

3-1-2021

## Violent Videos: Criminal Defense in a Digital Age

Amy Kimpel

*University of Alabama School of Law*, [akimpel@law.ua.edu](mailto:akimpel@law.ua.edu)

Follow this and additional works at: <https://readingroom.law.gsu.edu/gsulr>



Part of the [Criminal Law Commons](#)

---

### Recommended Citation

Amy Kimpel, *Violent Videos: Criminal Defense in a Digital Age*, 37 GA. ST. U. L. REV. 305 (2021).

Available at: <https://readingroom.law.gsu.edu/gsulr/vol37/iss2/5>

This Article is brought to you for free and open access by the Publications at Reading Room. It has been accepted for inclusion in Georgia State University Law Review by an authorized editor of Reading Room. For more information, please contact [gfowke@gsu.edu](mailto:gfowke@gsu.edu).

## VIOLENT VIDEOS: CRIMINAL DEFENSE IN A DIGITAL AGE

Amy F. Kimpel\*

### ABSTRACT

*Digital video evidence has exploded into criminal practice with far-reaching consequences for criminal defendants, their attorneys, and the criminal legal system as a whole. Defense attorneys now receive police body-worn camera footage, surveillance video footage, and cell phone video footage in discovery in even the most routine criminal cases. This Article explores the impact on defense attorneys of reviewing this avalanche of digital evidence. The author posits that the outsized role of digital evidence in criminal cases is taking a toll on defense attorneys in general—and public defenders in particular—resulting in increased burnout and secondary trauma.*

*This Article includes results from a recent survey by the author that indicate that public defenders are increasingly exposed to disturbing digital content—videos capturing violence by clients, police, and others. The survey further suggests that these images are impactful, increasing the emotional workload of defense attorneys and exacerbating burnout. Videos with violent or emotional content can also strain the attorney–client relationship by collapsing the distance between attorney, client, and crime. Implicit racial bias can also color what we see when viewing violent videos. These trends raise new concerns about defense attorneys’ abilities to advocate zealously for their clients and meet constitutional standards, particularly for public defenders whose caseloads require more*

---

\* Director of the Criminal Defense Clinic and Assistant Professor of Clinical Legal Instruction, University of Alabama School of Law; J.D., New York University School of Law; M.A., B.A., Columbia University. Thanks to Candis Mitchell, Karina Alvarez, Yaamini Rao, and Arley Lindberg for their input in the development of this Article and to the over 200 public defenders who took time out of their busy schedules to complete my survey. I am indebted to Michael Pinard and the other participants of the 2019 Clinical Law Review’s Writer’s Workshop hosted at the New York University School of Law. Thanks also to Erica Zunkel, Jenni Cox, Allyson Gold, Ben McMichael, Shalini Ray, Courtney Cross, Casey Faucon, John Acevedo, Fred Vars, Meghan Boone, the editors of the *Georgia State University Law Review*, and, of course, Rita C. Rodriguez.

*frequent interaction with digital video evidence and whose day-to-day practices have been reshaped dramatically by its presence. Finally, this Article suggests strategies to address the added toll of digital content on defense attorneys to ensure that defendants receive effective representation in the digital age.*

## CONTENTS

INTRODUCTION .....	308
I. THE GROWTH OF DIGITAL CONTENT .....	313
A. <i>Mental Health Impact of Graphic Content</i> .....	315
B. <i>Police BWCs and Viral Videos of Police Violence</i> .....	321
C. <i>Public Defender Survey Results</i> .....	327
II. IMPACT ON ATTORNEY COMPETENCE .....	338
A. <i>Background Mental Health Concerns for Public Defenders</i> ....	339
B. <i>Impact of Digital Content on Individual Attorneys</i> .....	344
C. <i>Impact on Offices and Institutions</i> .....	348
III. TENSION IN THE ATTORNEY–CLIENT RELATIONSHIP .....	352
A. <i>Identification with the Victim</i> .....	353
B. <i>Dangers of Perspective Bias</i> .....	357
C. <i>Voyeurism and the Attorney–Client Relationship</i> .....	368
IV. STRATEGIES TO ADDRESS DIGITAL CONTENT .....	370
A. <i>Change Criminal Defense Culture</i> .....	371
B. <i>Educate and Train Attorneys</i> .....	378
C. <i>Re-Evaluate Caseload Caps</i> .....	381
CONCLUSION .....	385
APPENDIX A .....	386
APPENDIX B .....	404
APPENDIX C .....	414
APPENDIX D .....	421

## INTRODUCTION

- A public defender watches body-worn camera footage of her client being punched in the face, hit with a billy club, pulled out of a bathroom stall naked, and kicked while on the ground. His cries for help are captured in the recording.
- An attorney reviews surveillance footage of his client performing oral sex on a woman passed out on the sidewalk. Passersby do not stop to see what is happening but merely walk on.
- A public defender reviews police dash camera footage of her client's apprehension and arrest. Her client runs from the police, and they run him over with their police cruiser.
- A criminal defense attorney confides that he has not been able to have sex with his wife since reviewing the child pornography his client is accused of possessing. It has been a few weeks.<sup>1</sup>

Digital media permeates both our world and criminal discovery practice. Fifty years ago, a public defender would typically receive a police report and written witness statements in discovery—perhaps photographs of a crime scene or a staticky tape recording of a post-*Miranda* confession.<sup>2</sup> Nowadays, public defenders routinely

---

1. Some of these examples are based on the experiences of colleagues in the two public defender offices in which I worked: the Santa Clara County Office of the Public Defender and the Federal Defenders of San Diego, Inc. The other examples are collected from an online survey of current and former public defenders. See discussion *infra* Section I.C. The survey and its responses are included in the attached appendices. See *infra* Appendix A [hereinafter Public Defender Survey]; Appendix B [hereinafter Comments to Survey Question 13]; Appendix C [hereinafter Comments to Survey Question 16]; Appendix D [hereinafter Comments to Survey Question 17].

2. This Article focuses primarily on public defenders. An argument can be made that private criminal defense attorneys and prosecutors have similar experiences because they are assigned the same or similar cases. Generally, public defenders are assigned a higher volume of cases as compared to private criminal attorneys, so the risk public defenders face of secondary trauma is multiplied. There are similarities between the ways prosecutors and defense attorneys interact with cases, so much of this Article will be applicable to prosecutors offices as well. But because prosecutors do not have a specific

receive police body-worn camera (BWC) footage, surveillance camera footage, and cell phone-recorded video footage in addition to traditional reports and other paper discovery.<sup>3</sup> No one has systematically explored the effect of this shift on individual criminal defense attorneys or public defender offices.<sup>4</sup> This Article explores the impact this proliferation of video evidence is having on criminal defense practice, particularly on attorneys' mental health, their relationships with their clients, and their ability to be zealous advocates.<sup>5</sup>

The influx of digital media presents obvious benefits to public defenders and criminal defendants<sup>6</sup>—most importantly, digital evidence's ability to exonerate and prove a defendant's innocence.<sup>7</sup>

---

client in a case but rather represent community interests, their experiences are different due to their unique role. *See, e.g.,* Stacy Caplow, *What If There Is No Client?: Prosecutors As "Counselors" of Crime Victims*, 5 CLINICAL L. REV. 1, 4 (1998) ("The critical absence of an individual client to whom a lawyer owes allegiance and whose confidences are protected distinguishes prosecutors from most other lawyers engaged in litigation."). Moreover, prosecutors can dismiss cases when dismissal is in the interest of justice; defense attorneys do not possess that power. *See id.*

3. *See* Jenia I. Turner, *Managing Digital Discovery in Criminal Cases*, 109 J. CRIM. L. & CRIMINOLOGY 237, 237, 239 (2019) ("[V]oluminous digital discovery is increasingly a feature of ordinary criminal prosecutions."); Matt Burgess, *From Fitbits to PlayStations, the Justice System Is Drowning in Digital Evidence*, WIRED: CRIME (Apr. 20, 2018), <https://www.wired.co.uk/article/uk-police-courts-data-justice-trials-digital-evidence-rape-cases-cps> [<https://perma.cc/K6CQ-YL47>].

4. Some defender groups have put out reports about the impact of police BWCs, but these focus on the effects on criminal defendants rather than the defense attorneys themselves. *See, e.g.,* NAT'L ASS'N OF CRIM. DEF. LAWS., *POLICING BODY CAMERAS: POLICIES AND PROCEDURES TO SAFEGUARD THE RIGHTS OF THE ACCUSED* 6 (2017) [hereinafter NACDL], <https://www.nacdl.org/Document/Policing-Body-Cameras> [<https://perma.cc/JL9P-GFXX>].

5. Lawyers in all contexts are required to be zealous advocates. *See* MODEL RULES OF PRO. CONDUCT pmbl. ¶ 2 (AM. BAR ASS'N 2020) ("As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system."); *see also* MODEL RULES OF PRO. CONDUCT r. 1.3 cmt. 1 (AM. BAR ASS'N 2020) ("A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf.").

6. *See, e.g.,* Seth W. Stoughton, *Police Body-Worn Cameras*, 96 N.C. L. REV. 1363, 1365 (2018). Aside from exonerating evidence, BWC footage and cell phone videos have "attracted public scrutiny and widespread criticism of the police." *Id.* (cataloguing videotaped instances of police shootings occurring between 2014 and 2017); *see also* Nicole Smith Futtrell, *Visibly (Un)Just: The Optics of Jury Secrecy and Police Violence*, 123 DICK. L. REV. 1, 8–19 (2018) (discussing how social activists have used video recordings of police violence to prompt conversations about structural problems in policing and to push for legal reform). Defense attorneys and other advocates have also harnessed digital media for a variety of purposes. *See, e.g.,* Raj Jayadev, *Don't Just Say It, Show It: The Use of Video to Humanize Clients and Change the Outcome of Cases*, 35 CORNERSTONE MAG., Apr.–Aug. 2014, at 24, 24 (describing the role of social media in mitigation videos and participatory defense).

7. *See generally* Joshua A.T. Fairfield & Erik Luna, *Digital Innocence*, 99 CORNELL L. REV. 981

This Article should not be read as an argument against the use of police BWC footage or video evidence more generally<sup>8</sup>—video evidence can make our system more accurate and police more accountable. Rather, the purpose of this Article is to document and address some of the challenges presented to public defenders by this technological shift in criminal practice.

Fairness in the American criminal legal system depends on competent defense counsel for the indigent.<sup>9</sup> Being a criminal defense attorney has always been challenging.<sup>10</sup> But being a criminal defense attorney or public defender has become more difficult in the digital era.<sup>11</sup> As BWC footage, surveillance video, and other “eyewitness media”<sup>12</sup> such as cell phone video play an increasingly large role in criminal discovery, public defenders must review larger volumes of digital content. Today, 96% of all Americans own a cell phone, and 96% of Americans aged eighteen to twenty-nine years old

---

(2014). For coverage of police BWC footage being used to exonerate when it captured an officer in Baltimore planting drug evidence to frame a defendant, see Justin Fenton & Kevin Rector, *Body Camera Footage Shows Officer Planting Drugs, Public Defender Says*, BALT. SUN (July 19, 2017, 2:30 PM), <https://www.baltimoresun.com/news/maryland/crime/bs-md-ci-body-camera-footage-20170719-story.html> [https://perma.cc/EH23-7LPZ], Jacey Fortin, *Baltimore Drops Dozens of Cases After Video Casts Doubt on Officers*, N.Y. TIMES (Aug. 2, 2017), <https://www.nytimes.com/2017/08/02/us/baltimore-drugs-police-dismissed.html> [https://perma.cc/DCH5-XSUU], and Kevin Rector, *Baltimore Police Officer Found Guilty of Fabricating Evidence in Case Where His Own Body Camera Captured the Act*, BALT. SUN (Nov. 9, 2018, 12:00 PM), <https://www.baltimoresun.com/news/maryland/crime/bs-md-ci-pinheiro-ruling-20181109-story.html>.

8. In part this is because it is futile to argue against technological advancements like video technology that have already been widely implemented and adopted.

9. See *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) (“[R]eason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth. . . . The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours.”); see also *Powell v. Alabama*, 287 U.S. 45, 68 (1932) (“[T]he right to . . . counsel is of this fundamental character.”).

10. For example, when future President John Adams chose to defend the British soldiers accused in the Boston Massacre, this was an unpopular position that exposed him to possible mob violence. See HILLER B. ZOBEL, *THE BOSTON MASSACRE* 220–21 (1970).

11. Turner, *supra* note 3, at 240.

12. See SAM DUBBERLEY ET AL., *MAKING SECONDARY TRAUMA A PRIMARY ISSUE: A STUDY OF EYEWITNESS MEDIA AND VICARIOUS TRAUMA ON THE DIGITAL FRONTLINE* 4 (2015), for a discussion of the term “eyewitness media.” The term is interchangeable with “user-generated content,” which is essentially media created by firsthand witnesses to events. *Id.* at 8.

own a smart phone<sup>13</sup>—digital surveillance and the potential for digital evidence abound. This presents new ethical challenges and puts defenders at risk for mental health conditions related to secondary trauma.<sup>14</sup> If we do not address these new challenges, we threaten to further erode a cornerstone of the criminal legal system: the right to competent counsel.<sup>15</sup>

This Article proceeds in four parts. Part I discusses the impact of the increased presence of digital media on both our culture and the criminal legal system. This includes the expansion of the *Diagnostic and Statistical Manual of Mental Disorders*' (DSM-5) definition of post-traumatic stress disorder (PTSD) to allow for a diagnosis based on contact with traumatic digital content, the proliferation of police BWCs, and the parallel phenomenon of viral videos of police violence.<sup>16</sup> This Part also contains a discussion of a survey I conducted of over 200 current and former public defenders working in forty states that explores the impact of the increased presence of digital media in criminal defense practice.<sup>17</sup> The survey results suggest that public defenders are facing new ethical, psychological, and institutional challenges because of the increased presence of digital media in their case work.

Part II discusses the impact of this increase in digital content on the mental health of public defenders. Videos containing violence inflicted on the client by the police or others can be traumatizing or

---

13. *Mobile Fact Sheet*, PEW RSCH. CTR.: INTERNET & TECH. (June 12, 2019), <https://www.pewinternet.org/fact-sheet/mobile/> [<https://perma.cc/63GB-WQWF>].

14. DUBBERLEY ET AL., *supra* note 12.

15. *Lafler v. Cooper*, 566 U.S. 156, 157 (2012) (“[T]he Sixth Amendment[] . . . requires effective assistance at critical stages of a criminal proceeding, including pre-trial stages.”); *McMann v. Richardson*, 397 U.S. 759, 771 (1970) (explaining that the Sixth Amendment right to assistance of counsel is the right to “effective assistance of competent counsel”); *see also* Monica K. Miller et al., *Addressing the Problem of Courtroom Stress*, 91 JUDICATURE 60, 61 (2007) (“In order for the judicial system to function properly, it is important for legal actors . . . to be of sound mind and body.”); Susan A. Bandes, *Repression and Denial in Criminal Lawyering*, 9 BUFF. CRIM. L. REV. 339, 384 (2006) (“[T]he costs of . . . avoidance [due to secondary traumatic stress] are great, not only for the emotional well-being of those who practice law, but for the system of justice as a whole.”).

16. *See* AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 271 (5th ed. 2013) [hereinafter DSM-5].

17. *See* discussion *infra* Part I.



demoralizing and cause burnout. Without mitigating interventions, traumatic video evidence could threaten attorney competence.

Part III inventories some of the negative impacts of digital content on the attorney–client relationship. Videos shot from the victim’s perspective may cause the attorney to overly identify with the victim and create distance from the client—or worse, moral repugnance or revulsion—making it harder to effectively advocate for the client. Attorneys will also view videos differently based on their own characteristics, lived experiences, and biases. When attorneys are of a different race, class, or gender from their clients, they may have a difficult time watching the video with an open mind rather than relying on heuristics or stereotypes—a pressing concern given that public defender clients are disproportionately people of color though defenders are overwhelmingly white.<sup>18</sup> These dynamics can undermine zealous representation.

Finally, Part IV includes proposals and strategies for addressing the new challenges presented by the increasing ubiquity of digital video in criminal defense practice. Some of these proposals draw from lessons learned in the context of war journalism and in lawsuits brought by content moderators against Facebook and Microsoft.<sup>19</sup> Others draw from public defender literature about implicit racial bias.<sup>20</sup> Caseload caps in public defender practice must also be recalibrated to reckon with the time-consuming work of reviewing video evidence.

---

18. National data about the demographics of public defenders are not available, but 85% of lawyers identify as white. See Debra Cassens Weiss, *Lawyer Population 15% Higher than 10 Years Ago*, *New ABA Data Shows*, A.B.A. J. (May 3, 2018, 2:31 PM), [https://www.abajournal.com/news/article/lawyer\\_population\\_15\\_higher\\_than\\_10\\_years\\_ago\\_new\\_aba\\_data\\_shows#:~:text=For%202018,%20the%20reported%20data,and%201%20percent%20as%20multiracial](https://www.abajournal.com/news/article/lawyer_population_15_higher_than_10_years_ago_new_aba_data_shows#:~:text=For%202018,%20the%20reported%20data,and%201%20percent%20as%20multiracial) [https://perma.cc/5KF7-EL8K].

19. Complaint at 8, *Scola v. Facebook, Inc.*, No. 18-CIV-05135 (Cal. Super. Ct. Sept. 21, 2018) [hereinafter *Scola* Complaint]; Complaint at 4, *Soto v. Microsoft Corp.*, No. 16-2-31049-4 (Wash. Super. Ct. Dec. 16, 2016) [hereinafter *Soto* Complaint].

20. Johnathan A. Rapping, *Implicitly Unjust: How Defenders Can Affect Systemic Racist Assumptions*, 16 N.Y.U. J. LEGIS. & PUB. POL’Y 999, 999 (2013); L. Song Richardson & Phillip A. Goff, *Implicit Racial Bias in Public Defender Triage*, 122 YALE L.J. 2626, 2626, 2628 (2013).

This Article looks at the impact of digital media on criminal defense attorneys and the ways in which both individual defense attorneys and public defender offices can adjust to respond effectively in the face of these new trends. Examining these questions is essential if we are to continue our constitutional commitment to robust indigent defense.

### I. THE GROWTH OF DIGITAL CONTENT

As President Barack Obama explained, “The world has always been messy. In part, we’re just noticing now because of social media and our capacity to see in intimate detail the hardships that people are going through.”<sup>21</sup> Our increasingly digital culture has not necessarily created more crises, but it has enhanced our ability to bear witness to the crises of others.

Criminal defense attorneys and public defenders represent people accused of all types of crimes, including the most heinous<sup>22</sup>—that has not changed with the rise of digital media. Likewise, public defenders have heard complaints about police violence from their clients for decades. But rather than reading a police report describing violence or looking at photographs of the aftermath, public defenders are increasingly watching videos of their clients inflicting violence or being subjected to violence. What impact does viewing this imagery

---

21. Jon Passantino, *Obama: “The World Has Always Been Messy . . . We’re Just Noticing Now Because of Social Media,”* BUZZFEED NEWS (Aug. 30, 2014, 2:15 AM), <https://www.buzzfeednews.com/article/passantino/obama-the-world-has-always-been-messy-were-just-noticing-now> [https://perma.cc/77TD-WEPN].

22. *Von Moltke v. Gillies*, 332 U.S. 708, 725–26 (1948) (Black, J.) (plurality opinion). In *Gillies*, the Supreme Court recognized the following:

The right to counsel guaranteed by the Constitution contemplates the services of an attorney devoted solely to the interests of his client. . . .

. . . Undivided allegiance and faithful, devoted service to a client are prized traditions of the American lawyer. It is this kind of service for which the Sixth Amendment makes provision. And nowhere is this service deemed more honorable than in case of appointment to represent an accused too poor to hire a lawyer, even though the accused may be a member of an unpopular or hated group, or may be charged with an offense which is peculiarly abhorrent.

*Id.*

have on individual defense attorneys and their relationship to both the clients depicted and their clients more generally? It is hard for attorneys to answer this question. Even admitting that the images have an impact reveals disloyalty—a cardinal sin in the attorney–client relationship.<sup>23</sup> Watching a client be brutalized can engender sympathy, but watching the client inflict violence can alienate. One public defender put it bluntly: video can make it “more difficult to objectively represent a client.”<sup>24</sup>

The use of police BWCs has expanded rapidly, but it is not the sole reason that defense attorneys are suddenly viewing and reviewing hours of violent videos.<sup>25</sup> In the past decade, people began to carry smartphones with them everywhere, so there is no longer a need to plan to record in advance—smartphone recording is essentially “cost-free” in the moment.<sup>26</sup> Ubiquity of smartphones and other devices that record high-quality video makes an increasing amount of both public and private behavior “instantaneously visible.”<sup>27</sup> Finally, digital surveillance has an increasing presence in our lived environment—in some cities people expect to be almost constantly surveilled when in public.<sup>28</sup> We are frequently watched and recorded, even by our home appliances and smart home devices.<sup>29</sup> This increasingly digital and recorded landscape comes at a cost.

---

23. See MODEL RULES OF PRO. CONDUCT r. 1.7 (AM. BAR ASS’N 2020).

24. See Comments to Survey Question 17, *infra* Appendix D; Liz Adetiba & Anna Almendrala, *Watching Videos of Police Brutality Can Traumatize You, Especially If You’re Black*, HUFFPOST, [https://www.huffingtonpost.com/entry/watching-police-brutality-videos\\_us\\_577ee9b3e4b0344d514eaa5d](https://www.huffingtonpost.com/entry/watching-police-brutality-videos_us_577ee9b3e4b0344d514eaa5d) [https://perma.cc/JM8T-4N8P] (Sept. 20, 2016).

25. See DUBBERLEY ET AL., *supra* note 12.

26. Rebecca J. Hamilton, *User-Generated Evidence*, 57 COLUM. J. TRANSNAT’L L. 1, 15, 32 (2018).

27. Sarah Brayne et al., *Visual Data and the Law*, 43 L. & SOC. INQUIRY 1149, 1152 (2018).

28. Richard E. Myers II, *Police-Generated Digital Video: Five Key Questions, Multiple Audiences, and a Range of Answers*, 96 N.C. L. REV. 1237, 1238 (2018). Admittedly, we are still far off from the “perfect surveillance” described in a recent article. Richard M. Re, *Imagining Perfect Surveillance*, 64 UCLA L. REV. 264, 290–92 (2016).

29. *Ever Had That Creepy Feeling Your Phone, Fridge or Whatever Is Spying on You? You’re Not Alone*, FIN. POST (Mar. 13, 2017), <https://business.financialpost.com/technology/personal-tech/ever-had-that-creepy-feeling-your-being-spied-on-by-your-phone-fridge-or-whatever-youre-not-alone> [https://perma.cc/CK34-7F2B]; Drew Harwell, *Ring and Nest Helped Normalize American Surveillance and Turned Us into a Nation of Voyeurs*, WASH. POST (Feb. 18, 2020, 8:00 AM),

### A. *Mental Health Impact of Graphic Content*

Exposure to traumatic content is increasing in our new digital world, and this increased exposure has a cost to our collective mental health. One study found that nearly a quarter of participants who viewed images and videos from disturbing events, including the events of September 11, 2001 (9/11), school shootings, and suicide bombings, over news and social media reported symptoms clinically consistent with PTSD.<sup>30</sup> After terrorism events such as 9/11 and the Boston Marathon bombing, rates of PTSD in the community increase—even among those who merely witness the event electronically.<sup>31</sup> One study found that some people who repeatedly viewed footage of deadly events sustained *more* trauma than people who witnessed the events in real life.<sup>32</sup> Studies have found that risk of PTSD is linked to, among other factors, frequency and length of exposure to media about the terrorism event.<sup>33</sup> And due to the shift from traditional news to social media, we can now watch violent stories and graphic images in “unedited horrific detail.”<sup>34</sup>

---

<https://www.washingtonpost.com/technology/2020/02/18/ring-nest-surveillance-doorbell-camera/> [https://perma.cc/TUG4-7D4T].

30. See Teddy Wayne, *The Trauma of Violent News on the Internet*, N.Y. TIMES (Sept. 10, 2016), <https://www.nytimes.com/2016/09/11/fashion/the-trauma-of-violent-news-on-the-internet.html> [https://perma.cc/7BTP-N7XD] (discussing these findings).

31. Daniel S. Busso et al., *Media Exposure and Sympathetic Nervous System Reactivity Predict PTSD Symptoms After the Boston Marathon Bombings*, 31 DEPRESSION & ANXIETY 551, 552 (2014); Sandro Galea et al., *Psychological Sequelae of the September 11 Terrorist Attacks in New York City*, 346 NEW ENG. J. MED. 982, 982–87 (2002); Carol S. North et al., *Psychiatric Disorders Among Survivors of the Oklahoma City Bombing*, 282 J. AM. MED. ASSOC. 755, 755–62 (1999).

