192-96 (1999) (discussing Watson's work). In recent years, David Wexler, Bruce Ennis and others have advocated for a therapeutic jurisprudence which "sees emotional well-being as an important value that law should serve." David B. Wexler and Bruce J. Winick, Foreword: Expanding the Role of the Defense Lawyer and Criminal Court Judge Through Therapeutic Jurisprudence, 38 *Crim. L. Bull.* 200 (2002). See also David Wexler, Some Reflections on Therapeutic Jurisprudence and the Practice of Criminal Law, 38 *Crim. L. Bull.* 205 (2002); David B. Wexler and Bruce J. Winick, Judging in a Therapeutic Key: Therapeutic Jurisprudence and the Courts (2003); Marjorie Silver, Love, Hate, and Other Emotional Interference in the Lawyer/Client Relationship, 6 *Clinical L. Rev.* 259 (1999); Susan Daicoff, Lawyer: Know Thyself: A Review of Empirical Research on Attorney Attributes Bearing on Professionalism, 46 *Am. U. L. Rev.* 1337 (1997).

⁹ Clinical and legal writing professors, who are likely to have "frontline" experience with the emotional reactions of law students, have contributed much to the literature on the emotional adaptation of law students. See e.g. Lawrence S. Krieger, Institutional Denial About the Dark Side of Law School, and Fresh Empirical Guidance for Constructively Breaking the Silence, 52 *J. Legal. Educ.* 112 (2002); Ruth Ann McKinney, Depression and Anxiety in Law Students: Are We Part of the Problem and Can We Be Part of the Solution,? 8 *Legal Writing* 229 (2002); Cathaleen A. Roach, A River Runs Through It: Tapping Into the Informational Stream to Move Students From Isolation to Autonomy, 36 *Ariz. L. Rev.* 667 (1994).

Such divisions manage to shortchange every aspect of lawyering: the intellectual as well as the emotional; the scholarly as well as the practical.

Most obviously, the traditional view tends to ensure that the emotional variables affecting legal practice will receive inadequate attention. There may be no other profession whose practitioners are required to deal with so much pain with so little support and guidance. And there is ample evidence that we could use the help: levels of alcoholism, drug abuse, depression and other serious dysfunction well above those for other stressful professions.¹⁰ The problem is more basic, though, than a lack of support systems. In the conventional view the very acknowledgement of our work's emotional aspects—of the pain we cause, the pain we experience, the costs of the dissonance between role and conscience, the empathy or revulsion we may feel toward particular clients and how we ought to deal with it—seems at odds with law's essence as a rational and rigorous discipline. In short, acknowledging the role of emotion may brand one as not merely weak, but downright unlawyerlike.

The conventional division between emotion and reason shortchanges the discussion of the theory and practice of lawyering as well. We are increasingly coming to understand the extent to which our approach to legal and ethical dilemmas is deeply influenced by—and intertwined with-- our emotional responses.¹¹ Certain emotional strategies can be seen to affect a lawyer's ability to do a professional job for a particular client. She may become too involved at

¹⁰ See *infra* text accompanying notes 70-72.

¹¹ See e.g. Joshua D. Greene, R. Brian Sommerville, Leigh E. Nystrom, John M. Darley and Jonathan D. Cohen, An fMRI Investigation of Emotional Engagement in Moral Judgment, *Science* vol. 293 at 2105, September 14, 2001. See also Sandra Blakeslee, Watching How the Brain Works as it Weighs a Moral Dilemma, *New York Times* p. D3, September 25, 2001 (discussing work on morals and neuroscience); Oliver R. Goodenough, Mapping Cortical Areas Associated with Legal Reasoning and Moral Intuition, 41 *Jurimetrics* 429 (2001); William D. Casebeer, Moral Cognition and its Neural Constituents, 4 *Nature Reviews/Neuroscience* 841, October 2003.

the expense of judgment, or fail to deal with her own repugnance.¹² A recent horrifying example of this latter scenario occurred when a lawyer from North Carolina, appointed to his first capital case, was so repelled by his client that he deliberately lost his case, a deed he acknowledged to himself and others only years later.¹³ Emotional strategies may also shade into ethical issues in the long run, for example when lawyers become burned out and unable to provide adequate representation because of excessive involvement or failure to care for their own emotional well-being.

More broadly, the traditional demarcation fails to apprehend the pervasive and often invisible influence of emotion on every aspect of the decision-making process. Emotion helps us to choose among sources, to emphasize, to highlight, to indicate importance and urgency, to assess risk or advantage, to assist in evaluating the intentions of others. It helps guide and prioritize decision-making processes; it moves us to action.¹⁴ In short, cognition shorn of emotion would cut decision-making off from much of what makes us human—our ability to communicate effectively with others, our ability to choose wisely, our motivation to care whether we’ve made the right choice at all. As neuroscientist and lawyer Oliver Goodenough put it:

¹² Andrea Lyon notes: “When I have clients I don’t like, I am very careful and double check myself over and over again to make sure that I am doing everything, sort of more naturally that [I would do] if I liked the client. You just have to be aware of how you feel. A lot of lawyers will tell you ‘I don’t have any feelings at all...about them...they are just a client,’ ... they just don’t know that they feel stuff, or not willing to admit that they feel stuff....and as a result, they may shortchange a client that they dislike and work really hard on a client’s case that they do like without realizing that they’re....responding to emotions.” Interview with Andrea Lyon, March 12, 2001.

¹³ Sara Rimer, Lawyer Sabotaged Case of a Client on Death Row, *New York Times* at A37, November 24, 2000.

¹⁴ See generally Antonio R. Damasio, *Descartes’ Error: Emotion, Reason and the Human Brain* (1994); Joseph LeDoux, *The Emotional Brain* (1996).

Perhaps it is not so much that emotion is the key to normative judgment as it is a key to important and effective normative judgment, normative judgment that gets our attention and gets translated into action...¹⁵

Thus, even the seemingly well developed ethical discussion is impoverished by the failure to address emotional variables that are bound to affect ethical and legal choices.

The focus of this article is threefold. First, it explores the emotional strategies employed by criminal defense lawyers, and the extent to which these strategies enable the lawyers to succeed both as advocates and as people whose work is comfortably integrated into their lives. In particular, it focuses on the ways in which certain aspects of the job are made immediate and concrete while others are made distant and abstract, and explores whether distancing may, in some contexts, be a positive coping strategy. Second, it suggests that criminal defense lawyers are not unique, and the mechanisms and strategies discussed shed light on a far greater swathe of professional and personal behavior, both in legal practice and in other settings. Finally, the article argues that legal discourse, beginning in law school and throughout our professional lives, needs to overcome its current aversion to the emotional aspects of lawyering, and that the consequences of our longstanding failure to do so are great and should not be perpetuated.

The article will focus on criminal defense lawyers, but several caveats about this focus are necessary. Most important, I do not suggest that issues about denial or other defense mechanisms are confined to criminal litigators. Certainly they apply to prosecutors as well as defense lawyers.¹⁶ For example, David Heilbroner discussed the denial of defendants' humanity, the need not to think about the reality of locking people up, that he found particularly

¹⁵ Oliver R. Goodenough and Kristin Prehn, A Neuroscientific Approach to Normative Judgment in Law and Justice, *Phil. Trans. R. Soc. Lond. B* 359, 1709-1726 (The Royal Society) (2004).

¹⁶ See Smith, Can You Be a Good Prosecutor, *supra* note 7 at 382 and n182.

dehumanizing about prosecuting.¹⁷ Likewise, they apply to civil as well as criminal lawyers. For example, Charles Reich described his corporate litigation experience as a time in which his personal values and emotions were so deeply suppressed that he nearly lost sight of them.¹⁸ They even apply to judges.¹⁹ As one criminal court judge explained, “When you hear about man’s inhumanity to man, twenty and thirty and forty times—it’s not like you become completely indifferent to what you hear, but you build up a mechanism to deal with it.”²⁰ One poignant description of the problem came from a sheriff’s deputy in a criminal courtroom, who asked “Should my heart go out to every person we hear about getting hurt? My heart would be going out every single day—I wouldn’t have a heart left.”²¹

Arguably, the entire fabric of law is tightly woven with defense mechanisms. One very interesting psychological account of denial described what it called “reasoned denial,” defined as “the motivation to reach a particular conclusion which leads to actively assigning a role to some

¹⁷ David Heilbroner, *Rough Justice: Days and Nights of a Young D.A.* (1990).

¹⁸ Charles Reich, *The Sorcerer of Bolinas Reef* (1976). Joseph Epstein’s short story “Coming In With Their Hands Up,” is a vivid evocation of the ethical tensions of divorce law and their psychic toll. See Joseph Epstein, *Fabulous Small Jews* at 216 - 231 (Mariner Books 2004). See also Kermit Roosevelt, *In the Shadow of the Law* (2005) for a superb account of the complex legal, ethical and emotional issues that arise for lawyers defending a corporation in a toxic tort case.

¹⁹ A recent study of 105 judges attending a workshop on domestic violence found that a significant majority showed symptoms of vicarious trauma or compassion fatigue (the result of becoming vicariously worn down and emotionally weary from hearing about and dealing with situations involving emotional or physical violence). See Peter G. Jaffe, Claire V. Crooks, Billie Lee Dunford-Jackson, and Judge Michael Town, *Vicarious Trauma in Judges: The Personal Challenge of Dispensing Justice*, *Juvenile and Family Court Journal* at 1, Fall 2003.

²⁰ Steve Bogira, *Courtroom 302: A Year Behind the Scenes in an American Criminal Courthouse* at 174 (2005) (quoting Judge Locallo of Cook County Circuit Court).

²¹ *Id.* (quoting Sheriff’s Deputy Guerrero of Cook County Circuit Court).

premises while not taking others into account.”²² Such mechanisms are, arguably, deeply ingrained in the adversary system.

No doubt those in other professions have things they must “put aside” as well. Those in medical fields provide an obvious example. Dr. Melvin Konner describes a “process of psychological hardening of medical students” which is “deliberately pursued” in medical school,²³ although this appears to be changing.²⁴ One fascinating study suggests that denial may be professionally—though not necessarily personally—adaptive for urban paramedics.²⁵ Wendy Simonds’ nuanced work examines feminist health workers in an abortion clinic and how they reconciled their emotional reactions to the physiology of late term abortions with their belief in the importance of access to abortion.²⁶ Pediatrician Perri Klass wrote movingly about her experience treating pediatric AIDS patients, and noted that she simply could not do her job and fall in love with each child she treated.²⁷

But in obvious ways, the issues surrounding denial or disavowal by criminal defense lawyers are particularly salient. Defense lawyers have to defend people accused of acts that are morally objectionable, even horrific. To do so, they may need not to think about the victims of

²² Maria Miceli and Cristiano Castelfranchi, Denial and its Reasoning, 71 *British Journal of Medical Psychology* 139, 140 (1998).

²³ Melvin Konner, M.D., *Becoming a Doctor: A Journey of Initiation in Medical School* at 245 (Penguin 1987). See also Wendy Simonds, *Abortion at Work: Ideology and Practice in a Feminist Clinic* at 87 (Rutgers Univ. Press 1996) (“the culture of the anatomy lab...encourages a display of callousness and joking among medical students; this behavior functions to shield students from the emotional potency of the interior of bodies and the deadness of cadavers.”) I thank David Garrow for introducing me to Simonds’ works.

²⁴ See Abigail Zuger, *Anatomy Lessons: A Vanishing Rite for Young Doctors*, *New York Times* Sec. D at D1 and D6, March 23, 2004 (reporting that medical schools now uniformly encourage students to work through their emotions, including their reactions to death and dying.)

²⁵ Francine Grevin, *Posttraumatic Stress Disorder, Ego Defense Mechanisms, and Empathy Among Urban Paramedics*, 79 *Psychological Reports* 483-495 (1996).

²⁶ Wendy Simonds, *Abortion at Work*, *supra* note 21.

²⁷ Perri Klass, *Other Women’s Children* (1990).

the crime, or the possibility that the accused might commit another such crime if the defense lawyer is successful.²⁸ They may need not to think about the impact of impugning the credibility of rape victims or children. Criminal defense lawyers also need to contend with the public perception that they are engaged in a disreputable enterprise that lies somewhere between pathological denial and out and out collaboration with criminality.²⁹ Whereas doctors treating pediatric AIDS patients receive societal support and even admiration, criminal defense attorneys are constantly called to account for their representation of the reviled—not just by the lay public but by others in the legal arena as well.³⁰

For the criminal defense attorney, some aspects of the work must remain emotionally immediate. Most obviously, the engaged and conscientious lawyer is vividly aware of his client as a person who stands to lose his freedom and perhaps even his life. As attorney David Feige put it:

²⁸ Conversely, they must live with the knowledge that the accused may be wrongly accused, and that the responsibility for keeping him from prison or execution rests entirely on their shoulders. See *infra* text accompanying notes 133-134.

