

University of Nevada, Reno

**Through the Lens of the Defense Attorney:
The Effect on Public Opinion of Shifting the Viewpoint of the Criminal
Justice System from Retributivism to Rehabilitation**

A thesis submitted in partial fulfillment of the requirements for the degree of
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by

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BACHELOR OF ARTS IN PHILOSOPHY: LAW, JUSTICE, AND POLITICS

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Abstract

With respect to the American criminal justice system, there exists a general impression among the “American public” (or as I shall refer to it, the observer perspective) that the criminal justice system functions to serve justice in the form of retributivism. Retributivism, with specific reference to the still-influential Kantian theory of retributivism, entails that offenders receive “just deserts,” or proportional punishment, for their crimes. Cast in the light of retributivism, the defense attorney appears to stand in the way of the system’s provision of justice. By securing acquittals and lesser punishments for their clients, defense attorneys appear to stop punishment from being exacted on those who, according to the retributivist framework, deserve it. Thus, the observer perspective holds defense attorneys in low regard. However, retributivism is not a complete description of the system’s objective. Through interviews with local prosecutors and defense attorneys, I aim to show that the system’s goal is better captured by the theory of rehabilitation. Within the rehabilitative framework, the defense attorney is vital to the administration of justice in virtue of their being the only agent in the system with access to client information pertinent to pursuing rehabilitative ends. Accordingly, when rehabilitation replaces retributivism as the perceived objective of the criminal justice system, it becomes clear that the defense attorney, promotes, rather than impedes, the administration of justice.

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Preliminary

My argument presupposes familiarity with some of the basic workings of the American criminal justice system. This preliminary section provides a simplified primer of the system's processes. Readers already familiar with the criminal justice system may want to skip ahead to the Introduction.

The American criminal justice system is a judicial institution which functions to hold criminal offenders accountable for their crimes. The system is tasked with determining the guilt or innocence of the accused, and administering the appropriate sentence following a conviction. A criminal case typically begins when the alleged offender, called the defendant, is arrested after being reported for committing a crime. No later than forty-eight hours after charges are filed against a defendant, the defendant attends the first court date of the case, called an arraignment. At this point in the process, the defendant may already have a private defense attorney, who is chosen and hired by the defendant to represent the defendant at all stages in the case. If the defendant does not have a private defense attorney, they will be assigned a public defender by the court. Public defenders work for the government, independent of the prosecutor, and represent defendants who are unable to pay for private counsel.

At arraignment, the defendant is appraised of the charges against them, and subsequently enter a guilty or not guilty plea to each charge. If the defendant pleads guilty at arraignment, the next step is sentencing. Sentencing is the procedure during which the judge hears from both the defense attorney and the prosecutor, who represent the client and the government, respectively, as to what they recommend as a sentence for

the offender considering the nature of the crime, prior criminal history, and aggravating and mitigating facts of the crime. The judge will order the defendant to serve time incarcerated, pay a fine, or take on some other sanction such as community service or a period of court-ordered supervision. For higher-level crimes, the judges have less discretion and are made to follow sentencing guidelines. These sentencing guidelines provide a range of sanctions to be instituted in response to a particular crime.

On the other hand, if the defendant pleads not guilty, the case will advance through a series of court proceedings. Ultimately, the case will conclude in a plea deal or a trial. A plea deal refers to an offer by the prosecutor and a corresponding agreement by the defendant for the defendant either to plead guilty to a lesser charge than that which they originally faced, or to plead guilty to the original charge in exchange for leniency in the prosecutor's recommendation for sentencing. Ninety to ninety-five percent of criminal cases end at the plea negotiation stage¹. However, if the case is not settled with a plea deal, the last stage of a case is a criminal trial. There are two types of trials: a bench trial, in which the judge hears the facts and decides a verdict of guilty or not guilty; and a jury trial, in which a panel of twelve to fourteen private citizens are randomly selected to hear the case and deliver a verdict. It is during the trial that the defense attorney and prosecutor present all the admissible evidence of a case before the judge or jury, persuading them to come to a verdict. That verdict either results in a conviction, which means that the defendant is found guilty of committing the crime; or an acquittal, which means the prosecution failed to show the defendant committed the crime beyond a

¹ Lindsey Devers, "Research Summary." In *Plea and Charge Bargaining*. (Arlington: U.S. Department of Justice Bureau of Justice Assistance, 2011), 3.

reasonable doubt and the defendant is found not guilty of committing the crime. For those defendants who receive guilty verdicts, the judge, or in certain circumstances the jury, will determine an appropriate sentence for the defendant's crime. If trial results in an acquittal, the defendant is released back into society.

Introduction

Public opinion (or what I shall refer to as the "observer perspective") holds defense attorneys in low regard. In this paper, I reconstruct a plausible argument to explain this attitude: the role of the defense attorney seems to be in conflict with the observer perspective's notion of the purpose of criminal justice. I argue that there is little rational basis for this evaluation. Specifically, I argue that the negative observer opinion about defense attorneys appears to be premised on a mistaken conception of the criminal justice system as being exclusively concerned with retributivism. Retributivism refers to the punishment of offenders to a degree proportional to their crimes. Once this faulty presupposition is removed, we can retrieve a more accurate portrayal of the system's purpose and how defense attorneys advance, rather than impair, the system's attempt to achieve justice.

In the opening section of my thesis, I address the perspective of Americans who do not work in the criminal justice system and have not been directly involved as a party to a case. This perspective is hereinafter referred to, for ease of reference, as the observer perspective. I argue that the observer perspective views the contemporary purpose of the criminal justice system as punishing offenders. This conception of punishment adopts the

theoretical framework of retributivism. I analyze Immanuel Kant's still influential philosophical theory of retributivism to explain the principles of this view. The first section also contains a subsection explaining the concept of rehabilitation, identifying the ways in which it differs from retributivism.

Sections two and three examine the observer perspective's attitude toward defense attorneys. In section two, I outline the role of defense attorneys as codified by the legal profession's leading professional organization, the American Bar Association. Section three reviews the observer perspective's cynical outlook on defense attorneys. In this section, I propose an argument to explain that cynical outlook: that the system's achievement of retributive justice is seemingly undercut by the efforts of defense attorneys in procuring an acquittal or a lesser punishment for the offender.

In section four, I discuss insight from prosecutors and defense attorneys about the true aims of the criminal justice system, showcased in its changing foci and modern operation. I also illuminate the insider's view of the duties and expectations of defense attorneys. The material for this section comes from my interviews with fifteen prosecutors and defense attorneys in the Reno and Carson City areas of Nevada.

Returning to the observer perspective's low regard of defense attorneys, I provide, in section five, an appraisal of the critical presupposition undergirding that perspective. Specifically, I argue (a) that the observer perspective tacitly presupposes an almost exclusively retributivist conception of the criminal justice system, (b) that this characterization of the criminal justice system is flawed, and (c) that consequently the observer perspective's negative attitude toward defense attorneys does not survive rational scrutiny.

In the sixth and final section, I argue that the opinion of defense attorneys would be cast in a much more favorable light if the observer perspective recognized the rehabilitative efforts of the system instead of focusing primarily on the retributivist framework. In the context of rehabilitation, defense attorneys become especially critical to the administration of justice.

The purpose of this project is to critically evaluate the aspect of the observer perspective which reflects poorly on the contributions of defense attorneys to the criminal justice system. The project aims to illustrate the possible effects on the observer perspective of viewing the system in a rehabilitative rather than retributive framework. Ultimately, this project invites the observer perspective to reconsider its opinion of defense attorneys in light of a more accurate appreciation of those attorneys' contribution to the administration of justice.

I. The Purpose of the Criminal Justice System

a. Analysis of the Observer Perspective Shows a Retributivist Vision of Criminal Justice

1. The Three Perceptions of the Criminal Justice System

In some way, every individual in the United States is implicated in the country's criminal justice system. There are three broad categories into which the population is sorted: professionals invested in the operation of the system, unwilling participants accused of or having witnessed a crime, and the rest of society which observes the system

from a distance². Each group has a distinct perception of the system and how it functions. These perceptions are based on the distinct experiences associated with being a member of a particular group. For instance, consider the professionals who work within the system, such as members of law enforcement, attorneys, judges, court administrators, and correctional officers. These professionals have firsthand knowledge of the inner workings of the system, see all the evidence in a case, represent the criminally accused, and hold community members responsible for lawless acts. Accordingly, these professionals would view the system in a particular way due to their personal involvement in its operation. Arguably, the professional group's view is more enlightened than that of the other two groups because they have more insight and agency in carrying out the functions of the system. Participants—defendants and victims who have been directly involved in a criminal case—approach the system in a completely different way, their viewpoints likely shaped from the ordeal of being processed by the system. And the laity—the public, those who observe from a distance without legal expertise or especially personal vested interests in any one case—foster yet a different view.

It is this last group, the observers, to which I will give special regard in this paper. I wish to emphasize that this category consists of people who do not work in the criminal justice system and have not been party to a criminal case. In other words, observers are all those who are not currently and have not previously been attorneys, judges, court personnel, corrections and law enforcement officers, witnesses³, victims, or defendants.

² My conception of observation as used here is compatible with serving as a juror. For reasons I explain shortly, individuals who have served or potentially will serve on a jury are categorized as observers rather than professionals or participants.

³ It should be clearly noted that I will not comment on the involvement or perception of witnesses who have been involved in a case, as witness involvement varies based on the role of the witness and thus

With regard to those members of the public who have had experience as jurors in a criminal case, or who are eligible to serve as jurors in the future, there is something to be said for the experience of being finders of fact in a case and delivering a verdict. However, the experience of jury duty does not obviously impact already-existing viewpoints and beliefs about the system to such an extent that an observer would qualify as a member of one of the other two groups. Certainly jurors are not professionals in the same sense that attorneys, judges, law enforcement, and like personnel are; nor are jurors involved to the same extent or to the same emotional degree as defendants and victims. Thus, despite their brief service in the courtroom, jurors are still considered observers for the purpose of my analysis.

Observers exhibit a general attitudinal trend about the system, largely due to the fact that these members of the public typically lack knowledge of the system's operation which accompanies experience in the system, and have a sort of nebulous vision of its organization, procedures, and objectives. It is this nebulous vision that I am most interested in delineating, for that viewpoint, while imprecise in its grasp of legal or procedural detail, is tolerably clear about one thing: its retributivist conception of justice. While I acknowledge the disparity among individual opinions and beliefs as they relate to the criminal justice system, I think that generally the public vision fits within a qualitative schema, to be reviewed in the next section.

For ease of reference, I will refer to the position of the "public" as it relates to

witnesses as a collective unit cannot be categorized into any one group. To illustrate, law enforcement officers who testify as witnesses qualify as professionals, character witnesses supporting defendants in a case would be considered participants based on the impact of their experience on their opinion of the system, and minimally impacted bystanders to crime would likely still qualify as observers based on their limited participation in a case.

the system as the “observer perspective.” This perspective is distinct from the “professional perspective” and the “participant perspective,” which refer to the viewpoints of those who work in the criminal justice system, and those processed as parties to a criminal case, respectively.

2. Studies Assessing the Observer Perspective

The observer perspective has been the subject of polls, surveys, and studies conducted in an effort to evaluate the feelings and beliefs of the typical observer. In the past three decades, the American Bar Association, the Prison Policy Initiative, the Opportunity Agenda, the Marshall Project, and Gallup have become a few of the well-known surveyors of “public opinion about criminal justice.”

I am particularly interested in the observer perspective’s interpretation of the criminal justice system’s purpose, and more specifically, what ideal of justice the system is intended to realize. As I will go on to show, the way the observer interprets this purpose has a significant influence on the observer perspective’s opinion about the agents who drive the system, especially defense attorneys.