32. *Prolonged Viewing of Boston Marathon Bombings Media Coverage Tied to Acute Stress*, U.C. IRVINE NEWS (Dec. 9, 2013), <https://news.uci.edu/2013/12/09/prolonged-viewing-of-boston-marathon-bombings-media-coverage-tied-to-acute-stress/> [https://perma.cc/BT7M-R7R4]. See generally E. Allison Holman et al., *Media’s Role in Broadcasting Acute Stress Following the Boston Marathon Bombings*, 111 PROC. NAT’L ACAD. SCI. 93 (2014).

33. Busso et al., *supra* note 31, at 558–59; Michael W. Otto et al., *Posttraumatic Stress Disorder Symptoms Following Media Exposure to Tragic Events: Impact of 9/11 on Children at Risk for Anxiety Disorders*, 21 J. ANXIETY DISORDERS 888, 896 (2007); Mark A. Schuster et al., *A National Survey of Stress Reactions After the September 11, 2001, Terrorist Attacks*, 345 NEW ENG. J. MED. 1507, 1509, 1511 (2001); Kathryn A. Becker-Blease et al., *Media Exposure Predicts Children’s Reactions to Crime and Terrorism*, 9 J. TRAUMA & DISSOCIATION 225, 243 (2008).

34. Wayne, *supra* note 30.

Before launching into a discussion of the ways in which digital content can impact mental health, it is useful to define several relevant mental health terms and conditions. PTSD is based on exposure to a traumatic event described as violence or threat of violence.<sup>35</sup> That exposure can include witnessing the traumatic event happen to someone else.<sup>36</sup> As a result of the exposure to trauma, one suffering from PTSD may experience symptoms such as difficulty sleeping, flashbacks, hypervigilance, avoidance, concentration problems, emotional difficulties, and detachment from others.<sup>37</sup> For a diagnosis of PTSD, these symptoms must persist for more than a month, bring about considerable distress, and interfere greatly with a number of areas in the person's life.<sup>38</sup>

In 2013, the diagnostic criteria for PTSD expanded to include repeated or extreme exposure to details of someone's trauma through electronic media in a work-related setting.<sup>39</sup> This revision reflects the emerging research on the effects of exposure to digital media. The change in diagnostic criteria also makes explicit the fact that workers, like criminal defense attorneys, who view recorded violence as part of their work can develop PTSD.<sup>40</sup> PTSD, unlike the conditions described *infra*, is a DSM-5 diagnosable disorder recognized by the American Psychiatric Association.<sup>41</sup> Empirically supported treatments exist to treat PTSD such as cognitive processing therapy, prolonged exposure therapy,<sup>42</sup> and eye movement desensitization and reprocessing therapy.<sup>43</sup>

---

35. Matthew Tull, *DSM-5 PTSD Diagnostic Criteria*, VERYWELL MIND (Nov. 7, 2019), <https://www.verywellmind.com/ptsd-in-the-dsm-5-2797324> [<https://perma.cc/2HEF-PHKQ>].

36. *Id.*

37. DSM-5, *supra* note 16, at 271–72. For a diagnosis of PTSD, a patient must have at least six of the symptoms listed in four categories. *Id.*; *see also* Tull, *supra* note 35.

38. DSM-5, *supra* note 16, at 272.

39. *Id.* at 271.

40. *Id.*

41. *Id.*

42. *What Is Posttraumatic Stress Disorder?*, AM. PSYCHIATRIC ASS'N, <https://www.psychiatry.org/patients-families/ptsd/what-is-ptsd> [<https://perma.cc/MJV8-UC4Z>].

43. *See generally* FRANCINE SHAPIRO, *EYE MOVEMENT DESENSITIZATION AND REPROCESSING (EMDR) THERAPY: BASIC PRINCIPLES, PROTOCOLS, AND PROCEDURES* (3d ed. 2017).

Individuals adjacent to trauma—particularly those working in the helping professions—often develop other conditions: compassion fatigue, secondary traumatic stress (STS), vicarious trauma, and burnout.<sup>44</sup> Compassion fatigue results from the cumulative emotional, psychological, and physical effects of exposure to the pain, distress, or injustice suffered by clients.<sup>45</sup> Compassion fatigue is used interchangeably with STS.<sup>46</sup> One pioneer in the field explained compassion fatigue as “a cost to caring.”<sup>47</sup> Individuals at high risk for compassion fatigue are “conscientious, perfectionist and self-giving.”<sup>48</sup> The symptoms of compassion fatigue include “rigid black and white thinking, difficulty concentrating, confusion and memory loss, [and] loss of sense of direction and purpose.”<sup>49</sup> Long-term compassion fatigue can even undermine deeply held beliefs and worldviews.<sup>50</sup> Generally, symptoms of compassion fatigue are similar to those of PTSD,<sup>51</sup> which include difficulty sleeping, dreams about the traumatic event, flashbacks, hypervigilance, avoidance, concentration problems, emotional difficulties and outbursts, and detachment from others.<sup>52</sup>

Vicarious trauma “is said to occur when professionals, who work with victims of trauma, find their own cognitive schema disrupted by the cumulative effect of exposure to traumatized clients or traumatic material.”<sup>53</sup> Vicarious trauma relates to compassion fatigue but also

---

44. See CHARLES R. FIGLEY, *COMPASSION FATIGUE: COPING WITH SECONDARY TRAUMATIC STRESS DISORDER IN THOSE WHO TREAT THE TRAUMATIZED* 27 (1995); Jenny Bulbulia et al., *Impact of Vicarious Trauma on Barristers Practicing Criminal Law: An Armoury of Resilience*, 2015 CORK J. APPLIED PSYCH. 33, 34 (2015).

45. See FIGLEY, *supra* note 44.

46. *Id.* at 26.

47. *Id.* at 22.

48. Lee Norton et al., *Burnout and Compassion Fatigue: What Lawyers Need to Know*, 84 UMKC L. REV. 987, 988 (2016).

49. *Id.* at 989.

50. *Id.*

51. Bulbulia et al., *supra* note 44, at 38.

52. *Id.*; Margaret Severson & Carrie Pettus-Davis, *Parole Officers' Experiences of the Symptoms of Secondary Trauma in the Supervision of Sex Offenders*, 57 INT'L J. OFFENDER THERAPY & COMPAR. CRIMINOLOGY 5, 7 (2013).

53. Bulbulia et al., *supra* note 44.

involves the disruption of deeply held assumptions about the world,<sup>54</sup> such as trust and dependency, safety, power, independence, and intimacy.<sup>55</sup> For example, one public defender reported that she was “paranoid and suspicious” when it came to her children—even to the point of being suspicious of her “gentle-hearted” husband, noting that working child sex abuse cases with graphic content “can definitely mess with [her] mind.”<sup>56</sup> She was describing the type of disruption in cognitive schema associated with vicarious trauma. Both vicarious trauma and compassion fatigue can impact a professional’s ability to do her job and other aspects of daily functioning outside the workplace.<sup>57</sup>

Finally, burnout is “emotional exhaustion whereby a person becomes disengaged [and] disillusioned” in the context of their work.<sup>58</sup> It can occur in any profession, not just those where people work with clients who have experienced trauma.<sup>59</sup> Burnout results from a discrepancy between expectations and outcomes or the perceived needs of a task exceeding the perceived resources.<sup>60</sup> Individuals are especially susceptible to burnout if they are idealistic, have poor personal and professional boundaries, and define themselves by their work—all qualities shared by many lawyers and public defenders in particular.<sup>61</sup> Symptoms of burnout include loss of hope, avoidance of clients and colleagues, agitation and irritability, self-doubt, loss of confidence, cynicism, and apathy.<sup>62</sup> Much of the

---

54. Andrew P. Levin, *Secondary Trauma and Burnout in Attorneys: Effects of Work with Clients Who Are Victims of Domestic Violence and Abuse*, PRISON LEGAL NEWS (Jan. 1, 2007), [https://www.prisonlegalnews.org/media/publications/Secondary\\_Trauma\\_and\\_Burnout\\_in\\_Attorneys\\_-\\_Effects\\_of\\_Work\\_with\\_Clients\\_Who\\_are\\_Victims\\_of\\_Domestic\\_Violence\\_and\\_Abuse\\_Levin\\_2007.pdf](https://www.prisonlegalnews.org/media/publications/Secondary_Trauma_and_Burnout_in_Attorneys_-_Effects_of_Work_with_Clients_Who_are_Victims_of_Domestic_Violence_and_Abuse_Levin_2007.pdf) [https://perma.cc/QBJ2-U9C4].

55. Andrew P. Levin & Scott Greisberg, *Vicarious Trauma in Attorneys*, 24 PACE L. REV. 245, 246 (2003); see also I. Lisa McCann & Laurie Anne Pearlman, *Vicarious Traumatization: A Framework for Understanding the Psychological Effects of Working with Victims*, 3 J. TRAUMATIC STRESS 131, 137 (1990).

56. See Comments to Survey Question 16, *infra* Appendix C.

57. Levin & Greisberg, *supra* note 55.

58. Bulbulia et al., *supra* note 44.

59. *Id.*

60. Norton et al., *supra* note 48, at 987.

61. *Id.*

62. *Id.* at 988.

theoretical development of the concept of burnout and related phenomena occurred in the social welfare and mental health professions.<sup>63</sup> But perhaps because mental health professionals tend to be more attuned to mental health needs and self-care, lawyers and others working outside the mental health profession are even more susceptible to burnout than mental health workers.<sup>64</sup>

With familiarity of these mental health conditions, it is helpful to talk about how they relate to workplace exposure to graphic digital content. Some workers have been viewing and reviewing graphic digital video content with even more frequency than criminal defense attorneys. Studies of journalists working in newsrooms handling graphic content have shown that repeated exposure to graphic electronic media can result in PTSD-like symptoms.<sup>65</sup> One report explored the impact of “eyewitness media” and traumatic imagery in journalism and human rights organizations dealing with graphic content on what it called the “digital frontline.”<sup>66</sup> The report included data from surveys and interviews with journalists and human rights professionals working with videos containing violence.<sup>67</sup> The report delved into what features of a video make it more and less traumatic—sound, for example, seemed to increase the traumatic impact of a video.<sup>68</sup> Another factor increasing traumatic impact was an apparent personal connection to the content, so that it seemed that the event depicted could have happened to someone the viewer knew.<sup>69</sup> The report documented the pervasive and detrimental effect that viewing graphic video as part of one’s job can have.<sup>70</sup>

---

63. *See, e.g., id.* at 987.

64. *Id.* at 987, 992–93.

65. *See, e.g.,* Anthony Feinstein et al., *Witnessing Images of Extreme Violence: A Psychological Study of Journalists in the Newsroom*, 5 J. ROYAL SOC’Y MED. OPEN, July 8, 2014, at 1, 3–4, <https://journals.sagepub.com/doi/pdf/10.1177/2054270414533323> [<https://perma.cc/7BVB-4HSA>].

66. DUBBERLEY ET AL., *supra* note 12.

67. *Id.* at 13–14.

68. *Id.* at 29.

69. *Id.* at 28.

70. *Id.* at 32–36 (including using alcohol abuse or frequent casual sex to cope with the stress).



Another group of workers who routinely review violent videos and other graphic digital content are internet content moderators.<sup>71</sup> Internet content moderators review internet content and remove inappropriate content from internet sites.<sup>72</sup> Internet content moderators often review hundreds of flagged posts a day, including images of violence and child pornography.<sup>73</sup> Recently, two lawsuits by internet content moderators against Microsoft and Facebook, respectively, have highlighted the risk of PTSD and other mental health conditions that content moderators are subjected to when reviewing hundreds of graphic images and videos.<sup>74</sup> The lawsuits sought workplace reforms to safeguard workers' mental health and lessen the impact of continually viewing toxic images.<sup>75</sup> Proposals included limiting the time spent reviewing graphic content, alternating tasks, and providing mandatory weekly meetings with a psychologist with specialized training on secondary trauma.<sup>76</sup>

Police working in child pornography units are also at risk for secondary trauma due to their work with violent videos and heinous images of child abuse.<sup>77</sup> These officers feel fatigued, overwhelmed, and moody as well as more paranoid and protective of their children and families.<sup>78</sup> This can lead to burnout, which can impact officers' abilities to do their jobs well and can lead to anxiety, depression, insomnia, and substance abuse.<sup>79</sup> In one study, 36% of computer forensic investigators reported either moderate or high levels of

---

71. See, e.g., Oliva Solon, *Facebook Is Hiring Moderators. But Is the Job Too Gruesome to Handle?*, THE GUARDIAN (May 4, 2017, 5:00 PM), <https://www.theguardian.com/technology/2017/may/04/facebook-content-moderators-ptsd-psychological-dangers> [https://perma.cc/J3TP-F9U6].

72. *Id.*

73. *Id.*

74. *Soto* Complaint, *supra* note 19, at 13; *Scola* Complaint, *supra* note 19, at 1–2.

75. *Soto* Complaint, *supra* note 19; *Scola* Complaint, *supra* note 19, at 3.

76. *Soto* Complaint, *supra* note 19; *Scola* Complaint, *supra* note 19, at 8.

77. See, e.g., Amanda Harms, *The Dirty Work of Law Enforcement: Emotion, Secondary Traumatic Stress, and Burnout in Federal Officers Exposed to Disturbing Media*, in CORNERSTONE: A COLLECTION OF SCHOLARLY AND CREATIVE WORKS FOR MINNESOTA STATE UNIVERSITY, MANKATO 1, 10 (2011) (Graduate Theses, Dissertations, and Other Capstone Projects, Paper 157).

78. *Id.* at 12.

79. *Id.*

STS.<sup>80</sup> One phenomenon observed in the research was that officers exposed to disturbing videos felt they could not talk about their work with others because it would be traumatizing to others, including loved ones.<sup>81</sup> At least one officer reported having difficulty being intimate with his wife due to his job and the images he viewed at work.<sup>82</sup>

These studies with war journalists, human rights investigators, internet content moderators, and police officers who investigate child pornography offenses demonstrate that there is a significant risk of secondary trauma and burnout when workers must review violent videos or other traumatic imagery as part of their jobs. Like all of us, public defenders are viewing video more often due to our increasingly digital culture, but the widespread adoption of police BWCs in the past several years has had an enormous impact on the frequency of public defender exposure to video content in their work.

### *B. Police BWCs and Viral Videos of Police Violence*

The use of police BWCs exploded after the 2014 shooting of Michael Brown, an unarmed Black teenager, by a white police officer and the ensuing riots in Ferguson, Missouri.<sup>83</sup> Many saw the adoption of police BWCs as a way to promote police accountability and deter police violence.<sup>84</sup> Proponents of this new technology framed it as a tool to repair relationships between law enforcement agencies and the communities they police.<sup>85</sup>

---

80. Lisa M. Perez et al., *Secondary Traumatic Stress and Burnout Among Law Enforcement Investigators Exposed to Disturbing Media Images*, 25 J. POLICE & CRIM. PSYCH. 113, 118 (2010).

81. Harms, *supra* note 77, at 20.

82. *Id.* at 33.

83. *What Happened in Ferguson?*, N.Y. TIMES, <https://www.nytimes.com/interactive/2014/08/13/us/ferguson-missouri-town-under-siege-after-police-shooting.html> [https://perma.cc/Q6SJ-KATS] (Aug. 10, 2015). For a more detailed account of the history of the use of BWCs by police officers, see Stoughton, *supra* note 6, at 1371–78.

84. Stoughton, *supra* note 6, at 1365–66.

85. *Id.* More recent accounts are less optimistic about the implementation of police BWCs, noting that, in fact, prosecutors use the videos more often to prosecute members of the public than to police the police. See Tim Cushing, *Prosecutors Benefiting Most from Police Body Cameras*, TECHDIRT (Dec. 28, 2017, 3:51 PM), <https://www.techdirt.com/articles/20171225/09362038880/prosecutors-benefiting-most-police-body-cameras.shtml> [https://perma.cc/53EU-VHEN]; Lindsey Van Ness, *Body Cameras*

No comprehensive nationwide list of police agencies using BWCs exists.<sup>86</sup> In 2013, 32% of police departments, employing 24% of all officers, were using BWCs.<sup>87</sup> In a 2015 survey by the Police Executive Research Forum, 35% of police departments used BWCs, and an additional 47% planned to do so in the near future.<sup>88</sup> By 2016, two years post-Ferguson, nearly half (47%) of general-purpose law enforcement agencies had acquired police BWCs, and 69% had dashboard cameras.<sup>89</sup> For larger police departments with more than 500 officers, the adoption rate was even greater with 80% acquiring BWCs and 70% putting them in service.<sup>90</sup> So, 80% of large police departments are already using BWCs, and over 80% of all police departments will be doing so in the near future.<sup>91</sup> This is a dramatic change from the landscape a decade ago when such recordings were far from the norm.<sup>92</sup> The emergence of this new technology has prompted new scholarship and police guidelines for the use of BWC equipment.<sup>93</sup>

---

*May Not Be the Easy Answer Everyone Was Looking for*, STATELINE (Jan. 14, 2020), <https://bit.ly/3fdB6rm> [<https://perma.cc/TFN5-RVVA>]; see also Rich Braunstein & David Erickson, *Best Practices, Challenges and Opportunities for Body Worn Camera Programs*, 63 S.D. L. REV. 510, 518 (2019) (“The research [into police BWCs] has shown not only intended and unintended benefits in the adoption of BWC technology in contemporary law enforcement but also looming costs that must be addressed to preserve and maximize the benefits of this new technology.”).

86. Kari Paul, *It’s Still Not Clear How Many Police Departments Actually Use Body Cameras*, VICE: MOTHERBOARD (July 30, 2015, 11:26 AM), [https://motherboard.vice.com/en\\_us/article/8qxy33/its-still-not-clear-how-many-police-departments-actually-use-body-cameras](https://motherboard.vice.com/en_us/article/8qxy33/its-still-not-clear-how-many-police-departments-actually-use-body-cameras) [<https://perma.cc/NWS6-5KPZ>].

87. BRIAN A. REAVES, BUREAU OF JUST. STAT., U.S. DEP’T OF JUST., SER. NO. NCJ 248767, LOCAL POLICE DEPARTMENTS, 2013: EQUIPMENT AND TECHNOLOGY 4 (Lynne McConnell & Jill Thomas eds., 2015), <https://www.bjs.gov/content/pub/pdf/lpd13et.pdf> [<https://perma.cc/VGN7-6LAT>].

88. POLICE EXEC. RSCH. F., COST AND BENEFITS OF BODY-WORN CAMERA DEPLOYMENTS 9 (2018) [hereinafter PERF], <https://www.policeforum.org/assets/BWCCostBenefit.pdf> [<https://perma.cc/G9DY-PPYC>].

89. SHELLEY S. HYLAND, BUREAU OF JUST. STAT., U.S. DEP’T OF JUST., SER. NO. NCJ 251775, BODY-WORN CAMERAS IN LAW ENFORCEMENT AGENCIES, 2016, at 1 (Caitlin Scoville & Jill Thomas eds., 2018), <https://www.bjs.gov/content/pub/pdf/bwclea16.pdf> [<https://perma.cc/2HTZ-JH2R>].

90. *Id.* at 2.

91. *Id.* at 10.

92. PERF, *supra* note 88, at 28–29 (“The adoption of BWCs has grown exponentially. A few agencies were experimenting with the technology as early as 2007. But their adoption significantly took off in 2014 . . .”).

93. See generally Bradley X. Barbour, *Big Budget Productions with Limited Release: Video Retention Issues with Body-Worn Cameras*, 85 FORDHAM L. REV. 1725 (2017); Laurent Sacharoff &

Among departments that have adopted BWCs, 85% would recommend or strongly recommend the practice, indicating both a high rate of satisfaction and a low likelihood that departments that have adopted BWCs will discontinue the practice in the near future.<sup>94</sup> Further supporting the trend of BWC implementation, the U.S. Department of Justice has established a grant program for the new technology and has awarded over \$23 million in grants to local police departments for BWC implementation.<sup>95</sup> Given this backdrop, some predict that universal use of BWCs by police in the near future is inevitable.<sup>96</sup>

Rapid adoption of BWCs occurred in a “low-information” environment, meaning that the technological advancement preceded robust empirical research into its effects.<sup>97</sup> This was not a data-driven development but one guided primarily by intuition and common sense—a course of action that can lead to unanticipated and unintended consequences.<sup>98</sup> Additionally, during this speedy ramp-up of BWC technology, there was minimal consideration of costs of BWC technology beyond law enforcement implementation and maintenance.<sup>99</sup> The results have not been as consistently positive as

---

Sarah Lustbader, *Who Should Own Police Body Camera Videos?*, 95 WASH. U. L. REV. 269 (2017); James S. Arrabito, *Out of Focus: Zooming In on Body Cameras, Privacy, and Medical Emergencies*, 69 RUTGERS U. L. REV. 741 (2017); Bryce Clayton Newell, *Collateral Visibility: A Socio-Legal Study of Police Body-Camera Adoption, Privacy, and Public Disclosure in Washington State*, 92 IND. L.J. 1329 (2017); Mary D. Fan, *Hacking Qualified Immunity: Camera Power and Civil Rights Settlements*, 8 ALA. C.R. & C.L. L. REV. 51 (2017). Cameras manufactured by Taser International, the dominant supplier, record even when in “off” mode and automatically save the thirty seconds of “buffer” that precede the officer turning on the camera. See Kelly Freund, *When Cameras Are Rolling: Privacy Implications of Body-Mounted Cameras on Police*, 49 COLUM. J.L. & SOC. PROBS. 91, 96 (2015) (describing Taser’s BWC technology).

94. PERF, *supra* note 88, at 57.

95. See Press Release, U.S. Dep’t of Just., Justice Department Awards over \$23 Million in Funding for Body Worn Camera Pilot Program to Support Law Enforcement Agencies in 32 States (Sept. 21, 2015), <https://www.justice.gov/opa/pr/justice-department-awards-over-23-million-funding-body-worn-camera-pilot-program-support-law> [http://perma.cc/XVY4-WBK9].

96. V. Noah Gimbel, *Body Cameras and Criminal Discovery*, 104 GEO. L.J. 1581, 1584 (2016) (compiling sources).

97. Anthony A. Braga et al., *The Effects of Body-Worn Cameras on Police Activity and Police-Citizen Encounters: A Randomized Controlled Trial*, 108 J. CRIM. L. & CRIMINOLOGY 511, 513 (2018).

98. *Id.*

99. VA. COMP. BD., REPORT TO THE GENERAL ASSEMBLY: WORKGROUP STUDY OF THE IMPACT OF

BWC proponents predicted.<sup>100</sup> For example, though police use of BWCs may reduce use-of-force complaints against officers, it may result in higher arrest rates, which could increase incarceration rates.<sup>101</sup> Studies have also demonstrated that use of BWCs increases police officer burnout.<sup>102</sup>

One dramatic effect of the increased use of police BWCs is the trend of viral videos of police violence being shared on social media.<sup>103</sup> Not all viral videos of police violence are products of BWCs—many are recorded by surveillance cameras or by bystanders engaged in “copwatching.”<sup>104</sup> But as video images of police brutality began to go viral, researchers applied their terrorism media coverage framework to a new context.<sup>105</sup> Researchers warned that watching these viral videos could result in PTSD or similar symptoms.<sup>106</sup> The risk of trauma due to media exposure was particularly acute in July 2016 when videos capturing the deaths of Alton Sterling and Philando Castille were released within a day of each other.<sup>107</sup>

Then came the summer of 2020, with the releases of videos of the killings of Ahmaud Arbery,<sup>108</sup> George Floyd,<sup>109</sup> and Rayshard Brooks.<sup>110</sup> These videos,<sup>111</sup> which captured acts likened to

BODY WORN CAMERAS ON WORKLOAD IN COMMONWEALTH’S ATTORNEYS’ OFFICES 7 (2018), <https://rga.lis.virginia.gov/Published/2019/RD68/PDF> [<https://perma.cc/6D42-BD5G>].

100. *Id.*

101. Braga et al., *supra* note 97, at 517, 537.

102. Ian Adams & Sharon Mastracci, *Police Body-Worn Cameras: Effects on Officers’ Burnout and Perceived Organizational Support*, 22 POLICE Q. 5, 14 (2019).

103. See Jocelyn Simonson, *Copwatching*, 104 CALIF. L. REV. 391, 419–20 (2016).

104. *Id.* at 427, 444 (detailing account of “copwatching” and its promise to promote social change).

105. Adetiba & Almendrala, *supra* note 24.

106. *Id.*

107. *Id.*

108. Richard Fausset, *What We Know About the Shooting Death of Ahmaud Arbery*, N.Y. TIMES (June 24, 2020), <https://www.nytimes.com/article/ahmaud-arbery-shooting-georgia.html> [<https://perma.cc/4CAS-CYX6>].

109. Evan Hill et al., *How George Floyd Was Killed in Police Custody*, N.Y. TIMES, <https://www.nytimes.com/2020/05/31/us/george-floyd-investigation.html> [<https://perma.cc/6D48-K8NT>] (Aug. 13, 2020).