²⁹ See e.g. Kenneth B. Nunn, *the Trial as Text: Allegory, Myth and Symbol in the Adversarial Criminal Process—A Critique of the Role of the Public Defender and a Proposal for Reform*, 32 *Am Crim. L. Rev.* 743, 812 (1995) (discussing “deep stigma” attached to the work of public defenders); Gerald B. Lefcourt, *Responsibilities of a Criminal Defense Lawyer*, 30 *Loyola L.A. L. Rev.* 59, 60 (1996) (“society expects a lot from us, all the while bashing us in every possible way.”) See also Lawrence S. Krieger, *What We’re Not Telling Law Students—And Lawyers—That They Really Need to Know: Some Thoughts—in—Action Toward Revitalizing the Profession From Its Roots*, 13 *J. L. & Health* 1, 25 (1998-99) (discussing impact on lawyers and law students of “intensely negative public perception of the profession.”) The case of Lynne Stewart, who was convicted of providing material support to terrorism under the 1996 Antiterrorism and Effective Death Penalty Act for her representation of an accused terrorist, raises particularly troubling questions in this regard. See Alissa Clare, *We Should Have Gone to Med School—In the Wake of Lynne Stewart: Lawyers Face Hard time for Defending Terrorists*, 18 *Geo. J. Legal Ethics* 651 (2005) (discussing chilling effect of Stewart prosecution); Abbe Smith, *The Bounds of Zeal in Criminal Defense: Some Thoughts on Lynne Stewart*, 44 *Tex. L. Rev.* 31 (2005) (considering why a defense lawyer, particularly one representing a political or social pariah, might cross ethical boundaries).

³⁰ In that regard, the closest analogy might be to the workers in abortion clinics. See *infra* text accompanying notes 223-227.

I care about the person I know. In most cases, the complainant is an abstraction to me. His victimization is an abstraction. My client, on the other hand, is very human and very real. It is his tears I see, his hand I hold and his mother I console.³¹

Other emotional aspects tend to be relegated to the other side of the divide. They are abstracted, and even disavowed, either temporarily or more permanently. In particular, criminal defense attorneys often abstract or distance themselves from the pain their clients may have caused and the pain the trial and its outcome may cause to victims and survivors. It is possible that a certain amount of distancing is adaptive, and that the problem arises when it shades into less conscious or less flexible defense mechanisms. At this point the loss of self-awareness and flexibility may become problematic both professionally and personally. As I will conclude, self-awareness is a key characteristic separating the adaptive from the maladaptive use of defense mechanisms. Such awareness is facilitated by reflection, peer support, mentoring and the opportunity for discussion. These are difficult to attain in a culture, like our legal culture, which provides no vocabulary, no ongoing discourse, no arena, and, arguably, no permission for discussion of coping strategies and their emotional effects.

a. Lawyers: Self defense and defense of others

Upon graduation from law school, I spent four years at the Chicago office of the Illinois State Appellate Defender, defending indigent clients who had been convicted of felonies. Thus my clients, most of them in state prison, had been convicted of murder, rape, armed robbery, home invasion, aggravated assault, and the like. I believed intensely in the social utility, and indeed, the rightness and importance, of my work, as did my colleagues in the office. And I still

³¹ David Feige, How to Defend Someone You Know is Guilty, New York Times Magazine, Sec. 6, at 59-60 (April 8, 2001).

believe in it, but after four years (perhaps a little longer than the norm) I left, with many symptoms of burnout.

What I could not allow myself to think about during those four years was the very question we were constantly asked to field: how can you defend those people? But as I suggested, that abstract question, so framed, has a number of compelling answers with which I am quite comfortable. The more difficult question for me was: what emotional strategies are necessary in order to defend people accused or convicted of horrific crimes? What is required in order to act zealously on behalf of a man convicted of invading an apartment in which a 102 year old woman resides, robbing her, pistol whipping her, and threatening to kill her?³² Or to defend a man convicted of jumping out of the bushes in a public park and molesting and ejaculating on an eight year old boy?³³ What is required, and what toll does it take, both professionally and personally?

The return of capital punishment³⁴ placed these issues in even sharper relief, and introduced some additional complications to the defense attorney's emotional landscape. Virtually all capital cases, at least in Illinois, had horrifyingly bad facts: victims who had been tortured, mutilated or forced to undergo humiliation before being killed, leaving emotionally devastated survivors. I recall an eerily clinical discussion with a colleague defending one of the early capital cases, in which it emerged that all turned on whether his client had simply thrown the infant in the water and watched her drown, or actually held her head underwater. How does a lawyer do work like that, year after year? And what happens to the lawyer when he goes home?

³² *People v. Withers*, 69 Ill. App. 3d 568 (1st Dist. 5th Div. 1979).

³³ *People v. Smith*, 64 Ill. App. 3d 1045 (First Dist. 3rd Div. 1978).

³⁴ The death penalty was reinstated in Illinois in 1973. See PA. 78-921, amending Ill. Rev. Stat. ch. 38 subsection 9-1 1005-5-3 (November 8, 1973).

There were certain obvious strategies for avoiding thinking about the emotions surrounding the defense of those accused (or convicted) of gruesome crimes. One was the use of euphemisms, or code. We referred to victims as “complainants” or “decedents.” We referred to murders, rapes, as “the incident in question” or “the alleged incident.” A truly horrifying case had “bad facts.” A fun case was often one with interesting or gory facts. We felt we could not afford to focus on the victim or to imagine the experience of the crime. The notion of immoral or wrongful behavior, of people worthy of our wrath, was reserved for our opponents in the State’s Attorney’s Office. The notion of right attached to important and deeply held principles: fairness, due process, and the vindication of constitutional rights. We felt loyalty to each other, and turned to each other for support. Most of all, we felt loyalty to our clients. We knew them and their families as human beings, we cared about them, we drew much of our strength and motivation from their desperate need for our help. Our clients’ needs were serious, immediate and palpable. Our job was to help our clients, which meant to get their convictions reversed or their sentences reduced. And like all good lawyers, we took pride in a job well done.

Even so, there was some “leakage.”³⁵ For one of my colleagues, one of the few with children in this young office, it was impossible to defend people convicted of sexually assaulting children. This was not a problem for me, though it would be today. For me the defensive wall was breached the day I read the record of a particularly brutal rape, saw the sentence of 20-60 years, and observed with discomfort my visceral reaction: anger that the sentence wasn’t longer. It was easy to know –intellectually--that this defendant too deserved a good appellate attorney. I was lucky that others could step in, sparing me the necessity of overruling my revulsion in order to mount a zealous defense.

³⁵ Donald P. Spence, *The Paradox of Denial* at 103, in *The Denial of Stress* (Shlomo Breznitz ed.) (International Universities Press, Inc. NY 1983).

Burnout is an imprecise term,³⁶ but at some point it became clear that all this “not thinking about” was taking its toll. There were emotions I couldn’t afford to explore, and I was no longer sure that they were all easily confined to my professional life. And now, with the luxury of the academy, I would like to face these difficult issues.

b. The Psychological Literature

First it is necessary to define the relevant terms. I seek to explore the process by which criminal defense lawyers distance themselves from certain aspects of their work, either temporarily or more permanently, while keeping other aspects salient. The psychological literature describes a constellation of mechanisms we use to achieve distancing. In common layman’s parlance, the term “denial” is often used as an umbrella term to describe these mechanisms. In the professional literature, the use of the term is a good deal more nuanced. However, it has no standard definition and is the subject of substantial disagreement among those in the field.³⁷ As psychologist Arnold Goldberg observed: “the use of the word *denial*...has been extended to cover...a wide variety of psychological maneuvers...”³⁸ There is a continuum

³⁶ See Charles J. Ogeltree Jr., *Beyond Justifications: Seeking Motivations to sustain Public Defenders*, 106 Harv. L. Rev. 1239 at 1241 n9 (1993) (discussing burnout, a term which he uses to “describe the disillusionment, depression, and demoralization experienced by public defenders as a result of their job responsibilities and working conditions,” and citing sources that discuss burnout in additional contexts).

³⁷ Miceli and Castelfranchi, *supra* note 20 at 140. Any serious study of the concepts of denial and repression must begin with the works of Sigmund and Anna Freud. See generally Sigmund Freud’s 1915 essay, “Repression,” in the Standard Edition of the Complete Psychological Works of Sigmund Freud, V. XIV, James Strachey ed. (London: Hogarth Press 1957). See also Leo Goldberger, *The Concept and Mechanisms of Denial: A Selective Overview* at 86 (in the *Denial of Stress*, *supra* note 33 (discussing Freud’s shifting views on denial). For Anna Freud’s further explication of defense mechanisms, see generally Anna Freud, *The Ego and the Mechanisms of Defense* (New York: International Universities Press 1946).

³⁸ See Arnold Goldberg, *Being of Two Minds: The Vertical Split in Psychoanalysis and Psychotherapy* at 21-22 (The Analytic Press Inc. 1999).

of defense mechanisms, including avoidance, disavowal, denial, suppression, repression, splitting and doubling, and these mechanisms both overlap and may go by different names.³⁹ Thus any summary will necessarily avoid or oversimplify certain debates, but given the purposes of this paper as well as the complexities of the field, this is difficult to avoid.⁴⁰ One working definition of denial is “a process through which a person attempts to protect himself from painful or frightening information related to external reality.”⁴¹ But even this simple definition contains the seeds of many disagreements. One controversy about the above definition is that not everyone would agree that the denial must be limited to external factual information. It might be a distortion of interpretation, a denial of not facts but their worst implications,⁴² an avoidance of comprehension or attention or exposure to seemingly irrelevant stimuli.⁴³ It might be internal: a denial of personal relevance, or responsibility.⁴⁴

Another source of controversy or confusion centers on how available the painful information is to the person engaged in denial. How conscious or subconscious is the protective

³⁹ George E. Vaillant, *Adaptation to Life* at 76 (Little Brown 1977), noting that “defense mechanisms refer to unifying processes rather than discrete entities.”

⁴⁰ As George Vaillant noted, “our knowledge of defenses is analogous to knowledge by nineteenth-century astronomers of the planet Pluto. Pluto could not be directly visualized, measured, or even identified as a single planet. Nevertheless, the tangible reality of Pluto could be appreciated by its systematic distortion of orbits of planets that were visible. In similar fashion, the observer identifies a user’s invisible defenses by noting systematic distortions.” Vaillant, *id* at 76.

⁴¹ Schlomo Breznitz, *The Seven Kinds of Denial* at 257, in *Denial of Stress*, *supra* note 33.

⁴² *Id* at 2.

⁴³ Anthony G. Greenwald, *Self-Knowledge and Self-Deception: Further Considerations* at 63, in *The Mythomanias: The Nature of Deception and Self-Deception* (Michael S. Myslobodsky ed 1997).

⁴⁴ Breznitz, *supra* note 39 at 61-62. According to the standard work of the American Psychoanalytic Association, “strictly speaking, denial usually refers to external reality, while repression relates to internal representations.” *Psychoanalytic Terms & Concepts* at 51 (1990) (Burness E. Moore and Bernard D. Fine eds.1990).

process?⁴⁵ How permanent or temporary?⁴⁶ How tentative or well entrenched?⁴⁷ How partial or complete?⁴⁸ This is partly a categorization issue, in that the literature often defines the more permanent or unconscious state of denial by other terms, such as repression or splitting.⁴⁹ The more partial and temporary state may be called avoidance, disavowal, dissociation, or suspension of disbelief.⁵⁰ It is also an issue on which the classical Freudian view of a rather rigid horizontal split between conscious and unconscious psychological mechanisms has been challenged, or perhaps supplemented, by a more porous conception of a vertical split which allows a greater number of affect states to be disavowed on a temporary basis.⁵¹

Although in common usage the term denial seems mostly derogatory,⁵² the psychological attitude toward the mechanism, or set of mechanisms, is a good deal more complex. Denial has both adaptive and maladaptive aspects: it has the potential to interfere with one's ability to deal with difficulties, but it is also an integral part of healthy coping.⁵³ The costs and benefits of

⁴⁵ Goldberger, *supra* note 35 at 86 (discussing Freud's shifting views on this topic).

⁴⁶ Richard S. Lazarus, *The Costs and Benefits of Denial* at 21-22, in *The Denial of Stress*, *supra* note 33.

⁴⁷ Lazarus, *id* at 12.

⁴⁸ *Id* at 12.

⁴⁹ *Id* at 14.