Of the common motivations behind criminal sanctions, such as protecting society, incentivizing others not to commit crime, preventing crime, rehabilitating offenders, and the like, punishing offenders consistently appeared to be the most apparent objective of the criminal justice system. To illustrate the observer perspective, the Opportunity Agenda study reported that respondents identified the system as being best at putting dangerous criminals in prison, followed by “making sure the right people are in prison,” “punishing wrongdoers,” “making sure criminals receive just punishments,” and “making

sure criminals receive punishments that are morally right and fully deserved.”^{4,5} The Prison Policy Initiative confirmed the public’s acknowledgement of prison time as the “centerpiece” of the system’s response to crime and correctional facilities as “warehouses” for criminals to “sit in time out.”⁶ In a discussion on public opinion, legal experts from the University of Southern Carolina referenced tough-on-crime sentencing crackdowns, purely punitive in nature, such as the Three-Strikes Law in California and state-by-state enforcement of the death penalty, as examples of the retributivist policies at work in the contemporary criminal justice system.⁷

Additionally, a study by the Opportunity Agenda revealed that one in five respondents identified the purpose of prison time, a virtually default sentence for a vast array of crimes, as punishment.⁸ A study by the American Bar Association found that more than 50% of Americans who viewed prison time as a means of punishment saw the purpose of the punishment as nothing more than giving the offenders what they deserved, “punishment for the purpose of punishment.”⁹ Notably, the public acknowledges the value of prison in removing offenders from society and other similar benefits, such as deterrence effects, but holds that function to be secondary to making offenders pay for

⁴ Jill Mizell, “Overview of Public Opinion” in *An Overview of Public Opinion and Discourse on Criminal Justice Issues*. (New York: The Opportunity Agenda, 2014), 23.

⁵ Notably, the prompt for the responses asked how well the system performed the functions and the results organized the responses in terms of a percentage saying the system performed the functions just fairly or poorly. The objectives listed saw fifty to sixty percent of respondents judging the system to be just fair or poor at performing; however, the objectives focusing on punishment were ranked highest on the list. The takeaway is that the observer perspective, regardless of its view that the system carries out the functions poorly, acknowledges that the top objectives are centered around punishment.

⁶ Peter D. Hart Research Associates, Inc., *Changing Public Attitudes toward the Criminal Justice System*. (New York: The Open Society Institute, 2002), 1,9

⁷ Francis Cullen, Bonnie Fisher, and Brandon Applegate, “Public Opinion about Punishment and Corrections,” *Crime and Justice* 27, no. 1 (2000): 2, 38, <https://doi.org/10.1177/0734016814529968>

⁸ Mizell, “Overview of Public Opinion,” 19.

⁹ Philip Anderson, “Perceptions of the U.S. Justice System,” *Albany Law Review*, 62, no. 4 (1998).

their crimes. Almost 60% of respondents in the Prison Policy Initiative study stated that the system was somewhat or very unsuccessful in rehabilitating prisoners. Only 2% stated the system was very successful in its rehabilitation efforts, and 32% acknowledged the system was “somewhat successful.”¹⁰ Likewise, 78% of respondents in the Opportunity Agenda study stated that the system is “just fair” or “poor” at rehabilitating criminals.¹¹

The notion of prison time representing punishment for punishment’s sake, as opposed to beneficial ends such as rehabilitation, is especially relevant because the incidence of allotting prison time in criminal sentencing is increasing. This increase is documented by a report consolidating the discussion that took place at a roundtable conference focusing on “punitiveness” in America in 2016, which reported that the last four decades have seen an “unprecedented expansion of the country’s use of prison as a response to crime.”¹² More prison time indicates a wider prevalence of the use of punishment for punishment.

All considered, these results demonstrate that the observer perspective recognizes punishment of criminal offenders as the purpose of the criminal justice system.

3. Exposition of the Observer Perspective by Jurists

The dominant theme in the survey responses outlining the observer perspective is punishment. This concept of punishment as an objective of the criminal justice system

¹⁰ Hart Research Associates, Inc., *Changing Public Attitudes*, 8-9, 19.

¹¹ Mizell, “Overview of Public Opinion,” 23.

¹² Bettina Munster and Jennifer Trone. *Why is America So Punitive?* (New York: John Jay College, 2016), 6.

has been defined, debated, and expanded by jurists¹³ for centuries, stemming back as far as the biblical reference to Exodus’ “an eye for an eye.” Jurists label this conception of punishment, retributivism. The eighteenth century philosopher Immanuel Kant elaborated a still-influential account of retributivism, which I shall adopt as my theoretical frame of reference. Before delving into the Kantian account of retributivism, however, it is important to establish an understanding of the foundation for retributivism: the jurist account of the overarching purpose of the system.

Broadly, jurists identify the ultimate goal of the system as administering justice in the face of crime.^{14;15;16;17;18} However, there is significant debate about what “administering justice” looks like. If we set aside the vague terminology, we find that the goal of the system can take at least five different forms.

Jurists identify five primary drivers of the system’s processes, rules, and order in attempting to administer justice. These objectives are deterrence, rehabilitation,

¹³ There is an important distinction to be made here between jurists and other legal scholars, and attorneys. The former are experts and analysts of jurisprudence and the concept of the law, whereas the latter are individuals who have studied the practice of law and are licensed to practice. Jurists have a more theoretical-based viewpoint. As such, since they do not work in the criminal justice system to the same degree as legal professionals like attorneys, judges, and law enforcement officers, jurist evaluations are not included in the professional perspective. They also do not qualify as observers because they have substantially more training in and knowledge of the legal system. Rather, the jurist perspective is a subset of its own; but it comes to the same conclusion as the observer perspective and thus can be used to expand on the observer perspective.

¹⁴ American Bar Association. *Model Rules of Professional Conduct*. (Chicago: ABA Publishing, 2019), 50.

¹⁵ Charles Curtis, “The Ethics of Advocacy,” *Stanford Law Review* 4, no. 1 (1951): 12. <https://www.jstor.org/unr.idm.oclc.org/stable/1225983>

¹⁶ Immanuel Kant, *Groundwork for the Metaphysics of Morals*. Translated and edited by Allen Wood. New Haven: Yale University Press, 2002.

¹⁷ John Mitchell, “The Ethics of the Criminal Defense Attorney: New Answers to Old Questions,” *Stanford Law Review* 32, no. 2 (1980): 293-337. <https://www.jstor.org/stable/1228491>

¹⁸ Victor Tadros. *The Ends of Harm: The Moral Foundations of Criminal Law*. (Oxford University Press, 2011).

restoration, incapacitation, and retribution.^{19;20} *Deterrence* refers to the system's reaction to crime as a "warning" to other potential criminals, to communicate that there are consequences of committing crime in order to discourage people from engaging in illegal activity. *Rehabilitation* encompasses the recognition that criminals are non-contributing members of society that must undergo some form of transformation, through the aid of the State and professionals, to reshape their attitude and activity so that they can reenter society as safe and productive members. *Restoration* is the concept of "making victims 'whole'," to aid those affected by crime in recovering from the effects of the criminal's actions. *Incapacitation* is the removal of the offender from society in order to protect the public from any future crimes that particular offender may commit. Finally, and most notably, *retribution* is generally understood as punishing a criminal to the degree of harm which they have inflicted on others in committing crime. Recall that the notions of these five objectives are referenced in the studies conducted to interpret the observer perspective, and that the observer perspective most closely aligns with punishment, or retributivism.

These five objectives may be further divided into two categories:

consequentialism and retribution.^{21;22;23} Consequentialist accounts of the form of justice posit that the sentences allotted to convicted criminals should benefit society in some

¹⁹ Cindy Cook DeRuyter, "Primary Goals of the Criminal Justice System," Legal Beagle, last modified December 1, 2018, <https://legalbeagle.com/7577128-good-things-criminal-justice-system.html>

²⁰ Ken Levy, "Why Retributivism Needs Consequentialism: The Rightful Place of Revenge in the Criminal Justice System," *Rutgers Law Review* 66, no. 3 (2014): 633. <https://heinonline.org/HOL/P?h=hein.journals/rutlr66&i=658>.

²¹ Immanuel Kant, "Kant on the Metaphysics of Morals [Vigilantius.]" In *Lectures on Ethics*. Edited by Peter Heath and J.B. Schneewind, translated by Peter Heath, (Cambridge: Cambridge University Press, 1997), 307.

²² Tadros, *Ends of Harm*, 22.

²³ Levy, "Why Retributivism Needs Consequentialism," 629-630, 633-634.

way. Accordingly, the goals of deterrence, rehabilitation, incapacitation, and restoration fit into the consequentialist category in that such foci result in some benefit to society; namely, reduction in the crime rate, successful reentry into society, protection of society, and compensation to the victims of crime, respectively. In contrast, the sole purpose of retribution as a category is punishment, to make the convicted suffer for the crime they committed in proportion to the suffering they induced. The only goal that qualifies in the retribution category is, as the name suggests, retribution.

Some jurists argue that in order for the consequentialist objectives to take form, retribution must first be achieved.^{24;25;26;27;28} The thought here is that without punishment as an end in itself, its function as a means of achieving some other end (e.g. deterrence) cannot be realized. In other words, retributivism is the cause as the consequentialist components are the effect, and the effect cannot occur without the cause. For this reason, many scholars argue that retributivism is the primary goal of the system and the other objectives function only as secondary goals.

With the basis of retributivism laid out, and its recognition as the primary goal of the system, we now delve into the substance of retributivism as a theory of punishment. In what follows, I appeal to Kant's discussion of retributivism to deepen my analysis of key theoretical considerations in punishment.

²⁴ Levy, "Why Retributivism Needs Consequentialism," 639.

²⁵ Tadros, *Ends of Harm*, 27.

²⁶ Kant, *Groundwork*.

²⁷ Kant, *Lectures*, 308.

²⁸ Immanuel Kant, *Practical Philosophy*. Edited and translated by Mary Gregor, (Cambridge: Cambridge University Press, 1996), 473.

Kant's theory of retributivist justice asserts that "the punishment of crime is right in itself, that it is fitting that the guilty should suffer, and that justice, or the moral order, requires the institution of punishment."²⁹ The authority of the system to impose punishment on an offender for committing a crime derives from its authority to stop an offender in the process of committing a crime. Refraining from punishment would effectively couple evil actions with impunity and sabotage the effort to stop such action. In virtue of the offender's choosing to commit a crime, an inherently immoral act, the offender brings punishment upon themselves. One explanation Kant offers for the moral necessity of punishing evil acts is that an individual's moral conduct determines that individual's worthiness to achieve happiness, so if someone commits evil acts, they are unworthy of happiness and are punished accordingly.³⁰

One consequence of the fact that an agent of evil action brings punishment upon themselves is that the punishment matches the severity of the crime. The reflexive nature of the punishment can take two forms: what I shall call the proportional-punishment view and the identical-punishment view. The proportional-punishment view institutes some sanction such as prison time, supervision, fines, or the like, where the sanction is determined by the severity and other factors of the crime to ensure treatment of the offender proportional to the harm which befell the victim in the wake of the crime the offender committed. For instance, a robbery might result in a prison sentence of a length which reflects the value of the objects that were taken by the offender during the robbery. This proportionality of the punishment to the crime, a feature of the modern conception

²⁹ Don E. Scheid, "Kant's Retributivism," *Ethics* 93, no. 2 (1983): 264, <https://doi.org/10.1086/292433>

³⁰ Kant, *Lectures*, 308, 310

of retributivism, essentially calls for “reducing the rights and powers [of the criminal] to roughly the same degree that he previously reduced the victim’s rights and power when he committed the crime.”³¹ While the perpetrator indicates through their crime that their rights and interests are superior to his victim’s, criminal punishment negates that message and puts the perpetrator back into the non-superior, equal position.”^{32;33}

On the other hand, the identical-punishment view, or what can be referred to as *lex talionis*, mandates the equal or mirrored treatment of the offender according to what the offender did to the victim.^{34;35} As the old adage goes, “An eye for an eye, a tooth for a tooth, burning for burning, wound for wound.”³⁶ Thus, robbers would be made to experience being robbed themselves, by losing the same items from their household that they took from the victim. Kant’s theory, and the form of retributivism jurists find to be prominent in the contemporary criminal justice system, abides by the proportional-punishment view. This aspect is arguably the most critical of the Kantian theory of retributivism. Kant asserts that the administration of punishment neglecting this limit of proportionality would be unjust.³⁷

Another feature of a strict application of retributivism is its refusal to cut breaks for people who are otherwise of high moral standing, say by treating the offense as if it is were an aberrant action not deserving of punishment. Retributivism concerns the crime,

³¹ Levy, “Why Retributivism Needs Consequentialism,” 655.