110. Chas Danner, *Everything We Know About the Killing of Rayshard Brooks by Atlanta Police*, N.Y. MAG.: INTELLIGENCER, <https://nymag.com/intelligencer/2020/06/what-we-know-about-the-killing-of-rayshard-brooks.html> [<https://perma.cc/87SU-6GBH>] (June 18, 2020).

111. Notably, the viral videos from the Arbery, Floyd, and Brooks killings were mostly not caught by police BWCs. An accomplice of Arbery’s killers took the footage of his shooting. Richard Fausset &

lynchings,<sup>112</sup> all involved Black men being killed by white police officers.<sup>113</sup> The videos tapped into the United States' deeply troubled legacy of racialized violence towards Black Americans.<sup>114</sup> An eruption of protests throughout the United States and the world ensued, calling for racial justice and the end of police violence towards Black Americans and communities of color.<sup>115</sup> Meanwhile, depression and anxiety among Black Americans spiked.<sup>116</sup>

---

Rick Rojas, *Man Who Filmed the Arbery Killing Faces Calls for Arrest*, N.Y. TIMES, <https://www.nytimes.com/2020/05/18/us/ahmaud-arbery-william-bryan.html> [https://perma.cc/JZR3-6C4A] (June 24, 2020). Though authorities later released police video of Floyd's killing, a fifteen-year-old bystander took the first video to be released. Audra D.S. Burch & John Eligon, *Bystander Videos of George Floyd and Others Are Policing the Police*, N.Y. TIMES, <https://www.nytimes.com/2020/05/26/us/george-floyd-minneapolis-police.html> [https://perma.cc/LT88-DMDJ] (May 29, 2020). Similarly, the first videos released of Brooks's killing were cell phone video and surveillance video from the Wendy's where the shooting occurred; authorities released police BWC and dashcam videos only after the initial uproar. Michael King, *Man Dies After Being Shot by Atlanta Police at Wendy's Drive-Thru*, 11ALIVE, <https://www.11alive.com/article/news/crime/man-dies-after-being-shot-by-atlanta-police-at-wendys-drive-thru/85-b7faf368-0315-4db5-b863-4d6a4c140784> [https://perma.cc/F735-5YWS] (June 14, 2020, 3:13 AM).

112. See, e.g., Adam Edelman, *Biden Slams Arbery Shooting As 'Grave Injustice,' Demands Investigation*, NBC NEWS (May 7, 2020, 3:16 PM), <https://www.nbcnews.com/politics/2020-election/biden-slams-arbery-shooting-grave-injustice-demands-investigation-n1202291> [https://perma.cc/4MGR-6ZX3] ("By now many of us have seen that harrowing footage of Ahmaud Arbery out on a jog on a beautiful day in February . . . in Georgia, shot down in cold blood, essentially lynched before our very eyes, 2020 style." (quoting President Joe Biden)); Jennifer Rae Taylor & Kayla Vinson, *Ahmaud Arbery and the Local Legacy of Lynching*, THE MARSHALL PROJECT (May 21, 2020, 6:00 AM), <https://www.themarshallproject.org/2020/05/21/ahmaud-arbery-and-the-local-legacy-of-lynching> [https://perma.cc/VL8E-LD5Z]; John W. Fountain, *A Modern-Day Lynching in Minneapolis*, CHI. SUN-TIMES (June 5, 2020, 6:00 PM), <https://chicago.suntimes.com/columnists/2020/6/5/21282034/george-floyd-killing-lynching-racism-police-brutality-derek-chauvin-john-fountain> [https://perma.cc/FDS7-DPQK].

113. Arbery's killing was at the hands of a former police officer and former district attorney's office investigator, George McMichael, while Brooks's and Floyd's killings were at the hands of active-duty police officers in Atlanta and Minneapolis, respectively. Taylor & Vinson, *supra* note 112; Fountain, *supra* note 112.

114. See generally EQUAL JUST. INITIATIVE, LYNCHING IN AMERICA: CONFRONTING THE LEGACY OF RACIAL TERROR (3d ed. 2017), <https://lynchinginamerica.eji.org/report/> [https://perma.cc/98V8-3VZ2]; SHERRILYN A. IFILL, ON THE COURTHOUSE LAWN: CONFRONTING THE LEGACY OF LYNCHING IN THE TWENTY-FIRST CENTURY (Beacon Press 2007).

115. John Eligon, *Black Lives Matter Grows As Movement While Facing New Challenges*, N.Y. TIMES, <https://www.nytimes.com/2020/08/28/us/black-lives-matter-protest.html> [https://perma.cc/2H9S-LCMZ] (Sept. 3, 2020).

116. Alyssa Fowers & William Wan, *Depression and Anxiety Spiked Among Black Americans After George Floyd's Death*, WASH. POST (June 12, 2020), <https://www.washingtonpost.com/health/2020/06/12/mental-health-george-floyd-census/?arc404=true> [https://perma.cc/TG7R-FMV9] (citing a survey showing that within a week of the video of George Floyd's death being released, levels of depression and anxiety in the Black community spiked—with

Studies have found that the risk of traumatization from violent videos is heightened if the viewer identifies with the victim.<sup>117</sup> This phenomenon puts Black people and people of color at increased risk for secondary trauma when it comes to viewing videos of police violence.<sup>118</sup> One 2018 study found that police killings of unarmed Black Americans have mental health spillover effects on Black Americans in the states where those killings occurred.<sup>119</sup> Similarly, mental health professionals posit that viewing electronic media—particularly viewing viral police brutality videos—can cause or exacerbate the related phenomenon of racial trauma.<sup>120</sup> Racial trauma can result from “cumulative experiences of racism and discrimination” rather than a single identifiable trauma.<sup>121</sup> Watching someone who is a part of the viewer’s community or racial group being victimized can make the viewer feel unsafe in the world generally.<sup>122</sup>

The perception that the perpetrators of violence—the police in the case of viral police videos—face no consequences for their actions can transform that trauma into terror.<sup>123</sup> Not only are the images of the violence disturbing, but because the violent actors are state actors, the images can disrupt the viewer’s sense of safety and security in our political and governmental systems. Research suggests that for people of color, frequent exposure to the shootings of Black people

---

41% screening positive for anxiety or depression).

117. Alexis Linkletter, *Can You Get PTSD from Watching Murder Videos Online?*, VICE (Sept. 19, 2016, 9:52 AM), [https://www.vice.com/en\\_us/article/dpk757/can-you-get-ptsd-from-watching-murder-videos-online](https://www.vice.com/en_us/article/dpk757/can-you-get-ptsd-from-watching-murder-videos-online) [<https://perma.cc/PG9G-MPS5>].

118. Caleb Lewis, *Videos of Police Brutality Are Everywhere. What Does Watching Them Do to Us?*, VOX (July 12, 2016, 10:20 AM), <https://www.vox.com/2016/7/12/12147290/police-brutality-racial-trauma-castile-sterling>.

119. Jacob Bor et al., *Police Killings and Their Spillover Effects on the Mental Health of Black Americans: A Population-Based, Quasi-Experimental Study*, 392 LANCET 302, 302 (2018) (finding that each additional killing of an unarmed Black American by police was associated with 0.14 additional poor mental health days among Black American respondents but finding no mental health impacts for white Americans in the same states).

120. Adetiba & Almendrala, *supra* note 24.

121. Lewis, *supra* note 118.

122. Adetiba & Almendrala, *supra* note 24.

123. *Id.*

can have long-term mental health effects.<sup>124</sup> Graphic videos combined with lived experiences of racism can create severe psychological problems reminiscent of PTSD.<sup>125</sup>

Much remains to be seen about the impact of police BWC footage on the criminal justice landscape, but some facts are immediately apparent. More police officers are equipped with BWCs.<sup>126</sup> More BWC footage is being taken of police-citizen interactions.<sup>127</sup> Prosecutors and defense attorneys are reviewing more BWC footage than ever before.<sup>128</sup> And attorneys of color may be more affected than their white colleagues when they see videos of police violence towards people of color.

### C. Public Defender Survey Results

Though research specifically studying public defenders' interactions with video evidence is scant, there is a growing body of research about law enforcement officials who handle the same cases and graphic content as public defenders.<sup>129</sup> That research suggests that, like law enforcement officials, public defenders and other defense attorneys may be at higher risk for secondary trauma.<sup>130</sup>

---

124. Kenya Downs, *When Black Death Goes Viral, It Can Trigger PTSD-like Trauma*, PBS NEWSHOUR (July 22, 2016, 8:04 PM), <https://www.pbs.org/newshour/nation/black-pain-gone-viral-racism-graphic-videos-can-create-ptsd-like-trauma> [https://perma.cc/AUJ9-3T9Y].

125. *Id.*

126. Brett Chapman, *Body-Worn Cameras: What the Evidence Tells Us*, NAT'L INST. OF JUST. (Nov. 14, 2018), <https://nij.ojp.gov/topics/articles/body-worn-cameras-what-evidence-tells-us> [https://perma.cc/G9VQ-L8XY].

127. *Id.*

128. See sources cited *supra* note 6.

129. See Perez et al., *supra* note 80, at 113; see also Brian E. Perron & Barbara S. Hiltz, *Burnout and Secondary Trauma Among Forensic Interviewers of Abused Children*, 23 CHILD & ADOLESCENT SOC. WORK J. 216, 216 (2006); Harms, *supra* note 77, at 10–11; Carolyn Burns et al., *The Emotional Impact on and Coping Strategies Employed by Police Teams Investigating Internet Child Exploitation*, 14 TRAUMATOLOGY 20, 27 (2008) (finding that viewing graphic images of violence against children had a qualitatively different and more severe impact than did talking about trauma as mental health professionals typically do).

130. See Perez et al., *supra* note 80, at 113. This is not to understate the risk of primary trauma inherent in public defender work. For an extreme example, there was a recent and disturbing trend in Chicago where inmates routinely exposed themselves to female public defenders in interview rooms. See Andy Grimm, *Public Defenders Pushed to Breaking Point by Masturbating Inmates*, CHI. SUN-TIMES (Oct. 28, 2017, 5:43 PM), <https://chicago.suntimes.com/news/cook-county-inmates->



Given the dearth of information about the impact of graphic digital content on public defenders, more information was needed to understand the contours of the new digital landscape of public defender work.

To gather data about the impact of video evidence on public defenders, I created a pilot study using a convenience sample. Two hundred twenty-nine current or former public defenders responded to an online survey about the impact of digital media on their practice.<sup>131</sup> The survey was disseminated as a link via informal e-mail networks.<sup>132</sup> It was designed to increase the pool of anecdotal evidence about the impact of digital media on public defenders and to see what defenders in different geographic areas and practice settings reported about their experiences.

About 90% of survey respondents were currently working as public defenders, while 10% were former public defenders (presumably many of whom are still criminal defense practitioners).<sup>133</sup> The respondents practiced or had practiced in a total of forty states and the District of Columbia.<sup>134</sup> Out of the survey respondents, 81.7% worked in the state system, 7.4% in the federal system, and 10.9% in both the federal and state systems.<sup>135</sup> The

---

masturbating-public-defenders/ [https://perma.cc/4XST-M2BC].

131. See Public Defender Survey, *infra* Appendix A. I conducted this survey using SurveyMonkey from September 24, 2018, to November 24, 2018, and distributed it via informal e-mail channels, including some national public defender listservs. *Id.* The completion rate for the survey among those who responded was 79%. *Id.* There is no data about response rate given the way the survey was distributed. *Id.*

132. *Id.* A sample of 229 defenders in a system of more than 15,000 state public defenders is not statistically significant when the sample is not randomly or systematically selected. *Id.* But given the logistical challenges of obtaining a more randomized sample, I decided that obtaining some survey information was better than theorizing solely based on personal experience. *Id.* The survey results did uncover new issues that had not been the focus of this Article as it was initially conceived. *Id.*

133. *Id.*

134. *Id.* States that had no representation in the survey results were Arkansas, Connecticut, Delaware, Maine, Nebraska, New Mexico, North Dakota, Rhode Island, Vermont, and West Virginia. *Id.* New York and California were likely overrepresented in the results because my informal social and professional networks are strongest there.

135. *Id.* Nationally, there are about 3,700 lawyers and support staff in federal defender offices and over 15,000 state public defenders. See *Defender Services*, U.S. CTS., <https://www.uscourts.gov/services-forms/defender-services> [https://perma.cc/8Z92-PNJZ]; LYNN LANGTON & DONALD FAROLE, JR., BUREAU OF JUST. STAT., U.S. DEP'T OF JUST., SER. NO. NCJ

sample varied in terms of years working in public defense but skewed towards those with more experience.<sup>136</sup> In terms of the jurisdictions in which they worked, about a third reported working in an area that included rural communities, and three-quarters reported working in an area that included urban communities.<sup>137</sup> About three-quarters of survey respondents were “line attorneys,” while the remaining quarter were supervisors or heads of their offices.<sup>138</sup> When asked about recent average caseload, over 10% had more than 150 cases (more than the American Bar Association’s (ABA) recommended felony case cap), about 20% had between 100 and 150 cases, 30% had between fifty and 100 cases, a quarter had between twenty and fifty cases, and a little more than 10% had fewer than twenty cases.<sup>139</sup> Generally, the sample provided a good cross section of those in the public defender field.

After obtaining this basic information, the survey then asked about the frequency of exposure to different kinds of digital content and eyewitness media.<sup>140</sup> The vast majority (87.3%) of survey respondents reported that they had dealt with police BWC footage as part of their public defender work.<sup>141</sup> Over 90% had reviewed videos from witnesses or the defendant, and more than half of respondents had reviewed contraband videos like child pornography in the course of their work.<sup>142</sup> Others reported encountering dashcam video from

---

228229, CENSUS OF PUBLIC DEFENDER OFFICES, 2007: STATE PUBLIC DEFENDER PROGRAMS, 2007, at 3 (Georgette Walsh & Jill Duncan eds., 2010), <https://www.bjs.gov/content/pub/pdf/spdp07.pdf> [<https://perma.cc/DTV8-MWFEM>].

136. See Public Defender Survey, *infra* Appendix A. Over 40% had worked more than ten years in public defense, about a quarter between five and ten years, less than a quarter between two and five years, and about 10% had less than two years’ experience. *Id.*

137. *Id.*

138. *Id.*

139. *Id.* Because of the large percentage of supervisors in the sample, it is likely these caseloads are on the low side compared to the national averages for state practice. *Id.* In addition, one respondent reported working in a capital habeas unit (where caseloads are likely low numerically), and another reported having half a caseload to allow him or her to work on policy issues during the other half of the time. *Id.*

140. *Id.*

141. *Id.* It is likely that, if replicated, an even higher percentage would report working with police BWC footage in 2020.

142. See Public Defender Survey, *infra* Appendix A.

the police, surveillance videos, autopsy photos, and videos from social media like Facebook and Snapchat.<sup>143</sup>

The survey asked respondents how often they dealt with “eyewitness media”—meaning video taken by an eyewitness to the incident, including police BWC and surveillance video.<sup>144</sup> Most defenders reported handling eyewitness media at least several times a week (10.5% daily, 47.4% several times a week).<sup>145</sup> Another 7.5% dealt with eyewitness media weekly, and 22.1% handled it several times a month.<sup>146</sup> Only 12.6% reported dealing with eyewitness media once a month or less.<sup>147</sup>

Slightly more than half (51.1%) reported handling eyewitness media for one to two hours at a time.<sup>148</sup> About a fifth (19%) reported sessions shorter than one hour, while a similarly sized group (22.3%) reported two- to four-hour sessions.<sup>149</sup> A small but significant cohort of 4.7% reported handling digital media in sessions longer than four hours at a time.<sup>150</sup> The overwhelming sense from the respondents was that the amount of digital media being reviewed is increasing (91.1% reported an increase, 8.4% reported no change, and only one respondent reported a decrease).<sup>151</sup> In addition, 93.6% of the surveyed public defenders reported that reviewing digital content is primarily an attorney’s responsibility.<sup>152</sup> These responses suggest that reviewing digital content is becoming an increasingly time-consuming part of public defender work.<sup>153</sup> These trends are

---

143. See Comments to Survey Question 13, *infra* Appendix B. This information was submitted by respondents using the comments feature of the survey. *Id.*

144. See Public Defender Survey, *infra* Appendix A. For a discussion of the origin and meaning of the term “eyewitness media,” see DUBBERLEY ET AL., *supra* note 12.

145. See Public Defender Survey, *infra* Appendix A.

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. See Public Defender Survey, *infra* Appendix A.

152. *Id.* Some did consider it investigator (1.1%) or paralegal (0.5%) work, and 4.7% said the responsibility for reviewing digital content might depend on the circumstances. *Id.*

153. This is consistent with findings in other literature and will be discussed further *infra* Section IV.C.

consistent with data from law enforcement agencies reporting increased utilization of BWC and other video evidence.<sup>154</sup>

The survey asked respondents, “On average, how often are you exposed to eyewitness media you would categorize as traumatic? (Traumatic content would include images of violence, threats of violence, and the immediate effects of violence.)”<sup>155</sup> In response to this question, very few reported daily exposure (2.1%), though roughly a quarter of respondents reported weekly exposure or more.<sup>156</sup> Another quarter reported exposure several times a month.<sup>157</sup> About half reported contact with traumatic content once a month or less.<sup>158</sup> These figures are a worthwhile benchmark because it is likely these numbers will continue to rise as digital media’s presence in defense work continues to grow.

The survey also explored the impact of digital media on the public defender respondents in both their professional and personal lives.<sup>159</sup> As a starting point, the survey asked respondents to “[d]escribe the video or image that has impacted you the most strongly.”<sup>160</sup> This question was purposely neutral and open-ended. Out of the 170 responses, only five reported not being significantly impacted by any image.<sup>161</sup> Among the responses about impactful images, several themes emerged. Many respondents mentioned “child pornography” without elaborating on the details.<sup>162</sup> Others described autopsy or crime scene photographs or videos of dead bodies in murder cases—

---

154. See discussion *supra* Section I.B. BWCs also serve as proxies for other video evidence that comes from many sources. For example, Ring, a security service that relies on a doorbell camera, has partnered with over 400 law enforcement agencies so that law enforcement can seamlessly request home surveillance footage for investigation of neighborhood crime. Drew Harwell, *Doorbell-Camera Firm Ring Has Partnered with 400 Police Forces, Extending Surveillance Concerns*, WASH. POST (Aug. 28, 2019, 6:53 PM), <https://www.washingtonpost.com/technology/2019/08/28/doorbell-camera-firm-ring-has-partnered-with-police-forces-extending-surveillance-reach/> [https://perma.cc/K3CS-AUJR].

155. See Public Defender Survey, *infra* Appendix A.

156. *Id.*

157. *Id.*

158. *Id.*

159. See *id.*

160. *Id.* For responses to this question, see Comments to Survey Question 13, *infra* Appendix B.

161. See Comments to Survey Question 13, *infra* Appendix B.

162. *Id.*

particularly those involving children, infants, or especially brutal means of death (two mentioned photographs of victims who had been burned to death).<sup>163</sup> Regrettably, these are not new categories of images in defense practice and are therefore not the thrust of the inquiry of this Article.

Aside from the child pornography and autopsy photographs, the other large groups of responses fell into two general categories: (1) videos capturing police violence or misconduct; and (2) videos capturing client violence, such as videos of clients committing assault or even murder.<sup>164</sup> A small but significant group reported exonerating videos of violence committed by others and wrongly attributed to their clients; for example, one response was, “video of shooting of victim, even if the video appears that a different person was the shooter and not my client.”<sup>165</sup> Another reported, “store video of suspect who was not the defendant.”<sup>166</sup> Though less frequent, this category is compelling.

Sometimes the videos depicting police misconduct or violence are exonerating or helpful in getting a case dismissed. For example, one respondent described a case in which “[a]n officer used a racial slur on a bodycam, [and] it resulted in dismissal of the case.”<sup>167</sup> Another respondent referenced “[v]ideo taken by a client who was assaulted by an officer and [w]as charged with assault”—presumably, this video was exonerating and helped the attorney secure a dismissal or acquittal of the client’s assault charges.<sup>168</sup>

But in other situations, the police violence, though excessive, may not have any relation to a defense for the client. One survey respondent stated the most impactful image included “[h]ostile, violent, disrespectful cops taking advantage of people.”<sup>169</sup> Nothing in that quotation suggests that the videos helped her clients—it rather

---

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. See Comments to Survey Question 13, *infra* Appendix B.

168. *Id.*

169. *Id.*

suggests that the footage just served to confirm and calcify her dislike and distrust of “cops.” Another respondent wrote “[p]olice brutality” without elaboration.<sup>170</sup> Yet another described, “I had a client who was involved in a high[-]speed chase down a residential street. When his car crashed, he ran away. As he hopped a fence, the police [officer] drove his vehicle into the fence and ran over the client, who was on foot.”<sup>171</sup> This defense attorney watched police officers run over her client with a car—an image she cannot “unsee.”<sup>172</sup>

Sometimes, it is too late to do anything at all for the client, like when video captures a former client’s death at the hands of police officers.<sup>173</sup> One survey respondent reported, “Our [office’s former] client Eric Garner was killed on video, and watching that video or arrests with similar levels of violence or hostility traumatize[s] me.”<sup>174</sup> As has been well-documented, the officers who killed Garner were not indicted for the killing neither on state nor federal charges, despite the video recording of Garner’s death.<sup>175</sup>

Traumatic images do not necessarily contain illegal conduct. Some respondents described police conduct that, though disturbing to them, is probably not even disciplinary misconduct.<sup>176</sup> For example:

---

170. *Id.*

171. *Id.*

172. *Id.*

173. See Comments to Survey Question 13, *infra* Appendix B. One respondent’s answer was, “The body worn camera footage of a cop chasing my client and shooting and killing my client.” *Id.* It is impossible to know the context for the viewing of the image here—obviously the “client” can no longer be represented by a public defender after his death. But the video still had a significant impact on the attorney.

174. *Id.*

175. J. David Goodman & Al Baker, *Wave of Protests After Grand Jury Doesn’t Indict Officer in Eric Garner Chokehold Case*, N.Y. TIMES (Dec. 3, 2014), <https://www.nytimes.com/2014/12/04/nyregion/grand-jury-said-to-bring-no-charges-in-staten-island-chokehold-death-of-eric-garner.html> [<https://perma.cc/S7DN-9BWN>]; Katie Benner, *Eric Garner’s Death Will Not Lead to Federal Charges for N.Y.P.D. Officer*, N.Y. TIMES (July 16, 2019), <https://www.nytimes.com/2019/07/16/nyregion/eric-garner-case-death-daniel-pantaleo.html> [<https://perma.cc/257H-KYZ3>].

176. See Comments to Survey Question 13, *infra* Appendix B.

A young defendant being arrested in the winter was held at gun point while in his socks and not very much clothing on. He was face down in the snow shaking uncontrollably. It was a small amount of meth that had been recovered on the ground. He begged to be moved inside or to get his shoes. The officers pointed guns at his head. He was [eighteen].<sup>177</sup>

There were other responses about police arresting clients who were “on PCP [phencyclidine]” or in a mental health crisis that similarly disturbed the attorney, despite not constituting official misconduct.<sup>178</sup> Watching a client being tased is disturbing even if it is preferable to the officer resorting to a real gun.<sup>179</sup> But the common thread is that, typically, the public defender client is on the receiving end of the police abuse.<sup>180</sup>

Images of clients inflicting violence are similarly impactful. But rather than engender empathy in the attorney for a client, these videos and images serve to distance the attorney from the client. Responses in this category included “[m]urder on video,” “[c]hild abuse resulting in death on video,” and “[a] body cam video capturing the last moments of a victim’s life, audio and visual, from the victim’s perspective.”<sup>181</sup> The descriptions of these videos are staccato to seem objective, but presumably the violence described in such objective terms is being inflicted by the attorney’s client. One attorney answered, “Video of a murder where victim and defendant’s children were on the porch and could be heard yelling in the 911 call.”<sup>182</sup> Another said, “Surveillance during a robbery where victims screamed for help and then laid on the ground while a replica firearm was pointed at them. They were shaking and began to hold hands as they laid face down on the floor near the safe.”<sup>183</sup>

---

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

182. See Comments to Survey Question 13, *infra* Appendix B.

183. *Id.*

Both accounts erase the client from the description—there is no actor committing the murder or pointing the firearm.<sup>184</sup> Another attorney responded that one of the most impactful images “involved a stabbing (over [ten] shanks) at a bus stop where a camera captured the victim bleed out and die over the course of [two] minutes.”<sup>185</sup> Another referenced a “video of a [thirteen-year-old] being killed by being shot in the head.”<sup>186</sup> These images of clients (or accomplices) inflicting extreme violence put pressure on the attorney–client relationship and raise significant ethical challenges, which will be discussed *infra* Part III.