⁵⁰ *Id* at 10-12.

⁵¹ See generally Goldberg, *The Vertical Split*, *supra* note 36. Goldberg describes a continuum between the most innocent and common vertical splits and seriously pathological horizontal splits. He defines vertical splits as experiences, which almost everyone has had, in which "coexisting feelings, which lead to different and opposite results, live within us...[and therefore] preference often and regularly comes down to stilling the voice of the one; so that the other is not only heard but is allowed to dominate." He says that most such splits are "innocent and short-lived." *Id* at 8. In these situations, the split-off part of the psyche is still accessible. *Id* at 10. A horizontal split, however, involves repression of the split-off part, so that it is "withheld from consciousness." *Id* at 10.

⁵² Goldberger, *supra* note 35 at 97.

⁵³ The title and subtitle of a recent article extolling the benefits of denial say it all. "What, Me Worry?: Market meltdowns. Global warming. Confounding health studies. Grim news leads to a summer of denial. Relax, say experts, it's good for you." *The New York Times* Section 9 pp 1, 5 (July 28, 2002).

denial depend on the context.⁵⁴ Certain self-deceptions, or avoidance mechanisms, are needed to live life and to maintain mental health. In fact, sometimes denial merges with the concept of positive thinking.⁵⁵ Or as one psychologist put it: “[I]nsight isn’t always important, and denial isn’t always bad.”⁵⁶ Psychologist George Vaillant prefers the terms “coping or adaptive mechanisms” rather than what he terms “so-called defense mechanisms,” in order “to underscore the fact that defenses are healthy more often than they are pathological.”⁵⁷ Indeed, he credits the use of mature defense mechanisms with acting to “integrate the four sometimes conflicting governors of behavior—conscience, reality, interpersonal relations, and instincts.”⁵⁸ However, even an adaptationally sound defense can be capable of eliciting a heavy price. The question is what kinds and degrees of adaptation are damaging or constructive, and under what conditions.⁵⁹ Most of these mechanisms are generally thought to have both adaptive and maladaptive consequences, depending on context and degree.

In examining the sorts of adaptations or defensive strategies criminal lawyers engage in to do the work they do, I raise the question whether these strategies are adaptive on both professional and personal levels. On a professional level, do they lead to more effective representation in the short term? Do they permit defense lawyers to do this stressful work for the

⁵⁴ The acceptability of denial as a coping mechanism is also culturally shaped. It has been suggested that the emphasis on the importance of self expression is a Western European construct. See George A. Bonanno and Hoovie I. Siddique, *Emotional Dissociation, Self-Deception, and Psychotherapy* at 263, in *At Play in the Fields of Consciousness: Essays in Honor of Jerome L. Singer* (1999).

⁵⁵ Lazarus, *supra* note 44 at 15. Indeed, some psychologists argue that much of our drive stems from a single, powerful psychological force: the denial of death. *Id.* at 2. See also author Marion Winick’s pithy comment: “What is now called denial used to be known as hope.” Marion Winick, *First Comes Love* at 145 (Vintage 1996).

⁵⁶ Goldberger, *supra* note 35 at 97.

⁵⁷ Vaillant, *supra* note 37 at 7.

⁵⁸ *Id.* at 85.

⁵⁹ See generally Lazarus, *supra* note 44.

long term, or do they promote burnout? On a personal level, when lawyers “put things aside” at work, how is their personal life affected? Do these strategies bleed inappropriately into the home arena, or can they be left at the office? A defensive strategy that seems to lead to success in litigation may be poorly designed for home use, and may not be so easy to leave at the office.

Take, for example, the mechanisms of intellectualization and isolation. As a general matter, intellectualization includes “paying undue attention to the inanimate in order to avoid intimacy with people; or paying attention to external reality to avoid expression of inner feelings; or paying attention to irrelevant detail to avoid perceiving the whole.”⁶⁰ Isolation is a mechanism which leaves the idea in consciousness, but strips it of all emotional affect.⁶¹ George Vaillant’s longitudinal study assessing the long term effects of several coping mechanisms classified intellectualization and isolation as neurotic rather than mature defenses,⁶² albeit defenses commonly used by healthy individuals.⁶³ He found that those who used them frequently tended to traits like “perseverance, orderliness, obstinacy, parsimony, obstinance, rigidity, and emotional constriction.”⁶⁴ They tended to be professionally successful, but this did not necessarily correlate with personal and social success.⁶⁵ Although Vaillant did not study lawyers in particular, his “intellectualizing” subjects did well, unsurprisingly, at academics and other

⁶⁰ Vaillant, *supra* note 37 at 384-85. See also Moore and Fine, *supra* note 42 at 101-02, defining intellectualization as “the psychological binding of the instinctual drives to intellectual activities, especially in order to exert control over anxiety and reduce tension.”

⁶¹ Vaillant, *id.* at 156. See also Moore and Fine, *id.* at 49, defining isolation as [separating] “a painful idea or event from feelings associated with it, thereby altering its emotional impact.” In one form of isolation, perhaps most relevant for this discussion, “ideas may appear simply without the conscious presence of associated feelings.”

⁶² Vaillant includes isolation, as well as rationalization, as aspects of the neurotic defense mechanism of intellectualization. *Id.* at 132. Moore and Fine, however, simply treat both isolation and intellectualization as mechanisms that may be adaptive or pathological. Moore and Fine *id.* at 49 (isolation) and 101-02 (intellectualization).

⁶³ Vaillant, *id.* at 384-85.

⁶⁴ *Id.* at 132.

⁶⁵ *Id.*

pursuits that value this set of traits.⁶⁶ The traits correlate very well with the “detail oriented rational analysis” valued in law.⁶⁷ As the standard work on psychoanalytic terms notes

defenses may...function constructively, making action and thought more efficient...For instance, isolation, by dissociating thinking from emotions, can facilitate the logical progression of ideas by avoiding the distraction associated emotions might cause.⁶⁸

Unfortunately, strong emphasis on this set of traits is also correlated with the high level of professional and personal distress and dysfunction found among lawyers.⁶⁹As one lawyer observed, “All of a sudden you are involved in intellectualizing or rationalizing every thought you have, and then you become distanced emotionally from your loved ones, your colleagues, and even your clients. You are distanced from your own feelings, and you kind of lose your humanity.”⁷⁰

Of course, whether denial is considered healthy and normal or pathological depends on how we define mental health and pathology, and both terms are value laden and contested.⁷¹ There are certain measures of pathology available, such as rates of depression, alcoholism and drug abuse, and suicide, which I discuss below, and which consistently show that lawyers are significantly more depressed⁷² alcoholic and drug dependent,⁷³ and suicidal⁷⁴ than the general

⁶⁶ Id.

⁶⁷ See Elwork and Benjamin, *supra* note 8 at 209-210.

⁶⁸ Moore and Fine, *supra* note 42 at 49.

⁶⁹ Elwork and Benjamin, *supra* note 8.

⁷⁰ Adrienne Drell, *Chilling Out*, ABA Journal at 70, October 1994.

⁷¹ Vaillant, *supra* note 37 at 360.

⁷² William Eaton et al, *Occupations and the Prevalence of Major Depressive Disorder*, 32 J. Occupational Med 1079 (1990) (finding lawyers to have the highest rate of major depressive disorder among 104 occupational groups studied); Connie J.A. Beck, et al, *Lawyer Distress: Alcohol-Related Problems and Other Psychological Concerns Among a Sample of Practicing Lawyers*, 10 J. L. & Health 1, 49 (1995) (finding about 18% of lawyers significantly depressed, as compared to 3 to 9% of the general adult population) ; Robert P. Schuwerk, *The Law Professor as Fiduciary: What Duties Do We Owe to Our Students*, 45 S. Tex. L. Rev. 753, 765 and n26 (2004) (citing sources).

population. Short of pathology, there are studies seeking to measure job satisfaction.⁷⁵ However, my purpose is not to argue for a particular version of adaptation for lawyers. Rather, it is to argue for the importance of having the discussion, of understanding the forces at play, and of taking seriously the need to craft solutions to identified problems.

II. Empathy and Denial: Lawyers' Accounts

One common thread among those who maintain a commitment to defense work is the importance of the connection to one's client,⁷⁶ and the importance of keeping his needs concrete and immediate. Although there is a rich body of literature on the ethical boundaries of zealous representation, there is far less scholarly discussion of the emotional boundaries of the connection between lawyer and client.

The purpose of this section is to examine the strategies of criminal defense lawyers, drawing from their own accounts. One characteristic of criminal defense lawyers, fortunately for

⁷³ Susan Daicoff, Making Law Therapeutic for Lawyers: Therapeutic Jurisprudence, Preventive Law, and the Psychology of Lawyers, 5 *Psychology, Public Policy and Law* 811, 840 n146 (1999) (about 18% of lawyers exhibit clinically significant alcohol or substance abuse, about twice the general population.) See also Kreiger, What We're Not Telling Law Students, *supra* note 27 at 30-32; Rick B. Allen, Alcoholism, Drug Abuse and Lawyers: Are We Ready to Address the Denial?, 31 *Creighton L. Rev.* 265 (1997); Eric Drogen, Alcoholism in the Legal Profession: Psychological and Legal Perspectives and Interventions, 15 *L. & Psychol. Rev.* 117 (1991).

⁷⁴ Kreiger, Institutional Denial, *supra* note 9 at 115 (lawyers rank fifth among occupational groups for incidence of suicide).

⁷⁵ See e.g. Lawrence R. Richard, Psychological Type and Job Satisfaction Among Practicing Lawyers in the United States, 29 *Capital Univ. L. Rev.* 979 (2002); John P. Heinz, Kathleen E. Hull and Ava A. Harter, Lawyers and Their Discontents: Findings from a Survey of the Chicago Bar, 74 *Indiana L.J.* 737 (1999).

⁷⁶ And as Austin Sarat notes, this connection with a capital client, affirming his worth and dignity as a person, is itself a crucial political act. Austin Sarat, *Between (the Presence of) Violence and (the Possibility of) Justice: Lawyering Against Capital Punishment* at 135, in *Cause Lawyering: Political Commitments and Professional Responsibilities* (Austin Sarat and Stuart Scheingold eds 1998)..

my project, is that a significant number of them have written eloquently about the experience, and I have drawn from their published accounts. I supplement these accounts with my own conversations with several practicing criminal defense lawyers. In addition, many of the strategies have also been discussed by other professionals—lawyers in other fields and medical personnel, for example. When useful discussions exist from other vantage points, I will refer to them as well.

The accounts written by criminal lawyers paint a complex portrait of the conditions that provide criminal lawyers sustenance and strength. There is a broad range of motivations for doing criminal law. There are differences between private attorneys and public defenders. The motivations of death penalty lawyers are not necessarily those of other criminal defense lawyers, and capital lawyers in public defender offices may differ from those in small public interest organizations. Individual lawyers within these groups, of course, differ in their motivations. What is most noteworthy about this wide range of motivations, for purposes of this paper, is the fluid and complex mix of the abstract and the concrete, the ideological and the practical.

Criminal lawyers deal with clients whose liberty and sometimes life is in the balance. For conscientious counsel, these high stakes concentrate the mind wonderfully. The needs of individual clients at such a pass are not abstract; they are immediate and pressing.⁷⁷ Yet more abstract principles may also provide motivations for criminal defense lawyers. Austin Sarat and Stuart Scheingold, in their landmark book on cause lawyering, define cause lawyering as a vocation of justice and moral engagement; a way of linking individual injustices to a broader more systemic pattern of injustice.⁷⁸ Terence Halliday, in a thoughtful review of their book,

⁷⁷ Michael Mello, *A Letter on a Lawyer's Life of Death*, 38 S. Tex. L. Rev. 121, 159 (1997); Feige, *supra* note 29.

⁷⁸ Sarat, *supra* note 74 at 318-25.

catalogues the sorts of motivations that might attract and sustain “cause lawyers.”⁷⁹ He mentions altruism, personal identification with the problem, religious motivation, humanistic impulses, civic orientation, and a sense of moral imperative.⁸⁰ Criminal defense lawyers may be motivated by some or all of these values.

The “cause lawyering” label is not necessarily useful in capturing the motivations of criminal or even capital lawyers. Motives are invariably complex.⁸¹ From an emotional perspective, criminal lawyers draw strength from many sources, not all of them lofty. Many of the lawyers who thrive in criminal defense (and perhaps this is true of any litigation-oriented practice) seem to relish the fight. They may be energized by challenging, and preferably thwarting, authority, by fighting for the underdog, or by their political commitments.⁸² Not all of these lawyers have a systemic critique of the criminal justice system and the place of capital punishment within that system.⁸³ Some work for public interest organizations which fight capital punishment as part of a larger strategy of fighting for civil rights. Most do capital cases one at a

⁷⁹ Terence Halliday, *Politics and Civic Professionalism: Legal Ethics and Cause Lawyering*, 24 *Law and Social Inquiry* 1013 (1999). He refers to cause lawyering as “a port manteau concept with relatively little detonative precision.” *Id.* at 1015. Reviewing Sarat, *id.*

⁸⁰ Halliday, *id.* at 1038.