³² Kant, *Lectures*, 311.

³³ Steven Eisenstat. “Revenge, Justice, and Law: Recognizing the Victim’s Desire for Vengeance as a Justification for Punishment.” *Wayne Law Review* 50, no. 4 (2004): 38.

³⁴ Levy, “Why Retributivism Needs Consequentialism,” 646.

³⁵ Tadros, *Ends of Harm*, 26.

³⁶ Exod. 21.24-25

³⁷ Kant, *Lectures*, 309.

not the person. Kant provides an example of a merchant who is well liked and helpful to all, but who commits a single minor transgression; despite the merchant's good nature and contribution to society, Kant claims that punishment is still necessary.³⁸ Although Kant recognizes the place of capacity and intent in determining the extent to which someone should be held responsible and thereby punished for their actions, there is little room to argue under a retributivist framework that people should be given second chances and have the opportunity to avoid criminal sanctions on the basis, say, that the offender made a mistake or was influenced by substance abuse or mental health issues. In effect, the judgment of individual action in relation to the categorization of criminal acts versus non-criminal acts is based on the crime, not the agent.

Additionally, Kant frames the distinction between retributive and consequentialist³⁹ objectives in terms of the temporal focus of the system's response. In its retributive efforts, the system is backward-looking, passing judgment and taking action on an offender's act from the past. Consequentialist efforts, on the other hand, are forward-looking insofar as they try to impact action that could be taken by individuals in the future. Kant, like the jurists referenced above, holds that the forward-looking objectives are secondary benefits to the administration of punishment for its retributive value. Most importantly, Kant holds retributive ends as being the only just response to

³⁸ Kant, *Lectures*, 309.

³⁹ Kant does not use the term utilitarian to describe the other objectives of the system outside of retributivism, and in fact refrains from commenting on utilitarianism at all in his discussion on retributivism. Instead, Kant refers to these principles (i.e. deterrence, rehabilitation, incapacitation, and restoration) as corrective punishments. For the purpose of consistent reference, I use the term utilitarian to describe the identified objectives other than retributivism, but note that Kant did not explicitly employ the term.

crime, withholding moral consideration of utilitarian ends, describing them merely as additional benefits which come about as a result of retributive action.⁴⁰

A broadly Kantian conception of retributivism which is apparent in the observer perspective, and consequently informs its judgment of the agents operating within the system. That is to say that the observer perspective views the roles of the system's agents within the parameters of achieving retribution for crime.

b. An Alternative to the Retributive Approach: Rehabilitation

While the observer perspective apparently takes retributivism to be in fact the dominant notion of justice motivating the contemporary criminal justice system, there are also indications that the observer perspective holds that the ideal purpose of the system is rehabilitation.

The majority of respondents expressed an interest in seeing more efforts to rehabilitate offenders over policies instating harsher punishments for offenders. The same study by the American Bar Association which showed that 50% of the population sees punishment for the purpose of punishment also found that 56% of respondents expressed support of sentencing alternatives to incarceration, such as community service.⁴¹ In another study, 54% of respondents prioritized prevention and rehabilitation of the causes of criminal offending, specifically in the form of job and educational training, over any other response to crime (with only 20% of respondents prioritizing punishment).⁴² The Opportunity Agenda survey found that 67% of respondents thought the best way to

⁴⁰ Kant, *Lectures*, 308.

⁴¹ Anderson, "Perceptions of the U.S. Justice System."

⁴² Hart Research Associates, Inc., *Changing Public Attitudes*, 3.

reduce crime was to “rehabilitate” offenders.⁴³ Moreover, when criminal justice reform is referenced in studies of the observer perspective, such reform is often geared toward better implementing the tenets of rehabilitation into the system’s operation.

Notably, the studies also revealed a fairly large percentage of the population supporting harsher punishment for crime and longer prison sentences. These ideas are tenets of retributivism, but the equal, and often abounding, support for rehabilitation indicates a higher idealistic support of rehabilitation over retributivism. A study by the Opportunity Agenda in 2016 found that America’s “punitive sentiment,” or the level of support for criminal justice initiatives designed primarily to punish offenders, declined over ten percentage points since the 1990s, returning to the pre-retribution era in which the system was much more equipped to rehabilitate offenders.⁴⁴

The concept of rehabilitation in the studies was captured in terms of substance abuse programs, therapy and counseling sessions, educational and vocational training, supervision opportunities, reentry programs, and alternatives to incarceration such as community service, diversion programs, and specialty courts. While these are useful examples of rehabilitation as implemented in the context of criminal justice, an understanding of the theoretical form of rehabilitation is necessary to appreciate the full picture of the observer perspective.

Rehabilitation is a theory of punishment which prioritizes the improvement of offenders to enable them to reenter society as productive and law-respecting citizens.⁴⁵

⁴³ Mizell, “Overview of Public Opinion,” 21.

⁴⁴ Loren Siegel, *A New Sensibility: Americans are Becoming Less Punitive*, (New York: The Opportunity Agenda, 2016), 10.

⁴⁵ Thom Brooks, “Rehabilitation.” In *Punishment*, (New York: Taylor & Francis Group, 2013), 51.

Ultimately, the goal is a sort of moral awakening or education by which an offender recognizes the wrongness of their action and strives to avoid, by their own volition, similar wrong acts for the mere reason that they are wrong.^{46;47} Rehabilitation ideally ensures offenders do not commit further crimes, and approach the world in a different, more morally-appreciative way. Often, especially in prisons and jails, such reform implicates treating and hopefully eliminating motivations of criminal activity, such as substance problems, mental health issues, or a lack of resources or support through counseling, skill workshops, educational and vocational training, and social networking to gain more support from family and positive influences as well as access to resource pools like social benefit programs or homeless shelters or the like.^{48;49;50;51} Theoretically, treatment of an offender is determined by their “risk profile,” or the tendencies and characteristics the offender exhibits which constitute a risk to society by making it more likely that the offender will commit crime in virtue of having those tendencies and characteristics.⁵²

Thom Brooks distinguishes two different justifications for rehabilitation: deontological rehabilitation and consequentialist rehabilitation.⁵³ Deontological rehabilitation justifies the improvement of the offender by virtue of their being a human

⁴⁶ Brooks, *Punishment*, 52.

⁴⁷ Mary Ann Farkas, “Rehabilitation in the Criminal Justice System,” *International Journal of Offender Therapy and Comparative Criminology* 54, no. 3 (2010): 287. doi: 10.1177/0306624X10369823

⁴⁸ Brooks, *Punishment*, 52.

⁴⁹ Farkas, “Rehabilitation in the Criminal Justice System,” 287.

⁵⁰ Michelle Phelps, “Rehabilitation in the Punitive Era: The Gap between Rhetoric and Reality in U.S. Prison Programs,” *Law Soc Rev* 45, no. 1 (2011): 39. doi:10.1111/j.1540-5893.2011.0042

⁵¹ Tony Ward and Robyn Langlands, “Repairing the Rupture: Restorative Justice and the Rehabilitation of Offenders,” *Aggression and Violent Behavior* 14, no. 3 (2009): 280. doi: 10.1016/j.avb.2009.03.001.

⁵² Ward and Langlands, “Repairing the Rupture,” 207.

⁵³ Brooks, *Punishment*, 52.

being, and thus deserving of a second chance and self-development. One supporter of this view, Bertrand Russel, asks people to consider the criminal as they would a patient with the plague.⁵⁴ Our desire to isolate the patient with plague and improve their situation as so not to infect everyone else is not, by any means, analogous to our vision of the criminal, and Russel argues that it should be. In the same vein that the plague patient is fighting an internal battle and requires outside help to restore their health, criminals also battle causes outside their control and need help from others to overcome those causes. On the other hand, consequentialist rehabilitation emphasizes the benefits to society at large from successful rehabilitative efforts, to include lower crime rates and less taxes to maintain care for the prison population.

It makes sense, given those justifications of rehabilitation, that rehabilitation is often described as opposed to retributivism. While retributive justice means punishing an offender to the proportional degree of their crime for no initial benefit more than serving the offender's "just deserts," rehabilitation critically views crime response as an opportunity to reshape the offender's values and behavior to reduce their tendency to commit crime.

⁵⁴ Brooks, *Punishment*, 54.

II. The Role of the Defense Attorney

a. The Primary Agents of the American Criminal Justice System

However “justice” is defined, the operation of the criminal justice system in administering justice is dependent on a case-by-case interaction of four principal agents: law enforcement, the judge, the prosecutor, and the defense attorney. Law enforcement and judges are not involved in the same manner as are prosecutors and defense attorneys, primarily because the latter two are adversarial representatives of the two parties to a criminal case. Each of the agents have specific duties and a unique contribution to the process. Without sufficient performance of each role, the system does not operate as it is intended to: upon evidence and with the opportunity for both sides of a case story to be heard.

Law enforcement usually initiates a case against a defendant, upon observation or receipt of a complaint that a crime has been committed. Although law enforcement has its responsibilities related to interfering in active crime and serving the public, with respect strictly to their place in the criminal justice system, the police are in charge of gathering the facts of a case.^{55;56} Through various state and federal agencies, each with their own jurisdiction, law enforcement heads the effort to investigate a crime, collecting evidence by interviewing witnesses, interrogating the defendant, organizing searches and seizures, and preserving physical evidence. From there, the material of their investigation is passed on to a prosecutor. The involvement of law enforcement typically ends upon arrest of a

⁵⁵ Bureau of Justice Statistics. “The Justice System.” Accessed 6 May 2020.
<https://www.bjs.gov/content/justsys.cfm>

⁵⁶ Anne Seymour, Mario Gaboury, and Christine Edmunds, “Chapter 2: The Criminal Justice System Continuum.” National Victim Assistance Academy. Last modified 2000.
https://www.ncjrs.gov/ovc_archives/academy/chap2-2.htm

defendant, though they may be called upon to testify in trial or assist the prosecutor in obtaining further evidence against the defendant.

The judge is the adjudicator of a case. They oversee it from beginning to end, arraignment to sentencing. Although judges have some discretion, their actions are dictated by the rules and regulations of the court in which they preside. These rules and regulations differ across states, and between the state and federal levels. Two of the most important functions of the regulations dictate which sorts of evidence judges are to let into court, and the sentences judges are made to hand down to convicted offenders. Some of their other duties involve evaluating the flight and safety risk of accused defendants, and deciding whether a defendant who has not yet been convicted is to be released or kept in custody while he or she awaits their trial. The judge is the ultimate gatekeeper to approve plea deals made between prosecutors and defense attorneys. Depending on the type of case, the judge may hear the evidence in a bench trial and deliver a verdict, or referee a jury trial. Judges can also dismiss cases if they find there is not enough evidence to continue forward, and must approve of a motion by either party to dismiss at any stage in the action.⁵⁷

The prosecutor is responsible for evaluating evidence collected by law enforcement and bringing one or more appropriate charges against a defendant on behalf of the government. Often, the prosecutor's role is viewed in terms of representing the victim of a crime, but this is an inaccurate depiction. Rather, the prosecutor is a representative of the government and the public at large, charging individuals for

⁵⁷ "The Justice System."

violating rules of society. The prosecutor is expected to recognize circumstances in which there is not enough evidence to charge a crime and subsequently drop charges against a defendant. Additionally, this agent is tasked with offering plea deals or diversion program opportunities⁵⁸ to a defendant. Alternatively, should the defendant elect to go to trial, the prosecutor tries the case on behalf of the government, proving the defendant committed the crime of which they are charged beyond a reasonable doubt.^{59;60;61}

The defense attorney is the “zealous advocate” and representative of the accused in a criminal case.¹⁰ Defense attorneys, whether they work in the private sector or for the governing in the public sector, are expected to fill the same role. Their involvement sometimes begins before charges are filed against a defendant. The defense attorney is expected to use their legal expertise to assess and combat problems that arise in a case, including Constitutional issues, improper seizing and keeping of evidence, and inconsistencies in witness testimony. Often, defense attorneys and their teams will conduct their own investigations into the circumstances of a crime to aid in the client’s defense. They are responsible for communicating plea offers to their clients, and explaining the implications of pleading or proceeding to trial. They will bring their own

⁵⁸ Diversion programs are alternatives to the typical processing of a case in that defendants are required to satisfy some condition--such as anger management courses, substance rehab programs, or victim restitution--in lieu of being convicted of a crime and made to serve post-conviction sentences.