Survey respondents were then asked to categorize how their interaction with “traumatic eyewitness media” impacted their personal and professional lives.<sup>187</sup> Not one survey respondent claimed a positive impact on their personal life, but about 12% described the impact of traumatic eyewitness media on their professional life as “positive.”<sup>188</sup> Another 23.8% and 34.9% claimed that dealing with traumatic eyewitness media had no impact on their personal or professional lives, respectively.<sup>189</sup> The remainder of respondents indicated that traumatic eyewitness media had an adverse impact on them.<sup>190</sup> In terms of personal life, two-thirds of respondents described a low to moderate adverse impact, while 10% had a high to very high adverse impact.<sup>191</sup> For professional life, almost half (46.5%) described a low to moderate adverse impact, while 6.4% had a high to very high adverse impact.<sup>192</sup> Respondents described the impact of traumatic eyewitness media on their personal lives as consisting of compartmentalization, desensitization to violence, paranoia (particularly fear of their children being

---

184. *Id.*

185. *Id.*

186. *Id.*

187. *See* Public Defender Survey, *infra* Appendix A. For responses to these questions, see Comments to Survey Question 16, *infra* Appendix C, and Comments to Survey Question 17, *infra* Appendix D.

188. *See* Public Defender Survey, *infra* Appendix A.

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.*



victimized), nightmares and bad dreams, and a suicide attempt; some even chose to leave the field of criminal defense.<sup>193</sup>

In terms of the impact of eyewitness media on respondents' professional lives, the answers were more varied.<sup>194</sup> Some believed the videos made them more empathetic and compassionate, while others described the effect as desensitizing or contributing to compassion fatigue.<sup>195</sup> Several respondents reported traumatic imagery was a reason they left the practice of public defense or criminal defense.<sup>196</sup> But others said the videos had the effect of motivating them to fight for justice.<sup>197</sup> Some believed that the videos were useful (if time-consuming) tools to gather evidence about police tactics and prepare a case.<sup>198</sup> Still others believed viewing traumatic images negatively impacted productivity due to their draining effects.<sup>199</sup> And one summed it up with, "It's what we sign up for."<sup>200</sup>

What are public defenders "signing up for" exactly? One component of the public defender survey consisted of a series of questions adapted from a validated mental health screening tool used to screen for secondary trauma and related conditions.<sup>201</sup> The screening tool includes eighteen questions with each answer scored on a scale of one to five.<sup>202</sup> Helpfully, the tool includes a cutoff score to identify intervention and treatment needs.<sup>203</sup> Scores of thirty-eight or higher are "indicative of mild to severe anxiety and depression and

193. See Comments to Survey Question 16, *infra* Appendix C.

194. See Comments to Survey Question 17, *infra* Appendix D.

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.*

200. See Comments to Survey Question 17, *infra* Appendix D.

201. See Public Defender Survey, *infra* Appendix A; see also Robert W. Motta et al., *Initial Evaluation of the Secondary Trauma Questionnaire*, 85 PSYCH. REPS. 997, 999 (1999) [hereinafter Motta et al., *Initial Evaluation of STQ*]. Psychologists developed the assessment tool used in the survey in 1999 and refined it in 2001. Robert W. Motta et al., *Discriminant Validation of the Modified Secondary Trauma Questionnaire*, 2 J. PSYCHOTHERAPY INDEP. PRAC. 17, 20 (2001) [hereinafter Motta et al., *Validation of Modified STQ*].

202. See Public Defender Survey, *infra* Appendix A; see also Robert W. Motta et al., *Assessing Secondary Trauma*, 27 BEHAV. THERAPIST 45, 55 (2004) [hereinafter *Assessing Secondary Trauma*].

203. See Public Defender Survey, *infra* Appendix A; *Assessing Secondary Trauma*, *supra* note 202.

also are related to problematic intrusion and avoidance symptoms.”<sup>204</sup> Scores of forty-five or higher indicate the “possibility of significant emotional concerns, as they [are] associated with moderate to severe anxiety and depression.”<sup>205</sup>

The responses from the public defender survey indicate that of the 177 public defenders who responded to each question, eighty-six (or 48.6%) scored over the screening cutoff of thirty-eight points—indicating mild to severe anxiety and depression.<sup>206</sup> Likewise, the average score was 38.7 points—above the screening cutoff.<sup>207</sup> Additionally, fifty-one of 177 respondents (28.8%) scored over forty-five points, indicating the “possibility of significant emotional concerns.”<sup>208</sup> This is not necessarily a representative data set,<sup>209</sup> but if it is even possibly true that nearly half of our public defenders are experiencing mental health concerns and over a quarter potentially have “significant emotional issues,” this reality seriously compromises the efficacy of public defender offices and individual public defense attorneys. Even if this is what defenders “sign up for,” it cannot be acceptable to a society interested in justice and due process.<sup>210</sup>

The final questions on the survey dealt with public defender office culture and training as they related to digital media.<sup>211</sup> The survey asked respondents whether they agreed or disagreed with the statement, “My workplace culture is such that I would feel

---

204. See Public Defender Survey, *infra* Appendix A; *Assessing Secondary Trauma*, *supra* note 202, at 57.

205. See Public Defender Survey, *infra* Appendix A; *Assessing Secondary Trauma*, *supra* note 202, at 57.

206. See Public Defender Survey, *infra* Appendix A; see also *Assessing Secondary Trauma*, *supra* note 202, at 57. Many skipped the quiz section entirely, while others skipped a question or two, invalidating the results.

207. See Public Defender Survey, *infra* Appendix A; see also *Assessing Secondary Trauma*, *supra* note 202.

208. See Public Defender Survey, *infra* Appendix A; see also *Assessing Secondary Trauma*, *supra* note 202, at 57.

209. For example, it may be that attorneys most symptomatic of secondary trauma were more interested in completing the survey, skewing the data. See *supra* note 206.

210. See Comments to Survey Question 17, *infra* Appendix D.

211. See Public Defender Survey, *infra* Appendix A.

comfortable asking for support in handling traumatic content and stress relating to traumatic content.”<sup>212</sup> In the sample, though more than half agreed or strongly agreed, a significant 27% disagreed or strongly disagreed with the statement—indicating office culture is exacerbating the mental health needs of public defenders in many offices.<sup>213</sup> The survey also asked participants whether they agreed or disagreed with the statement, “If I felt adversely affected by handling traumatic content at work, I would feel comfortable discussing my feelings with my supervisor.” Similarly, though more than half of respondents agreed or strongly agreed, a significant 27% disagreed or strongly disagreed.<sup>214</sup> This high percentage of disagreement makes it unsurprising that only about a third of public defenders surveyed reported receiving training on secondary trauma, and a mere 10% reported receiving training on the handling of graphic digital content.<sup>215</sup> Nearly two-thirds (63%) reported receiving no training on either of these topics.<sup>216</sup> These data paint a bleak picture of the institutional response of public defender offices to the challenges presented by the onslaught of digital media.

## II. IMPACT ON ATTORNEY COMPETENCE

So why should we care about the emotional toll of criminal defense work in the digital age? Why does it matter that attorneys may be desensitized or traumatized by what they view? Or that nearly half of public defenders meet the screening threshold for mild anxiety and depression? Because when the lawyers in the criminal defense bar and public defender offices are overworked and overloaded with stress, the negative outcomes affect their clients and communities.<sup>217</sup> One report posits that when public defense is

---

212. *Id.* This and other questions were adapted from another survey. DUBBERLEY ET AL., *supra* note 12, at 39.

213. *See* Public Defender Survey, *infra* Appendix A.

214. *Id.*

215. *Id.*

216. *Id.*

217. *See* KATE TAYLOR, SYSTEM OVERLOAD: THE COSTS OF UNDER-RESOURCING PUBLIC DEFENSE 2

underfunded, it results in increased incarceration due to needless pretrial detention, pressure to plead guilty, trial errors, and a lack of resources for reentry services.<sup>218</sup> Underfunded offices produce overworked attorneys who cannot perform competently.<sup>219</sup> Threats to attorney mental health, like those presented by the increased exposure to violent digital content, are also threats to attorney competence.<sup>220</sup> And when attorneys in the defense bar lack competence, our commitment to justice falters, and the system loses legitimacy in the communities it purportedly serves.

#### A. *Background Mental Health Concerns for Public Defenders*

Public defenders work with clients in crisis every day. Most clients have experienced trauma, and often that trauma is central to the criminal case. Sometimes, defenders witness traumatic events firsthand. But more often, especially since the proliferation of police BWC and other video evidence, the defender experiences the traumatic event through recorded media—video or photographs. Sometimes, the traumatic media depicts a crime or is contraband itself, as in the case of child pornography. At other times, the defender merely hears of the traumatic event from her client or a witness, or reads about it in an arrest report or other document. But the frequency and intensity of public defenders' interactions with traumatic content are increasing in the digital era. Even the toughest criminal defense attorney can be battered by these experiences, especially as they accumulate over time.

Public defenders have echoed the chorus of BWC proponents for understandable reasons.<sup>221</sup> BWC and other video evidence have a

---

(2011), [http://www.justicepolicy.org/uploads/justicepolicy/documents/system\\_overload\\_final.pdf](http://www.justicepolicy.org/uploads/justicepolicy/documents/system_overload_final.pdf) [<https://perma.cc/K7HD-SLX7>]; see also Norton et al., *supra* note 48, at 987, 992–93.

218. TAYLOR, *supra* note 217, at 17–23 (describing how underfunding public defense results in increased incarceration and costs communities needless resources).

219. *Id.* at 11.

220. JOHN WESLEY HALL, JR., PROFESSIONAL RESPONSIBILITY IN CRIMINAL DEFENSE PRACTICE § 34:7 (3d ed. 2005).

221. See, e.g., NACDL, *supra* note 4, at 11 (endorsing cautiously the continued and wider use of BWCs but noting that “as with any police technology, the devil is in the details”).

unique ability to ferret out police abuses and misconduct.<sup>222</sup> Uncovering police abuses not only helps in the individual cases where an officer is found to be dishonest or violent but also helps puncture the pristine reputation of police officers in general, which helps criminal defendants and public defenders at trial in any case where police credibility is central to the case—the vast majority of cases.<sup>223</sup> In addition, there is some evidence that simply wearing BWCs makes police less apt to use force.<sup>224</sup> Because the clients of public defenders often bear the brunt of police force, again, it is unsurprising that public defenders would applaud the use of BWCs. But BWC video, surveillance video, and cell phone video are powerful tools that come at a cost: violent videos are impacting public defenders already at high risk for mental health conditions like trauma and burnout.

The mental health and wellbeing of lawyers generally stands on shaky ground. In a 2016 study of nearly 13,000 lawyers, between 21% and 36% qualified as problem drinkers, and approximately 28%, 19%, and 23% struggled with some level of depression, anxiety, and stress, respectively.<sup>225</sup> Another study found that lawyers topped the list of professionals at risk for depression.<sup>226</sup> Attorneys also have high rates of suicide.<sup>227</sup> Even law students have elevated levels of

---

222. See, e.g., Fenton & Rector, *supra* note 7 (describing BWC footage that shows an officer planting drugs in a trash-strewn lot and then returning to “discover” them a few seconds later); see also Monica Davey, *Officers’ Statements Differ from Video in Death of Laquan McDonald*, N.Y. TIMES (Dec. 5, 2015), <https://www.nytimes.com/2015/12/06/us/officers-statements-differ-from-video-in-death-of-laquan-mcdonald.html> [<https://perma.cc/AR5B-N8PH>] (reporting on Laquan McDonald’s death after released video contradicted Chicago police officers’ claims that McDonald lunged at them with a knife when he was shot because the video showed him walking away from police at the time of the shooting).

223. See Sacharoff & Lustbader, *supra* note 93, at 275–76 (noting that BWC footage is used against private citizens far more often than against police). There is some concern that because BWC technology is generally marketed towards police departments, the technology is becoming a tool for law enforcement purposes rather than a technology aimed at police accountability. *Id.* at 289.

224. Barak Ariel et al., *The Effect of Police Body-Worn Cameras on Use of Force and Citizens’ Complaints Against the Police: A Randomized Controlled Trial*, 31 J. QUANTITATIVE CRIMINOLOGY 509, 530 (2015).

225. Patrick R. Krill et al., *The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys*, 10 J. ADDICTION MED. 46, 51 (2016).

226. Lisa Caplan, *Stress, Compassion Fatigue and Burnout: Occupational Hazards of Practicing Law*, 45 MD. BAR J. 54, 56 (2012).

227. See, e.g., Rosa Flores & Rose Marie Arce, *Why Are Lawyers Killing Themselves?*, CNN,

depression and anxiety.<sup>228</sup> There have been national calls for action regarding lawyer well-being, centered on aiding lawyers struggling with substance use and mental health disorders.<sup>229</sup>

Other research has specifically explored the mental health concerns of attorneys dealing with trauma-exposed clients, like attorneys working with immigration asylum seekers or clients who are victims of domestic violence and abuse.<sup>230</sup> A 2003 study assessed attorneys working in domestic violence and family law and compared them to mental health providers and social service workers in the same fields.<sup>231</sup> The survey found that attorneys had a higher caseload of traumatized clients and more symptoms of secondary trauma and burnout.<sup>232</sup> The surveyed attorneys felt that education regarding the effects of trauma on their clients and themselves could mitigate the effects.<sup>233</sup> Some features of lawyering may exacerbate the risk of burnout and other related conditions.<sup>234</sup> One is the “unbearable burden” of confidentiality, which isolates attorneys by requiring them not to disclose troubling information related to clients or cases.<sup>235</sup> Moreover, even when confidentiality obligations allow the sharing of troubling information, some attorneys may refrain because of a desire to not traumatize friends, family, or co-workers.<sup>236</sup>

In a 2011 study of public defenders in Wisconsin, 11% met screening criteria for PTSD, 39.5% met screening criteria for

---

<https://www.cnn.com/2014/01/19/us/lawyer-suicides/index.html> [<https://perma.cc/824V-D5GG>] (Jan. 20, 2014, 2:42 PM).

228. Stephen B. Shanfield & G. Andrew H. Benjamin, *Psychiatric Distress in Law Students*, 35 J. LEGAL EDUC. 65, 68, 74 (1985); see also Lawrence S. Krieger, *Institutional Denial About the Dark Side of Law School, and Fresh Empirical Guidance for Constructively Breaking the Silence*, 52 J. LEGAL EDUC. 112, 114 (2002).

229. See, e.g., BREE BUCHANAN ET AL., NAT’L TASK FORCE ON LAW. WELL-BEING, THE PATH TO LAWYER WELL-BEING: PRACTICAL RECOMMENDATIONS FOR POSITIVE CHANGE 7 (Anne Brafford et al. eds., 2017).

230. See, e.g., Levin & Greisberg, *supra* note 55, at 250.

231. *Id.*

232. *Id.* at 246, 250. In this context, “secondary trauma” refers to both STS/compassion fatigue and vicarious trauma. *Id.* at 246.

233. *Id.* at 252.

234. See, e.g., Norton et al., *supra* note 48, at 996.

235. *Id.*

236. See, e.g., Harms, *supra* note 77, at 20.

depression, 37.4% met screening criteria for burnout, and 34% met the screening criteria for STS syndrome.<sup>237</sup> These rates were notably higher than support staff in the same public defender offices, demonstrating that the burnout comes in part from the attorney work.<sup>238</sup> The researchers found that the attorneys had a higher number of hours at work and greater exposure to trauma-exposed clients than support staff—both factors that were associated with greater likelihood of screening for PTSD symptoms.<sup>239</sup> The study also found that 74.8% of the attorneys met screening criteria for functional impairment, meaning that exposure to clients’ trauma was interfering with the attorneys’ ability to function in one of three spheres: work, social life, or family life.<sup>240</sup>

After the study’s release, the *Wisconsin Lawyer* published a follow-up article with interviews from public defenders.<sup>241</sup> One public defender talked about how hard it was emotionally to dig into the stories of his juvenile clients because “[y]ou learn about a lot of bad stuff, and you have to try to process that every day.”<sup>242</sup> Another veteran public defender explained that older attorneys get good at putting up protective boundaries, “but then when they get home, they have trouble lifting those boundaries with family and friends.”<sup>243</sup> Another qualitative study about criminal lawyers in Ireland found evidence of similar phenomena—attorneys explained that the work “definitely makes you harder” and “coarsens you.”<sup>244</sup> In explaining how vicarious trauma impacted her, one public defender blogger explained, “I doubted all my decisions, felt helpless, and certain that whatever I was doing wasn’t good enough for my clients.”<sup>245</sup> She

---

237. Andrew P. Levin et al., *Secondary Traumatic Stress in Attorneys and Their Administrative Support Staff Working with Trauma-Exposed Clients*, 199 J. NERVOUS & MENTAL DISEASE 946, 948 (2011).

238. *Id.*

239. *Id.* at 948–49.

240. *Id.* at 948.

241. Dianne Molvig, *The Toll of Trauma*, 84 WIS. LAW. 4, 4 (2011).

242. *Id.*

243. *Id.* at 9.

244. Bulbulia et al., *supra* note 44, at 38.

245. Renate Lunn, “How Are You Feeling?” – *The Impact of Working in Public Defense*, NAT’L

described feelings of vicarious trauma, secondary stress, compassion fatigue, and burnout as “perfectly normal responses to working in a defender office” where one hears “heart-wrenching stories regularly.”<sup>246</sup>

Recently, another study based on interviews with eighty-seven current and former public defenders documented what the study’s authors describe as the “stress of injustice” experienced by public defenders.<sup>247</sup> Though the study did not specifically address digital video evidence, it discussed how three structural elements of the criminal legal system—penal excess, disinvestment in indigent defense, and the criminalization of mental illness—can produce occupational stress among public defenders.<sup>248</sup> The authors argued that these conditions make public defenders “highly vulnerable to chronic stress” and could have “profound implications for their ability to safeguard the rights of poor defendants.”<sup>249</sup>

Unlike other helping professionals, “attorneys must often induce and reenact trauma for presentation at trial[,] and they must further revisit the traumatic aspects of cases during trial preparation and the development of a coherent narrative for the case.”<sup>250</sup> This is especially true of criminal defense attorneys. Attorneys are ethically bound by a duty of loyalty and zealous representation to revisit the traumatic content if doing so would further the representation of the client.<sup>251</sup> And when the case requires it, attorneys must routinely view graphic content—images or videos of violence.<sup>252</sup>

---

ASS’N FOR PUB. DEF. (July 13, 2016, 4:39 PM), [http://www.publicdefenders.us/blog\\_home.asp?display=87](http://www.publicdefenders.us/blog_home.asp?display=87) [<https://perma.cc/4TRM-9MFP>].

246. *Id.*

247. See generally Valerio Baćak et al., *The Stress of Injustice: Public Defenders and the Frontline of American Inequality* (Dec. 12, 2020) (unpublished manuscript), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3765714](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3765714).

248. *Id.* at 13.

249. *Id.* at 1.

250. Evan R. Seamone, *Sex Crimes Litigation As Hazardous Duty: Practical Tools for Trauma-Exposed Prosecutors, Defense Counsel, and Paralegals*, 11 OHIO ST. J. CRIM. L. 487, 505 (2014).

251. MODEL RULES OF PRO. CONDUCT pmbl. ¶ 9 (AM. BAR ASS’N 2020).

252. Levin et al., *supra* note 237, at 947 (“In addition to hearing first-hand accounts, the attorneys review reports and photographs and have contact with physical evidence such as bloody clothing.”).



As one federal judge said of reviewing contraband child pornography images, “There are some images that are haunting, and they cannot be unseen.”<sup>253</sup> This is true of child pornography, but it is also true of other traumatic electronic media like BWC footage or cell phone video depicting a violent crime.

### B. Impact of Digital Content on Individual Attorneys

The Supreme Court stated, “Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have.”<sup>254</sup> Access to attorneys is paramount, but just having an attorney is not enough to meet constitutional muster—defendants are entitled to *competent* and *effective* representation.<sup>255</sup> Likewise, competence is the first rule of attorney ethics.<sup>256</sup> But attorney burnout and other mental health conditions, which the influx of digital content may exacerbate, threaten to impact attorney competence at both the individual and institutional level.<sup>257</sup> PTSD, for example, includes the criterion of functional impairment, meaning that no one can be diagnosed with PTSD unless the condition is negatively impacting their ability to function in either their work or personal life.<sup>258</sup>

PTSD, as explained *supra*,<sup>259</sup> includes several types of symptoms—intrusion symptoms, avoidance symptoms, negative alterations in cognition or mood, and alterations in arousal and

---

253. *United States v. Cunningham*, 680 F. Supp. 2d 844, 854 (N.D. Ohio 2010), *aff’d*, 679 F.3d 355 (6th Cir. 2012).

254. *United States v. Cronin*, 466 U.S. 648, 654 (1984) (quoting Walter V. Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 8 (1956)).

255. *McMann v. Richardson*, 397 U.S. 759, 771 (1970) (“[I]f the right to counsel guaranteed by the Constitution is to serve its purpose, defendants cannot be left to the mercies of incompetent counsel . . . .”); *see also id.* at 771 n.14 (“It has long been recognized that the right to counsel is the right to the effective assistance of counsel.”).

256. MODEL RULES OF PRO. CONDUCT r. 1.1 (AM. BAR ASS’N 2020).

257. TAYLOR, *supra* note 217, at 11.

258. DSM-5, *supra* note 16, at 271–72.

259. *See supra* Section I.A.

reactivity.<sup>260</sup> All of these symptoms can impact attorney performance. For example, intrusion symptoms are episodes of re-experiencing the initial trauma, including flashbacks, unwanted memories, and emotional distress relating to those memories.<sup>261</sup> These symptoms distract from an attorney's ability to focus. As one survey respondent explained, "[I]mages linger in my mind long after viewing. This can distract me."<sup>262</sup> Another reported, "The sound of screaming and keening in a 911 call—if it's bad enough I can't stop hearing it. It makes it hard to attend to what I'm supposed to be doing when I come home."<sup>263</sup> These distractions can be particularly problematic in the world of criminal defense, where attorneys are often in court responding to situations on the fly with little time for reflection and pause.

Avoidance symptoms—particularly when the traumatic content triggering the condition is work-related—are potentially even more problematic. And the bulk of public defender survey respondents reported avoidance symptoms.<sup>264</sup> If images of police violence on video have traumatized an attorney, the attorney may be reluctant to review police BWC video in discovery. If a client resembles a different client who was involved in a traumatic case, the attorney may be reluctant to meet with the client for fear of triggering a negative emotional reaction.<sup>265</sup>

Obviously, negative mood and cognition, which include such symptoms as overly negative feelings about oneself or the world and decreased interest in activities, can reduce attorney productivity or compassion. As one survey respondent expressed, "[V]iewing traumatic images tends to drag my productivity down further."<sup>266</sup>

---

260. DSM-5, *supra* note 16, at 271–72.

261. *Id.* at 271.

262. *See* Comments to Survey Question 16, *infra* Appendix C.

263. *Id.*

264. *See* Public Defender Survey, *infra* Appendix A.

265. *See* Comments to Survey Question 13, *infra* Appendix B. For example, the survey respondent who stated that the most impactful images were videos with police hostility or violence, similar to those in the video of the murder of her office's former client Eric Garner, may be inclined to avoid reviewing video evidence because it brings up the trauma of watching Garner's death.

266. *See* Comments to Survey Question 17, *infra* Appendix D.

Another reported, “[A]fter seeing so much misery, I just stop caring. Trauma becomes a fixed constant devoid of any meaning.”<sup>267</sup> These negative feelings may make it difficult to establish rapport with clients because attorneys may be overly suspicious of clients or may not have the bandwidth to care. Alterations in arousal and reactivity include increased risk-taking, hyper-vigilance, and difficulty concentrating.<sup>268</sup> Increased risk-taking can render an attorney incompetent—attorneys should counsel clients about the risks associated with different courses of action in the case. If a PTSD-related condition alters a public defender’s risk-calibration gauge, that alteration may have disastrous consequences for her clients. An attorney might misadvise a client to reject a favorable plea deal or to take the stand in trial, opening the door to damning evidence.<sup>269</sup>

Aside from PTSD, the symptoms of other trauma-related conditions discussed *supra* include black-and-white thinking, which is problematic for defense attorneys who often must inject ambiguity into seemingly straightforward cases.<sup>270</sup> Attorneys can also become desensitized and then become poor judges for how prosecutors, judges, and jurors will view the same evidence. As one survey respondent explained, “[Viewing graphic content] has increased my tolerance for violent imagery[] and sometimes makes it difficult for me to imagine how a jury might see things fresh.”<sup>271</sup> Another stated, “[I]t begins to feel normal and it so isn’t.”<sup>272</sup>

Attorney competence is an inflexible standard in many ways. An attorney’s incompetence is not excused by the excessive caseloads so often confronted in public defender offices.<sup>273</sup> And mental illness or

---

267. *Id.*

268. DSM-5, *supra* note 16, at 272.

269. *See, e.g.*, FED. R. EVID. 609(a)(1)(B) (allowing for impeachment of a criminal defendant by evidence of criminal convictions).