⁸¹ See Carrie Menkel-Meadow, *Narrowing the Gap by Narrowing the Field: what’s Missing from the MacCrate Report—Of Skills, Legal Science and Being a Human Being*, 69 *Wash. L. Rev.* 593, 596 (1994). See also Susan Bandes, “We the People” and Our Enduring Values, 96 *Mich. L. Rev.* 1376, 1417-18 (1998).

⁸² See e.g. Barbara Babcock’s review of Kunen’s “How Can you Defend Those People?”, 53 *Geo. Wash. L. Rev.* 310, 314 (1984-85 (discussing importance of the sheer joy of thwarting the will of authority as a motivating force.) See also Ogeltree, *supra* note 34 at 1243; Abbe Smith, *Too Much Heart and Not Enough Heat: The Short Life and Fractured Ego of the Empathetic, Heroic Public Defender*, 37 *U.C. Davis L. Rev.* 1203 at 1209 n17 (2004)..

⁸³ See Margareth Etienne, “The Ethics of Cause Lawyering: An Empirical Examination of Criminal Defense Lawyers as Cause Lawyers” (March 2005). U Illinois Public Law Research Paper No. 05-06. <http://ssrn.com/abstract=690721>, arguing that many criminal defense attorneys are in fact cause lawyers who are committed to individual clients but also the cause of legal reform in criminal law.

time, trying to save one life at a time.⁸⁴ In terms of ability to sustain commitment and emotional health, there are advantages and disadvantages to each approach. The burden of saving lives can be crushing; adding the imperative of “making the world a better place”⁸⁵ may be sustaining for some,⁸⁶ debilitating for others.⁸⁷ Yet my point here is that all these lawyers would describe themselves as fighting for a principle as well as a client,⁸⁸ and would say that, in varying measures, both the abstract principle and the immense needs of the individual client were important in sustaining them.

At times, however, abstract principle may sit uneasily with concrete experience. Charles Ogeltree, for example, describes the situation he confronted when, during his time as a public defender, his sister Barbara was murdered. He says, in describing his crisis of faith:

My determination to track down my sister’s murderer and secure his conviction led me to adopt an outlook that was in many ways incompatible with the justifications I had consistently used to defend my profession.⁸⁹

His abstract belief in the importance of constraints on police behavior was challenged by his desire for the police to find the murderer. In addition, he was forced to consider, from a wholly new vantage point, the role of the defense attorney at the trial of his sister’s killer. He says:

⁸⁴ See Ogeltree, *supra* note 34 at 1279 n164, arguing that “criminal defense is fundamentally *individual* representation; public defenders cannot easily focus on class-wide problems without forgoing their constitutionally necessary role.”

⁸⁵ Smith, *Defending Defending*, *supra* note 1 at 953.

⁸⁶ Charles Ogeltree argues for the motivational importance of what he calls “heroism,” the “desire to take on the system and prevail, even in the face of overwhelming odds.” Ogeltree, *supra* note 34 at 1243.

⁸⁷ See James S. Kunen, “How Can You Defend Those People?”: the Making of a Criminal Lawyer at 142 (1983); Rader, *supra* note 8 at 324.

⁸⁸ But see Michael Mello, describing the evolution of his motivations: “I didn’t want to become a pitiful cartoonish caricature of an ideologue, working for the abstract issue of abolition, the cause, rather than working to prevent the Sunshine State from killing particular human beings I’ve come to know, if not necessarily to like or to understand what made them murderers.” Mello, *A Letter on a Lawyer’s Life of Death*, *supra* note 75 at 162.

⁸⁹ Ogeltree, *supra* note 34 at 1262.

Imagining the role the defense attorney would play at the trial of Barbara's killer forced me to face squarely the real consequences suffered by victims and their families as a direct result of the zealous advocacy of clever defense lawyers. I had to consider how victims feel about lawyers like myself, lawyers who secure dismissals on technicalities, or who seek to raise sufficient doubt for a jury to find the client not guilty, even in the face of strong evidence against the accused. I also imagined the impact on my mother of a defense strategy that would present Barbara's life in a negative light. I agonized over the possibility that the person responsible for my sister's death might walk away.⁹⁰

His faith in the criminal justice system and his commitment to criminal defense work were badly shaken.⁹¹ Ultimately, he found a way beyond his crisis of faith, and he gives much of the credit to the power of empathy for his clients.⁹² His ability to focus on his clients as individuals and as friends, to understand their problems and to feel compassion for their plights, became a sustaining motivation for him.⁹³ He says, in relation to one such client:

I did not think about what he had done, nor did I feel responsible for what he might do if released. I knew that at that moment I was my client's only friend, and that my friend wanted to go home.⁹⁴

The narrative raises important questions about the nature of a criminal defense attorney's empathy toward his clients.⁹⁵ First, Ogeltree's discussion makes clear that empathy serves several purposes for the criminal defense lawyer. Empathy can provide a sense of meaning. It enables lawyers to care deeply about what happens to their clients; and this concern is one of the

⁹⁰ Id.

⁹¹ Id.

⁹² Id at 1271.

⁹³ Id at 1271-72.

⁹⁴ Id at 1271.

⁹⁵ For an excellent discussion of Professor Ogeltree's thesis that empathy provides a sustaining motivation for public defenders over the long term, see Smith, *supra* note 80. Smith suggests that the quality Ogeltree describes is actually closer to love than to empathy, and she questions whether it is either feasible or, in the long run, desirable for a public defender to love—or aspire to love—all of his or her clients. Id at 1218-33. See also Robert J. Condlin, "'What's Love Got To Do With It?' - 'It's Not Like They're Your Friends for Christ's Sake': The Complicated Relationship Between Lawyer and Client," 82 *Nebraska Law Review*, 101 (2004); <http://ssrn.com/abstract=473324> (discussing evolving theories of lawyer/client "friendship.")

things that keep them going in difficult times. As Ogeltree explicitly recognizes, empathy for the client can also improve the quality of representation. It is a source of the passion that can transform advocacy.⁹⁶ It is also a quality that will influence decision makers. If the judge or jury sees that the lawyer cares about her client, they will be more likely to care about him as well.⁹⁷ Most notably, for purposes of this discussion, Ogeltree argues that “empathy provides defenders with the ability to hear ‘complex, multivocal conversations,’”⁹⁸ such as conversations with opposing counsel, for example. It enables lawyers to “stand in the shoes of another and view things from her perspective.”⁹⁹ He thinks it likely that “the better understanding we have of a situation at *all* levels, the better our decisionmaking is likely to be.”¹⁰⁰ But he notes later that in the face of empathy “not just for the defendant but also for the victim, and perhaps even for future victims whose safety would be threatened by the defendant’s release...empathy for one’s client may prove difficult to sustain.”¹⁰¹

This last observation highlights the tension that is at the crux of my inquiry. A broad capacity for empathy is likely an important component of emotional maturity and mental health. It may—and this is a separate question—make us better professionals by allowing us to understand what is at stake for our opponents as well as our clients. Or perhaps too much empathy will actually interfere with our ability to represent our clients. If so, the needs of our profession may diverge from our psychic and emotional needs. Both the professional and emotional effects of empathy are important to address; recognizing their divergence is equally

⁹⁶ Randy Bellows, Notes of a Public Defender at 79, in Phillip b. Heymann and Lance Liebman, *The Social Responsibility of Lawyers: Case Studies* (Foundation Press 1988).

⁹⁷ *Id.*

⁹⁸ Ogeltree, *supra* note 34 at 1274-75, citing Lucie E. White, *Revaluing Politics: A Reply to Professor Strauss*, 39 *UCLA L Rev* 1331, 1338 (1992).

⁹⁹ Ogeltree, *id.* at 1275 n148.

¹⁰⁰ *Id.* at 149.

¹⁰¹ *Id.* at 1278.

important. In a therapeutic setting, the goal would likely be to discourage selective empathy, particularly where it neatly coincides with self-serving goals, and assist the analysand to understand multiple perspectives.¹⁰² As often occurs, once we import psychological terms into the legal context, definitional conflicts arise. The goals of therapy are not often the goals of the adversary system.¹⁰³ In the particular legal context of criminal defense, empathy for the client plays several roles, some of them quite instrumental. If the lawyer is truly to empathize more widely, not just with prosecutors, juries and judges, to enable her to meet opposing arguments and couch arguments favorably for her client, but also with victims, survivors, and adverse witnesses, the result might be to hinder rather than help her efforts for her client. Is it necessary, then, to repress these voices, this particular source of empathy, in order to do the work? Or conversely, is it necessary for a criminal lawyer to take in what happens to everyone—victim, defendant, and those close to both?¹⁰⁴

Exercising selective empathy, shutting out awareness of the pain of victims, survivors and witnesses, may on some level be adaptive and even necessary for lawyers, and perhaps especially for criminal lawyers. David Heilbroner, in his memoir of his time prosecuting, wondered whether compassion was a professional liability. He referred to compassion for the defendants he was helping to lock up as well as for the victims and witnesses with whom he dealt

¹⁰² At the heart of Sister Helen Prejean's beautiful book "Dead Man Walking" is an unsparing exploration of a similar issue. As the spiritual advisor to death row inmate Patrick Sonnier, and as one who has come to oppose the death penalty for him and generally, she confronts the question of her obligation to the victims and survivors of Sonnier's brutal crime. Sister Helen Prejean, *Dead Man Walking: An Eyewitness Account of the Death Penalty in the United States* (1993).

¹⁰³ Susan Bandes, *Empathy, Narrative, and Victim Impact Statements*, 63 *U. of Chi. L. Rev.* 361, 379-82 (1996).

¹⁰⁴ See Smith, Rose O'Neill, *supra* note 2 at 49.

every day.¹⁰⁵ The defense attorneys I discussed earlier recounted that they could not allow themselves to think too much about the victims, and that they used euphemisms to describe the victims and their suffering. They recounted that they did not think about certain moral issues, such as their treatment of witnesses and their contribution to putting dangerous criminals back on the street. Could these lawyers have allowed themselves to feel more empathy, or to think more deeply about those affected by the trial and by their client's behavior, and still been effective professionally? And how would doing so have affected them personally?

a. Coping Mechanisms

Criminal defense lawyers describe a number of strategies for dealing with emotionally difficult aspects of their jobs. In this section I will explore the attorneys' accounts of their means of distancing themselves (or in some instances, declining to do so) from the pain inherent in their work.

Two important points bear repeating. First, the relevant psychological categories are not fixed. There is a continuum of defense mechanisms, including avoidance, denial, suppression, repression, splitting and doubling, and these mechanisms both overlap and may go by different names. Second, most of these mechanisms are generally thought to have both adaptive and maladaptive consequences, depending on context and degree. For example, one longitudinal study by developmental psychologists found that defense mechanisms tend to have both mature and immature forms. Mature forms enable the individual to mediate flexibly among multiple

¹⁰⁵ Heilbroner, *supra* note 17 at 241.

demands and make full use of her cognitive abilities, whereas immature forms result in rigid, maladaptive interpersonal transactions and less than full use of one's cognitive ability.¹⁰⁶

To complicate matters, whether particular coping mechanisms are professionally adaptive will depend on the expectations of the profession. Some defense mechanisms tend to correlate with professional success as a general matter. George Valliant observed that “the upwardly mobile tend to be obsessive, utilizing the mechanisms of inhibition or repression.”¹⁰⁷ The law, with its heavy emphasis on detail oriented rational analysis,¹⁰⁸ is ostensibly well suited for those who are adept at armoring themselves against their feelings,¹⁰⁹ and who possess an arsenal of well developed defense mechanisms.¹¹⁰ More accurately, a good number of these mechanisms closely correlate with a particular—and prevalent-- model of the adversarial lawyer.¹¹¹ Legal training and practice emphasize a cognitive model based on thinking, or impersonal logical analysis, to the exclusion of feeling, or person-centered values. Those who hew to this model are,

¹⁰⁶ Daniel Hart and Susan Chmiel, *Influence of Defense Mechanisms on Moral Judgment Development: A Longitudinal Study*, 28 *Developmental Psychology* 722 (and chart at 730) (1992). See generally Valliant, *Adaptation to Life*, supra note 46.

¹⁰⁷ Valliant, id at 85-90.