⁵⁹ “The Justice System.”

⁶⁰ Seymour, Gaboury, and Edmunds, “Criminal Justice System Continuum.”

⁶¹ American Bar Association. “Criminal Justice Standards for the Prosecutor Function.” Last modified 2017. https://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition/

witnesses to testify on behalf of the defendant and present evidence separate from the prosecutor, should the defendant choose to go to trial.^{62;63}

b. Further Exploration of the Defense Attorney's Role

It is this last role, the defense attorney, that serves as the main focus of this project. The defense attorney's role is particularly complex and demanding. The American Bar Association (hereinafter, "the ABA"), the leading professional group in the legal field, acknowledges that the defense attorney role is uniquely demanding compared to the other agent roles.⁶⁴ The ABA offers substantial guidance on the professional behavior expected of defense attorneys; most notably, there are the ABA's *Model Rules of Professional Conduct* (hereinafter "*The Rules*"). *The Rules* communicate a summary of the duties, liabilities, and responsibilities of defense attorneys as expressed in the rules of professional conduct specific to each state's Bar Association. For instance, *The Rules* define and delimit the appropriate relationship between attorney and client, the level of authority lawyers enjoy in the larger agenda of the system, confidentiality, monetary gain, litigation efficiency, the place of truth in legal affairs, public service, integrity, and the obligation of professional membership to the Bar⁶⁵. Although these guidelines apply to attorneys of all fields, a large portion deals exclusively with defense attorneys. And while there is no guarantee that all defense attorneys operate within the confines of *The Rules*, the Bar Associations of each state effectuate such requirements by disbaring, or

⁶² "The Justice System."

⁶³ American Bar Association. "Criminal Justice Standards for the Defense Function." Last modified 2017. https://www.americanbar.org/groups/criminal_justice/standards/DefenseFunctionFourthEdition/

⁶⁴ American Bar Association, "Defense Function."

⁶⁵ To note, membership to the ABA is not mandatory for a lawyer to practice law. However, membership to the State Bar belonging to the jurisdiction in which the attorney practices is required.

invalidating the license of, any attorney who is found to have violated principles such as those expressed in *The Rules*.

Pursuant to both *The Rules* and jurists' theoretical conception of the defense attorney role, the primary purpose of defense attorneys is to act as a legal advocate and professional representative of a person accused of a criminal act.^{66;67;68} While the defense attorney is expected to be mindful of the interests of others, including society at large, their first priority is the interest of the client. A major component of that expectation is that the defense attorney provides protection to the client. Such protection includes checking that the charges are appropriate to the circumstances of the alleged crime, that no unconstitutional or illegal action by law enforcement is taken in gathering evidence, that inadmissible evidence is not pursued for use by the prosecutor, and that the client is not taken advantage of due to a lack of knowledge about the processes and rules of engaging in the system.

The protection of a client often extends beyond the individual client, to affect the future treatment of others that may find themselves in similar positions. For instance, a defense attorney who wins a motion against the government to suppress evidence seized in a search as a result of an unconstitutional search violating Fourth Amendment rights sets a precedent for future action of law enforcement to respect the privacy of the citizenry and go about getting evidence in the lawful and prescribed way. The defense attorney's commitment to protecting the client and the public is characterized as a

⁶⁶ American Bar Association, *Model Rules*, 50.

⁶⁷ Curtis, "The Ethics of Advocacy," 13.

⁶⁸ Roberta Flowers, "The Role of the Defense Attorney: Not Just an Advocate," *Ohio State Journal of Criminal Law* 7, no. 2 (2010): 648.

https://kb.osu.edu/bitstream/handle/1811/73158/1/OSJCL_V7N2_647.pdf

method of ensuring “checks and balances” against law enforcement and the government, imposing limits on the type of action law enforcing institutions can take in coercing the general public, and ensuring the government does not have excessive power to abuse the rights of citizens—including the criminally condemned—and follows the rules regarding the gathering of evidence and charging of criminal acts.

At the root of the defense attorney’s role is the principle that, regardless of guilt or innocence, a person charged of a crime deserves to be treated with respect, simply in virtue of their being a human being.^{69;70} The view that an accused deserves a rigorous defense and a zealous advocate is reflected in the presumption of innocence which has been upheld since the system’s inception in the eighteenth century.⁷¹ The presumption of innocence mandates that a person is treated as if they are innocent, unless and until they are proven guilty of committing a crime. The tenet of the presumption is expressed in a famous quote by William Blackstone, an English jurist whose philosophy is reflected in the spirit of the American criminal justice system: that it is better that “ten guilty persons escape than that one innocent suffer.”⁷² The presumption of innocence guarantees certain rights to the accused, one of which is the opportunity to defend against the allegations regardless of the case evidence. It is the role of the defense attorney to enforce the presumption of innocence.

This obligation to protect the presumption of innocence manifests in two forms, dependent on the route the case takes. If the case ends in a plea negotiation, the defense

⁶⁹ Mitchell, “Ethics of the Criminal Defense Attorney,” 329.

⁷⁰ Kant, *Groundwork*.

⁷¹ Mitchell, “Ethics of the Criminal Defense Attorney,” 299.

⁷² Vidar Halvorsen, “Is it Better that Ten Guilty Persons Go Free than that One Innocent Person Be Convicted?” *Criminal Justice Ethics* 23, no. 2 (2004): 3. doi:10.1080/0731129X.2004.9992168

attorney is tasked with securing the best outcome for the client, whether that is a lesser charge than the original charge, or a lesser penalty than what the original charge mandates. On the other hand, if the case proceeds to trial, the defense attorney is obligated to try to get an acquittal. An important note to reiterate is that the defense attorney is not to evaluate the evidence and determine the guilt or innocence of the client, and proceed with their defense only when the defense attorney deems the client innocent. Rather, the defense attorney, regardless of the evidence and whether they think the client is guilty or innocent of the crime charged, is tasked with challenging the merits of the case and ultimately attempting to secure a not guilty verdict.⁷³

In some interpretations, this delegation is only one of several, with the defense attorney not only having an obligation to the client, but also owing responsive action to the courts as a judicial officer and to society as a public citizen with a special commitment to justice.^{74;75} Still, in all cases, the obligation to the client comes before all other professional duties.

Due to these various aspects of the defense attorney's role, this agent can find themselves in ethically compromising situations, and face role conflict as a result of

⁷³ This conclusion about the defense attorney role to be used in my argument is, admittedly, significantly simplified. Realistically, this role only applies in trial situations where a defendant has maintained their innocence and their claim is being tested by a jury. In that situation, the defense attorney is always aiming for an acquittal. However, I recognize situations in which a case is not going to trial and the defense attorney is trying to get the best deal for their client, which is not necessarily the defendant's acquittal on all charges. It could mean treatment or the least amount of prison time while still taking accountability for their actions. I justify this simplification because this discussion takes place in the context of the observer perspective, and the observer perspective simplifies the defense attorney role as well. Thus, to capture the observer perspective requires recognition that the perspective does not appreciate the complexities of the role.

⁷⁴ Flowers, "The Role of the Defense Attorney," 647.

⁷⁵ American Bar Association, *Model Rules*, 51-52.

being a representative of the client, officer of the court, and protector of society.^{76;77;78}

Such ethically compromising situations are showcased by three relatively common examples.⁷⁹ The first example is when a client maintains that they did not commit the crime and insists on going to trial, requiring the attorney to construct a defense arguing that the client is innocent, when the assumption of the client's innocence is difficult to sustain in the face of the evidence against them. The second example is when the defense attorney is asked for information by the other agents of the system, of which they have become aware through communication protected by attorney-client privilege, and must lie⁸⁰ or refuse to answer so as not to reveal the information, even when the information is critical to proving, or even solving, a criminal case. The third example is when the defense attorney, in the process of preparing for trial, becomes aware that the client intends to lie on the stand. In all of these examples, the defense attorney is pulled in opposite directions by, on the one hand, their commitment and obligation to their client, and on the other hand, their responsibility to maintain the integrity of the system and achieve justice. It is in these and similar situations that *The Rules* become especially vital

⁷⁶ Curtis, "The Ethics of Advocacy," 3.

⁷⁷ Flowers, "The Role of the Defense Attorney," 647.

⁷⁸ Mitchell, "Ethics of the Criminal Defense Attorney," 295.

⁷⁹ Zitrin, Richard, Carol M. Langford and Liz Ryan Cole. *Legal Ethics in the Practice of Law*. (San Francisco: Matthew Bender & Company, 2013), 143, 439.

⁸⁰ Ordinarily, the defense attorney would be advised to cite attorney-client privilege as an answer to a question which requests confidential information; however, there are scenarios in which answering the question by citing attorney-client privilege will indicate that such information does exist, which may by itself be a violation of privilege. For instance, if the prosecutor were to ask what drug the defendant was on when they committed the crime, if the defense attorney were to respond by saying that they cannot answer due to attorney-client privilege, it may indicate to the prosecutor that the defendant was in fact on drugs, regardless if that was the case. Since that may damage the client's defense, the defense attorney is obligated not to say anything.

to the conduct of the defense attorney, because *The Rules* instruct the defense attorney on how to handle the situation.

For instance, in the first example cited above, where the defense attorney finds themselves in a position in which the evidence points to a client's guilt but they are expected to argue for their innocence, *The Rules* instruct the defense attorney to zealously defend their client anyway, and allow the judge or jury to weigh the evidence and come to a verdict. When the lawyer is in a position where they are asked for information they have become aware of through communication with their client, *The Rules* require the attorney to protect such information disclosed under the context of attorney-client privilege by declining to answer, omitting privileged information, or lying about knowledge of information. And when the attorney becomes aware, in the process of preparing for trial, that their client intends to lie on the stand, *The Rules* instruct the defense attorney to counsel their client and encourage them to testify truthfully or not at all, but to ultimately let the client decide whether they take the stand and, if they do, what they will testify to. Some of these actions arguably violate basic tenets of ethical theories and considered moral judgments, but in the interest of preserving the integrity of the defense attorney role and upholding the prioritization of the client, the actions must be executed. If the defense attorney were to take action that does not subscribe to the appropriate responses set forth in *The Rules*, they could be disbarred and prohibited from practicing law.

In the sense that these situations arise in the course of their professional obligations, and attorneys' responses are results of direction by the ABA, it is clear that taking such action in the face of ethically compromising situations is an aspect of the role

itself. *The Rules* effectively discourage defense attorneys from consulting their personal ethical convictions, and instead directs them to consult a professional standard. Jurists have noted that the actions inspired by *The Rules*, and the expectations laid out governing the defense attorney role, are methods of treating something as powerful as the law “with reason, rather than impulse.”⁸¹ Defense lawyers are “required to be disingenuous...to make arguments [they] do not believe in,” renowned Boston litigator Charles Curtis remarks, because that is the nature of their professional obligation to the system.⁸² Facing these predicaments are an inevitable aspect of practicing criminal defense.⁸³

In sum, as one of the critical agents of the criminal justice system, the defense attorney is primarily an advocate, professional representative, and protector of the criminally accused, with a secondary role serving the justice system and society. In the scope of their professional obligations, it is not unusual for them to confront difficult ethical situations, but the ABA provides clear instruction on how to comport themselves in such situations.