270. Norton et al., *supra* note 48, at 989.

271. *See* Comments to Survey Question 17, *infra* Appendix D. In practice, I periodically played videos to support staff to get a fresh take because I was numbed to the violence.

272. *Id.*

273. ABA Comm. on Ethics & Pro. Resp., Formal Op. 06-441, at 9 (2006) (“The obligations of competence, diligence, and communication under the Rules apply equally to every lawyer. All lawyers,

impairment, like that resulting from PTSD or burnout, does not excuse failure to comply with the ethical rules regarding competence or diligence.<sup>274</sup> Supervisors may even be required to report ethical violations of an attorney who fails to comply with the rules due to mental health conditions brought on by exposure to traumatic imagery.<sup>275</sup> Recently, one public defender office fired an attorney for the PTSD she developed from years of defending juveniles accused of sex offenses.<sup>276</sup>

Self-care practices enable an attorney to both effectively address trauma exposure responses and enhance the sustainability of direct client work.<sup>277</sup> Perceptions that self-care only benefits the lawyer and the absence of self-care only harms that lawyer are dangerous because when lawyers fail to engage in sustainable practice, they end up hurting the client with substandard work.<sup>278</sup> Safeguarding the mental health of attorneys is necessary to protect clients. Individual attorneys are ethically bound to maintain levels of mental health required for competent representation and zealous advocacy;<sup>279</sup> but of course, there are limits to self-care. Sometimes, professional help or institutional support is needed.

---

including public defenders, have an ethical obligation to control their workloads so that every matter they undertake will be handled competently and diligently.”); Taylor Payne, *Plight of the Public Defender: Excessive Caseload As a Non-Mitigating Factor in Sanctions for Ethical Violations*, 83 MO. L. REV. 1087, 1112 (2018) (discussing mitigation arguments likely rejected by the Missouri Ethics Commission in disciplining a public defender who blamed excessive caseloads for his lack of diligence); see also MODEL RULES OF PRO. CONDUCT r. 1.3 cmt. 2 (AM. BAR ASS’N 2020) (“A lawyer’s work load must be controlled so that each matter can be handled competently.”).

274. ABA Comm. on Ethics & Pro. Resp., Formal Op. 03-429, at 2 (2003) (“Simply stated, mental impairment does not lessen a lawyer’s obligation to provide clients with competent representation.”).

275. *Id.* at 5 (“If, on the other hand, a lawyer’s mental impairment renders the lawyer unable to represent clients competently, diligently, and otherwise as required by the Model Rules and he nevertheless continues to practice, partners in the firm or the supervising lawyer must report that violation.”); see also ABA Comm. on Ethics & Pro. Resp., Formal Op. 03-431, at 4 (2003).

276. Lisa Burden, *EEOC: Attorney Who Represented Sex Offenders Fired During Leave for PTSD*, HR DIVE (May 7, 2019), <https://www.hrdiver.com/news/eec-attorney-who-represented-sex-offenders-fired-during-leave-for-ptsd/554176/> [http://perma.cc/Z8LQ-BFER]; see also Complaint at 1, *EEOC v. Def. Ass’n of Phila.*, No. 19-CV-1803 (E.D. Penn. Apr. 26, 2019).

277. Hannah C. Cartwright et al., *Self-Care in an Interprofessional Setting Providing Services to Detained Immigrants with Serious Mental Health Conditions*, 65 SOC. WORK 82, 83 (2020).

278. *Id.* at 86.

279. MODEL RULES OF PRO. CONDUCT rr. 1.1, 1.3 cmt. 1 (AM. BAR ASS’N 2020).

### C. Impact on Offices and Institutions

Aside from impacting individual attorneys, the emotional toll and added workload of reviewing violent videos and other traumatic content can have a cumulative effect on public defender offices, the provision of indigent defense, and our criminal legal system. One problem is that burnout can cause attorneys to leave indigent defense work altogether.<sup>280</sup> Historically, many zealous defenders who care about clients burn out and leave public defense.<sup>281</sup> Some evidence suggests that criminal attorneys are leaving indigent defense at higher rates due to the increased workload that comes with video evidence.<sup>282</sup> In fact, several public defender survey respondents reported leaving jobs or wishing they could retire due to the impact of reviewing traumatic eyewitness media.<sup>283</sup> It is also possible that the attorneys who leave are the ones we would most want to keep—those who review the video diligently and those who most reflect the communities their clients come from.

Recently, there has been increased focus on the lack of diversity in public defender offices and the ways in which the implicit racial biases of public defenders can fuel systemic racism in the criminal legal system.<sup>284</sup> One way to mitigate implicit racial bias is to have

---

280. See, e.g., ROBERT C. BORUCHOWITZ ET AL., NAT'L ASS'N OF CRIM. DEF. LAWS., *MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA'S BROKEN MISDEMEANOR COURTS* 46 (2009), [https://www.opensocietyfoundations.org/sites/default/files/misdemeanor\\_20090401.pdf](https://www.opensocietyfoundations.org/sites/default/files/misdemeanor_20090401.pdf) [<https://perma.cc/CF6U-V32X>].

281. *Id.* at 39–40, 46–47.

282. VA. CTS. OF JUST. COMM., *VCJC STUDY: IMPACT OF BODY WORN CAMERAS ON PROSECUTORS AND DEFENSE ATTORNEYS 1* (2019) (on file with author) [hereinafter *VCJC STUDY*] (noting that one-third of court-appointed defense counsel were considering leaving or had already left the appointment panel due to the increased workload from reviewing BWC footage).

283. See Comments to Survey Question 17, *infra* Appendix D. One reported leaving a “position as a line attorney to get away from the impact”; another withdrew from criminal defense entirely; one changed jobs; and one stated, “I am close to retiring and I wish I could go now.” *Id.*

284. See, e.g., Richardson & Goff, *supra* note 20, at 2643; Rapping, *supra* note 20; Kristin Henning, *Race, Paternalism, and the Right to Counsel*, 54 AM. CRIM. L. REV. 649, 652 (2017); Alexis Hoag, *Black on Black Representation*, 96 N.Y.U. L. REV. (forthcoming 2021), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3785013](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3785013); see also Andrea Estes, *District Attorney Rollins Calls Public Defenders Too White and Privileged, Setting Off a Storm of Protest*, BOS. GLOBE (May 6, 2020, 2:19 AM), <https://www.bostonglobe.com/2020/05/05/metro/district-attorney-rollins-calls-public-defenders-too-white-privileged-setting-off-firestorm-among-defense-lawyers/> [<https://perma.cc/6CA2-M8G5>] (describing progressive prosecutor Rachel Rollins’s criticisms of public

significant positive contact with individuals who do not fit our stereotypes about their group; for instance, one study found that people reporting more positive personal contacts with Black people were less likely to have negative beliefs about their criminality and violence.<sup>285</sup> The problem is that those defense attorneys who are most likely to be shielded from implicit racial bias based on positive personal contacts with Black or Latinx people are also those who are most likely to be negatively affected by job-related traumatic eyewitness media. As discussed *supra*, traumatic images tend to be more impactful and troubling when they include people whom the viewer identifies with or when they remind the viewer of someone they care about.<sup>286</sup> Because police violence disproportionately affects people of color, public defenders of color or public defenders who have close social ties to people of color are more likely to be negatively impacted by traumatic BWC footage.<sup>287</sup> This means BWC footage may be making public defender jobs more difficult for the very public defenders we most want to retain to diversify the profession and reduce racial bias in the criminal legal system.

There is also the possibility of civil suit against public defender offices or governmental entities that fail to safeguard attorneys against the harms inherent in reviewing violent videos. As any criminal practitioner knows, litigation based on ineffective assistance of counsel lacks teeth in a world post-*Strickland v. Washington*.<sup>288</sup>

---

defenders in Boston as being “overwhelmingly privileged” and white and therefore not responsive to their “poor, Black, and [B]rown” clients).

285. Richardson & Goff, *supra* note 20, at 2643. See generally Shaki Asgari et al., *When Does Contact with Successful Ingroup Members Change Self-Stereotypes? A Longitudinal Study Comparing the Effect of Quantity vs. Quality of Contact with Successful Individuals*, 41 SOC. PSYCH. 203 (2010); B. Michelle Peruche & E. Ashby Plant, *The Correlates of Law Enforcement Officers’ Automatic and Controlled Race-Based Responses to Criminal Suspects*, 28 BASIC & APPLIED SOC. PSYCH. 193, 196 (2006).

286. See discussion *supra* Section I.B.

287. Deidre McPhillips, *Deaths from Police Harm Disproportionately Affect People of Color*, U.S. NEWS (June 3, 2020, 4:07 PM), <https://www.usnews.com/news/articles/2020-06-03/data-show-deaths-from-police-violence-disproportionately-affect-people-of-color>.

288. 466 U.S. 668, 687 (1984), *superseded on other grounds by* Antiterrorism and Effective Death Penalty Act of 1966, Pub. L. No. 104-132, 110 Stat. 1214; see also Pamela R. Metzger, *Fear of Adversariness: Using Gideon to Restrict Defendants’ Invocations of Adversary Procedures*, 122 YALE L.J. 2550, 2559–72 (2013) (discussing how *Strickland* eviscerates a defendant’s capacity to seek redress

But if public defender offices or the governments that fund them are deaf to the concerns of their employees over the rise of digital media, those public defender employees could litigate to better their working conditions—potentially at great taxpayer expense.

Internet content moderators have filed two high-profile lawsuits in recent years against employers based on the claim that the employers breached a duty of care by failing to provide a safe workplace by exposing employees to traumatic digital content without reasonable safeguards.<sup>289</sup> Obviously, the frequency of exposure to disturbing digital content is much greater for internet content moderators than public defenders, but the outlines of a potential litigation strategy are present in the pleadings of these cases against behemoths Facebook and Microsoft.<sup>290</sup>

Female public defenders recently filed a class action lawsuit against the Cook County Public Defender and sheriff.<sup>291</sup> The lawsuit is a Title VII hostile work environment lawsuit stemming from county jail inmates exposing themselves to public defenders and the county officials failing to adequately address this repeated conduct.<sup>292</sup> The unsafe environment in this public defender lawsuit is based on real life (rather than video) exposure to graphic content.<sup>293</sup> But if public defender offices fail to respond to the demands of the increase in digital media in criminal defense practice, a civil suit is a possibility.

Finally, and most importantly, when the quality of public defense declines, it erodes the community's trust in the justice system.<sup>294</sup>

---

when counsel precludes the exercise of a fundamental right).

289. See Solon, *supra* note 71; see also Soto Complaint, *supra* note 19, at 13; Scola Complaint, *supra* note 19, at 1–2.

290. See Soto Complaint, *supra* note 19, at 13–39; Scola Complaint, *supra* note 19, at 11–17.

291. Brown v. Cook Cnty., 332 F.R.D. 229, 233 (N.D. Ill. 2019).

292. *Id.*

293. *Id.*

294. See Tony Fabelo, *What Policy-Makers Need to Know to Improve Indigent Defense Systems*, 29 N.Y.U. REV. L. & SOC. CHANGE 135, 137 (2004). See generally Jenny E. Carroll, *Nullification As Law*, 102 GEO. L.J. 579, 615 (2014) (“In moments of disconnect, when the law is discordant with the community’s values or expectations, the law loses its power, and the underlying aim of the rule of law is defeated.”). For a critique of the crisis of legitimacy framework for conceptualizing the eroded relationship between communities of color and actors in the criminal legal system, see Monica C. Bell,

When public defenders and other actors in the criminal legal system shirk their constitutional obligations, people cease to have confidence in the court and begin to believe the system is undeserving of respect and thus lacks legitimacy.<sup>295</sup> Moreover, the promise of police BWCs to promote police accountability is significantly diminished if the attorneys tasked with reviewing the footage are too desensitized or overworked to do the job.

The criminal legal system is facing a historic reckoning in the United States right now. Concerns and critiques of the legitimacy of the system are at an all-time high and have fueled worldwide protests.<sup>296</sup> The failures of the criminal legal system tend to be borne disproportionately by Black defendants. For example, of the 1,900 defendants who were convicted but later exonerated due to innocence, 47% were Black—over three times their rate in the population at large.<sup>297</sup>

Americans are concerned that criminal courts are in the business of doing the work of institutional racism and that there are “two systems” of justice in America—one for rich whites and the other for poor people of color.<sup>298</sup> Given this backdrop, it is more important than ever that we renew our commitment to robust indigent defense.<sup>299</sup> Procedural justice is insufficient to fully address the scope

---

*Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054, 2066 (2017) (framing the crisis as one of legal estrangement).

295. Stephen B. Bright & Sia M. Sanneh, *Fifty Years of Defiance and Resistance After Gideon v. Wainwright*, 122 YALE L.J. 2150, 2155 (2013).

296. Alan Taylor, *Images from a Worldwide Protest Movement*, THE ATLANTIC (June 8, 2020), <https://www.theatlantic.com/photo/2020/06/images-worldwide-protest-movement/612811/> [https://perma.cc/45AR-YPB4].

297. SAMUEL R. GROSS ET AL., NAT’L REGISTRY OF EXONERATIONS, RACE AND WRONGFUL CONVICTIONS IN THE UNITED STATES 1 (2017), [http://www.law.umich.edu/special/exoneration/Documents/Race\\_and\\_Wrongful\\_Convictions.pdf](http://www.law.umich.edu/special/exoneration/Documents/Race_and_Wrongful_Convictions.pdf) [https://perma.cc/23TJ-ZQL9].

298. See, e.g., Derrick A. Bell, Jr., *Racism in American Courts: Cause for Black Disruption or Despair*, 61 CALIF. L. REV. 165, 174 (1973). These concerns are not new but have just received wider attention in the summer of 2020. *Id.* (raising the same concerns nearly fifty years ago).

299. Historically, concerns about race have shaped the scope and trajectory of indigent defense in the United States. Shaun Ossei-Owusu, *The Sixth Amendment Façade: The Racial Evolution of the Right to Counsel*, 167 U. PA. L. REV. 1161, 1164 (2019) (describing how racial concerns motivated *Gideon v. Wainwright*, 372 U.S. 335 (1963), and the right to counsel for indigent defendants).



of calls for reform,<sup>300</sup> but the criminal legal system cannot hope to redeem itself if the attorneys it provides for poor defendants (who are more likely to be Black or Brown) are so over-burdened and mentally taxed that they are not able to competently represent their clients.

### III. TENSION IN THE ATTORNEY–CLIENT RELATIONSHIP

One court, describing the duties of defense counsel, explained the ethical and constitutional roots for the duty of loyalty:

Critical to the attorney–client relationship and the integrity of judicial proceedings is an attorney’s duty to represent the interests of a client with zeal and loyalty. The duty of loyalty is so essential to the proper functioning of the judicial system that its faithful discharge is mandated not only by the Rules of Professional Conduct, but also, in criminal cases, by the Sixth Amendment right of a criminal defendant to the effective assistance of counsel.<sup>301</sup>

But the defense attorney’s viewing of video-recorded client violence creates tension in the attorney–client relationship and strains the defense attorney’s ability to zealously advocate for a client. This tension makes it “more difficult to objectively represent a client” and creates a challenge with both ethical and constitutional dimensions.<sup>302</sup> This tension needs to be addressed head-on.

The failure to deal with emotional aspects of representation can have disastrous consequences. For example, one attorney in North Carolina found his client’s crime so morally repugnant that he

---

300. See Paul D. Butler, *Poor People Lose: Gideon and the Critique of Rights*, 122 YALE L.J. 2176, 2179, 2197 (2013) (noting that poor Black defendants are substantively worse off fifty years after *Gideon* and that “providing them with more, or better, defense attorneys would not substantially alter their subordination” and arguing that procedural reforms have resulted in poor people “simultaneously receiv[ing] a fairer process and more punishment”).

301. *State v. Holland*, 876 P.2d 357, 359 (Utah 1994) (citing *United States v. Cronin*, 466 U.S. 648, 656–57 (1984)).

302. See Comments to Survey Question 17, *infra* Appendix D.

intentionally missed a filing deadline and sabotaged the case because he believed his client deserved the death penalty.<sup>303</sup> Relevant to the inquiry into the impact of graphic images on attorneys, the attorney initially planned to represent the client zealously, but after seeing an autopsy photo of the murder victim, he could not get the image out of his mind and determined that his client deserved to die.<sup>304</sup> If photos can cause a defense attorney to shirk the duty of loyalty, imagine what violent videos can do.

#### A. *Identification with the Victim*

Criminal defense attorney and Professor of Law Abbe Smith explained:

But I have chosen a side and must feel for my client first and last—at least while I represent the client. My recognition of another’s suffering becomes strategic when a client is alleged to have caused that suffering. I must contemplate how a fact finder might feel about a suffering witness and address this in advocacy. There is dissonance here, of course—some cases can be disturbing, some feelings especially hard to manage. Defense lawyers are human beings after all.<sup>305</sup>

Criminal defense attorneys are expected to engage in selective empathy; empathy for clients can be motivating, but too much empathy for victims or other actors in the criminal legal system can be problematic.<sup>306</sup> Sympathy for the victim is “not an emotion [a

---

303. *State v. Tucker*, 545 S.E.2d 742, 742 (N.C. 2000) (noting that defense counsel admitted in an affidavit that he “deliberately sabotaged his representation of defendant”); *see also* Knight Ridder, *Lawyer Admits Sabotaging Death Penalty Case*, BALT. SUN (Nov. 11, 2000), <https://www.baltimoresun.com/news/bs-xpm-2000-11-11-0011110121-story.html> [<https://perma.cc/J2KT-R4SS>].

304. Ridder, *supra* note 303.

305. Abbe Smith, *Representing Rapists: The Cruelty of Cross Examination and Other Challenges for a Feminist Criminal Defense Lawyer*, 53 AM. CRIM. L. REV. 255, 292 (2016).

306. Bandes, *supra* note 15, at 362–63.

defense attorney] can afford to nurture or encourage,” because doing so will make the already difficult job of a defense attorney “nearly impossible.”<sup>307</sup> But as Professor Smith explains, that is easier said than done because defense attorneys are human.<sup>308</sup>

Generally, people feel more strongly for a known or identified victim rather than a faceless or unidentified victim.<sup>309</sup> So it makes sense that one coping strategy used by criminal defense attorneys is to distance themselves from the victim—this distancing is adaptive and helpful in many cases.<sup>310</sup> A prominent defense attorney explained, “The complainant is an abstraction to me. His victimization is an abstraction.”<sup>311</sup> Professor of Law and former appellate defender Susan Bandes described using “euphemisms[] or code” to avoid thinking about the gruesome crimes of which her clients were accused or convicted.<sup>312</sup> She and her colleagues referred to victims as “complainants” or “decedents” and to murders and rapes as “the incident in question” or “the alleged incident” to protect themselves from the emotional content of the work.<sup>313</sup>

But once the victim is identified and can be visualized, the defense attorney is more apt to feel stronger emotions and a desire to help the victim—the strategy of distancing oneself from an abstract, unidentified victim collapses.<sup>314</sup> Video is a particularly effective way to bring the victims to life, humanize them, and force identification with them.<sup>315</sup> Once the defense attorney watches unedited video of the victim, it is hard to render the victim a distant abstraction. Empathy is harder to suppress.

---

307. Randy Bellows, *Notes of a Public Defender*, in *THE SOCIAL RESPONSIBILITIES OF LAWYERS: CASE STUDIES* 69, 80 (Philip B. Heymann & Lance Liebman eds., 1988).

308. Smith, *supra* note 305 (“Defense lawyers are human beings after all.”).

309. Susan A. Bandes & Jessica M. Salerno, *Emotion, Proof and Prejudice: The Cognitive Science of Gruesome Photos and Victim Impact Statements*, 46 *ARIZ. ST. L.J.* 1004, 1033 (2013).

310. Bandes, *supra* note 15, at 348.

311. David Fiege, *How to; Defend Someone You Know Is Guilty*, *N.Y. TIMES MAG.* (Apr. 8, 2001), <https://www.nytimes.com/2001/04/08/magazine/how-to-defend-someone-you-know-is-guilty.html> [<https://perma.cc/2L7R-U95A>].

312. Bandes, *supra* note 15, at 349.

313. *Id.* at 349–50.

314. Bandes & Salerno, *supra* note 309.

315. *Id.* at 1042.

In response to the question of what image had the strongest impact, one defender survey respondent replied, “A body cam video capturing the last moments of a victim’s life, audio and visual, from the victim’s perspective.”<sup>316</sup> Presumably, this video is from a murder case where the public defender is tasked with representing the defendant accused of the murder. Watching this footage from the victim’s perspective of his or her last moments of life creates a closeness and connection between the victim and the defense attorney. It is telling that the attorney used the word “victim.”<sup>317</sup> As mentioned *supra*, defense attorneys tend to use terms like “complaining witness,” “decedent,” or “alleged victim,” which place more narrative distance between the defendant and the crime and remind the listener of the presumption of innocence.<sup>318</sup> But here, the survey respondent uses the term “victim.”<sup>319</sup> This word choice suggests that the factual issue of victimhood—which is inextricably intertwined with the defendant’s guilt—has already been decided in the mind of the defendant’s attorney. This is an understandable reaction to the video described but seems in tension with the attorney’s duty of loyalty to the client and seems to undermine the attorney’s ability to zealously defend the client.<sup>320</sup>

Another survey respondent answered the question about the most impactful image, “I can’t think of anything specifically that has impacted me most strongly. In my homicide case you can see the decedent being shot and killed[,] which was shocking the first time I viewed it. Those videos probably have an effect on me.”<sup>321</sup> Here, the defense attorney uses the more neutral term of “decedent.”<sup>322</sup> She

---

316. See Comments to Survey Question 13, *infra* Appendix B.

317. *Id.*

318. Bandes, *supra* note 15, at 349–50.

319. See Comments to Survey Question 13, *infra* Appendix B.

320. See MODEL RULES OF PRO. CONDUCT r. 1.7 cmt. 1 (AM. BAR ASS’N 2020); see also MODEL RULES OF PRO. CONDUCT pmb. ¶¶ 2, 8 (AM. BAR ASS’N 2020) (“As advocate, a lawyer zealously asserts the client’s position under the rules of the adversary system. . . . [W]hen an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done.”).

321. See Comments to Survey Question 13, *infra* Appendix B.

322. *Id.*

admits to being shocked by the video the first time but then hedges, saying that the video “probably” affected her without saying what the effect could have been.<sup>323</sup>

A third survey respondent wrote, “A brick was being thrown repeatedly at someone’s head after he was unconscious. Folks just calmly walked away as he was bleeding out. The photographs connected to this had brain matter coming out of the victim’s skull.”<sup>324</sup> Again, the defense attorney uses the term “victim” to describe the person her client is presumably accused of beating.<sup>325</sup> This situation presents the attorney with three options: identify with the defendant, identify with the victim, or identify with the nonchalant passersby. This positioning puts tension on the attorney’s duty of loyalty—the only moral position seems to be to side with the victim, but in an adversarial system, that is something that the defense attorney cannot do.<sup>326</sup> Another survey respondent mentioned, “Surveillance during a robbery where victims screamed for help and then laid on the ground while a replica firearm was pointed at them. They were shaking and began to hold hands as they laid face down on the floor near the safe.”<sup>327</sup> These humanizing details of the victims’ reactions to the robbery are compelling and put pressure on the attorney’s ability to connect with her client—the alleged robber.

Another survey respondent described being impacted by “cell phone videos of violent assaults. One comes to mind of a fight where one participant got knocked out unconscious, and the other fighter used both feet to jump as high as possible in the air and stomp the unconscious person[’]s head a few times.”<sup>328</sup> Again, presumably the “fighter” is her client or a co-defendant in a case she is duty-bound to

---

323. *Id.*

324. *Id.*

325. *Id.*

326. *See* State v. Holland, 876 P.2d 357, 362 (Utah 1994) (sanctioning a defense attorney who espoused the philosophy that “[it is] my obligation to get [the criminal defendant client] to take the first step, and that is to come forth, admit their wrongdoing, then to get them through the system in a sense that the appropriate punishment is imposed and they live with that punishment”).

327. *See* Comments to Survey Question 13, *infra* Appendix B.

328. *Id.*

defend. The dissonance of being beholden to ethical rules that are in opposition to emotional reactions and moral instincts takes a toll and causes strain on attorney–client relationships in the digital age.

### B. *Dangers of Perspective Bias*

There is also a danger that defenders will defer to the video, thinking it presents an objective and neutral record of what occurred, rather than viewing video evidence critically. This is a new take on the old concern that jurors and other decision makers in the criminal legal system may give “outsized weight” to video evidence because they find visual evidence more compelling.<sup>329</sup> But as Justice Holmes once said, “The image of justice changes with the beholder’s viewpoint, prejudice, or social affiliation.”<sup>330</sup> It is naive to think that video is not subject to the same manipulation, bias, and interpretation as other types of evidence. Aside from falsified evidence, which is a legitimate concern,<sup>331</sup> even just a shift in the camera angle can change the story a video tells.