¹⁰⁸ Elwork and Benjamin, supra note 8 at 210.

¹⁰⁹ See e.g. Elwork and Benjamin, id at 213-14; Mixon and Schuwerk, supra note 8 at 94, Daicoff, *Lawyer, Know Thyself*, supra note 8 at 1392.

¹¹⁰ Lawrence Joseph makes this point amusingly in *Lawyerland*, in the chapter called “Something Split.” (Jack’s psychoanalyst...tells Jack that Jack is in a state of schizogenesis...Jack’s paying...several hundred dollars an hour...to hear that his lawyer self is constantly splitting, and that he’s replicating the split in every area of his life...Jack says, ‘what you are saying, in effect, is that because I am a lawyer, I am a pathologue...’” Lawrence Joseph, *Lawyerland: What Lawyers Talk About When They Talk About Law* at 39-44 (Farrar, Straus & Giroux New York 1997).

¹¹¹ As one lawyer and substance abuse professional says: “...compulsivity is a very nice thing to have in a lawyer. Clients love it, and it builds billable hours. That’s why this business is rife with workaholics and alcoholics.” Amy Lindgren, *Counting the Costs: Substance Abuse in the Legal Profession* 22 at 27, in *The Bench and Bar of Minnesota*, March 1990 (quoting William Milota, former head of group for chemically dependent legal professionals who argues that the practice of law exacerbates addictive tendencies by rewarding them.)

unsurprisingly, most likely to complete and do well in law school.¹¹² This is not to say that they thrive in law school by all measures. Some researchers posit that those who stay in law school may be successful at repressing emotion but may experience negative health consequences because of their failure to address emotional conflict.¹¹³ The extent to which their ability to repress emotion is correlated with success in legal practice is a complex issue.¹¹⁴ It may make the lawyer less skillful in communicating with and dealing with clients and others,¹¹⁵ it may interfere with her ethical and moral decision-making capabilities,¹¹⁶ and it may be poorly suited to the many areas of law that require conflict resolution rather than litigation.¹¹⁷ Moreover, those

¹¹² Elwork and Benjamin, *supra* note 8 at 213-14; Mixon and Schuwerk, *supra* note 8 at 94; Paul Miller, *Personality Differences and Student Survival in Law School*, 19 *J. Legal Educ.* 460, 466 (1967); Daicoff, *Making Law Therapeutic for Lawyers*, *supra* note 71 at 836.

¹¹³ Elwork and Benjamin, *supra* note 8 at 214. An American Bar Foundation study concluded that a typical legal education takes a group of highly intelligent, intellectually curious students and quadruples the number with serious mental health and substance abuse problems by the time they graduate. Mixon and Schuwerk, *supra* note 10 at 95 (citing ABF study). Those who excel academically, according to one study, suffer “losses in well-being and life satisfaction to the same extent as the rest of their class.” Krieger, *Institutional Denial*, *supra* note 9 at 123.

¹¹⁴ See Susan Daicoff, *Asking Leopards to Change Their Spots: Should Lawyers Change? A Critique of Solutions to Problems With Professionalism by Reference to Empirically-Derived Attorney Personality Attributes*, 11 *Geo. J. Legal Ethics* 547 (1998).

¹¹⁵ Mixon and Schuwerk, *supra* note 8 at 99; Marcus T. Boccaccini, Jennifer L. Boothby and Stanley L. Broadsky, *Client-Relation Skills in Effective Lawyering: Attitudes of Criminal Defense Attorneys and Experienced Clients*, 26 *Law and Psychology* 97, 101 (2002) (prisoners ranked effective communication skills and concern for the client as more important than a lawyer’s competency).

¹¹⁶ Mixon and Schuwerk, *supra* note 8 at 97; Rob Atkinson, *How the Butler Was Made to Do It: The Perverted Professionalism of The Remains of the Day*, 105 *Yale L.J.* 177 (1995); Schuwerk, *The Law Professor as Fiduciary*, *supra* note 70 at 795 (positing that lawyer “misbehavior occurs because of individual pathologies—mental or emotional illness, substance abuse, or rampant excesses of the ‘lawyering skills’ that every law student manages to acquire, namely rationalization and denial—that leave them either unable to discern their true ethical situation or unable to conform their conduct to known standards of professional behavior.”)

¹¹⁷ Silver, *Emotional Intelligence*, *supra* note 8 at 1191-92.

without the emotional tools to acknowledge and resolve personal conflicts are at risk for career dissatisfaction and negative health consequences.¹¹⁸

b. The Utility of “Not Knowing”

The ethical literature about criminal defense attorneys shows a fascination with the question of what the defense attorney knows, or chooses not to know, about her client’s guilt or innocence of the crime charged.¹¹⁹ The question is often cast as the much debated “role differentiation” issue: is it ethical for lawyers knowingly to defend behavior that they would not condone in their non-professional lives?¹²⁰ As an ethical matter, I believe Ted Schneyer’s response to this argument is persuasive. Role is imbedded in situation. We have moral principles that govern various aspects of our lives, but they will not necessarily be consistent across all our complex roles in life.¹²¹ “The lawyer-client relationship has moral value as a relationship; some actions taken in its name may conflict with moral principles the participants might follow if acting independently.”¹²² It is possible for lawyers to uphold the principles of the adversary system, including the right to a fair trial and the presumption of innocence, without moral inconsistency, though they would not defend the commission of crimes in their personal lives.

¹¹⁸ Elwork and Benjamin, *supra* note 8 at 216; Lynda L. Murdoch, Psychological Consequences of Adopting a Therapeutic Lawyering Approach: Pitfalls and Protective Strategies, 24 Seattle Univ. L. Rev. 483, 489 (2000).

¹¹⁹ See e.g. Luban, *supra* note 4; William A. Edmundson, Contextualist Answers to Skepticism, and What a Lawyer Cannot Know, 30 Fla. St. U. L. Rev. 1 (2002); Atkinson, A Skeptical Answer to Edmundson’s Contextualism, *supra* note 3.

¹²⁰ See e.g. Luban, *supra* note 4; Simon, The Ethics of Criminal Defense, *supra* note 4.

¹²¹ Schneyer, *supra* note 5 at 1532.

¹²² *Id.* at 1564. Charles Fried’s argument for the “special purpose friend” is quite similar. See Charles Fried, The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation, 85 Yale L.J. 1060, 1071-76 (1976).

The lack of moral inconsistency among roles, however, does not guarantee a lack of emotional dissonance.¹²³ Criminal defense attorneys are intellectually comfortable with role differentiation, but the emotional conflicts are more complex, and much farther below the radar.

Barbara Babcock explains the defender's need not to know as follows:

The defender goes down the treacherous path of burnout once she concerns herself with guilt or innocence. The defender must suspend belief (or disbelief) in every case, and must be disinterested in either freeing the guilty or protecting the innocent. Any other attitude inevitably leads to corruption of the defender's role because most of the accused are guilty. Once the defender consciously recognizes this fact, her work becomes unsupportable and she is disabled.¹²⁴

This justification makes clear that the act of "not knowing" is designed to protect the rights of defendants and the working of the adversary system.¹²⁵ Abbe Smith argues that the suspension of judgment is "one of the most important things a defense lawyer can offer a client accused of a terrible crime."¹²⁶ It may also be protective for the defender's emotional health, or perhaps not. Smith, like Ogeltree,¹²⁷ recognizes that even the deepest commitment to criminal defense work will not insulate defenders from emotional conflict over the pain they confront, some of it caused by their clients.¹²⁸

How, then, does the defender suspend disbelief? How does she maintain the presumption of innocence in any but the most abstract sense? Must she avoid knowing, or dwelling on, the

¹²³ See Atkinson, A Skeptical Answer to Edmundson's Contextualism, *supra* note 3 at 46-47; Seymour Wishman, *Confessions of a Criminal Lawyer* *supra* note 12 at 12 (Times Books 1981); James Elkins, *The Moral Labyrinth of Zealous Advocacy*, 20 *Capital U. L. Rev.* 735, 789 (1992).

¹²⁴ Babcock, Book Review, *supra* note 80 at 314.

¹²⁵ Atkinson, A Skeptical Answer to Edmundson's Contextualism, *supra* note 3 at 30.

¹²⁶ Smith, *Defending Defending*, *supra* note 1 at 928. See also Smith, *Can You Be a Good Person and a Good Prosecutor*, *supra* note 7 at 382.

¹²⁷ Ogeltree, *supra* note 34.

¹²⁸ Smith, Rosie O'Neill, *supra* note 2 at 45-62.

crime of which her client is accused, and the pain caused by that crime? If so, how is this achieved, and at what cost?

Barbara Babcock believes that “the fundamental mind-set of most criminal defense lawyers toward defending the guilty is one of staggering indifference to the question.”¹²⁹ But, she notes, “the indifference to their clients’ guilt takes its psychological toll on members of the defense bar.”¹³⁰ Lisa McIntyre says “most public defenders don’t ask whether their clients ‘did it.’ They claim it’s irrelevant, but some seem afraid their clients will tell the truth.”¹³¹ Seymour Wishman says:

Fighting for acquittal of guilty men didn’t disturb me—‘society’ was too abstract an idea for me...I tried, as an act of will, to limit my vision to what I actually did in the courtroom—the trial was a fascinating process, a game... If a crime or a criminal had been particularly offensive, I had always coped with my feelings by putting them aside, out of the way of my professional judgments. My method of dealing with these kinds of cases had seemed emotionally necessary and ethically appropriate.¹³²

James Kunen is concerned about not wanting to know. He describes thinking “What’s become of me? I’m in it to win. It’s a matter of indifference to me whether my client’s guilty or not.”¹³³

And later he says:

We would never know whether ...[our client] had committed the crimes, but that was beside the point. The complaining witness had lied. She was not credible. In our world, that’s what mattered.¹³⁴

However, the ability or need to put guilt or innocence aside sometimes gave way, when an attorney believed he was dealing with an innocent client. As one veteran appellate defender

¹²⁹ Babcock, *Defending the Guilty*, supra note 1 at 180.

¹³⁰ *Id.*

¹³¹ Lisa J. McIntyre, *The Public Defender: The Practice of Law in the Shadows of Repute* at 152 (U of Chicago Press 1987).

¹³² Wishman, supra note 121 at 14.

¹³³ Kunen, supra note 85 at 24. But see Babcock, review of Kunen, supra note 80 at 313: “Kunen was not really at the pd’s office as a pd, but an observer or even a voyeur.”

¹³⁴ Kunen, *id.* at 89.

told me, “In innocence cases, you scream bloody murder, you never give up, you take extraordinary steps.”¹³⁵ He described the emotional havoc wrought by the advent of widely available DNA testing. He described himself as understanding, finally, that he had been living in denial of the “DNA induced knowledge that many of our clients weren’t guilty and that our representation can lead to conviction of the innocent.”¹³⁶ Suddenly the question of guilt or innocence did not seem so abstract.

Closely connected to the question of guilt of the crime is the question of the victim and his suffering. Defenders talk about not thinking about the victim. Randy Bellows says:

While it is often impossible not to feel sympathy for the victim, this is not an emotion you can afford to nurture or encourage. To put it simply, it is not easy to develop warm feelings when your focus is on the devastation which your client has left in his wake. It makes a difficult job nearly impossible.¹³⁷

Likewise, James S. Kunen writes:

Of course, you feel sympathy for the victims (“complainants,” we called them—just “c/w” [complaining witnesses] in our memos) but you suppress it. It gets in the way...¹³⁸ I put myself in my client’s position, entirely. I don’t think about the victim very much, nor should I.¹³⁹

He observes that it is almost literally true that the lawyer knows but one person—his client. He explains that the defense attorney spends a lot of time with his client and grows to care about him. The people on the other side are just names.¹⁴⁰ David Feige says “I care about the person I know. The complainant’s victimization is an abstraction to me.”¹⁴¹ He elaborates:

¹³⁵ Interview with Alan Goldberg, Assistant Appellate Defender, Office of the Illinois State Appellate Defender, May 15, 2000. Goldberg is my former colleague at the Office of the State Appellate Defender.

¹³⁶ *Id.*

¹³⁷ Bellows, *supra* note 94 at 80.

¹³⁸ Kunen, *supra* note 85 at 143.

¹³⁹ *Id.* at 150.

¹⁴⁰ *Id.* at 189.

¹⁴¹ Feige, *supra* note 29.