III. The Observer Perspective of the Defense Attorney

a. Studies Reveal Negative Perceptions of the Defense Attorney

Studies not only reveal the observer perspective of the criminal justice system, but also of criminal defense attorneys. The conclusions offered by these studies indicate that

⁸¹ Curtis, “The Ethics of Advocacy,” 22.

⁸² Curtis, “The Ethics of Advocacy,” 9.

⁸³ Mitchell, “Ethics of the Criminal Defense Attorney.”

the observer perspective holds defense attorneys in very low regard. Such studies show that a large portion of polled observers find defense attorneys to be unethical, dishonest, and lacking reverence for justice. A measure of favorability toward a list of over twenty professions ranked lawyers one of the lowest; only stockbrokers and politicians were ranked lower.^{84;85} Additionally, observers tend to see defense attorneys as self-interested and money-driven, detached from their clients, and emotionally cold. The focus of defense work as identified by the observer perspective is getting offenders off on technicalities rather than promoting justice.

In terms of commitment to honesty and ethics, multiple studies revealed that, on average, more than 80% of the American population said that the traits “honest” and “ethical” are inaccurate descriptors of attorneys, and 80% judged the ethical standard expected of lawyers as “neutral” or “low.”^{86;87} Despite the existence of the American Bar Association to govern the behavior and action of lawyers, generally Americans feel that the ABA does not hold its members accountable or punish them adequately for violations of the organization’s ethical and professional code.⁸⁸

Additionally, the observer perspective appears to hold that lawyers do not have much of a passion for justice.⁸⁹ A large part of this outlook evidently stems from the fact that lawyers, with the offender’s life in their hands, make a story out of the events

⁸⁴ Gary Hengstler. “Vox Populi: The Public Perception of Lawyers: ABA Poll.” *ABA Journal* 79, no. 9 (1993): 61. www.jstor.org/stable/27834973

⁸⁵ Myrna Oliver, “Lawyers Losing the Verdict in the Court of Public Opinion,” *Los Angeles Times*. Last modified October 19, 1987. <https://www.latimes.com/archives/la-xpm-1987-10-19-mn-10349-story.html>

⁸⁶ Hengstler, “Vox Populi,” 63.

⁸⁷ Gallup. “Honesty/Ethics in Professions.” *Gallup News*. Last modified December 12, 2018. <http://news.gallup.com/poll/1654/honesty-ethics-professions.aspx>

⁸⁸ Anderson, “Perceptions of the U.S. Justice System,” 1365.

⁸⁹ Hengstler, “Vox Populi,” 62.

surrounding the allegation, and seem to employ rhetorical tricks and mind games to persuade others to believe their rendition of the events of the crime.⁹⁰ Between the two attorneys in the courtroom, the competition lies in which one can “paint the best story,” which seems to taint the integrity of a system that, as it is commonly understood, seeks to find the truth given two sides of the same story. The impact of the story-telling is exacerbated by the logical necessity that one of the two attorneys is wrong about the facts of the case⁹¹, and observers⁹² tend to assume one of the attorneys is intentionally lying to them in trying to win the case. Additionally, the American Bar Association determined that only one in five people would disagree with the position that defense attorneys aim to “find technicalities to get criminals released.”⁹³ Overall, the impacts of these positions—the story-telling and utmost regard for winning—is that the process of achieving justice is converted to a game by defense attorneys, and so defense attorneys are to blame for the corruption of the system’s operation.

Given its conception of the defense attorney as more concerned with getting their clients off than with justice, we might expect the observer perspective to think that

⁹⁰ Richard K. Sherwin, “Symposium: Picturing Justice: Images of Law & (and) Lawyers in the Visual Media – Introduction,” *University of San Francisco Law Review* 30, no. 1 (1996): 891-903, https://heinonline.org/HOL/Page?collection=journals&handle=hein.journals/usflr30&id=907&men_tab=srchresults

⁹¹ By “facts of the case,” I refer to all circumstances of the defense and prosecution theory, to include motivation, setting, intent, timing, parties involved, charge, evidence, etc. If, for instance, the defense was approaching a case from a self-defense perspective, either the prosecution or the defense would have to be wrong about the case, at the very least, in terms of whether the defendant acted out of self-defense or was the initial aggressor.

⁹² Considering the context of the use of “observers” here, it is likely that Sherwin was evaluating the position and beliefs of jurors who have served in a criminal case, rather than observers in general. Given that jurors are grouped into the observer group, this specific designation is irrelevant to the discussion.

⁹³ Anderson, “Perceptions of the U.S. Justice System,” 112.

defense attorneys at least care about their clients. However, the observer perspective is suspicious even of that relationship. Studies indicate that, from the observer perspective, it is not that defense attorneys prioritize their clients' well-being over the demands of justice, but rather that defense attorneys prioritize their own well-being over the demands of both clients and justice.⁹⁴ Almost one-half of respondents of the ABA survey agreed with the statement that most attorneys are more concerned with themselves and their success than they are about their client's "best interests," and another 22% reported neutral feelings about the statement.^{95;96} Further studies revealed that a common sentiment is that "profit is the driving ethic" of the legal field, which is to say that lawyers value making money over other interests. Overall, the results related to the attorney-client connection show that more than two-thirds of the survey participants do not describe the attorney's focus as the client.⁹⁷ One possible explanation for this deeper cynicism about defense attorneys is that, from the observer perspective, the fact that defense attorneys are at odds with the observer perspective's conception of justice is itself an indication that defense attorneys themselves are unjust.

The observer perspective seems to take defense attorney's professional non-emotive manner as further evidence of something morally suspect in the legal agents.^{98;99} Given that the defense attorney's role is to advocate, support, and protect the client, the public appears to have a vision of a friendly, and perhaps paternal, relationship between

⁹⁴ Hengsler, "Vox Populi," 64.

⁹⁵ Hengsler, "Vox Populi," 65.

⁹⁶ Oliver, "Lawyers Losing the Verdict in the Court of Public Opinion."

⁹⁷ Anderson, "Perceptions of the U.S. Justice System," 112.

⁹⁸ Sherwin, "Picturing Justice."

⁹⁹ Curtis, "The Ethics of Advocacy," 15.

the attorney and the client. The contrast between this vision and reality translates to a view that defense attorneys are less than human because they are able to process a situation and a relationship that should be emotional and personal without the expected emotion or attachment.

b. Rationalizing the Negative Perception: An Argument for the Incompatibility of the Defense Attorney Role and the Purpose of the Criminal Justice System

The previous section shows that the observer perspective has an incredibly cynical vision of the defense attorney. In this section, I reconstruct a possible argument to explain this cynical view, which I refer to as the Incompatibility Thesis. Specifically, I argue that because (i) the observer perspective regards retributivism—the punishment of offenders proportional to their crimes—as the objective of the criminal justice system, and (ii) the observer perspective further regards the defense attorney’s role as incompatible with this retributivist objective, that (iii) defense attorneys are consequently determined, by the observer perspective, to interfere with the administration of justice.

As shown in Section II (b), the primary function of defense attorneys is to protect the client. As this concept of protection takes on two forms depending on if the case goes the route of trial or plea negotiation, the argument is composed of two iterations also dependent on the route of the case. Protection as it is used in this argument, and where it is most impactful on the goal of retributivism, is the kind of protection which shields the defendant from conviction in the case of trial or procures a lesser punishment in the case of plea negotiation.

Notably, there is something to be said for how acquittals are reached during trial and what drives a prosecutor to offer a plea deal for a lesser punishment or lesser charge.

In the former instance, a judge or jury is ultimately responsible for reaching a verdict of not guilty, and in the latter scenario it is the prosecutor's initiative to offer and execute a plea. However, in both cases, the judge or jury's verdict and the prosecutor's decision to offer a plea is based on the efforts of the defense attorney in challenging the grounds of a case and raising reasonable doubt. Ultimately the defense attorney is held at least partially responsible for the outcome of a trial and plea deal negotiations.

Now, how the defense attorney role contributes to the success of the system in achieving retributive justice is the key to understanding the negative nature of the observer perspective's opinion of defense attorneys. In the case of trial, given that the role of the defense attorney is to secure an acquittal regardless of the guilt or innocence¹⁰⁰ of their client, there are four possible results of their efforts. (1) The defendant is factually innocent and is found innocent. Retributivism would hold that justice has been served in such a case, as the system successfully determined that the offender did not commit a crime. (2) The defendant is factually innocent and is found guilty. Retributivism would hold that justice is not served in such a case because the defendant did not commit a crime warranting punishment, yet the system wrongfully determined that the defendant did commit a crime and thus is deserving of punishment that is, in fact, undue. (3) The defendant is factually guilty, and is found guilty. According to retributivism, this is a just result, as the criminal will be punished in proportion to their crime. (4) The defendant is factually guilty, and is found innocent. Retributivism would

¹⁰⁰ By the innocent and guilty designations as used here, I mean factually guilty or innocent, the circumstances of fact independent of evidence of judgment. Factual guilt is distinct from a determination of guilt following the defendant's being processed by the criminal justice system and found to have committed the crime beyond a reasonable doubt. Factual guilt does not imply a determination of guilt, and neither does a determination of guilt necessitate factual guilt.

hold that this situation is unjust because a criminal deserving of punishment evades that punishment.

The defense attorney is successful in situations (1) and (4), in both of which the defendant is acquitted. Note that the success does not depend on whether the client is factually innocent: in (1) justice is achieved, whereas in (4) justice is circumvented. It is the permanent possibility of (4)—that the factually guilty can be found innocent—that constitutes a violation of retributive principles.

Likewise, in the case of plea negotiation, a defense attorney is successful when they obtain a lesser punishment or a lesser charge for the client. In the case of lesser punishment, the offender suffers less than is proportional to the crime they committed. In the case of a lesser charge, the crime of which the offender is convicted does not reflect the actions of the defendant and the associated punishment is not proportional to the crime. In either case, assuming the defendant is factually guilty, the success of the defense attorney consists in helping the defendant evade punishment for their crime, undermining retributive justice.

Although the observer perspective must admit that there are instances when the defense attorney does help the system achieve justice—for instance, in case (2) described above, in which innocent defendants are found innocent—due to the psychological effects of negativity bias, the instances in which the defense attorney is judged to interfere with the system and justice itself are much more salient in the evaluation of the observer perspective.¹⁰¹

¹⁰¹ Paul Rozin and Edward B. Rayzman, “Negativity Bias, Negativity Dominance, and Contagion,” *Personality and Psychology Review* 5, no. 4 (2001): 397. doi: https://doi.org/10.1207/S15327957PSPR0504_2

It is this ultimate judgment—that the defense attorney works against justice in trying to evade punishment for criminals—that provides an explanation for the observer perspective’s pejorative view of defense attorneys. There seems to be something very unsettling about the idea of someone opposing justice and actively working to sabotage its administration. Since this argument on behalf of the observer perspective establishes that defense attorneys do, in fact, oppose and actively work against the administration of justice, it is logical that the observer perspective would exhibit a general negative reaction to defense attorneys and their line of work.

I acknowledge that the argument that I have reconstructed does not provide the complete explanation for the observer perspective’s attitude toward defense attorneys. For instance, it is possible that the observer perspective may be based on a simple argument such as “I don’t like criminals” (even accused ones), and since defense attorneys are associated with criminals, people don’t like defense attorneys. However, I have identified reasons to think that the Incompatibility Thesis that I have sketched in this section is a seldom identified part of the explanation, and one which provides a basis from which to critically evaluate the observer perspective.

IV. The Professional Perspective

Reviewing the results of surveys and studies permits a general understanding of the observer perspective, but there is not such easy access to the professional perspective.¹⁰² In order to gain insight on the professional perspective, I interviewed

¹⁰² Part of the reason that it is not as easy to delineate the professional perspective as it is to delineate the observer perspective is because there are many more observers than professionals in the American population. General trends in views are more likely to be identified when they belong to a larger

defense attorneys and prosecutors who play an active and necessary role in the criminal justice system.

a. Methods

In order to gather data about the professional perspective, I conducted in-person and telephonic interviews with fifteen attorneys in the Reno and Carson City areas of Nevada. Additionally, as a result of one of my interviews, I was invited to attend a panel consisting of federal and state judges that highlighted the progress of the Nevada system in implementing policies intended to improve efforts to rehabilitate offenders being processed by the system.