There are documented visual biases in video evidence—for example, judges and jurors are more likely to find a suspect’s confession voluntary if the camera is facing the suspect compared to when the camera is facing the interviewing officer or in a neutral position.<sup>332</sup> It may be that defense attorneys experience this same effect. This could lead defense attorneys to not file meritorious suppression of statements motions due to a camera angle. Similarly, when video is presented in slow motion, it increases a viewer’s perception of premeditation and intentionality.<sup>333</sup> An attorney

329. See Hamilton, *supra* note 26, at 42.

330. MONROE H. FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS’ ETHICS 10 (4th ed. 2010) (citing LIVA BAKER, THE JUSTICE FROM BEACON HILL 608 (1991)).

331. See Philip Ewing, *What You Need to Know About Fake Video, Audio and the 2020 Election*, NPR (Sept. 2, 2019, 7:00 AM), <https://www.npr.org/2019/09/02/754415386/what-you-need-to-know-about-fake-video-audio-and-the-2020-election> [<https://perma.cc/Z5LA-76CG>].

332. See Hamilton, *supra* note 26, at 49 (citing G. Daniel Lassiter et al., *Videotaped Interrogations and Confessions: A Simple Change in Camera Perspective Alters Verdicts in Simulated Trials*, 87 J. APPLIED PSYCH. 867, 868 (2002)).

333. See Brayne et al., *supra* note 27, at 1155 (citing Eugene M. Caruso et al., *Slow Motion Increases Perceived Intent*, 113 PROC. NAT’L ACAD. SCIS. 9250 (2016)); see also Eugene M. Caruso et al.,

reviewing a video in slow motion to look for details might be convinced of a client's intentionality when an action was truly accidental and then may have a harder time trying the case or negotiating a favorable plea. Photographs and video evidence "magnify details that would have otherwise been momentary or invisible."<sup>334</sup> Again, the defense attorney may give outsized weight to these fleeting moments when they are captured on film and may improperly weigh the strength of the prosecution's case as a result. There is also the related phenomenon of "created memory" for the victims, witnesses, and defendants depicted in the video; the videos color these people's memories of the events after they watch them.<sup>335</sup> A witness may see things she did not see at the time or would not have remembered, but watching the video sears them into her memory.<sup>336</sup>

In the United States, police BWCs tend to be mounted to the officer's chest rather than near her eye level.<sup>337</sup> Because of this camera positioning, BWC footage tends to make suspects appear larger and more intimidating than they really are.<sup>338</sup> This camera angle could later be used by the prosecutor to justify police use of force, and if defense attorneys do not look at the evidence critically, they may fail to zealously argue their client's position in plea negotiations with the prosecutor or in closing arguments before the jury. Aside from being positioned on the officer's chest, many police BWCs have a narrow field of vision—even as small as fifty or sixty degrees.<sup>339</sup> The narrow range of vision in a police BWC creates a sense of surprise or danger that overstates the situation that the

---

Opinion, *The Problem with Slow Motion*, N.Y. TIMES (Aug. 5, 2016), <https://www.nytimes.com/2016/08/07/opinion/sunday/the-problem-with-slow-motion.html> [<https://perma.cc/U5SG-MXCC>].

334. Anna Veronica Banchik, *Too Dangerous to Disclose? FOIA, Courtroom "Visual Theory," and the Legal Battle over Detainee Abuse Photographs*, 43 L. & SOC. INQUIRY 1164, 1168 (2018).

335. STACEY C. KOON & ROBERT DIETZ, PRESUMED GUILTY: THE TRAGEDY OF THE RODNEY KING AFFAIR 179 (1992).

336. *Id.* at 178.

337. NACDL, *supra* note 4, at 8.

338. *Id.*

339. *Id.* at 8, 22.

officer actually faced.<sup>340</sup> Some have even opined that the police-friendly perspective bias of most BWCs could be intentional and attributable to the fact that cameras are marketed towards police departments rather than to the community at large.<sup>341</sup> Again, defense attorneys need to look at these videos critically rather than quickly coming to police-friendly judgments based on camera tricks.<sup>342</sup>

Video can also be manipulated.<sup>343</sup> The greater the ambiguity, the greater the likelihood that we will see what we expect to see. For example, in the Derrick Price case in Florida, police BWC footage seemed to show Price resisting arrest.<sup>344</sup> The officers shouted “stop resisting” as they beat the suspect in the BWC footage.<sup>345</sup> But a nearby surveillance camera captured the full story.<sup>346</sup> Price had initially run, but he quickly surrendered and laid face down on the ground.<sup>347</sup> But because the police officers did not activate their BWCs until after they were upon Price and because of the perception problems with police BWCs mentioned *supra*, the viewer cannot really see what is happening in the BWC footage.<sup>348</sup> With the accompanying audio of the police repeating “stop resisting,” a viewer can jump to the conclusion that Price was indeed resisting and that

340. Stoughton, *supra* note 6, at 1409–10.

341. NACDL, *supra* note 4, at 22.

342. Arguably, criminal defense attorneys are not living up to their duty of competence if they are unfamiliar with the ways to watch video critically. See MODEL RULES OF PRO. CONDUCT r. 1.1 cmt. 8 (AM. BAR ASS’N 2020) (requiring attorneys to keep abreast of the risks and benefits of new technologies).

343. See NACDL, *supra* note 4, at 22.

344. Radley Balko, *Police Cameras Are a Tool. It’s How We Use This Tool That Matters*, WASH. POST (Mar. 15, 2016, 11:20 AM), <https://www.washingtonpost.com/news/the-watch/wp/2016/03/15/police-cameras-are-a-tool-its-how-we-use-this-tool-that-matters/> [<https://perma.cc/8SJZ-GX6P>]; Alex Johnson, *Video Shows Florida Deputies Beating Non-Violent Man During 2014 Arrest*, NBC NEWS, <https://www.nbcnews.com/news/us-news/video-shows-florida-deputies-beating-non-violent-man-during-2014-n506176> [<https://perma.cc/X2XS-TPSJ>] (Jan. 28, 2016, 6:14 PM); see also Press Release, U.S. Atty’s Off. Middle Dist. of Fla., Former Marion County Deputy Charged with Excessive Use of Force (Jan. 27, 2016), <https://www.justice.gov/usao-mdfl/pr/former-marion-county-deputy-charged-excessive-use-force> [<https://perma.cc/5F4R-3ZH2>].

345. Balko, *supra* note 344.

346. *Id.*

347. *Id.*; Jay Stanley, *A Video That Every Potential Juror Should See*, AM. C.L. UNION (Mar. 11, 2016, 11:00 AM), <https://www.aclu.org/blog/privacy-technology/surveillance-technologies/video-every-potential-juror-should-see> [<https://perma.cc/6UHR-4AMP>].

348. Balko, *supra* note 344.



the police officers' blows were justified.<sup>349</sup> Fortunately for Mr. Price, the nearby surveillance camera captured the fuller truth, exonerating him.<sup>350</sup>

Aside from technical shifts like slow motion and camera angle, the viewer sees video through her own cultural prism. Preexisting beliefs and biases influence what we see—for example, if the viewer holds a favorable opinion of the police, the viewer is less likely to see police misconduct in an ambiguous video.<sup>351</sup> This is an even more dangerous bias because although defense attorneys can learn about camera angles and slow motion,<sup>352</sup> it is far more difficult for the individual defense attorney to ferret out personal biases while watching video evidence in a client's case.

As mentioned *supra*, empathy is often selective—we are more apt to feel empathy when we identify with the person.<sup>353</sup> Studies demonstrate that empathy requires more effort across racial lines, and this phenomenon makes it harder for people to evaluate the intent, motives, and attributes of those from other racial groups.<sup>354</sup> People of color in general, and Blacks in particular, are overrepresented in the criminal legal system as defendants.<sup>355</sup> One in fifteen Black men over eighteen and one in thirty-six Latino men over eighteen are imprisoned, though only one in 106 white men over eighteen is behind bars.<sup>356</sup> Criminal defense attorneys and public defenders often

349. *Id.*

350. *Id.* (quoting Stanley, *supra* note 347).

351. Dan M. Kahan et al., *Whose Eyes Are You Going to Believe? Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837, 903 (2009); Timothy Williams et al., *Police Body Cameras: What Do You See?*, N.Y. TIMES, <https://www.nytimes.com/interactive/2016/04/01/us/police-bodycam-video.html> [<https://perma.cc/N4WZ-Y7TP>] (Apr. 1, 2016).

352. See discussion *supra* notes 332–34.

353. Bandes & Salerno, *supra* note 309, at 1048 (citing John R. Chambers & Mark H. Davis, *The Role of the Self in Perspective-Taking and Empathy: Ease of Self-Simulation As a Heuristic for Inferring Empathic Feelings*, 30 SOC. COGNITION 153, 154 (2012)).

354. *Id.* at 1039 (citing CRAIG HANEY, DEATH BY DESIGN: CAPITAL PUNISHMENT AS A SOCIAL-PSYCHOLOGICAL SYSTEM 238 (2005)).

355. PEW CTR. ON THE STATES, ONE IN 100: BEHIND BARS IN AMERICA 2008, at 5–7 (2008), [https://www.pewtrusts.org/-/media/legacy/uploadedfiles/wwwpewtrustsorg/reports/sentencing\\_and\\_corrections/onein100pdf.pdf](https://www.pewtrusts.org/-/media/legacy/uploadedfiles/wwwpewtrustsorg/reports/sentencing_and_corrections/onein100pdf.pdf) [<https://perma.cc/JWU6-UPCC>].

356. *Id.* at 6.

do not match the demographics of their clients in a variety of ways, including race, educational attainment, class, age, and gender. This makes it harder for attorneys to watch a video and evaluate the intent and motives of clients. The attorneys may share more in common with the police or victims in the videos and have an easier time empathizing with them—as explained *supra* Section III.A. An attorney’s assessment of case evidence—including video evidence—can also be affected by implicit racial biases.<sup>357</sup> Simply put, an attorney might read guilt into the video when the reality is more nuanced or even when the client is innocent.

In *Scott v. Harris*, the Supreme Court decided whether a police officer had violated the civil rights of a suspect by watching a dashboard camera video of the incident.<sup>358</sup> The plaintiff was speeding; after the police tried to pull him over, he fled, and a chase ensued—eventually ending when the police car tapped the back of the plaintiff’s car causing it to spin out and paralyzing the plaintiff for life.<sup>359</sup> The majority concluded it was “clear from the videotape that [the] respondent posed an actual and imminent threat to the lives of any pedestrians who might have been present, to other civilian motorists, and to the officers involved in the chase.”<sup>360</sup> In an unprecedented move, the Court included a link to the footage in its opinion.<sup>361</sup> In his concurrence, Justice Breyer suggested that the “interested reader” of the case watch the video included in the link because it “made a difference to [his] own view of the case.”<sup>362</sup>

Justice Stevens, along with the lower court judges, did not think the video clearly resolved the issue in favor of the officer.<sup>363</sup> When he watched the video, he did not see a “Hollywood-style car chase of the most frightening sort” like his colleagues but rather saw that the

---

357. See Richardson & Goff, *supra* note 20, at 2635–36 (describing how implicit racial bias can impact the way a public defender assesses evidence in a case).

358. 550 U.S. 372, 374 (2007).

359. *Id.* at 374–76.

360. *Id.* at 384.

361. *Id.* at 378 n.5.

362. *Id.* at 387 (Breyer, J., concurring).

363. *Id.* at 390 (Stevens, J., dissenting).

respondent “though speeding, retained full control of his vehicle” and did not experience any “close calls.”<sup>364</sup> Justice Stevens noted that “[i]f two groups of judges can disagree so vehemently about the nature of that pursuit and the circumstances surrounding the pursuit, it seems eminently likely that a reasonable juror could disagree with this Court’s characterization of events.”<sup>365</sup>

As Justice Stevens tried unsuccessfully to explain to his colleagues, videotape “doesn’t speak for itself—that *different* people with different experiences can *see different things* in it.”<sup>366</sup> One study, using the video from *Scott*, showed that people’s perceptions of what happened in the video varied based on race, age, geographic region, political viewpoint, and level of education.<sup>367</sup> People of color, people from the Northeast, liberals, and people with higher educational attainment were more likely to find for the plaintiff when they viewed the video.<sup>368</sup>

But this is a lesson we learned decades ago in one of the first iconic video evidence cases—the prosecution of Los Angeles police officers for the beating of Rodney King.<sup>369</sup> The public watched the video, and many concluded that the officers were guilty; many saw no point in a trial because the officers surely faced a guilty verdict based on the video.<sup>370</sup> But the defendant police officers disagreed and asked for trial, wanting to fight the case.<sup>371</sup> Sergeant Stacey Koon, the highest-ranking officer charged, wrote: “The picture of unjustified police brutality is untrue, grotesquely so. In fact, nothing about the Rodney King incident could be more false than that

---

364. *Scott*, 550 U.S. at 390–92 (Stevens, J., dissenting).

365. *Id.* at 396.

366. Kahan et al., *supra* note 351, at 848.

367. *Id.* at 867; *see also* Melissa L. Finucane et al., *Gender, Race, and Perceived Risk: The ‘White Male’ Effect*, 2 HEALTH RISK & SOC’Y 159, 163, 166 (2000).

368. Kahan et al., *supra* note 351, at 867.

369. MultiShoW TV, *Rodney King Beating Full Video | 8 Minutes Screener*, YOUTUBE (Mar. 12, 2015), <https://www.youtube.com/watch?v=sb1WywIpUtY>.

370. *See* The Associated Press, *Rodney King Riot: Timeline of Key Events*, AP NEWS (Apr. 26, 2017), <https://apnews.com/article/fa4d04d8281443fc8db0e27d6be52081>.

371. *Id.*

image.”<sup>372</sup> Many would discount Koon’s viewpoint, but his defense attorney, Darryl Mounger, was a former police officer who identified with Koon as he watched the video.<sup>373</sup> Mounger meticulously broke down the video into still photographs and looked for images that supported the theory of defense—that King continuously tried to rise to his feet even as he was being beaten by the officers and therefore always presented a threat.<sup>374</sup>

The original jury acquitted Koon based on Mounger’s dissection of the video evidence.<sup>375</sup> It no doubt helped Koon and Mounger that the mostly white jury from Simi Valley came from a demographic pool more likely to believe Koon than to sympathize with King.<sup>376</sup> But in the not-guilty verdict, we collectively saw as a nation that a video can be interpreted different ways (and sometimes in unjust ways) due to cultural biases of the viewer. A video that would have turned many into a monster did not impair the jurors’ ability to see Koon as a person they identified with. Even after Koon’s conviction in a subsequent federal trial, the trial judge (and later the Supreme Court on review) saw the humanity and mitigation in his case, granting him significant sentencing departures based on his unique situation and characteristics.<sup>377</sup>

Most defendants caught inflicting violence on video will receive neither a second look nor the vigorous defense Koon had. That is in part because the biases of the judge and jury will often not align with the criminal defendant, but it is also because the biases of the defense attorney may not align with a client’s case. Very few defendants in the system receive representation from someone who shares as much of the same cultural prism as Koon and Mounger did, and it is likely that because of that reason, few criminal defendants will be represented so zealously. The Rodney King beating case exposed

---

372. KOON & DIETZ, *supra* note 335, at 12.

373. *Id.* at 129.

374. *Id.* at 182.

375. *Id.* at 189; Koon v. Powell, 518 U.S. 81, 87–88 (1996).

376. See The Associated Press, *supra* note 370.

377. Koon, 518 U.S. at 89–90 (describing sentencing departures of eight levels based on mitigating circumstances and affirming in part).

many injustices, but among them was not a failure of zealous defense advocacy. In viewing video evidence, all criminal defense attorneys should aspire to be like Mounger and to dissect the video looking for a defense.

In *Implicit Racial Bias in Public Defender Triage*, L. Song Richardson and Phillip Abita Goff explained that public defenders are at risk for making decisions based on implicit racial bias.<sup>378</sup> In particular, a public defender may engage in racially biased evaluation of case evidence, including video evidence.<sup>379</sup> This is one version of viewing evidence through one's own cultural prism but a way that could systematically disadvantage defendants of color. Public defenders are at risk of relying on implicit biases because implicit biases "are likely to be particularly influential in circumstances where time is limited, individuals are cognitively taxed, and decision-making is highly discretionary—exactly the context in which [public defenders] find themselves."<sup>380</sup>

The thesis in the *Public Defender Triage* article is premised on the fact that indigent defense is in a state of crisis because defender offices are chronically underfunded, and defenders have caseloads that regularly surpass recommended caseload limits.<sup>381</sup> Richardson and Goff translate the lessons learned in the healthcare world to the public defender context and postulate that because public defenders are overtaxed and stressed, they can be susceptible to the influence of implicit racial bias<sup>382</sup>:

When translated to the context of [public defender] triage, these studies suggest that when clients are [B]lack or otherwise criminally stereotyped, [implicit racial biases] can influence evidence evaluation, potentially causing

---

378. Richardson & Goff, *supra* note 20, at 2648.

379. *Id.* at 2635–36.

380. *Id.* at 2628.

381. *Id.* at 2631; *see also* NAT'L RIGHT TO COUNS. COMM., JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL 67 (2009) [hereinafter JUSTICE DENIED], <http://www.constitutionproject.org/pdf/139.pdf> [<https://perma.cc/5GE7-PCLJ>].

382. Richardson & Goff, *supra* note 20, at 2628.

[public defenders] to unintentionally interpret information as more probative of guilt. Consequently, [public defenders] may determine that the state will have little difficulty meeting its burden of proof and thus, that the case does not warrant much effort.<sup>383</sup>

There is even some indication that public defenders may systemically spend less time on the cases of Black clients.<sup>384</sup>

One study of appointed defense counsel in Virginia connected the proliferation of BWCs to lower rates of job satisfaction and an increased need to triage their cases.<sup>385</sup> When the traumatic effects of electronic media further tax and mentally overload public defenders, they become even more susceptible to reliance on implicit racial bias.<sup>386</sup> And when defense attorneys and public defenders rely on implicit racial bias in evaluating video evidence, many criminal defendants—particularly clients of color—will bear the costs.<sup>387</sup>

Prosecutors, judges, and jurors watch violent videos too. The violent images impact their thinking and perceptions of the defendant. Mitigation is more difficult when the prosecutor or judge has a visual image in her head of the defendant behaving like a monster. Emotions triggered by gruesome visual evidence can prejudicially bias viewers and inhibit decision-making.<sup>388</sup> Case law addresses the prejudicial impact of violent imagery and videos, but this case law functions under the legal fiction that only jurors are susceptible to this bias and that judges and attorneys are immune.

Gruesome and disturbing photographic evidence is often determined by courts to be more probative than prejudicial and

---

383. *Id.* at 2636.

384. Maurice Chammah, *Do Public Defenders Spend Less Time on Black Clients?*, THE MARSHALL PROJECT (May 2, 2016, 10:00 PM), <https://www.themarshallproject.org/2016/05/02/do-public-defenders-spend-less-time-on-black-clients> [https://perma.cc/247P-PG5U].

385. VCJC STUDY, *supra* note 282, at 18 (noting that several public defenders and court-appointed attorneys said the usage of BWCs has lowered their job satisfaction and has forced them to triage their cases).

386. Richardson & Goff, *supra* note 20, at 2628.

387. *Id.* at 2636.

388. Banchik, *supra* note 334, at 1166.

therefore admissible.<sup>389</sup> Courts acknowledge that video evidence can be different and more prejudicial than photographs or other evidence.<sup>390</sup> For example, in *United States v. Bailey*, a firearms and drug-trafficking conspiracy case, the district court permitted the government to present evidence that another member of the drug-trafficking organization (DTO) with which the defendants were affiliated had murdered a rival heroin trafficker.<sup>391</sup> The surveillance camera captured the other DTO member shooting the rival dealer at extremely close range outside a fast food restaurant.<sup>392</sup> At trial, the district court permitted the Government to present both the video recording of this murder as well as non-video evidence—testimony and recorded conversations—discussing the murder.<sup>393</sup> The U.S. Court of Appeals for the Third Circuit found error in admitting the video evidence of the murder because the “video had a substantially greater risk of unfair prejudice than the [other evidence of the murder] because it graphically depict[ed] what can only be described

---

389. *See, e.g.*, *United States v. McRae*, 593 F.2d 700, 707 (5th Cir. 1979) (finding no error to admit photographs of a murder victim that the court characterized as “gross, distasteful and disturbing” and “not pretty even to the hardened eye”); *United States v. Naranjo*, 710 F.2d 1465, 1468 (10th Cir. 1983) (“Gruesomeness alone does not make photographs inadmissible.”); *United States v. Ortiz*, 315 F.3d 873, 897 (8th Cir. 2002) (finding admission of graphic photos of a bloody corpse did not constitute an abuse of discretion in a capital case because they corroborated testimony regarding a victim’s murder and established that the murder was heinous and depraved); *United States v. Rezaq*, 134 F.3d 1121, 1138 (D.C. Cir. 1998) (finding autopsy photographs relevant to the determination of “force and violence” in a hijacking case and to the corroboration of the government’s theory regarding systematic executions); *United States v. Cruz-Kuilan*, 75 F.3d 59, 61 (1st Cir. 1996) (finding photographs of lacerations on a victim’s head corroborated the government’s theory regarding stray bullets); *United States v. Treas-Wilson*, 3 F.3d 1406, 1410 (10th Cir. 1993) (finding autopsy and crime scene photographs, though graphic, relevant to the determination of the defendant’s intent or state of mind); *United States v. De Parias*, 805 F.2d 1447, 1453–54 (11th Cir. 1986) (finding a photograph of a badly decomposed body of a kidnapping victim was admissible to show identity and cause of death), *overruled on other grounds* by *United States v. Kaplan*, 171 F.3d 1351 (11th Cir. 1999); *United States v. Holmes*, 632 F.2d 167, 169 (1st Cir. 1980) (finding a color photograph of a victim was helpful in illustrating a medical examiner’s testimony regarding the sequence of wounds).

390. *See, e.g.*, *United States v. Bailey*, 840 F.3d 99, 121–22 (3d Cir. 2016); *United States v. Cunningham*, 694 F.3d 372, 390 (3d Cir. 2012).

391. 840 F.3d at 121.

392. *Id.* at 116.

393. *Id.*

as a cold-blooded murder,” and the emotional impact of the video would unfairly prejudice the jury against members of the DTO.<sup>394</sup>

Similarly, in a case involving possession of child pornography, the Third Circuit found error in admitting two of seven clips of the child pornography allegedly possessed by the defendant.<sup>395</sup> In explaining its reasoning the court stated:

Even in the cesspool of evidence presented here, Excerpts 1 and 3 in the second set of video clips stand out. We will not repeat the description of them but note simply that their violent and sadistic character likely created “disgust and antagonism” toward [the defendant,] which risked “overwhelming prejudice” toward him. . . . Given the other available evidence, the government did not need to show videos of pre-pubescent children being bound, raped, and violently assaulted to prove that Cunningham knowingly possessed, received, and distributed child pornography.<sup>396</sup>

Though keeping this evidence out of the trial helps the defense, in a system where about 95% of cases resolve in guilty pleas, one must think about the impact these prejudicial videos have on the negotiating prosecutor and defense attorney inevitably reviewing them.<sup>397</sup>

The emotions attorneys experience as they view evidence affect not only the appraisal of the evidence but the cognitive processing of the evidence in the case.<sup>398</sup> For example, sadness correlates with uncertainty, greater deliberation, helplessness, and inaction.<sup>399</sup> On the

---

394. *Id.* at 121–22.

395. *Cunningham*, 694 F.3d at 390.

396. *Id.* at 390–91.

397. LINDSEY DEVERS, BUREAU OF JUST. ASSISTANCE, U.S. DEP’T OF JUST., PLEA AND CHARGE BARGAINING: RESEARCH SUMMARY 1 (2011), <https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/PleaBargainingResearchSummary.pdf> [<https://perma.cc/U32N-8MF9>].

398. Bandes & Salerno, *supra* note 309, at 1005.

399. *Id.* at 1008.



other hand, anger is tied to shallow processing, tendency to rely on heuristics and stereotypes, and greater certainty in decision-making.<sup>400</sup> This shallow and heuristic decision-making is particularly problematic in the criminal justice arena when compounded by implicit racial biases. And when prosecutors view inflammatory images, they may be unjustifiably certain about the defendant's guilt and the strength of their cases. Likewise, anger corresponds with a desire to act, though sadness correlates to helplessness and inaction.<sup>401</sup> So images of violence may exacerbate black-and-white prosecutor thinking, bolster prosecutor certainty about the strength of the case, and facilitate aggressive lawyering by prosecutors. This is dangerous for defendants.