Defending the reviled, even those who are guilty, is not some mental trick, nor even a moral struggle for me. I don't lack imagination, or willfully close my eyes to another's suffering. Rather, the reality of my clients, their suffering, their fear, is more vivid to me than that of the victims. My clients are the ones left exposed. They are the ones who are hated. They are the ones who desperately need my protection. Everyone else can look out for the victims. And they do, of course.¹⁴²

Here too, however, there was an interesting variation. Several veteran litigators have found it essential not to put the pain aside. Some argued that it was an essential component of effective lawyering. Patrick Keenan said: "It makes you a better lawyer. If you can't figure out where to put the pain, juries and courts won't either."¹⁴³ Randolph Stone asserted that "a public defender cannot afford the luxury of denying the victim's personhood. He must stay in the victim's shoes as long as he can stand it."¹⁴⁴ My colleague Andrea Lyon attributed much of her success as a litigator as well as her emotional resilience to her ability to remain open to the pain of the survivors, and to acknowledge the emotional aftermath of the crime.¹⁴⁵

Lawyers describe not thinking about the emotional impact of their cross examination of complainants and other witnesses. Seymour Wishman describes his habitual assumption that if he humiliated a victim, it was because in order to be effective he had to act forcefully, even

¹⁴² Id. Others observe, however, that prosecutors do not necessarily take good care of their complaining witnesses. Indeed, this concern is one central focus of the victims' rights movement. See Deborah Kelly, Victim Participation in the Criminal Justice System, in *Victims of Crime: Problems, Policies and Programs* 172, 173 (Arthur J. Lurigio et al eds, 1990).

¹⁴³ Interview with Patrick Keenan, March 12, 2004. Patrick Keenan is currently Assistant Professor of Law at the University of Illinois College of Law. He spent five years litigating death penalty cases in Georgia and Alabama as an attorney with the Southern Center for Human Rights.

¹⁴⁴ Interview with Randolph Stone, February 11, 2002. Stone is currently a Clinical Professor at the University of Chicago. He has done criminal defense work for more than thirty years, and is the former Public Defender of Cook County, IL.

¹⁴⁵ Interview with Andrea Lyon, March 12, 2001. Lyon is currently Clinical Professor and Director of the Center for Justice in Capital Cases, DePaul College of Law. She has done criminal defense work for more than thirty years, and is former Chief of the Homicide Task Force of the Office of the Public Defender, Cook County, IL.

brutally at times. He would say there was nothing personal in what he was doing.¹⁴⁶ They also describe not thinking about whether their clients might commit more violent crimes once they are released. David Lynch says the public defenders in his office detached themselves from responsibility on the grounds that “if everybody does their job, the judicial system as a whole works.”¹⁴⁷ They do not have the ultimate responsibility. The judge decides what will be done and the prosecutor has to agree to the plea.¹⁴⁸ Lisa McIntyre says that public defenders don’t focus on the possibility that someone they get off will kill again. Instead, they focus on their adherence to strong social values like safeguarding the presumption of innocence and correcting systemic abuse, and on the desire to win.¹⁴⁹

The above descriptions show lawyers engaging in a wide range of coping strategies which enabled them to avoid taking it all in, either temporarily or more permanently. They illustrate strategies for not thinking about the victim. The published accounts suggest additional such strategies. They describe the black humor used to distance the lawyers from the victims and their pain.¹⁵⁰ Randy Bellows describes the sick jokes he and his colleagues told each other in order to ease the tension that came from being hard on witnesses for whom you really feel pity, or advocating positions that were personally abhorrent.¹⁵¹ They described the use of

¹⁴⁶ Wishman, *supra* note 121 at 6.

¹⁴⁷ David R. Lynch, *In Their Own Words: Occupational Stress Among Public Defenders*, 34 *Crim. L. Bull.* 473, 491 (1998).

¹⁴⁸ Lynch, *id.*

¹⁴⁹ McIntyre, *supra* note 129 at 167.

¹⁵⁰ *Id.* at 103. Mello, *A Letter*, *supra* note 75 at 161 (discussing use of black humor by death penalty lawyers).

¹⁵¹ Bellows, *supra* note 94 at 72. See also Konner, *supra* note 31 at 245 (discussing use of humor as part of process of psychological hardening of medical students in the dissecting room). But see Valliant, *supra* note 37 at 116-117 (discussing humor, “one of the truly elegant defenses in the human repertoire.”); Rose Laub Coser, *Role Distance, Sociological Ambivalence, and Transitional Status Systems*, 72 *Amer. J. of Sociology* 173, 178-179 and n39 (1966-67)

euphemisms, or bureaucratic language, (like calling the murder victim the “decedent”¹⁵² or a particularly bloody demise a “great case”¹⁵³ or a “fun case.”¹⁵⁴) which psychologists say we often use to help us to avoid confronting the true meaning or impact of our acts or the acts of others.¹⁵⁵ They described a deflection of responsibility onto other parts of the system.¹⁵⁶ Many of them also described, to varying degrees, a tendency toward dehumanization of certain people or groups of people, such as victims or witnesses. They simply could not allow themselves to focus on the humanity of, or exercise empathy toward, people in those categories.

c. Costs of denial

To what extent are these behaviors problematic, or maladaptive? To some degree, suppression of emotion (defined as “the conscious or semiconscious decision to postpone paying attention to a conscious impulse or conflict”¹⁵⁷) is a healthy adaptation. To the extent that it remains in consciousness and offers a temporary hiatus from dealing with emotions, suppression may allow the lawyer to put aside difficult feelings that interfere with professional demands, saving them to deal with at a later time. In a fascinating study of urban paramedics, Francine

(observing that humor in the operating room “helps those present to live up to the ambivalent role prescription of ‘detached concern.’”)

¹⁵² Kunen, *supra* note 85 at 114.

¹⁵³ *Id.* at 118.

¹⁵⁴ McIntyre, *supra* note 129 at 152.

¹⁵⁵ Herbert C. Kelman, Violence Without Moral Restraint: Reflections on the Dehumanization of Victims and Victimizer, 29 *Journal of Social Issues* 25, 48 (1973); Albert Bandura et al, Mechanisms of Moral Disengagement in the Exercise of Moral Agency, 71 *Journal of Personality and Social Psychology* 364, 365 (1996); Jonathan Glover, *Humanity: A Moral History of the Twentieth Century* at 351-52 (Yale Univ. Press 1999).

¹⁵⁶ Wishman, *supra* note 121 at 148-52.

¹⁵⁷ Valliant, *supra* note 37 at 386.

Grevin found that the subjects registered high scores on denial and repression.¹⁵⁸ They also scored low on empathy. Grevin hypothesized that low empathy and the use of repression and denial allowed the paramedics to do their work effectively, keeping stress and anxiety within manageable limits. She believed that a highly empathetic person who did not use denial mechanisms would be most prone to developing post-traumatic stress disorder.¹⁵⁹ However, she was uncertain whether long term use of defense mechanisms was adaptive, or might eventually interfere with the recovery process.¹⁶⁰

This is a matter of concern. In George Valliant's study of coping mechanisms, his description of a purely adaptive use of suppression involved a one-time crisis; a navy diving accident during World War II. He found that suppression as a long-term strategy was still generally correlated with professional success, but it had more mixed results, because it is so susceptible to over-use. His stark conclusion: "Those who used suppression most had the least need for ...other defenses...but their lives hurt."¹⁶¹

Short term suppression seems an essential tool. Sometimes even pressing emotional issues need to be put on hold when there are deadlines to meet or trials to conduct.¹⁶² Capital lawyers may need to temporarily suppress their emotional reactions to a guilty verdict in order to

¹⁵⁸ She defined repression and denial in terms of "failure to acknowledge affect-laden events." Grevin, *supra* note 23 at 491.

¹⁵⁹ *Id* at 493.

¹⁶⁰ *Id* at 492.

¹⁶¹ Valliant, *supra* note 37 at 121.

¹⁶² In Kermit Roosevelt's description: "Harold...dealt with (falling in love) as he did all imponderables, through a quick mental triage. Is it an immediate problem? No, he decided; it is not. Then put it aside, he told himself; there are briefs to be written, fires to be put out." Roosevelt, *supra* note 18 at 62. In fact, the character of Harold nicely illustrates how suppression becomes repression—his legal career had all but succeeded in completely supplanting his access to his emotions.

move on to the penalty phase. But suppression becomes a more problematic tool for lawyers who are faced with pain on a daily basis and have no opportunity to let their reactions surface.¹⁶³

1. Spillage and Psychic Numbing

Lawyers may find that the adversarial nature of their jobs takes a terrible toll unless they erect adequate defenses.¹⁶⁴ Some lawyers¹⁶⁵ describe the constant professional antagonism which requires them to develop thick skins, to become suspicious, aggressive and hostile. They

¹⁶³ See Smith, Rose O'Neill, *supra* note 2 at 57 (“Suppressing conflict altogether by embracing the role of advocate or blaming the system is a short term coping mechanism, not a life plan.”)

¹⁶⁴ See e.g. Rand Jack and Dana Crowley Jack, *Moral Vision and Professional Decisions: The Changing Values of Women and Men Lawyers* at 145-146 (1989).

¹⁶⁵ Although gendered differences in criminal lawyers’ coping strategies are beyond the scope of this article, they raise a topic well worth pursuing. Several studies noted the masculine caste of many of the qualities valued in litigation—competitiveness, aggression, a thick skin. Female litigators described wrenching role conflicts. One study of occupational stress among public defenders noted: “Some female public defenders experienced an additional burden not shared by men: a feeling that the criminal courts represent a ‘good old boy’ system based on male values of competition and aggressiveness. If they adopt these values and play by the rules of the game, they feel judged for being too ‘masculine.’ They also feel a sense of artificiality and perhaps a sense of loss in conforming to values in which they do not believe.” Lynch, *supra* note 145 at 488-89. Elwork and Benjamin observe that “gender-related personality differences...have been found to correlate with stress...[W]omen tend to get emotionally sensitized by stress, whereas men tend to repress their emotions but express stress behaviorally.” Elwork and Benjamin, *supra* note 8 at 213 and n30 (citing several sources). See also Jack and Jack, *supra* note 162 at 132-155, Daicoff, *Lawyer, Know Thyself*, *supra* note 8 at 1408. There is a rich literature examining many of these issues in the context of women’s experience with legal education. See e.g. Lani Guinier et al, *Becoming Gentlemen: Women’s Experiences at One Ivy League Law School*: 143 *U. Pa. L. Rev.* 1 (1994); Catherine Weiss & Louise Melling, *The Legal Education of Twenty Women*, 40 *Stan. L. Rev.* 1299 (1988); Paula Gaber, “Just Trying to be Human in this Place”: *The Legal Education of Twenty Women*, 10 *Yale J.L. & Feminism* 165 (1998); Judith Resnik, *A Continuous Body: Ongoing Conversations About Women and Legal Education*, 53 *J. Legal. Educ.* 564 (2003).

report that these defenses are not easily left at the office; they spill over into their personal lives.¹⁶⁶

It is at this point that suppression is in danger of evolving into repression and denial of a more harmful sort. Each of the mechanisms described above has its place. The danger is that “they will be used not wisely but too well.”¹⁶⁷ A defense turns pathological when it becomes rigid and inflexible, when it “dams rather than rechannels the expression of feeling.”¹⁶⁸

In this manner modes of behavior that begin as adaptations to a special professional setting may gradually expand to fill virtually all the lawyer’s interpersonal space.¹⁶⁹ Their use may contribute to personal dysfunction, including an unbalanced approach to life, difficulties relating to peers, family, friends, and clients,¹⁷⁰ stress-related physical problems,¹⁷¹ and far higher than average rates of depression and substance abuse.¹⁷² In their extreme form, the mechanisms the lawyers employ are characteristic of a moral disengagement that is at the root of a host of antisocial or destructive behaviors.

¹⁶⁶ Elwork and Benjamin, *supra* note 8 at 211; Jack and Jack, *supra* note 162 at 147; Lynch, *Occupational Stress*, *supra* note 145 at 211; Rader, *supra* note 7 at 314; Wayne D. Brazil, *The Attorney as Victim: Toward More Candor About the Psychological Price Tag of Litigation Practice*, 3 *J. Legal Prof.* 107, 115-16 (1978).

¹⁶⁷ Brazil, *id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 115-16.

¹⁷⁰ Daicoff, *Lawyer, Know Thyself*, *supra* note 8 at 1414.

¹⁷¹ See Shuwerk, *The Law Professor as Fiduciary*, *supra* note 71 at 764 n25 (citing sources on lawyer and law student stress and stress-related problems). Jaffe, et al, in their study of judges, catalogue a range of symptoms experienced by judges, both internalized (e.g. sadness, depression, anxiety); and externalized (e.g. anger, hostility, intolerance and cynicism). Jaffee, *supra* note 19 at 5.

¹⁷² See Daicoff, *Lawyer, Know Thyself*, *supra* note 8; Brazil, *supra* note 164; Elwork and Benjamin, *supra* note 8.