With respect to the interviews, I focused the interviews in the Reno and Carson City areas of Nevada primarily due to ease of access, but also to limit the impact of confounding variables on the interviewees' experience in the system. These variables include the quality of the working relationship with law enforcement and with adversarial colleagues, the policies and foci implemented by the elected District Attorney, the number of judges deciding cases and refereeing the attorneys, and the various regionally-determined rules of evidence and procedure.¹⁰³

number of people than when they are held by a smaller number of people because there is less variation in opinion among larger populations and thus a better interpretation of a "general" viewpoint. As such, there are more studies done regarding the "public opinion" about the criminal justice system than the opinion of those who work in the system because the former is easier to measure and evaluate. Moreover, opinions of the observer perspective seem to be a more relevant line of inquiry for the organizations involved in the system (such as the American Bar Association) that desire to know how their work is being received by the members of the society the organizations serve.

¹⁰³ These variables might be expected to differ between Reno and Carson City, which might raise question as to the comparability of the responses from the attorneys in the respective areas. However, I note that defense attorneys in Reno often practice in Carson City, so their responses are shaped by both regions; thus including both the opinions of attorneys who practice in Reno as well as those that practice in Carson City should not have an effect on the conclusions. Additionally, the rules of evidence and procedure are the same in Reno and Carson City due to the implementation of such rules

I interviewed five prosecutors, five private defense attorneys, and five public defenders, as well as an influential and high-ranking judicial officer to get a comprehensive picture of the professional perspective.¹⁰⁴ The interviews were unstructured, though they focused on the same topics and I posited the same set of questions to each interviewee.

The following is a list of the questions I asked the interviewees, in order that they appeared in the interviews:

1. How would you describe the goal of the system?
2. What is the purpose of requiring prison time for criminal offenses?
3. Do you believe “eye for an eye” is an accurate representation of the system’s outlook on punishing crime?
4. In one word, describe the defense attorney.
5. Given that the basic role of the system is to serve justice, how does the defense attorney fit in?

on a state level. However, I do acknowledge that the relationship between the agents and the amount of judges differs between Reno and Carson City. For the purpose of the interviews in generating a picture of the professional perspective, these variables had little impact.

¹⁰⁴ I note the limitation of application of the professional perspective as only attorneys in the Reno and Carson City area were interviewed for this project. The professional perspective cannot be generalized in the same way that the observer perspective could be insofar as the latter is based on evaluation of public opinion surveys conducted in various areas across America and the former is based on interview data from a small area. However, in the sense that this project intends to capture the nature of the distinction between the professional and observer perspective, the scale of generalization of those perspectives is not significant. The professional perspective of the Reno and Carson City agents is merely an example of the professional perspective to serve as a basis for comparison to the observer perspective.

6. How does your responsibility as a defense attorney (or a prosecutor, *if the interviewee was a prosecutor*), differ from that of the prosecutor (or the defense attorney, *if the interviewee was a prosecutor*)?¹⁰⁵
7. Have you had cases where you believed the defendant was guilty (or innocent, *if the interviewee was a prosecutor*). Did that change the way you approached the case? If so, how? How did you feel about defending a guilty person (or prosecuting an innocent person, *if the interviewee was a prosecutor*)?
8. Have you had an experience with a member of the public in which they questioned your character after they found out that you were a defense attorney (or prosecutor, *if the interviewee was a prosecutor*)? If yes, describe what happened.

These questions were intended to provoke a free-flowing conversation about the interviewees' experiences and personal-professional opinions about the topics, and thus flowed according to those topics in which the agent expressed special interest or concern. While I asked the questions in the same order, I asked additional follow-up questions throughout the interview based on their responses. Thus, each interview was unique in that the conversation progressed in different ways and provoked varying responses. For instance, when I asked question 3, one interviewee responded that the notion of "eye for an eye" severely under-represented the spirit of sentencing defendants to prison time. The interviewee's answer spurred a discussion about what they meant by the "spirit of

¹⁰⁵ At this point in the interview, the questions began to delve into the interviewees' personal experiences working in the system. Since the judicial officer I interviewed was a public defender before they became a judicial officer, I asked about their past experiences as a public defender for questions 6, 7, and 8.

sentencing,” why the notion of “eye for an eye” is not an accurate depiction of the use of prison time, and how the use of prison time might be better understood. Since no other interviewees responded in the same way to question 3, I did not initiate the follow-up discussion with the other interviewees.

I did not tell the interviewees the intention of my project before the interviews began, stating merely that I was interested in evaluating the purpose of the criminal justice system and the role of the defense attorney within the system. I emphasized that the interviewees were free to refrain from answering questions they did not wish to answer, and that they could end the interview at any time. I closed the interview by describing my project in more detail and ensuring the interviewee had no questions or concerns about the process.

b. Results

The responses varied among the interviewees, but not in the way that I anticipated. I anticipated there would be general opinions and take-aways shared by members of the same agent group (i.e. prosecutors would appear to approach the system one way, private defense attorneys another, public defenders still differently than the other two groups), but that was not the case. Themes emerged from the interviewees’ responses, but the apparent differences occurred among the individuals’ viewpoints and opinions based on their personal experience working in the system, rather than on the basis of their roles.

I have divided this section into two subsections discussing the interview responses as they relate to the purpose of the criminal justice system (questions 1 through 3) and the role of the defense attorney (questions 4 through 8).

1. The Purpose of the Criminal Justice System According to the Professional Perspective as Demonstrated by the Interview and Panel Data

On a broad view of the system, the general consensus expressed by the attorneys was that the system's purpose is to do justice. Notably, almost none used the phrase "serving justice," choosing instead the phraseology "doing justice." The I considered to use of this terminology to be an indication of the level of agent involvement in achieving justice. Though the substitute of "doing" for "serving" may chalk up to training and established legalese, the concept of "doing" rather than "serving" justice seems to communicate that justice is not an abstract ideal which exists somewhere in objective reality to be realized by the system, but rather that justice is *created* via the efforts of the agents.

The similarity in responses then diverged. The different takes of the agents on what "justice" means included enforcing the law, rehabilitating offenders, protecting society, and punishing criminals. The most commonly cited objective was protecting society, which includes the falsely accused and overcharged. Many of the participants, defense attorneys and prosecutors like, described the ultimate objective as getting an individual out of the system and ensuring they did not go on to commit (potentially more) crime. Several described the goal of the system by referencing multiple objectives. For

instance, the another common response was that the system, as it works now, punishes offenders and protects society.

All of the attorneys acknowledged the pervasive influence of punishment and retribution in the system as it currently operates, even if they did not identify it as the ultimate purpose of the system. In fact, one agent asserted that the system is “obsessed with punitive measures” to an unreasonable degree. Another attorney, a prosecutor, indicated that the system’s punitive approach culminates in a complete lack of “art, soul, or recognition of human differences and suffering.” That same attorney described retributivism as a romantic outlook on crime response, a black-or-white approach, so to speak: you do this, we punish you. Two referred to the fact that America has the largest prison population relative to its total population to show retributivism’s hold on the system. One theorized that prison time is used as a default to shuttle as many defendants through the system as possible, and carries the intended side effect of punishing offenders for the mere purpose of punishing them. Almost all of the interviewees said prison time was valued for its retributive and punitive effects. Three highlighted the lack of adequate treatment programs. One attorney said the use of prison time has remained the default because it is the “easy” solution to crime, and that people—including the agents in the system—do not understand the complete impact of incarceration.

As for the accuracy of the notion of an “eye for an eye” in representing the use of prison time, almost none of the attorneys said it was an accurate statement. I was surprised to find that only three of the attorneys agreed that “eye for an eye” was an accurate conception of sentencing policies. Seven attorneys said that punishment was more for an “eye for an eye,” because a sentence does not just depend on the crime, but

also on the offender's history, what the victim wants, the degree of violence, and the like. The fact that more than just the crime is considered when imposing a sentence indicates that the sentence is not proportional to the crime, and many attorneys referenced sentences for petty crimes (such as fifteen years for attempted sexual assault) as examples of sentences which were far harsher than what the crime warranted. Additionally, many said "eye for an eye" failed to capture the system's operation because punishments were not equivalent, but proportional to the crime, which reiterated the predominance of retributivism in contemporary sentencing policies.

Critically, the majority identified retributivism as the main focus of the system since the 1970s, but indicated that the modern system is slowly moving, or trying to move, away from retributivism. The reason the retributive mindset was so popular in the 1970s was because at that time, the public deemed that reform of the criminal was not guaranteed to be effective, that it took too long to change the criminal mentality and intention, and that "nothing else worked." Despite this assessment, virtually all of the attorneys, particularly the defense attorneys, lamented the fact that the system's focus was so punitive. Instead of that punitive vision, these attorneys articulated a vision of a system committed to improving individuals and taking a compassionate and empathetic approach to understanding and addressing the causes of crime. In fact, I found that many of the attorneys were enthusiastic about speaking about rehabilitation and its rise in influence over the system's operation. Most of the attorneys said that they have seen a dramatic increase in rehabilitative efforts in the last decade. Those rehabilitative efforts, according to more than eight of the respondents, were not just occurring in Reno and

Carson City; it was their impression that the changes in rehabilitative focus were also occurring on a nationwide level.

This message was reflected in the paneled seminar I attended following one of the interviews. The seminar covered the change in focus of the Nevada criminal justice system from retributivism to rehabilitation that was initiated by Governor Sandoval in 2015. The panel referenced the ever-increasing prevalence of specialty courts¹⁰⁶ as evidence of the shift toward rehabilitation. These specialty courts are relevant because they disrupt the practice of assigning prison time as the default sentence. The specialty courts make the realization of rehabilitating offenders possible, at least more so than before.

Additionally, the panelists stated that mandatory sentencing guidelines are being reconsidered, and more educational, vocational, and treatment programs are being introduced in the prisons. Some states are initiating overhauls of their criminal codes to redefine crime and alter corresponding punishments, and to leave sentencing to the discretion of judges rather than legislators. Judges are being trained to recognize underlying substance or mental health issues and to identify pertinent treatment programs as alternatives to incarceration. In fact, some states are incorporating new training for law enforcement so that officers can identify alternative ways to respond to crime than with arrests and criminal charges.

¹⁰⁶ Specialty courts offer programs specially designed to treat and address the specific needs of groups of individuals who experience challenges such as substance abuse, mental health issues, PTSD following military service, or homelessness. The list of issues addressed in specialty courts is growing, united by the factors' influence in causing criminal activity. In some cases, if a defendant is successful in a specialty court, they can get their charges dismissed and go on with their lives without the collateral consequences of a criminal conviction.

One interviewee indicated that the push toward rehabilitation was spurred by the opioid crisis experienced in the early 2000s, because it changed the way people thought about offenders. Suddenly, the criminal wasn't the typical mean, menacing monster lurking in the neighborhoods. Instead, people envisioned their family and friends as the defendants, essentially victimized by opioids and victimized by the system.¹⁰⁷ At that point, it seemed the people in control of the system became more interested in using it to help the offenders because it became personal for them. Intuitively, this makes sense; people are much less apt to support a harsh-on-crime approach when it is them or someone they know on trial. The opioid crisis prompted society to consider the implications of the retributivist approach, and rehabilitation efforts have been taking hold since. Moreover, the panel identified the rise in specialty courts and alternatives to incarceration as an effort to reduce government costs, specifically of housing inmates, following the Great Recession.