### C. Voyeurism and the Attorney–Client Relationship

All this digital evidence collapses the distance between attorney, client, and crime. Closeness comes at a cost. There is sometimes a utility of not knowing whether your client is guilty or innocent.<sup>402</sup> Barbara Babcock, Professor of Law, explained:

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

---

400. *Id.* at 1005, 1008; see also David A. Bright & Jane Goodman-Delahunty, *The Influence of Gruesome Verbal Evidence on Mock Juror Verdicts*, 11 PSYCHIATRY PSYCH. & L. 154, 158 (2004); David A. Bright & Jane Goodman-Delahunty, *Gruesome Evidence and Emotion: Anger, Blame, and Jury Decision-Making*, 30 LAW & HUM. BEHAV. 183, 187 (2006); Kevin S. Douglas et al., *The Impact of Graphic Photographic Evidence on Mock Jurors' Decisions in a Murder Trial: Probative or Prejudicial?*, 21 LAW & HUM. BEHAV. 485, 494 (1997).

401. Bandes & Salerno, *supra* note 309, at 1008.

402. Bandes, *supra* note 15, at 366–68.

she is disabled.<sup>403</sup>

Many defense attorneys created a work-around to the rule discussed in *Nix v. Whiteside* that prohibits an attorney from cooperating with the defendant in presenting perjured testimony: the attorney would strategically decide not to know what happened.<sup>404</sup> The more information the defense attorney has about the client and the case, the harder it is to honestly claim not knowing whether the client did it. And in the digital age, the defense typically has more information about the client and crime than ever before.

Violent videos are not the only things that can change the attorney–client relationship in the digital age. Defenders often receive forensic downloads of clients’ cell phones or computers in discovery.<sup>405</sup> Modern cell phones contain an immense amount of data about every facet of the owner’s life.<sup>406</sup> The cell phone records include access to photographs, picture messages, text messages, internet browsing history, social media, e-mails, and cell site location data.<sup>407</sup> And defense attorneys may get access to all of it in discovery. They can review all the text messages between the client and her boyfriend over months or years.<sup>408</sup> A defense attorney might stumble upon an intimate selfie or video-recording while poring over the forensic download to look for evidence that might prove useful to the defense or prosecution.<sup>409</sup> There is a fine line between zealous

---

403. *Id.* at 367–68 (quoting Barbara A. Babcock, Book Review, 53 GEO. WASH. L. REV. 310, 314–15 (1985) (reviewing JAMES S. KUNEN, “HOW CAN YOU DEFEND THOSE PEOPLE?”: THE MAKING OF A CRIMINAL LAWYER (1983))).

404. 475 U.S. 157, 163 (1986); FREEDMAN & SMITH, *supra* note 330, at 151–53 (discussing the ethical dilemmas presented by client perjury).

405. Kashmir Hill, *Imagine Being on Trial. With Exonerating Evidence Trapped on Your Phone.*, N.Y. TIMES (Nov. 22, 2019), <https://www.nytimes.com/2019/11/22/business/law-enforcement-public-defender-technology-gap.html> [<https://perma.cc/TN77-G9MA>].

406. *Riley v. California*, 573 U.S. 373, 394–95 (2014) (“The sum of an individual’s private life can be reconstructed through a thousand photographs labeled with dates, locations, and descriptions . . . [I]t is no exaggeration to say that many of the more than 90% of American adults who own a cell phone keep on their person a digital record of nearly every aspect of their lives—from the mundane to the intimate.”).

407. *See id.* at 394.

408. *See id.*

409. *See id.* at 395.

defense and invasion of the client's privacy. There may even be a voyeuristic pleasure in watching videos involving the client.<sup>410</sup> More and more defense attorneys will know the intimate details of their clients' lives—whether the client wants them to or not.

This knowledge may prove useful to the case or may humanize clients to their attorneys, but it may also be overwhelming for attorneys to know so much. Attorneys may know more about their clients from reviewing the evidence than even the clients' loved ones who accompany them to court. And some of the information uncovered may be unflattering or may even be repugnant to the attorneys, making it more difficult to represent their clients zealously. For example, if a female attorney reads misogynistic texts unrelated to the case that her male client sent, it may render her less sympathetic to him. If an ardent progressive learns that a client posts favorably on social media about politicians the attorney views as racist, zeal could be impacted. The client may not even be aware the attorney knows this information and certainly would not be able to guess at its impact. This presents additional challenges in the attorney–client relationship.

#### IV. STRATEGIES TO ADDRESS DIGITAL CONTENT

To address the new challenge of violent videos in criminal defense discovery, public defender offices need to first shift their culture to acknowledge the emotional content of their work and the potential for secondary trauma and burnout.<sup>411</sup> They also must acknowledge

---

410. Brayne et al., *supra* note 27, at 1159; *see also* Jade E. Davis, *Black Men Being Killed Is the New Girls Gone Wild*, MEDIUM (Apr. 10, 2015), <https://medium.com/matter/black-men-being-killed-is-the-new-girls-gone-wild-da5c150b70c4> [<https://perma.cc/2MPR-KX3K>] (“Yes, we should celebrate that even though an unarmed [B]lack man was killed, his killing was caught on film, so there’s a better shot at justice and closure. But I’m trying desperately to make sense of why watching and sharing the video that tore his mother’s heart to pieces is as normal as making your latest Instagram post. So far I’m landing at this: In a world where we are inundated with explicit content, watching [B]lack men die on camera provides a thrill that America thought she lost when popular lynchings ended with no need for a ‘mature audiences only’ disclaimer.”).

411. *See* Sue Bryant & Jean Koh Peters, *Concepts in Vicarious Traumatization*, FIVE HABITS OF CROSS-CULTURAL LAWYERING & MORE, <https://fivehabitsandmore.law.yale.edu/jeans->

the presence of perspective bias, including implicit racial bias, in the process of evaluating evidence and work to overcome those biases.<sup>412</sup> Next, offices need to do more than simply support self-care for individual attorneys—they need to think about how organizational and institutional practices can mitigate the effects of secondary trauma, particularly those faced due to new technology. Offices need to provide education to attorneys about both handling video evidence—including the dangers of perspective and implicit racial bias—and responding to secondary trauma. And finally, caseload caps need to be re-evaluated; public defenders had too many cases before, but now each case has double or triple the workload due to the additional video evidence received in discovery.<sup>413</sup> A comprehensive strategy will require either additional public defender funding or a significant reduction in the number of prosecutions system-wide. If caseloads are unmanageable, even the best practices will be inadequate to meet the challenge.

#### A. *Change Criminal Defense Culture*

Criminal defense and public defender culture is a barrier to combatting the challenge ahead.<sup>414</sup> Public defender offices have an ingrained and traditional culture generally resistant to change.<sup>415</sup> Public defenders also can suffer from a “bias blind spot” and fail to

---

materials/vicarious-trauma/concepts-in-vicarious-trauma/ [https://perma.cc/33BP-TYUG]; Pamela Bucy Pierson et al., *Stress Hardiness and Lawyers*, 42 J. LEGAL PROF. 1, 13 (2018) (noting that, in general, lawyers are among the least likely to seek help for or admit to having a mental health problem).

412. Richardson & Goff, *supra* note 20, at 2645–46; Rapping, *supra* note 20, at 1022; *see also* JEFF ADACHI ET AL., BLUEPRINT FOR RACIAL JUSTICE 5, https://sflawlibrary.org/sites/default/files/Racial%20Justice%20Blueprint\_1.pdf [https://perma.cc/8ZST-TVGW] (detailing “[a] proposal to achieve racial justice through enhancing the work of public defense organizations throughout the [United States]”).

413. *See* VA. COMP. BD., *supra* note 99, at 45.

414. *See* Eve Brensike Primus, *Culture As a Structural Problem in Indigent Defense*, 100 MINN. L. REV. 1769, 1769–70 (2016) (describing entrenched culture in public defender offices as a barrier to reform); Jonathan A. Rapping, *Directing the Winds of Change: Using Organizational Culture to Reform Indigent Defense*, 9 LOY. J. PUB. INT. L. 177, 181 (2008) (same).

415. *See* Robin Steinberg & David Feige, *Cultural Revolution: Transforming the Public Defender’s Office*, PUB. DEF.: PAPERS FROM EXEC. SESSION ON PUB. DEF. (Harv. Univ., John F. Kennedy Sch. of Gov’t., Cambridge, Mass.), Aug. 2002, at 1, https://www.ncjrs.gov/pdffiles1/bja/193773.pdf [https://perma.cc/XFQ4-9VZN].

recognize their own biases despite being cognizant of the biases of others in the system.<sup>416</sup> Though mental toughness is a useful skill, defense culture creates unrealistic expectations of attorneys' abilities to compartmentalize, remain objective, and avoid the emotional content of their work.

In the iconic HBO show *The Wire*, there are few portrayals of public defenders.<sup>417</sup> But towards the end of the first season, a public defender accompanies one character to an interrogation.<sup>418</sup> When a detective pulls out a gruesome photograph of one of the people that a drug-trafficking organization has killed, the public defender flinches and says, "God!"<sup>419</sup> The body in the photo in this episode was that of a fifteen-year-old boy who had been shot in the head at close range.<sup>420</sup>

One criminal defense attorney thought this portrayal gave "short shrift" to defense attorneys because she had seen "autopsy photos and soupy bodies that had been in the trunks of cars for the whole summer" and thought it was "glaringly unrealistic" for the public defender to react this way because defense attorneys "develop a certain hardness that you have to have if you're going to represent your clients adequately."<sup>421</sup> Yes, defense attorneys develop a thick skin. But by calling a fictional defense attorney's visceral reaction to the sight of a murdered fifteen-year-old "glaringly unrealistic," the real-life defense attorney highlights the problem in defense culture: a denial that criminal defense attorneys experience human reactions to images of violence.

Historically, discussion of the emotional burden of criminal lawyering has been marginalized.<sup>422</sup> As one public defender

---

416. See Henning, *supra* note 284, at 652 (citing Emily Pronin, *Perception and Misperception of Bias in Human Judgement*, 11 TRENDS COGNITIVE SCI. 37–39 (2007)).

417. See generally *The Wire* (HBO television broadcast 2002–2008).

418. *The Wire: Sentencing* (HBO television broadcast Sept. 8, 2002).

419. *Id.*

420. *Id.* If you follow the show, you know the fifteen-year-old is Wallace. *Id.*

421. DVD: *The Wire: The Complete Third Season* (HBO 2006) (Special Feature: Q&A with David Simon and Creative Team).

422. Bandes, *supra* note 15, at 340; see also Sofia Yakren, *Lawyer As Emotional Laborer*, 42 U. MICH. J.L. REFORM 141, 141–42 (2008).

explained, “We work in offices that value toughness.”<sup>423</sup> Display or acknowledgment of emotion can result in a lawyer being labeled weak or unlawyerly—particularly in the defense community.<sup>424</sup> One professor and criminal defense attorney, in writing about the emotional content of defense work, explained that her “aim [was] to dig a little deeper, and be a little more truthful than battle-weary criminal defense lawyers tend to be.”<sup>425</sup> She was trying to escape the dominant culture in the defense bar that traditionally downplays the emotional toll of the work and pushes it aside.

In the Cook County lawsuit mentioned *supra* Section II.C, the female public defenders in the class reported a toxic public defender office culture that contributed to their abuse.<sup>426</sup> Female attorneys were pressured to not report harassment and felt that the public defender program had a culture in which victims of the sorts of exhibitionist attacks they endured were expected to simply turn the other cheek.<sup>427</sup> Public defender culture tries to silence discussions of workplace victimization and erase the traumatization of the work. This must change.

Criminal defense attorneys in general and public defenders in particular identify with heroic ideals and see themselves as waging a war against an unjust system.<sup>428</sup> This conception of public defender as warrior-hero may create unrealistic expectations that public defenders will not experience burnout, trauma, or even emotion that

---

423. Lunn, *supra* note 245.

424. Bandes, *supra* note 15, at 342.

425. Smith, *supra* note 305, at 256.

426. *Brown v. Cook Cnty.*, 332 F.R.D. 229, 233 (N.D. Ill. 2019).

427. *Id.* at 236. For news coverage of the relevant events, see Jason Meisner, *Judge Gives Go-Ahead to Class-Action Suits Alleging Indecent Conduct by Cook County Jail Inmates Against Female Employees, Public Defenders*, CHI. TRIB. (Aug. 12, 2019, 5:24 PM), <https://www.chicagotribune.com/news/criminal-justice/ct-cook-county-jail-indecency-lawsuit-20190812-5tvej323rbvdo62ehbdgrptvu-story.html> [<https://perma.cc/GYC2-95VJ>], and Megan Crepeau, *Detainees Regularly Expose Themselves to Female Public Defenders, Suit Alleges*, CHI. TRIB. (Nov. 9, 2017, 7:04 AM), <https://www.chicagotribune.com/news/breaking/ct-met-sex-harassment-public-defenders-lawsuit-20171108-story.html> [<https://perma.cc/B26P-547T>].

428. John P. Gross, *Case Refusal: A Right for the Public Defender but Not a Remedy for the Defendant*, 95 WASH. U. L. REV. 253, 254, 258 (2017) (listing New Orleans, Louisiana; Nashville, Tennessee; Hobbs, New Mexico; Missouri; and Florida as sites of case refusal and related litigation).

interferes with their abilities to zealously advocate for their clients. This ideal of the justice warrior also leaves defenders susceptible to the “bias blind spot,” allowing defenders to criticize the biases of prosecutors, judges, and police while failing to reflect on how bias pervades their own practices including the evaluation of evidence.<sup>429</sup>

Digital video aggravates existing structural challenges to indigent defense like excessive caseloads, “attorney isolation, inadequate training, and inadequate oversight.”<sup>430</sup> If the criminal defense bar fails to acknowledge the emotional toll of its work in the digital age, the result will be defenders who are jaded, cynical, depressed, and disillusioned.<sup>431</sup> This would exacerbate the crisis in indigent defense and augment the opportunities for implicit racial bias and perspective bias to operate. As in any recovery process, the first step is admitting there is a problem.<sup>432</sup> Defenders cannot address burnout or point it out when it begins to impact their colleagues unless we shed the aspects of criminal defense culture that expect an unrealistic lack of emotional response to emotional work.<sup>433</sup>

Reducing long work hours and limiting attorney exposure to traumatic content mitigate vulnerability to burnout and secondary trauma.<sup>434</sup> This is a significant challenge because public defender offices and criminal defense attorneys doing appointed work are often underfunded and overloaded.<sup>435</sup> Public defenders are ethically

---

429. See Henning, *supra* note 284, at 657; see also Vanessa A. Edkins, *Defense Attorney Plea Recommendations and Client Race: Does Zealous Representation Apply Equally to All?*, 35 LAW & HUM. BEHAV. 413, 422 (2011). One study also found that public defenders were more willing to accept and recommend plea offers that included more severe sentences for Black clients than for white clients. Edkins, *supra*.

430. See Primus, *supra* note 414, at 1783.

431. See *id.* at 1798 n.140; see also Charles J. Ogletree, Jr., *An Essay on the New Public Defender for the 21st Century*, 58 LAW & CONTEMP. PROBS. 81, 88 n.4 (1995).

432. See Toni Messina, *Vicarious Post-Traumatic Stress—Or Why There’s Such a High Rate of Burnout Among Criminal Defense Attorneys*, ABOVE THE L.: HEALTH/WELLNESS (Nov. 5, 2019, 12:12 PM), <https://abovethelaw.com/2019/11/vicarious-post-traumatic-stress-or-why-theres-such-a-high-rate-of-burnout-among-criminal-defense-attorneys/> [<https://perma.cc/CUE5-PHSF>] (“Step one is recognizing secondary traumatic stress is real, and should be addressed rather than repressed.”).

433. HALL, *supra* note 220.

434. Levin et al., *supra* note 237, at 953.

435. See *Luis v. United States*, 136 S. Ct. 1083, 1095 (2016) (“These defendants, rendered indigent, would fall back upon publicly paid counsel, including overworked and underpaid public defenders. As

bound to provide zealous representation,<sup>436</sup> and many public defenders are idealistic and personally committed to providing the best representation possible. With limited financial resources, many public defenders think of themselves as resources that can be stretched. But if individual public defenders continue to be stretched to the breaking point—a situation made more immediate because of the new threat of digital media and accompanying increased workload—then our adversarial system will be thrown further out of balance.

Traditionally, the focus has been on individual efforts to promote self-care, but it is more effective to think about organizational and institutional responses.<sup>437</sup> Self-care can complement the organizational efforts, but individual self-care alone is no longer an adequate response.<sup>438</sup> Public defender offices need to be equipped to prevent secondary trauma and burnout and to intervene when it inevitably occurs.<sup>439</sup>

The first step is to assess the extent of secondary trauma in the organization.<sup>440</sup> This assessment can include self-assessments and other screening tools.<sup>441</sup> Staff members also need sufficient education to identify secondary trauma and burnout when they see it in

---

the Department of Justice explains, only 27 percent of county-based public defender offices have sufficient attorneys to meet nationally recommended caseload standards. And as one amicus points out, '[m]any federal public defender organizations and lawyers appointed under the Criminal Justice Act serve numerous clients and have only limited resources.' The upshot is a substantial risk that accepting the Government's views would—by increasing the government-paid-defender workload—render less effective the basic right the Sixth Amendment seeks to protect." (citations omitted); see also TAYLOR, *supra* note 217, at 6–16 (describing the underfunding of public defense).

436. MODEL RULES OF PRO. CONDUCT pmb. ¶ 2 (AM. BAR ASS'N 2020).

437. Olga Phoenix, *Vicarious Trauma Prevention: Your Agency's Crisis Response and Resilience Building Program*, LINKEDIN (July 23, 2018), <https://www.linkedin.com/pulse/vicarious-trauma-prevention-your-agencys-crisis-response-olga-phoenix> [<https://perma.cc/Y8X8-5LJu>].

438. *Id.*

439. *Id.*

440. *Id.*

441. Christina Rainville, *Understanding Secondary Trauma: A Guide for Lawyers Working with Child Victims*, A.B.A. (Sept. 1, 2015), [https://www.americanbar.org/groups/public\\_interest/child\\_law/resources/child\\_law\\_practiceonline/child\\_law\\_practice/vol-34/september-2015/understanding-secondary-trauma--a-guide-for-lawyers-working-with/](https://www.americanbar.org/groups/public_interest/child_law/resources/child_law_practiceonline/child_law_practice/vol-34/september-2015/understanding-secondary-trauma--a-guide-for-lawyers-working-with/) [<https://perma.cc/A89J-XM9H>]. For a comprehensive overview of different screening tools and self-assessments, see Seamone, *supra* note 250, at 551–78.



themselves and in their co-workers.<sup>442</sup> Offices should train public defenders in strategies to mitigate the effects of digital content. The Dart Center at Columbia Journalism School developed practice tips for journalists dealing with traumatic digital content.<sup>443</sup> These tips include practical advice, such as eliminating needless repeat exposure, adjusting the viewing environment, taking frequent screen breaks, and crafting one's own self-care plan.<sup>444</sup> These tips can be imported into the public defender context. Offices need to establish protocols and processes to normalize the disclosure of secondary trauma and burnout<sup>445</sup>—a challenge in a culture that values mental toughness.<sup>446</sup> Offices need to facilitate treatment when necessary and foster relationships with treatment providers so that those treatment providers have working knowledge of the culture of public defender offices.<sup>447</sup> Law enforcement often has designated social workers and psychologists to deal with trauma, who must sometimes screen an officer's mental health before a return to duty after a traumatic event.<sup>448</sup> But there is no parallel effort in public defense.

It is also helpful for defense attorneys to have diverse caseloads so that the bulk of the graphic digital content does not fall on a small team within the office.<sup>449</sup> Offices should consider creating peer support groups or mentors for self-care, and they should also make sure to allow time for self-care and education about handling graphic electronic media and about secondary trauma. Individual coping strategies include debriefing, improving time management (including blocks of quiet time where defenders do not take calls and can

---

442. Phoenix, *supra* note 437.

443. *Working with Traumatic Imagery*, DART CTR. FOR JOURNALISM & TRAUMA (Aug. 12, 2014), <https://dartcenter.org/content/working-with-traumatic-imagery> [<https://perma.cc/9VD6-ETWK>].

444. *Id.*

445. Phoenix, *supra* note 437.

446. Lunn, *supra* note 245.

447. *See, e.g., Social Work*, BRONX DEFS., <https://www.bronxdefenders.org/our-work/soc-work/> [<https://perma.cc/2NZU-3YKQ>]. Some offices now have social workers or other mental health professionals on staff, which can help build bridges between lawyers and treatment providers. *Id.*

448. *See, e.g.,* Konstantinos Papazoglou & Brooke McQuerrey Tuttle, *Fighting Police Trauma: Practical Approaches to Addressing Psychological Needs of Officers*, 8 J. POLICE EMERGENCY RESPONSE 1, 6 (2018).

449. Phoenix, *supra* note 437.

concentrate without interruption), minimizing multitasking, and having a generally healthy lifestyle.<sup>450</sup> Mindfulness meditation can also be helpful to mitigate mental health risks.<sup>451</sup>

As discussed *supra* Part III, empathy is a powerful advocacy tool, but it can be dangerous.<sup>452</sup> Although defense attorneys are told to develop strong bonds with clients to understand them and tell their stories, that close identification puts attorneys at risk for secondary trauma. In one study of Irish criminal attorneys, one attorney warned: “[T]he last thing you want to do is to, in fact, put yourself in [the client’s] shoes.”<sup>453</sup> That is not to say that public defenders should lack empathy, but it is imperative for public defenders to establish boundaries to mitigate the effects of secondary trauma. This can be something as simple as avoiding bringing work home and trying to finish work at the office or declining to give clients your outside-business-hours contact information.<sup>454</sup>

But even institutionally supported self-care is not enough. Meditation, mindfulness, and physical exercise have their limits in the context of preventing burnout and deterioration of mental health in criminal defense work. As one lawyer explained, “Doing yoga is not going to fix how we feel about the injustices we face every day. The problem is the injustices, not that we aren’t taking care of ourselves well enough. But sometimes, it is both.”<sup>455</sup> Addressing public defender burnout and trauma necessitates self-care, but it also

---

450. Caplan, *supra* note 226, at 59.

451. See, e.g., Shauna L. Shapiro et al., *Mindfulness-Based Stress Reduction for Health Care Professionals: Results from a Randomized Trial*, 12 INT’L J. STRESS MGMT. 164, 170 (2005). For example, the Santa Clara Office of the Public Defender hosted a six-session mindfulness meditation program during 2016–2017 led by Professors of Law Ron Tyler and Rhonda MaGee. See Ronald Tyler, *The First Thing We Do, Let’s Heal All the Law Students: Incorporating Self-Care into a Criminal Defense Clinic*, 21 BERKELEY J. CRIM. L. 1, 17 (2016); Mark F. Bernstein, *Rhonda Magee ‘93 Advocates for Mindful Awareness and Reflection*, UVA LAW., Spring 2019, at 116, 116, [https://www.law.virginia.edu/system/files/uvalawyer/2019-spring/UVA-LAWYER\\_S19\\_lores.pdf](https://www.law.virginia.edu/system/files/uvalawyer/2019-spring/UVA-LAWYER_S19_lores.pdf) [<https://perma.cc/UV8H-MW6H>].

452. Bandes, *supra* note 15, at 30.

453. Bulbulia et al., *supra* note 44, at 39.

454. *Id.* at 40.

455. Cartwright et al., *supra* note 277, at 85 (providing an anonymous survey response from a provider in the immigration detention setting).

requires attorney education and restructuring public defender caseloads.

### B. Educate and Train Attorneys

The discussion about secondary trauma, including that triggered by electronic media, needs to begin in law school.<sup>456</sup> Lawyers are rarely taught in law school about self-care and responding to secondary trauma in their work.<sup>457</sup> Some clinical professors are beginning to develop trauma-informed curricula and are teaching students to build resiliency and a sustainable practice.<sup>458</sup> Once young lawyers are inundated by their day-to-day responsibilities as public defenders, it is difficult to find the time and attention to focus on secondary trauma. Clinical education provides a perfect setting to indoctrinate future public defenders in better methods of self-care. But sustainable practice needs to take up more space in law school education; it should not be ghettoized to the clinical program but should be discussed in doctrinal classes as well.

One aspect of attorney competence is that “a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology.”<sup>459</sup> Once in practice, criminal defense attorneys need more education on technology, graphic digital content, and secondary trauma.<sup>460</sup> This must include

---

456. Tyler, *supra* note 451, at 11–12 (describing a mindfulness and self-care curriculum in a criminal defense clinic).

457. See, e.g., Cartwright et al., *supra* note 277, at 85.

458. Sarah Katz & Deeya Haldar, *The Pedagogy of Trauma-Informed Lawyering*, 22 CLINICAL L. REV. 359, 371 (2016); Tyler, *supra* note 451, at 28; see also Danielle R. Cover, *Good Grief*, 22 CLINICAL L. REV. 55, 76 (2015) (discussing the use of case-related-loss as a teaching tool in the clinical law school setting).