An ABA Journal article discussing the negative effect of the lawyers' persona on personal relationships contained a handy sidebar with several recommendations for overcoming the problem. One was:

Compartmentalize. You keep one part of your life separate. Be a rough-and-tumble lawyer, if that is your style, but leave it behind for home or socializing.¹⁷³

Many lawyers find it difficult to take such advice on a long-term basis. The conscious choice to compartmentalize may shade into long term mechanisms that are outside of awareness, or at least very hard to cabin. One such mechanism is splitting, a “sequestering off of a portion of the self so that the ‘split off’ element ceases to respond to the environment (as in...psychic numbing) or else is in some way at odds with the remainder of the self.”¹⁷⁴ Rand and Dana Crowley Jack, in their detailed examination of the impact of splitting on lawyers, recount the feeling of one lawyer that she must either “forsake the self or forsake the law.”¹⁷⁵

For Jane, growth as a person takes place through relationships, whereas her development as a lawyer depends on splitting off what she calls her ‘emotional, intuitive self.’ She continually experiences stress from carrying out role demands that conflict with her personal orientation, and from her inability to respond to the human pain she witnesses as a lawyer. In part, this stress is born of living with competing world views.¹⁷⁶

Carried too far, the act of splitting one’s personal and professional selves can “sap the energy that would be available to an integrated person”¹⁷⁷ and, ultimately lead to losing touch with one’s emotional and moral guideposts. Cordoning off painful feelings leads to

¹⁷³ Drell, supra note 68 at 73.

¹⁷⁴ Robert J. Lifton, *The Nazi Doctors: Medical Killing and the Role of Genocide* at 419 (Harper Collins 1986). Lifton notes that Freud used the concepts of “splitting” and “dissociation” interchangeably. *Id.* He compares splitting with the more extreme psychological principle of doubling, “the division of the self into two functioning wholes, so that a part-self acts as an entire self.” *Id.* at 418.

¹⁷⁵ Jack and Jack, supra note 162 at 149.

¹⁷⁶ *Id.* at 148

¹⁷⁷ Goldberg, *Vertical Split*, supra note 36 at 27.

dehumanization, a “decrease in a person’s sense of his own individuality and in his perception of the humanness of other people.”¹⁷⁸ The authors of one study on dehumanization note that the mechanism has many adaptive as well as maladaptive uses.¹⁷⁹ They observe:

No one, of course, could possibly retain his mental health and carry on the business of life if he remained constantly aware of, and empathically sensitive to, all the misery and injustice that are in the world. But this very essentiality of dehumanization, as with other defenses, makes for its greatest danger: that the constructive self-protection it achieves will cross the ever-shifting boundaries of adaptiveness and become destructive, to others as well as to the self.¹⁸⁰

Dehumanization, they explain, brings a temporary feeling of relief and illusion of problems solved or at least postponed. But in its maladaptive form, it also brings dangerous possibilities, including increased emotional distance from other human beings, a diminished sense of personal responsibility for the consequences of one’s actions, increasing involvement with procedural problems to the detriment of human needs, and feelings of personal helplessness and estrangement.¹⁸¹ It leads to psychic numbing, a state in which one becomes detached and loses the capacity to care for and have compassion for others. Herbert Kelman explains of one in this state: “Insofar as he excludes a whole group of people from his network of shared empathy, his

¹⁷⁸ See Viola W. Bernard, Perry Ottenberg and Firtz Redl, Dehumanization at 102, in *Sanctions for Evil: Sources of Social Destructiveness* (Nevitt Sanford and Craig Comstock eds.) (Joessey-Bass, Inc. 1971). The authors characterize dehumanization, not as a mental mechanism, but as a “composite psychological defense which draws selectively on other well known defenses, including unconscious denial, repression, depersonalization, isolation of affect, and compartmentalization (the elimination of meaning by disconnecting related mental elements and walling them of from each other.”) *Id* at 103.

¹⁷⁹ *Id* at 103.

¹⁸⁰ *Id* at 109.

¹⁸¹ *Id* at 112-15.

own community becomes more constricted and his sense of involvement in humankind declines.”¹⁸²

Lawyers describe becoming so used to suppressing their personal emotional and moral reactions that they no longer have access to them after hours.¹⁸³ Several of the defense attorneys described experiencing a loss of feeling or capacity to feel. Randy Bellow described coming home from work emotionally empty,¹⁸⁴ and how the “well was dry” for good.¹⁸⁵ James Kunen described the constant knowledge that the iron doors are closing on one’s clients all the time. He recounts:

I hardly ever think about it. You don’t get worn out from all the pain and sadness. You get worn out from *not feeling* the pain and sadness. You get tired of not feeling.¹⁸⁶

Lawyers describe themselves beginning to manipulate, dominate, compartmentalize and dehumanize in their personal relationships.¹⁸⁷ One litigator who wrote about the psychological price tag of litigation practice spoke of the manipulative practices litigators engage in, and their spillover effect. He said that people in general began to seem more inanimate, objectified, not equals. He then began to see himself that way. Why, he asked, should we think it possible to shift gears over the weekend?¹⁸⁸ Several defense attorneys talked about difficulties explaining

¹⁸² Kelman *supra* note 153 at 52. See also Lifton, *the Nazi Doctors*: *supra* note 172 at 419; Robert Jay Lifton, *Existential Evil* at 40, in *Sanctions for Evil: Sources of Social Destructiveness* (Nevitt Sanford and Craig Comstock eds) (Joessey-Bass, Inc. 1971).

¹⁸³ Atkinson, *How the Butler Was Made to Do It*, *supra* note 114 at 212-13; Brazil, *supra* note 164 at 116.

¹⁸⁴ Bellows, *supra* note 94 at 73.

¹⁸⁵ *Id* at 98.

¹⁸⁶ Kunen, *supra* note 85 at 143. But see Michael Mello, *Death and His Lawyers: Why Joseph Spaziano Owes His Life to the Miami Herald—And Not to Any Defense Lawyer or Judge*, 20 *Vermont L Rev* 19, 52 (1995) (self defensive instinct to distance oneself from a friend who is about to die is a luxury capital defense attorneys cannot permit themselves to feel).

¹⁸⁷ Brazil, *supra* note 164 at 108-113; Wishman, *supra* note 121 at 233.

¹⁸⁸ Brazil, *id* at 116.

their work to their loved ones or friends. For example Randy Bellows said that although his wife continued to understand the need for his work on an intellectual level, she found the abstract knowledge increasingly dwarfed by her sense that her husband was helping child molesters and other evil people go free. He said that to preserve their love, they had to agree not to discuss his work.¹⁸⁹ But the issue is not only the dissonance between one's ideals and one's loved ones' understanding of them. The perhaps more serious issue is the extent to which these behaviors become impossible to cabin.

2. Distress and Burnout

Many of the lawyers' accounts described a moment in which the denial stops being possible; the detachment ceases to work.¹⁹⁰ Sometimes this occurs in isolated instances—triggered by particular clients or cases, or by particular events in the lawyer's life. But sometimes it is the result of the cumulative effects of the practice. The time arrives when the lawyer simply can no longer continue to do the work effectively.

David Lynch, for example, talked about finding representation of those accused of sexually abusing children to be offensive because he thought of his own kid.¹⁹¹ Phyllis Crocker gave a similar description of her struggle with the defense of clients in capital cases who had

¹⁸⁹ Bellows, *supra* note 94 at 71-72.

¹⁹⁰ Professor David M. Siegel aptly characterized this reaction as “denial fatigue”—the point at which the psychic demands of engaging in denial become too great. Letter from David M. Siegel, July 17, 2000.

¹⁹¹ Lynch, *supra* note 145 at 491.

been accused of murder and sexual assault.¹⁹² James Kunen described what happened when his own home was burglarized. He said:

At work, everyone expressed sincere outrage that such a horrible thing had happened to us—‘it’s the idea of someone *invading your home*,’ and then went back to work defending alleged burglars, as did I.¹⁹³

But, he says, it affected him. He fought back the urge to ask the alleged burglar he was defending whether he had burglarized his house. He says that “as I stood there obstructing the search for somebody’s property, I felt as though I were preventing the recovery of my own.”¹⁹⁴

Later, he describes a more permanent loss of detachment after a few years on the job. He says:

It was around this stage of my career that the image of someone in my own family becoming the victim of a violent crime started coming to my mind more and more frequently. I imagined that the criminal would be put on trial, and that I would walk up to him in open court and shoot him dead.¹⁹⁵

Randy Bellows describes a similar experience. He was representing a client accused of armed rape. On the day before his opening statement in the insanity phase of the trial, a close family relation was robbed and raped at knifepoint. Bellows asked:

What in God’s name was I doing here representing this rapist? What was I about? If Jerold [the client] was a Dr. Jeckyl/Mr. Hyde, what kind of split personality did I have? How could I be on both sides of this bloodied, tear-streaked fence?¹⁹⁶

He prevailed, and his client was found not guilty by reason of insanity. He said:

For a long time after the case was over, I wondered if I really could continue being a public defender. I wondered if I really could handle another rape case. How would I

¹⁹² Phyllis L. Crocker, *Feminism and Defending Men on Death Row*, 29 St. Mary’s L.J. 981, 984-88 (1998).

¹⁹³ Kunen, *supra* note 85 at 54.

¹⁹⁴ *Id* at 54-79.

¹⁹⁵ *Id* at 257.

¹⁹⁶ Bellows, *supra* note 94 at 78.

know my client was not the same person who had raped a member of my family? And, beyond this, if I could not represent the man who had raped a member of my family, how could I represent the man who raped a member of someone else's family?¹⁹⁷

Shortly thereafter, he reports, he left the public defender's office. He explains:

I'm burned out, sick of representing so many bad people, sick of being afraid to walk in my own parking lot yet helping people who mug citizens in other parking lots. I have lost much of the empathy I once had for my clients. It is time to go.¹⁹⁸

Seymour Wishman describes a couple of incidents that interfered with his habitual detachment.

One was an incident in which a rape victim he had subjected to a brutal cross-examination recognized him later and screamed about him: "That's the lawyer... That's the son of a bitch that did it to me."¹⁹⁹ He describes his dawning understanding that this woman did not see things his way---did not see that he was simply performing his professional duty. He faced the undeniable fact that he had humiliated her, and that she saw him, not as an effective lawyer, but as a motherfucker.²⁰⁰ He said "I was frightened by the person she saw...frightened that I might *be* that person."²⁰¹

The other incident was his representation of a man who had killed his two year old daughter, and who exhibited no remorse or sense of responsibility for this act. In one chilling passage, Wishman describes making a constant effort not to call the two year old daughter of his client (Williams), whom his client was accused of murdering, "it." But, he said, "'it' is what I was usually thinking."²⁰² Later, he found that the dehumanization of the victim was not so easy to cabin. He recounts:

¹⁹⁷ Id at 78-79.

¹⁹⁸ Id at 97.

¹⁹⁹ Wishman, *supra* note 121 at 4-6.

²⁰⁰ Id.

²⁰¹ Id at 18.

²⁰² Id at 239.

...[S]omething different was happening to me now as I looked at [my client]...I had lost my ability to feel detached from the possibility of [getting my client off so that he could kill someone else]...As long as I had been able to think of myself as a mere technician...I was able to pass off the responsibility onto a parent, a social worker, a clergyman, or even onto some vague notion of society at large.²⁰³ [But now] Williams had become a symbol of all the clients I had represented over the years whom I'd hated without ever being able to admit it to myself.²⁰⁴

Wishman's new perception of his professional role brought with it new perceptions about its effect on his personal life. He saw the courtroom as a place to act out a host of intense emotions, in a controlled and purposeful setting. But for years he had been troubled by his difficulty in expressing the same range and depth of feeling outside the courtroom, where expressing emotion seemed infinitely more threatening. He noted that frequently the problem wasn't just in the expression of feelings—but in a failure to experience those feelings, or to experience them with sufficient intensity to recognize them.²⁰⁵ This is the hard part. Feeling too much is painful; not feeling at all is worse, for the attorney and those he loves, and perhaps even for his clients. As Abbe Smith well put it, “before you can deal with conflict, you have to recognize it, and worse, feel it.”²⁰⁶ As Andrea Lyon recounts:

When I started [doing capital cases for the public defender's office] another attorney sat down and he started to have this conversation about me getting too involved and too emotional and how I had to be objective and that I was never going to last in this work...And at first I am listening to him because first of all, he has a lot of years on me and second of all, I know he means me some good and maybe I am screwing up...and then I am listening for awhile, and I go ‘don't talk to me about who is emotional, I don't have high blood pressure, I am not losing my hair, and I don't have an ulcer...you are the one who's emotional...you just don't let it out...’ I think that is where people get into trouble, they don't say, ‘I'm upset, I'm angry, I hurt, I whatever...’