¹⁰⁷ It is important to acknowledge the influence of race on society's response to the opioid crisis. The re-characterization of the typical "criminal" which inspired people to consider methods of treatment over handing out the default prison time was, in large part, due to the race of the defendants that were getting caught up in the system as a result of the opioid crisis. That is, prior to the opioid crisis, the majority of drug-related offenses that were processed by the criminal justice system (and thus the typical picture of the drug offender) involved people of color. However, following the opioid crisis, the number of white offenders skyrocketed because whites are prescribed opioids at a far higher rate, and whites are addicted to opioids at far higher rates, than non-whites.¹⁰⁸ Consequently, many whites found themselves and people they knew suffering the retributive consequences, and becoming the typical picture of the drug offender. The result of this shift was a want of complete overhaul of sentencing procedures for drug-related cases; hence, the more readily accepted rehabilitation alternatives.¹⁰⁹

¹⁰⁸ Helena Hansen and Julie Netherland, "Is the Prescription Opioid Epidemic a White Problem?" *Am J Public Health* 106, no. 12 (2016): 2127-2129. doi: 10.2105/AJPH.2016.303483

¹⁰⁹ Anjali Om, "The Opioid Crisis in Black and White: The Role of Race in our Nation's Recent Drug Epidemic," *Journal of Public Health* 40, no. 4 (2018): 614-615. doi: <https://doi.org/10.1093/pubmed/fdy103>

Although the system is slow to implement rehabilitative practices into the adult system, two of the interviewees stated that the criminal justice system already treats juveniles in a rehabilitative light. One attorney described the system's approach to handling juvenile offenders as similar to that of the system's handling of victims. The attorney stated that the juvenile system offers extensive resources to both victims and juvenile offenders, including substance abuse treatments, homelessness relief, and counseling. By offering these resources, it is clear that the juvenile system successfully recognizes that juvenile offenders are often not making rational decisions to commit crime and instead are acting on account of those crime-causing factors (substance abuse, homelessness, undiagnosed mental illnesses, etc.). This recognition of the influence of crime-causing factors culminates in treatment programs for offenders, where those programs are intended to relieve the influence of the crime-causing factor on the juvenile offender and reduce the possibility of the juvenile continuing to commit crime. This routine treatment of juveniles begs the question, why is rehabilitation not a standard practice for adult offenders? What is it about juveniles that permits the system's recognition that their crimes are not a reflection of their poor character or moral judgment? Why does the adult system fail to recognize that crime factors can be addressed to improve the defendant and shape them into law-abiding members of society, like the juvenile system does? Why are adults not treated with the same compassion and understanding as juveniles?

The interviewee responses revealed the same theme about the purpose of the criminal justice system that the observer perspective did: retributivism in practice, but rehabilitation as the ideal. Notably, however, the professional perspective views the goal

of rehabilitation as being increasingly incorporated into the criminal justice system and overtaking retributivism as the focus of the courts; the observer perspective does not adopt this view.

In addition to explaining what the system does, many of the attorneys also discussed what the system does not do. Some of the attorneys suggested that the system is not concerned with fairness or what makes sense. For instance, many times, the interest of the victim seems to be the ultimate priority of the system, when there are realistically a lot of other interests—including that of society at large—that should be considered in every step of the process. As a result, sometimes the case outcomes favor the victim to an extreme and set a bad precedent for future claims and future cases. To illustrate, one attorney told me about a domestic violence case in which the defendant's soon-to-be-ex-wife claimed that the defendant hit her and her child. There were no injuries or corroborative evidence aside from the testimony of witnesses living next door who had heard screaming and shouting from the woman. The defendant was convicted in spite of the lack of evidence, and the wife went on to get full custody of the child, most of the property and a large sum of money in the divorce proceedings, and a protection order against the defendant. The defendant also lost his job. That result, the attorney iterated, does not seem just.

Additionally, the attorneys criticized the failure of the system to approach cases on a case-by-case basis. They asserted that it declines to recognize that circumstances matter, and tries to apply a one-size-fits-all approach to crime (which is to send offenders to prison).

2. The Role of the Defense Attorney According to the Professional Perspective as Demonstrated by the Interview and Panel Data

The objective which the interviewees identified as the purpose of the system shaped the way they described the role of the defense attorney in the system. In all cases, the defense attorney was identified as an advocate for their client. The one word the interviewees used to describe the defense attorney related to their fighting for or protecting rights, and their relationship to the client. Most described the technical responsibility of the job as determining and executing the proper procedure specific to a case, whether that be a trial or a plea deal, while fighting evidentiary issues and Constitutional violations.

For those who had emphasized the predominantly retributive approach of the system without referring the system's in-progress shift to rehabilitation, the defense attorney was described as acting as more of a check on the prosecutor and law enforcement, and serving as a guarantor of due process and Constitutional rights to ensure that the state proved that the defendant committed the crime and should be punished. One attorney noted that rules of procedure for the government and law enforcement are, in fact, laws, and those laws must be followed regardless of the evidence against the defendant and or how easily a crime may be proved. Perhaps more important than reaching a verdict, this same attorney argued, was going through the process the correct way, and making sure everything in the system functioned properly and that the evidence was, indeed, what it was purported to be. In terms of sentencing, the retributive-focused interviewees said the defense attorney was to secure the best and most

reasonable sentence for the client. One attorney specifically defined the best sentence as “the least amount of prison time.”

Those who framed the discussion in the light of the shift toward rehabilitation¹⁰⁸ described the defense attorney as trying to capture the myriad of factors leading to criminal activity. The purpose of the providing the bigger picture was to provoke discussion of ways to treat the underlying issues rather than just throwing the offender in prison. Many of the rehabilitation-focused defense attorneys described their job as “fixing” the client via a holistic and compassionate approach. They recognized their duty to emotionally support the client and build a relationship of trust to make the client believe in themselves and in their case, and in cases where the defendant was guilty, help the client recognize the potential for ongoing self-development and productively move forward with their lives. One attorney emphasized the importance of humanizing the client for the jury to ensure the jury saw the client as a human being, with the hope of influencing the jury to think of the crime as a mistake and see the possibility of the defendant’s personal development. One defense attorney emphasized the importance of encouraging the prosecutor, and potentially the jury, to envision walking a mile in the defendant’s shoes. This attorney emphasized the critical skill and function of persuading the prosecutor to see the crime from the other side. This thought was reiterated by another defense attorney, who said that the prosecutor typically tends not to give due

¹⁰⁸ Notably, this discussion about rehabilitation centered around a presupposition that the defendant in the case was, in fact, guilty. In situations in which the defense attorneys thought the client was innocent, the defense attorneys voiced priority in getting the case dismissed or getting an acquittal at trial, rather than trying to come up with a treatment program to address the underlying crime factors and rehabilitate the defendant (since, with innocent clients, there was theoretically no need to rehabilitate them because they had not committed the crime).

consideration to the defendant's vantage point when they evaluate the facts of a case. Part of this lack of considering the defendant's position is due to the fact that the prosecutor generally does not have the same information about a defendant as the defense attorney does, which is exactly why the defense attorney's role is so important.

The defense attorneys distinguished their role from the judge and jury by denying any practice of making a judgment of guilt about any of their clients. All of the defense attorneys said that it was not their place to make a judgment about a defendant's guilt or innocence, and in fact all but one said that guilt or innocence did not matter, for the client deserved the same representation regardless. Many attorneys recalled times they had represented particularly dislikable clients, or clients accused of, and previously been found to have committed, egregious crimes, but cited Constitutional and due process rights owed to the client in spite of their un-likeability or guilt. All of the defense attorneys I interviewed stated that defending a client they thought was factually innocent was far harder than defending a client they thought was factually guilty. Two defense attorneys had experienced what it was like to lose a case in which the client was innocent, and both said that the experience stuck with them for years.

A common sentiment among the attorneys, prosecutors and defense attorneys, was that above all, the defense attorney should pursue the best interest and outcome for the client in every case. Without exception, the defense attorney was described as having a deep loyalty to their client. Often, that loyalty takes the form of empathizing with them. One of the defense attorneys said that offenders are the "worst society has to offer with respect to mental illnesses, drug dependencies, and the disenfranchised," yet despite this, they are still human beings deserving of compassion. Many of the other defense attorneys

and one of the prosecutors—who had previously been a defense attorney—echoed this sentiment. In many cases, the participants said, the offender deserves a second chance. It is the defense attorney who tells the defendants’ stories and helps them get that second chance. As one defense attorney put it, “being a defense attorney, you are exposed to know what that life is like through the client, and it makes it personal; suddenly, you have more of an understanding” and a drive to reveal that insight in a way that can cut the client the break they need.

V. In Defense of the Defense Attorney: Dismantling the Argument from the Observer Perspective

In this section, I address the Incompatibility Thesis I offered in Section III on behalf of the observer perspective. The material I collected from my interviews with the attorneys is critical to my critique of the explanation. By refuting the observer perspective’s argument against defense attorneys, I will identify errors in the observer perspective’s evaluation of defense attorneys.

For ease of analysis, I shall put my reconstruction of the observer perspective’s argument (provided in Section III0 in premise-conclusion form:

Premise 1: The goal of the criminal justice system and thus the form of justice itself is retributivism.

Premise 2: The role of the defense attorney is to secure an acquittal in the case of trial, or a lesser punishment or charge during plea negotiations.

Premise 3: Assuming a defendant is guilty, securing an acquittal, or a lesser punishment or charge, effectively helps a criminal offender evade due punishment.

Premise 4: For their part in helping the criminal offender evade due punishment, the defense attorney undermines retributivism.

Conclusion: Because the defense attorney undermines retributivism, the defense attorney undermines the criminal justice system and justice itself.

I will address the flaws of each premise and the conclusion in turn. To anticipate, I show to show that the Incompatibility Thesis has no rational basis.

One worry about premise one is that the observer perspective fails to sufficiently acknowledge other motivations of the criminal justice system. As shown in Section I (a)(2) and Section I (a)(3), the position of the observer perspective is that the criminal justice system is primarily focused on punishing offenders, and that the other objectives are a secondary benefit of the administration of punishment. To the extent that the defense attorney's actions further non-retributivist objectives, those actions can seem to violate the demand of justice. However, this position fails to consider those actions as a component of a non-retributivist framework in light of the more complete view of the system as a whole. The complex and varied roles of the defense attorney are oversimplified when one considers their actions only with an eye to retributivism. Against premise one, I argue that while retributivism is a predominant aim of the criminal justice system in its contemporary functioning, there are other equally prominent objectives, such as rehabilitation. The influence of rehabilitation in the system's operation (i) rebukes the assumption of an exclusively retributivist criminal justice

system, and (ii) problematizes any evaluation of the defense attorney from an exclusively retributivist standpoint. Since the system is not identified with retributivism, then even if we assume that the defense attorney violates retributive principles, it does not follow that the defense attorney works against the system or against justice.

The concern with premise two is that it oversimplifies the role of the defense attorney. Section IV (b) described the ways that defense attorneys and prosecutors think of the defense attorney role, and almost none of them described it in the way that premise two describes it. If acquittals and pleas are not the motivation of the defense attorney in their work, then it cannot be said that their work helps criminals evade punishment.

Premise three errs in relying on the presupposition that the defendant is always guilty. It is based on this presupposition that the argument concludes that the defense attorney generally works against the system's attempt to administer justice: if every defendant is guilty, then every defendant evades punishment and every defense attorney is culpable of undermining the system and undermining justice. However, such a presupposition means the argument fails to consider situations in which the defendant is not guilty. Neglecting consideration of cases involving innocent defendants effectively permits every situation to be considered an evasion of due punishment because the only ones being considered are those in which the defendant is guilty and is not punished accordingly. Moreover, disregarding cases in which the client is not guilty fails to acknowledge that sometimes the defense attorney is the agent responsible for the realization of a result that even the retributivist would deem just: Namely, when the system successfully acquits an innocent defendant. Such a situation is relevant because if the observer perspective preoccupies itself with instances in which the defense attorney

contributes to bringing about what, by a retributivist account, are unjust results, then a simple rejoinder presents itself: Cite situations in which the defense attorney contributes to outcomes that are unequivocally just even by retributivist standards. By virtue of its demand to consider only cases culminating in an unjust result, premise three is an inaccurate portrayal of the defense attorney role. When all effects of the role are accounted for, specifically the successful protection of the innocent, premise three loses some authority because it is only partially true.

Additionally, in the event that the defense attorney successfully procures a lesser charge or punishment for their client, it does not necessarily follow that the lesser charge or punishment is an evasion of due punishment. There is arguably a lower degree of punishment warranted for defendants convicted by way of plea deals, because plea deals arise from the prosecutor's recognition that there is not enough evidence to prove that the defendant committed the crime beyond a reasonable doubt. For plea deals featuring lesser charges or punishments, it is possible that the punishment of the offender is more proportional to the crime, at least in terms of what is known about it based on the evidence, than the punishment for the original charge would be. Similarly, prosecutors sometimes overcharge, and plea deals ensure that the defendant is not punished to a degree proportional to the overcharged crime, because the punishment would be in excess of the degree warranted by the crime. In fact, I would argue that even in the context of retributivism, the defense attorney ensures that only those who deserve punishment are punished, and that the punishment is of the proportionally appropriate degree.

Premise four, given its relationship with premise three, does not hold in cases where lesser charges or punishments are more proportional to the crime than the original

charge. More specifically, since there is no evasion of punishment, there is no violation of retributivism. Moreover, premise four faces a potential challenge insofar as the intention and motivation of the defense attorney's efforts factor into the judgment of their culpability as it relates to violating retributivist principles. Referring to the assertion that the defense attorney is responsible for violating retributivism because they help the defendant evade due punishment, I think there is something to be said for the intent behind and motivation of the defense attorney's actions which intonate that the defense attorney is not exclusively, or at least primarily, concerned with helping the defendant evade due punishment. As discussed in Section II (b), the defense attorney's role is not to help their clients evade punishment, but rather to ensure their rights are respected, and that the presumption of innocence is protected. Granted, these ends sometimes result in guilty clients evading due punishment. However, the fact that such a situation results from the necessary efforts to protect rights and the presumption of innocence dilutes the claim that the defense attorney violates retributivist principles. If anything, it seems that mandating that the defendant is proven to have committed the crime beyond a reasonable doubt would ensure that only those defendants truly guilty of the crime are punished accordingly. Thus, for their part in protecting the presumption of innocence, defense attorneys actually perfect retributive justice by ensuring it is only administered to those it is due, to the degree it is due. Consequently, it cannot be said that the defense attorney, merely for sake of their role, violates retributivist principles.

On its own merits, the conclusion, like premise one, mistakenly presupposes that retributivism is both the purpose of the criminal justice system and the equivalent of justice itself. In addition to the concerns I identified in my analysis of the first premise,

there is a separate point to be made about premise five's assumption that defense attorneys' actions subvert justice itself. Just as the system's goal involves more than punishing criminals, the achievement of justice is not just the punishment of criminals. Justice, understood within the parameters of the criminal justice system, is just the correct determination of guilt or innocence. As discussed in the critique of premise three, the defense attorney is critical in coming to that determination. In fact, that determination of guilt or innocence cannot be reached without the participation of all agent in the process. Since every agent is needed in the process, it follows that the defense attorney is necessary to the operation of the criminal justice system and the administration of justice. By virtue of their necessity in the system and to justice, it cannot be said that defense attorneys subvert justice. While there are scenarios in which defense attorneys assist in bringing about an unjust result by acquitting a guilty client, there are also situations in which defense attorneys assist in bringing about the just result of acquitting an innocent client. Achieving the part of justice concerned with the acquittal of innocent clients necessarily entails that the efforts of the defense attorney can secure acquittals for guilty clients as well. It cannot be said that because the defense attorney's efforts sometimes result in injustice by acquitting a guilty client, that it follows that defense attorneys circumvent justice generally. Like premise three, premise five demands that we ignore the totality of the defense attorney's role.

In light of the objections to the Incompatibility Thesis identified in this section, the observer perspective's opinion of the defense attorney seems to have little backing. The observer perspective's negative attitude toward defense attorneys on these grounds is unfounded. The fact that there is no justification for the belief suggests that the observer

perspective can be changed to more accurately appraise the actions of defense attorneys. Perhaps correcting the observer perspective starts with expanding the view of the system's goal, and justice generally, to reflect more than the mere administration of convictions and punishments to offenders. If the observer perspective expands its vision of the system's purpose, it makes room to acknowledge that the one-in-four scenario of a guilty defendant being acquitted does not erode the situations in which the defense attorney is necessary to reach a just result.

VI. The Effect of Rehabilitation as the Primary Purpose of the System on the Observer Perspective

The Incompatibility Thesis, offered in Section III and critiqued in Section V, evaluates the defense attorney role in the context of retributivism. This section features an argument in the same grain, but assumes rehabilitation to be the purpose of the criminal justice system instead of retributivism. As the argument will show, viewing the system as rehabilitating rather than punishing offenders could significantly change the way the defense attorney is viewed.

As shown in Section IV (b), rehabilitation is becoming a prominent goal of the system, especially in Nevada. The agents working within the system find that rehabilitation better describes its end, especially as time passes and the courts finds new and more effective ways to treat criminal offenders and reduce recidivism. In my interviews, prosecutors and defense attorneys described their job efforts in rehabilitative

terms. Both prosecutors and defense attorneys expressed more interest in improving the criminal and ensuring their successful participation in society than in punishing the offender for the mere sake of punishment (though not rejecting punishment altogether). This framing of the roles is significant because, as agents of the system, their experiences are a direct reflection of the system. Since the professional perspective has more insight into the system's functioning than does the observer perspective, it seems substantial weight should be given to the professional perspective's tendency to view the system as rehabilitative, not retributive.

Acknowledging the function of rehabilitation in the proceedings and objectives of the criminal justice system, the role of the defense attorney becomes more integral to the attainment of justice. When the effort of the system is to ameliorate causes of crime, the information about the defendant critical to assessing those causes and determining an effective treatment is known only to, or at least primarily by, the defense attorney. Since the nature of the defense attorney's role connects them to the defendant in a way that no other agents' roles permits, the defense attorney becomes pivotal in the rehabilitation of offenders.

The defense attorney is the only agent that is privy to the emotional, mental, and physical status of the defendant. Substance abuse and mental health issues are likely to be ignored or neglected in the purview of the case facts alone, which is all the other agents would have to go on without the information gathered and offered by the defense attorney. Often, it is in response to independent defense investigations and defense-initiated professional evaluations that mitigating factors arise. For instance, one attorney described a case in which their client was battling an undiagnosed mental disorder, and

had committed a trivial crime during their first manic episode; the client's mental health was not on the table until the defense attorney, based on a single statement from the client, requested a mental health evaluation from a third party professional. The evaluation showed the degradation of the client's mental health, and in response, the prosecutor offered a deal exchanging diagnosis and medical treatment of the mental illness for diversion and eventually dismissal of the case.

It is these mitigating factors--mental illness, substance abuse, and the like--which may mandate that a client is treated instead of punished. Since it is the job of the defense attorney to bring these factors to the attention of the prosecution, the court, and potentially a jury, their role in achieving justice for the offender and society are paramount to the system's ability to do what, in the agents' eyes, it is intended to do: treat and improve the offender so that they do not commit further crime.

Moreover, for cases in which factors causing criminal activity become known, the guilt or innocence of the offender arguably becomes less important. In the rehabilitative eye, the goal of the system is to address the causes of crime, rather than judging and punishing the crime. The criminal justice system becomes a means of identifying individuals with underlying issues which may have caused them to commit a crime, or may cause them to commit crimes in the future. The system's subsequent efforts to address those issues not only improves the individual, but also society at large.

The system has taken steps to realize rehabilitation, demonstrated by the increasing number of specialty courts and diversion programs, but it appears the observer perspective does not yet recognize this change. Adopting the rehabilitative framework, the defense attorney becomes crucial in achieving justice, and so I surmise that if the

observer perspective were to recognize rehabilitation as the system's end goal, then the observer perspective's opinion of the defense attorney would significantly improve. The results of Section I (a)(2) show that even though the observer perspective identified retributivism as the criminal justice system's current purpose in practice, the observer perspective indicated an interest in seeing the system move toward rehabilitative justice. The interest in rehabilitation suggests that the observer perspective would likely value the defense attorney as the agent whose efforts make rehabilitation possible and effective, and that it may be a simple transition from seeing rehabilitation as an ideal goal to one that is gaining ground in the contemporary operation of the American criminal justice system.

VII. Conclusion

When it comes to its relationship to the criminal justice system, the American population is not monolithic; depending on peoples' perspective of the system's operations, their attitudes will vary. Throughout this project, I focused on the observer perspective, which I identified as the viewpoint belonging to the portion of the population not working in the criminal justice system and not directly involved in a criminal case. Studies and jurist evaluations indicate that the observer perspective regards the system's purpose as achieving retributive justice, or the punishment of criminal offenders proportional to their crimes. Yet these same studies reveal that the observer perspective

recognizes rehabilitation, or the holistic improvement of the offender, as the ideal goal of the system, yet dismisses its active role in the contemporary system.

Having established the nature of the criminal justice system as seen by the observer perspective, in the second section, I set up the foundation for my evaluation of the observer perspective's attitude toward defense attorneys. I described the role of the defense attorney in the system by reference to the expectations of the role laid out in the ABA's *Model Rules of Professional Conduct*. *The Rules* identify the defense attorney, out of the four agents of the criminal justice system, as the only agent committed to the interests of the defendant in a case. The section found the defense attorney to be responsible for securing the best outcome for the defendant in a case. For the most part, that best outcome consisted of a lesser punishment or lesser charge at the plea negotiation stage, or an acquittal if the case proceeded to trial.

In the third section, I reviewed numerous studies which demonstrated the observer perspective's negative opinion of defense attorneys. The studies reveal that defense attorneys are commonly associated with unpalatable traits, such as coldness, selfish calculation, and lack of moral scruples. I reconstructed a possible argument to explain this negative opinion, which I called the Incompatibility Thesis. Given that the observer perspective sees the system as committed to delivering punishment, I posited that defense attorneys seem to usurp the system's efforts, and justice itself, by seemingly helping the defendant evade punishment for their crimes.

To provide a basis for my critique of the Incompatibility Thesis, in section four I introduced the professional perspective. This project's version of the professional perspective was shaped by insight provided by prosecutors and defense attorneys during

interviews I conducted in the Reno and Carson City areas of Nevada. Those interviewed were intended to determine the attorneys' take on the purpose of the criminal justice system and the role of the defense attorney. Notably, not only did these opinions differ from the conclusions offered in sections one and two, but the responses revealed that the professional perspective and the observer perspective view the system as achieving two different forms of justice: rehabilitation and retribution, respectively. The insight from the professional perspective lends credence to the view that rehabilitation is a more accurate account of the criminal justice system and that the role of the defense attorney is much more complex than the observer perspective realizes.

In section five, I critiqued the Incompatibility Thesis. I identified such as the fact that the observer perspective overly simplifies the defense attorney's role and considers only those situations in which the defendant is guilty and the case result is unjust. Those objections demonstrated that the Incompatibility Thesis is unfounded, and thus the observer perspective's attitude toward defense attorneys has no rational basis.

The dissolution of the Incompatibility Thesis provided the base for the discussion in the sixth and final section. In that section, I reevaluated the role of the defense attorney from the view that rehabilitation is the primary objective of the criminal justice system. My argument retrieves the necessary role of the defense attorney role in rehabilitative justice. I hypothesize that the observer perspective's opinion of defense attorneys would approve if it were to view the system in a rehabilitative light and realize that rehabilitative justice is not possible without the work of defense attorneys.

In sum, I argued that the negative opinion of defense attorneys exhibited by the observer perspective is explained by the apparent incompatibility of the role of the

defense attorney and the retributivist purpose of the system. I argued that if the observer perspective were to recognize that the system also prioritizes the rehabilitation of offenders and considers the interacting roles of the agents within the system, the observer perspective's opinion of defense attorneys would be more favorable. Certainly, this project alone will not completely enlighten the observer perspective, but by developing a basis of foundational premises to challenge the observer perspective, this project suggests a way to improve the observer perspective's opinion about defense attorneys by changing the way it views the system.

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