III. Some Thoughts About Solutions

²⁰³ Id at 148-52.

²⁰⁴ Id at 167.

²⁰⁵ Id at 232.

²⁰⁶ Smith, Rose O'Neill, *supra* note 2 at 52.

There is a rich literature on lawyering ethics and the scope of zealous representation. Yet the question of how one becomes, and remains, a zealous lawyer, what emotional strategies are involved, and what emotional costs are entailed, has received little attention. The legal profession avoids conversation about the emotional costs of lawyering for a wide range of reasons, some of which go to the very heart of our conception of what it means to be a lawyer. Yet the costs of this avoidance are great, not only for the emotional well-being of those who practice law, but for the system of justice as a whole.

There are no easy solutions to the problems arising from practice in a high stress, high stakes, combative environment rife with pain. In some environments in which professionals are continually exposed to stress and pain, efforts are made to address the emotional costs and pitfalls of the work.²⁰⁷ Law does not tend to be one of those environments.²⁰⁸ On the contrary, lawyers dealing with stress and pain are particularly burdened by the perception that emotion is to be discouraged; that it is an unwelcome interference with the rigor and tough-mindedness that characterize good lawyering. A growing body of empirical work on attorney attitudes suggests that beginning in law school and throughout our professional lives, certain behaviors are taught and reinforced, including splitting thinking from feeling and the professional from the personal,

²⁰⁷ Psychoanalysts, for example, go through training analysis, which enables them to examine unconscious conflicts that can “impede the analyst’s neutrality, leading to ‘blind spots’ that impair empathy and understanding.” Moore and Fine, *supra* note 42 at 47; Silver, Love, Hate, *supra* note 8 at 276 n81. See also *supra* note 32 (discussing changes in medical training to address emotional aspects).

²⁰⁸ There are some welcome efforts to counteract this state of affairs. The Therapeutic Jurisprudence movement, discussed above at note 8, *supra*, is deeply concerned with such issues. For one practical response to the problem, see the website of the Quality of Life and Career Committee at www.fla-lap.org/qlsm and its interactive listserv, “The Healthy Lawyer.” (last visited August 21, 2005).

and denial of the conflict between legal rights and personal ethics.²⁰⁹ Susan Daicoff summarizes research finding that “law students... cope with uncomfortable feelings not by utilizing other people for social support, but... by becoming more aggressive and ambitious, turning to workaholism and substance abuse, or becoming depressed.”²¹⁰ John Mixon and Robert Shuwerk found that:

Students try to deaden the psychic pain caused by the intense anxiety [of law school] by using anxiety muting defenses in every broadening area of their lives to block emotional awareness. They progressively surround themselves with a suit of psychological armor that makes them more and more impervious to not only the immediate stresses of the classroom but the emotional aspects of most situations. This impairs character formation and cripples the student’s ability to behave in a professionally appropriate manner in practice.²¹¹

Our insistence on educating law students by placing nearly exclusive emphasis on the intellectual aspects of legal issues, while denigrating the importance of “basic human wellsprings of character and virtue,”²¹² “impairs character formation and cripples the student’s ability to behave in a professionally appropriate manner in practice.”²¹³ The practice of law only tends to

²⁰⁹ See e.g. Daicoff, *Lawyer, Know Thyself*, supra note 8; Watson, supra note 8; Mixon and Schuwerk, supra note 8 (discussing Watson’s work as well as other similar studies); Silver, *Emotional Intelligence*, supra note 8 (same); Drell, supra note 68 (discussing psychological price of litigating); Elwork and Benjamin, supra note 8 (same).

²¹⁰ Daicoff, *id.* at 1419-20.

²¹¹ Mixon and Schuwerk supra note 8 at 94-96.

²¹² *Id.* at 97 (citing Dr. Andrew Watson).

²¹³ *Id.*, at 95. See also Elwork and Benjamin, supra note 8 at 213 (noting that instead of using their conscience, lawyers prefer to solve ethical dilemmas by relying on authoritatively fixed rules that protect the social order; citing L. J. Landwehr, *Lawyers as Local Progressives or Reactionaries: the Law and Order Cognitive Orientation of Lawyers*, 7 *Law and Psychology Review* 39 (1982)); R. Granfield & T. Koenig, *It’s Hard to Be a Human Being and a Lawyer: Young Attorneys and the Confrontation With Ethical Ambiguity in Legal Practice*, 105 *W. Va. L. Rev.* 495, 496-97 (2003) (concluding that law school does not adequately prepare lawyers to face moral, ethical and professional conflicts of practice); Maury Landsman, *Moral Judgment of Law Students Across Three Years: Influences of Gender, Political Ideology and Interest in Altruistic Law Practice*, 45 *S. Tex. L. Rev.* 891, 892-94 (2004) (summarizing consensus that law school fails to address moral and ethical issues adequately); McKinney, supra note 9 at 230-31

reinforce these behaviors.²¹⁴ When it is socially engineered and reinforced in this manner, maladaptive denial will become more deeply ingrained.²¹⁵

A number of those who have written about legal ethics and professionalism have emphasized the need for critical reflection,²¹⁶ for talking over doubts and ambiguities with colleagues,²¹⁷ and for acknowledgement of moral choices and moral claims that conflict with our professional roles.²¹⁸ The first step is to create opportunities to come together. Collegial support is essential for several reasons. It enables consultation on legal issues, of course, but in addition it decreases isolation,²¹⁹ contributes to job satisfaction,²²⁰ and permits the building of communities in which lawyers are able to explore ambiguity, admit uncertainty²²¹ and gain emotional sustenance.

The more difficult tasks center on addressing the legal community's deep antipathy to acknowledging, discussing, and seeking help to deal with the emotional aspects of our work.²²²

(arguing that legal education leads students to adopt coping mechanisms detrimental to “their learning and to their growth and development as professionals.”)

²¹⁴ See generally Elwork and Benjamin, *supra* note 8; Silver, Love, Hate, *supra* note 8.

²¹⁵ Goldberger, *supra* note 35 at 87.

²¹⁶ Susan G. Kupfer, *Authentic Legal Practices*, 10 *Georgetown Journal of Legal Ethics* 33, 76 (1996).

²¹⁷ Atkinson, *How the Butler Was Made to Do It*, *supra* note 114 at 195.

²¹⁸ David Luban, *Lawyers and Justice: An Ethical Study* at 145 (Princeton 1988).

²¹⁹ Kreiger, *supra* note 27 at 44 n170 (referring to problem of isolation among law students and lawyers); Smith, Rosie O'Neill, *supra* note 2 at 52 (advising against isolation for criminal lawyers).

²²⁰ Daicoff, *Making Law Therapeutic for Lawyers*, *supra* note 71 at 841; citing Barbara S. McCann, Joan Russo, & G. Andrew H. Benjamin, *Hostility, Social Support, and Perceptions of Work*, 2 *J. Occup. Health Psychol.* 175, 178 and 180 (1997).

²²¹ Atkinson, *How the Butler Was Made to Do It*, *supra* note 114 at 205 (discussing dangers of moral isolationism).

²²² Elwork and Benjamin note that lawyers, even when they seek help, “are experts at defending themselves through the use of denial and rationalization. Also their strong cognitive abilities combined with weak development of their affective abilities may interfere with creating relationships with counselors.” Elwork and Benjamin, *supra* note 8 at 218. See also Krieger, *Institutional Denial*, *supra* note 9 at 116 (noting law professors' discomfort with “the kind of

Criminal defense lawyers labor under yet another burden. Many of those to whom they might turn for support, emotionally or professional, are uncomfortable with or even judgmental about what they do.²²³ Some criminal lawyers are lucky to work within professional communities in which discussion and debate are encouraged.²²⁴ Others find themselves reviled by the larger community, and feeling isolated and under siege.

Wendy Simonds' insightful work on feminist abortion practice offers some instructive parallels. She writes about women working at a feminist abortion clinic who, at the outset, explained their strong support for the availability of abortion primarily in terms of an abstract right of women to end unwanted pregnancies. As they worked at the center, they confronted the fact that many aspects of second trimester abortions were "troubling or unpleasant and, in some cases...disgusting or abhorrent."²²⁵ They experienced ambivalence and sadness. They found that the polarization of the abortion debate made discussion of ambivalence extremely difficult, even dangerous. The use of medicalized and sanitized words like "tissue" and "products of conception" seemed imperative to combat anti-abortion rhetoric, but it left no language for dealing with feelings of sadness, loss or ambivalence. One woman said "...somehow I had to make it black and white. Abortion isn't okay unless it's *completely* okay and there's nothing to be sad about."²²⁶ Eventually, most of the health workers found it imperative to acknowledge and

non-rational, non-analytical matters such discussions [of law student distress] will inevitably entail.")

²²³ See generally Lynch, *supra* note 145. See also Smith, *Can You Be a Good Person*, *supra* note 7 at 356-360.

²²⁴ See e.g. Richard W. Garnett, *Sectarian Reflections on Lawyers' Ethics and Death Row Volunteers*, 77 *Notre Dame L. Rev.* 795, 821-24 (2002) (discussing close knit fraternity of death penalty specialists); Mello, *A Letter on a Lawyer's Life of Death*, *supra* note 75 at 135 (discussing camaraderie of office as respite from a general sense of loneliness and isolation); Bellows, *supra* note 94 at 73 (describing supportive atmosphere of public defender's office).

²²⁵ Simonds, *supra* note 21 at 64.

²²⁶ *Id.* at 81.

deal with their ambivalence.²²⁷ They came to believe that “misgivings may coexist with pro-choice political views”²²⁸ and that “thinking through the complexity gave their position increased strength.”²²⁹

Criminal defense lawyers may also find themselves surrounded by disapproving and even hostile forces, deprived of the language or the permission to pierce abstractions and explore complex and ambivalent reactions to their demanding work. The costs can be high, in both professional and human terms. The tensions of criminal law practice are to a degree inherent in the work.²³⁰ The barriers to acknowledging, discussing and facing those tensions, however, are not necessarily endemic to the practice. In this paper, I have begun to explore some of the ways in which criminal lawyers deal with such an environment. There is ample room for further exploration of the questions raised here. To what extent is it adaptive for criminal lawyers to distance themselves from the pain of others? What are the costs of this distancing, in the short term and in the long term? Are there effective ways to address these costs? These questions,

²²⁷ *Id* at 83.

²²⁸ *Id* at 101.

²²⁹ *Id* at 102.

²³⁰ The hurdles faced by defense lawyers are formidable. Professor Tom Geraghty of Northwestern Law School, who has long represented criminal defendants, eloquently observed that the aspects of defense lawyering he saw as most stressful included: “the problems associated with relating to and communicating with clients whose cultures and values are different from their lawyers’; public defenders feeling guilty when they can’t manage caseloads that are too heavy; working within a system that routinely imposes excessive punishment and feeling responsible when barbaric sentences are imposed; the marginalization of the defense bar; having to take fees from people who can’t afford to pay or from people who are committing crimes in order to pay fees; hopelessness of the clientele; powerlessness in dealing with overbearing prosecutors or judges...” (Letter from Tom Geraghty to Susan Bandes, February 7, 2003). As this partial list of problems suggests, defense lawyers are not a monolithic group. Those in public defender offices, for example, face a different set of pressures from those in private practice. For discussion of these pressures, see Lynch, *supra* note 145; Michael Scott Weiss, *Public Defenders on Judges: A Qualitative Study of Perception and Motivation*, 40 *Crim. Law Bull.*36 (2004). See also the three part series on New York City’s overburdened indigent criminal defense bar (Two-Tier Justice, *New York Times* April 8, 9 and 10, 2001.) Defense attorneys doing capital work face intense pressure of an additional sort. See Lynch, *id* at 489.

important in their own right, also have broader implications for the teaching and practice of law as a general matter.

As we learn more about the relationships among emotion, cognition, and ethical and moral decision-making, we should remain alert to the implications for legal education, the practice of law, and the ability of lawyers to lead good lives. I would like to suggest that we pursue these questions, and do so with an eye toward increasing interdisciplinary exchange. There is a rich ethical and philosophical literature on role differentiation and moral disengagement among lawyers. There is a rich body of psychological literature on denial and other defense mechanisms, as a general matter. There is a fledgling but growing literature on the psychology of lawyers and law students—one which would be well served by additional empirical studies. These areas of inquiry have much to learn from one another. The practical stakes are high, both for lawyering as a profession and for lawyers and their clients as people. If we can face our collective avoidance of the emotional aspects of lawyering, we may find ample room to improve both the teaching and practice of law.