459. MODEL RULES OF PRO. CONDUCT r. 1.1 cmt. 8 (AM. BAR ASS’N 2020).

460. See *id.* I worked in two well-funded public defender offices that provided robust continuing legal education opportunities for nearly a decade and was never trained on handling digital content or on secondary trauma. Anecdotally, attorneys in child welfare law and immigration asylum work seem to be provided better access to these educational programs. See, e.g., Tamara Steckler & Vicki E. Light, *The Hidden Cost of Empathy: How to Address Secondary Trauma Stress in a Child Law Office*, A.B.A. (Jan. 9, 2017), <https://www.americanbar.org/groups/litigation/committees/childrens-rights/articles/2017/hidden-cost-of-empathy-how-to-address-sts-child-law-office/> [https://perma.cc/8TYV-ML96]; *Overcoming Secondary Trauma in Immigration Practice*, AM. IMMIGR. LAWS. ASS’N (Oct. 16, 2018) [hereinafter *Overcoming Secondary Trauma*],

training about how implicit racial bias operates in the evaluation of digital evidence and tips on how defenders can fight for racial justice.<sup>461</sup>

Public defenders are asking for these educational opportunities. A recent survey found that roughly three out of four public defenders agree or strongly agree that “[s]pecific training is needed in order to handle BWC evidence.”<sup>462</sup> They want guidance on the mechanics of police BWCs and how to litigate issues involving video evidence.<sup>463</sup> Public defenders should also be trained in strategies to mitigate the effects of digital content, like the Dart Center’s tips for working with traumatic imagery.<sup>464</sup> Many respondents to the public defender survey in this Article mentioned training or education as a primary way their office could better mitigate the effects of vicarious trauma and exposure to graphic media.<sup>465</sup>

Public defender offices should put protocols in place to support the Dart Center’s tips, like scheduling office time during the day to avoid attorneys watching violent or disturbing videos late at night right

---

<https://www.aila.org/practice/self-care-center/overcoming-secondary-trauma-immigration-practice> [<https://perma.cc/DE6P-U7BL>].

461. Jeff Adachi, *10 Things Public Defenders Can Do to Stand Up for Racial Justice*, MEDIUM (Sept. 28, 2015), <https://medium.com/@sfdefender/10-things-public-defenders-can-do-to-stand-up-for-racial-justice-c8f508459c52> [<https://perma.cc/X6PQ-WUXF>]. Fortunately, it appears that public defender training on implicit racial bias is becoming more common. See, e.g., *Implicit Bias Training for Public Defenders*, EQUAL JUST. SOC’Y, <https://equaljusticesociety.org/publicdefenderstraining/> [<https://perma.cc/R324-XF49>]; *Race Matters II: The Impact of Race on Criminal Justice (2019)*, NAT’L ASS’N OF CRIM. DEF. LAWS. (Jan. 10, 2019), <https://www.nacdl.org/Content/RaceMattersTheImpactofRaceonCriminalJustice2019> [<https://perma.cc/CS5T-FCSN>]; *Webinar: Implicit Bias in the Law, the Court System, the Legal Community, and Your Legal Career*, FED. BAR ASS’N (May 6, 2020), <https://www.fedbar.org/event/webinar-implicit-bias-in-the-law-the-court-system-the-legal-community-and-your-legal-career/> [<https://perma.cc/6HKE-DM78>]; *Implicit Bias Videos and Toolkit*, A.B.A., <https://www.americanbar.org/groups/diversity/resources/implicit-bias/> [<https://perma.cc/9P65-E29B>].

462. JOHN MCCLUSKEY ET AL., *BODY-WORN CAMERA: TRAINING & TECH. ASSISTANCE, THE EVIDENTIARY VALUE OF BODY-WORN CAMERA FOOTAGE: A SURVEY OF PROSECUTORS AND PUBLIC DEFENDERS* 7 (2019).

463. See generally Harlan Yu, *The Details Beyond Body-Worn Camera Footage*, CHAMPION, July 2019, at 28, [https://www.nacdl.org/getattachment/1ab4f140-01e7-47a9-9d2c-1f67aced4615/28-30-40\\_harlan\\_yu\\_body\\_cameras\\_july\\_2019\\_champion\\_07172019\\_1213.pdf](https://www.nacdl.org/getattachment/1ab4f140-01e7-47a9-9d2c-1f67aced4615/28-30-40_harlan_yu_body_cameras_july_2019_champion_07172019_1213.pdf) [<https://perma.cc/J6XM-Y4BZ>] (discussing mechanics and technical features of police BWCs).

464. *Working with Traumatic Imagery*, *supra* note 443.

465. See Public Defender Survey, *infra* Appendix A.

before going home to bed.<sup>466</sup> Prosecutor guidance relating to BWC implementation includes recommendations for tech support and forensic specialists.<sup>467</sup> Public defenders need these same resources. Offices should invest in technology to aid attorneys in marking and tagging video evidence without having to repeatedly review it unnecessarily.<sup>468</sup>

And obviously, criminal defense attorneys and public defenders need training on secondary trauma—how to recognize it and how to mitigate the risks of secondary trauma in their day-to-day practice. These trainings occur regularly in other legal fields, like child welfare and immigration,<sup>469</sup> but they occur too rarely in the criminal defense realm.

Fortunately, this is starting to change. One public defender office brought in an expert in PTSD to talk to new attorneys about strategies to reduce burnout.<sup>470</sup> At first, senior attorneys within the office “poo-pooed the idea as a sop for coddled millennials.”<sup>471</sup> But after the session, senior attorneys noted that even they “suffered symptoms of STS—clipped emotional bandwidth, short-temperedness with family, disturbed sleep, withdrawal, exhaustion, anxiety, and helplessness.”<sup>472</sup> This is progress. Just because criminal defense attorneys have been told for decades to “man up” does not mean that public defender culture cannot change through training and education.<sup>473</sup>

Finally, offices need to be explicit about a commitment to racial justice and reckon with the ways in which even public defenders are

466. See *Working with Traumatic Imagery*, *supra* note 443.

467. KRISTINE HAMANN ET AL., PROSECUTORS’ CTR. FOR EXCELLENCE, POLICE BODY-WORN CAMERAS: WHAT PROSECUTORS NEED TO KNOW 31 (2018), [https://pceinc.org/wp-content/uploads/2018/03/20180301-Police-Body-Worn-Cameras\\_What-Prosecutors-Need-to-Know-White-and-Case-and-PCE.pdf](https://pceinc.org/wp-content/uploads/2018/03/20180301-Police-Body-Worn-Cameras_What-Prosecutors-Need-to-Know-White-and-Case-and-PCE.pdf) [<https://perma.cc/DTH6-CY44>].

468. See *id.* at 7–10.

469. See, e.g., Steckler & Light, *supra* note 460 (discussing the work of a STS committee in the Juvenile Rights Practice of Legal Aid in New York City, including attorney training on secondary trauma); *Overcoming Secondary Trauma*, *supra* note 460.

470. Messina, *supra* note 432.

471. *Id.*

472. *Id.*

473. *Id.*

susceptible to implicit racial bias when they evaluate evidence. This includes fostering attorney diversity to mitigate the effects of implicit racial bias. Discussions about secondary trauma must include the phenomenon of racial trauma and acknowledge that violent videos—particularly those depicting police violence towards people of color—can impact public defenders of color differently than their white colleagues. Supporting the resiliency and career longevity of public defenders of color is paramount to achieving a more just system.

### C. *Re-Evaluate Caseload Caps*

The protests of the summer of 2020 were accompanied by cries to defund the police and reinvest in communities.<sup>474</sup> Public defender offices need to capitalize on this moment and advocate for adequate funding—shifting money spent prosecuting cases to money spent defending them.<sup>475</sup> Part of that funding request should be tied to the added workload due to BWC and other video evidence. BWCs will not hold police accountable if only police and prosecutors watch the footage. Public defenders are well-positioned and ethically bound to

---

474. Amna A. Akbar, *How Defund and Disband Became the Demands*, N.Y. REV. OF BOOKS (June 15, 2020, 7:00 AM), <https://www.nybooks.com/daily/2020/06/15/how-defund-and-disband-became-the-demands/> [<https://perma.cc/ABU5-UV9Z>]; Christy E. Lopez, Opinion, *Defund the Police? Here's What That Really Means.*, WASH. POST (June 7, 2020, 6:37 PM), <https://www.washingtonpost.com/opinions/2020/06/07/defund-police-heres-what-that-really-means/> [<https://perma.cc/4TYB-4HHV>].

475. See, e.g., Premal Dharia, *The Progressive Prosecutor Movement Is Great—But Without Funding Public Defenders It Won't Work*, SALON (Dec. 14, 2019, 8:00 AM), <https://www.salon.com/2019/12/14/the-progressive-prosecutor-movement-is-great-but-without-funding-public-defenders-it-wont-work/> [<https://perma.cc/WA5V-PNQM>]; see also, e.g., BRYAN FURST, BRENNAN CTR. FOR JUST., A FAIR FIGHT: ACHIEVING INDIGENT DEFENSE RESOURCE PARITY 2 (2019), [https://www.brennancenter.org/sites/default/files/2019-09/Report\\_A%20Fair%20Fight.pdf](https://www.brennancenter.org/sites/default/files/2019-09/Report_A%20Fair%20Fight.pdf) [<https://perma.cc/EH99-H5MY>]; Ben Pope, *Public Defenders Hold Black Lives Matter March Around Courthouse, Jail Complex*, CHI. SUN-TIMES (June 8, 2020, 7:55 PM), <https://chicago.suntimes.com/news/2020/6/8/21284596/cook-county-public-defenders-black-lives-matter-march-protest-takenya-nixon-ashley-shambley> [<https://perma.cc/HZU5-Y9AV>] (“We do not work with the state: we are trying to help people, they are trying to convict people . . . There’s a great difference. We are all about the community.” (quoting Black Lives Matter protestor and Assistant Public Defender Takenya Nixon)). Of course, if the protests really do reduce the footprint of police and prosecutors and shrink the size and scope of the criminal justice apparatus, then this funding may prove unnecessary.

review BWC footage,<sup>476</sup> but they need to be adequately resourced to do so.

Nearly all major police departments across the United States have BWC programs, and this results in defense attorneys and their staff needing to review hours upon hours of video footage to defend clients.<sup>477</sup> BWCs were pitched as tools that promote police accountability, but the reality is that they are “surveillance devices that help officers and prosecutors gather evidence in a wide range of everyday cases.”<sup>478</sup> Public defenders and court-appointed indigent defense lawyers are either working longer hours or failing to review this influx of evidence; neither response is sustainable.

In a study of the impact of police BWCs on prosecutors and defense attorneys in Virginia, both noted additional workload due to BWC footage.<sup>479</sup> A poll of public defenders and court-appointed defense attorneys in Virginia found that 93% reported difficulty in finding time to review all of the footage.<sup>480</sup> In another survey, 90% of public defenders reported spending at least an hour reviewing case footage before hearings.<sup>481</sup> The report from Virginia explained that some defense attorneys on the indigent panel end up reviewing the additional digital discovery without receiving adequate compensation while “others likely forgo adequate review of the evidence.”<sup>482</sup> Some attorneys stopped taking indigent criminal cases altogether because they were no longer worth it.<sup>483</sup>

ABA guidelines recommend that defenders handle no more than 150 felony cases or 400 misdemeanor cases a year.<sup>484</sup> Those

---

476. See MODEL RULES OF PRO. CONDUCT r. 1.3 (AM. BAR ASS’N 2020).

477. Yu, *supra* note 463.

478. *Id.* at 30.

479. VA. COMP. BD., *supra* note 99, at 45.

480. *Editorial: Use of Body Cameras Comes with Growing Pains*, DAILY PRESS (Sept. 9, 2019, 11:55 PM) [hereinafter *Growing Pains*], <https://www.dailypress.com/opinion/dp-ed-body-cameras-0910-20190910-gbewhh4ye5gelogmvzlgalur64-story.html> [<https://perma.cc/YXQ5-NGMZ>]; see also VCJC STUDY, *supra* note 282, at 5.

481. MCCLUSKEY ET AL., *supra* note 462, at 14.

482. Turner, *supra* note 3, at 252.

483. See *Growing Pains*, *supra* note 480.

484. STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, AM. BAR ASS’N, ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM 5 n.19 (2002),

guidelines are frequently cited when allocating funding and determining caseload caps, but those guidelines were developed in 1973 and adopted by the ABA in 2002<sup>485</sup>—long before digital technology exploded into criminal practice. These guidelines are outdated and likely inaccurate.<sup>486</sup> Prosecutor offices are effectively advocating for additional personnel due to the added workload of BWC and other video evidence.<sup>487</sup> Some estimates are that an additional prosecutor is needed for every 100 BWCs deployed in the community.<sup>488</sup> Another estimate indicates an additional prosecution staff member is needed for every seventy-five BWCs deployed.<sup>489</sup> What is the figure for public defender offices? We cannot afford not to know the answer to this question.

Obviously, a recommended caseload cap is no panacea. Even with the ABA recommendations, public defenders frequently carry more cases than the cap permits. Public defender offices are chronically underfunded—and have been since the time of *Gideon v. Wainwright*.<sup>490</sup> One public defender in New Orleans reported handling double the 150 recommended felony cases in 2014 and reported that it was “impossible for [her] to do a good job representing [her] clients” due to a lack of funding resulting in unmanageable caseloads.<sup>491</sup>

---

[http://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_def\\_tenprinciplesbooklet.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_tenprinciplesbooklet.authcheckdam.pdf) [<https://perma.cc/X8VH-8Z8L>].

485. See JUSTICE DENIED, *supra* note 381, at 66.

486. *Id.* (“Because the [National Advisory Commission] standards are [thirty-five] years old and were never empirically based, they should be viewed with considerable caution. . . . [T]he practice of criminal and juvenile law has become far more complicated and time-consuming . . . .”); see also NORMAN LEFSTEIN, SECURING REASONABLE CASELOADS: ETHICS AND LAW IN PUBLIC DEFENSE 140–60 (2011), <https://www.in.gov/publicdefender/files/SecuringReasonableCaseloads.Book.pdf> [<https://perma.cc/LWY6-9NSQ>] (describing case weight studies).

487. See, e.g., VA. COMP. BD., *supra* note 99, at 16.

488. HAMANN ET AL., *supra* note 467, at 29; VA. COMP. BD., *supra* note 99, at 15–16.

489. VA. COMP. BD., *supra* note 99, at 15–16.

490. 372 U.S. 335 (1963).

491. Tina Peng, Opinion, *I'm a Public Defender. It's Impossible for Me to Do a Good Job Representing My Clients.*, WASH. POST (Sept. 3, 2015), [https://www.washingtonpost.com/opinions/our-public-defender-system-isnt-just-broken—its-unconstitutional/2015/09/03/aadf2b6c-519b-11e5-9812-92d5948a40f8\\_story.html](https://www.washingtonpost.com/opinions/our-public-defender-system-isnt-just-broken—its-unconstitutional/2015/09/03/aadf2b6c-519b-11e5-9812-92d5948a40f8_story.html) [<https://perma.cc/WTX8-4MPN>].



More recently, public defender offices have been refusing cases and engaging in systemic litigation to address this chronic underfunding.<sup>492</sup> The lawsuits highlight the underfunding and excessive caseload issues in public defense, but many use the ABA caseload caps in arguments for more funding.<sup>493</sup> And some lawsuits are successful in getting additional funding allocated based on the ABA guidelines.<sup>494</sup> For example, a recent settlement in Fresno, California, regarding inadequate funding of the public defender's office by both the county and the state, will result in millions of additional state and county funds for indigent defense.<sup>495</sup>

The benefits of caseload caps are obvious: more time with clients, more time to investigate, research, and review discovery—generally more zealous representation.<sup>496</sup> Fewer cases also means less triage and fewer opportunities for implicit racial bias to operate. High caseloads, on the other hand, force public defenders to routinely violate professional oaths because there is no way to zealously defend each case given the amount of hours in a day.<sup>497</sup> When time is scarce, attorneys cut corners and may rely on biases and stereotypes to do so. The explosion of BWC and other video evidence into

---

492. Gross, *supra* note 428, at 253–54 (listing New Orleans, Louisiana; Nashville, Tennessee; Hobbs, New Mexico; Missouri; and Florida as sites of case refusal and related litigation); *see also* State v. Peart, 621 So.2d 780, 791 (La. 1993) (finding excessive caseloads gave rise to a rebuttable presumption that counsel was not meeting constitutional standards); State *ex rel.* Mo. Pub. Def. Comm'n v. Waters, 370 S.W.3d 592, 612 (Mo. 2012) (en banc) (approving public defender case refusal when caseloads exceed capacity); Pub. Def., Eleventh Jud. Cir. of Fla. v. State, 115 So.3d 261, 274 (Fla. 2013) (upholding a public defender's right to withdraw from a case due to excessive caseloads).

493. *See, e.g., Waters*, 370 S.W.3d at 607–08.

494. *See, e.g.,* Robert Rodriguez, *Fresno County Public Defender's Office to Boost Ranks After Legal Settlement with ACLU*, FRESNO BEE, <https://www.fresnobee.com/news/local/article239172383.html> (Jan. 11, 2020, 12:35 PM).

495. *Id.* (“In September 2013, more than 80 percent of the attorneys working in the Fresno County Public Defender's Office signed a letter protesting their working conditions. The attorneys alleged they had so little time with their clients that they did not have time to prepare an adequate defense.”); *see also* Phillips v. State, No. 15CECG02201, 2016 WL 1573199 (Cal. Super. Ct. Apr. 11, 2016) (issuing a tentative ruling in the Fresno public defender litigation).

496. MELISSA LABRIOLA ET AL., INDIGENT DEFENSE REFORMS IN BROOKLYN, NEW YORK: AN ANALYSIS OF MANDATORY CASE CAPS AND ATTORNEY WORKLOAD, at iii, vi (2015), [https://www.courtinnovation.org/sites/default/files/media/documents/2017-11/case\\_caps\\_nyc.pdf](https://www.courtinnovation.org/sites/default/files/media/documents/2017-11/case_caps_nyc.pdf) [<https://perma.cc/39DL-8JVU>].

497. Bright & Sanneh, *supra* note 295, at 2166.

defense practice requires recalibration of the ABA recommended caseload caps. We need better data on what a reasonable caseload consists of in the digital age, and we need to fund public defender offices to handle the influx of video evidence. If BWCs exacerbate historical inequality in the funding of prosecutor and public defender offices, there is no way that it can promote police accountability or do the necessary work to repair community relations with the criminal legal system. Burning out defenders by asking them to watch violent videos in an unmanageable caseload cannot be the path to reform.

#### CONCLUSION

Digital evidence, including BWC footage, can be a powerful weapon in the arsenal of public defenders. But, as with any new technology, it also presents new challenges. As digital media becomes a defining feature of criminal defense practice, public defender offices need to take stock and adjust to the demands of this new form of criminal discovery. Reviewing violent videos over and over can take a toll.<sup>498</sup> New ethical problems present themselves, and digital media exacerbates the risk of secondary trauma for public defenders. Crippled by secondary trauma and ethically compromised, public defenders may not be able perform at constitutionally mandated levels of practice. Moreover, the mental strain can increase public defenders' reliance on implicit biases, compounding racial inequities notorious in the criminal legal system. No accounting of the costs and benefits of digital evidence is complete absent a reckoning of the impact on the individual public defenders that have to review the footage. But with a shift in public defender culture that is more attuned to the risks of secondary trauma, institutional responses, and education to foster self-care and a recalibration of caseload caps, public defender offices can respond to the challenge of digital media and zealously advocate for criminal defendant clients.

---

498. See Public Defender Survey, *infra* Appendix A.

APPENDIX A<sup>499</sup>

Q1: Are you a current or former public defender?

<b>Answer choices:</b>	<b>Responses %</b>	<b>Responses #</b>
I am currently working as a public defender	89.08%	204
I used to be a public defender	10.04%	23
I am on leave from a public defender job	0.87%	2
		n = 229

Q2 Where have you worked as a public defender?<sup>500</sup>

<b>Answer choices:</b>	<b>Responses %</b>	<b>Responses #</b>
California	20.96%	48
Idaho	11.79%	27
New York	9.61%	22
Minnesota	8.30%	19
Arizona	5.24%	12
Georgia	5.24%	12
		n = 229

499. I conducted this survey using SurveyMonkey from September 24, 2018, to November 24, 2018, and distributed it via informal e-mail channels, including some national public defender listservs. The questions and responses are included *infra*.

500. Participants in the survey could select one state and add additional states in the comments field. Forty states and the District of Columbia were represented. No survey respondent indicated working in Arkansas, Connecticut, Delaware, Maine, Nebraska, New Mexico, North Dakota, Rhode Island, Vermont, or West Virginia. The states with the most representation in the first field selections are included in the table.

Q3: Have you worked as a public defender in the state or federal system?

<b>Answer choices:</b>	<b>Responses %</b>	<b>Responses #</b>
State system	81.66%	187
Federal system	7.42%	17
Both the state and federal system	10.92%	25
		n = 229

Q4: How long have you worked as a public defender?

<b>Answer choices:</b>	<b>Responses %</b>	<b>Responses #</b>
For less than 2 years	9.25%	21
Between 2 and 5 years	22.47%	51
Between 5 and 10 years	26.43%	60
For more than 10 years	41.85%	95
		n = 227

Q5: How many cases have you had in your average case load over the past three months? (or during the last three months you worked as a public defender if you are not currently working as a public defender)

<b>Answer choices:</b>	<b>Responses %</b>	<b>Responses #</b>
Less than 20 cases	12.23%	28
Between 20 and 50 cases	26.64%	61
Between 50 and 100 cases	29.69%	68
Between 100 and 150 cases	19.65%	45
More than 150 cases	11.79%	27
		n = 229

Q6: Describe the jurisdiction in which you are a public defender (check all that apply).

<b>Answer choices:</b>	<b>Responses %</b>	<b>Responses #</b>
Rural	32.75%	75
Suburban	37.55%	86
Urban	75.11%	172
		n = 229

Q7: Describe your (current or most recent) role in the public defender office where you work or worked.

<b>Answer choices:</b>	<b>Responses %</b>	<b>Responses #</b>
I am a line attorney	77.78%	75
I am a supervisor	11.11%	25
I am the head of my office	11.11%	25
		n = 225

Q8: Which of the following types of eyewitness media have you reviewed as part of your work as a public defender?

<b>Answer choices:</b>	<b>Responses %</b>	<b>Responses #</b>
Body-worn camera footage from law enforcement	87.30%	165
Videos from defendants or witnesses	93.12%	176
Contraband videos like child pornography	56.61%	107
Graphic photographs	94.18%	178
		n = 189

2021] VIOLENT VIDEOS: CRIMINAL DEFENSE IN A DIGITAL AGE 389

Q9: How often do you review eyewitness media (like that listed above)?

<b>Answer choices:</b>	<b>Responses %</b>	<b>Responses #</b>
Daily	10.53%	20
Several times a week	47.37%	90
Once per week	7.37%	90
Several times a month	22.11%	42
Once per month	4.74%	9
Less than once per month	7.89%	15
		n = 190

Q10: When you work with eyewitness media, how much of your day is typically spent engaged in this material?

<b>Answer choices:</b>	<b>Responses %</b>	<b>Responses #</b>
Less than 1 hour	18.95%	36
1–2 hours	51.05%	97
2–4 hours	25.26%	48
More than 4 hours	4.74%	9
		n = 190

Q11: How would you describe the trend in terms of how much eyewitness media is being reviewed in your office in the past few years?

<b>Answer choices:</b>	<b>Responses %</b>	<b>Responses #</b>
Over the past few years, the amount of eyewitness media being reviewed is increasing.	91.05%	173
Over the past few years, the amount of eyewitness media being reviewed is decreasing.	0.53%	1
Over the past five years, the amount of eyewitness media being reviewed is staying about the same.	8.42%	16
		n = 190

Q12: Who has primary responsibility to review body-worn camera footage and other eyewitness media in your office?

<b>Answer choices:</b>	<b>Responses %</b>	<b>Responses #</b>
Attorneys	93.68%	178
Interns	0.00%	0
Investigators	1.05%	2
Paralegals	0.53%	1
It depends	4.74%	9
		n = 190

Q13: Describe the video or image that has impacted you the most strongly.

<b>Answers in APPENDIX B</b>		
		n = 170

2021] VIOLENT VIDEOS: CRIMINAL DEFENSE IN A DIGITAL AGE 391

Q14: On average, how often are you exposed to eyewitness media you would categorize as traumatic? (Traumatic content would include images of violence, threats of violence, and the immediate effects of violence.)

<b>Answer choices:</b>	<b>Responses %</b>	<b>Responses #</b>
Daily	2.12%	4
Several times a week	14.81%	28
Once per week	6.88%	13
Several times a month	25.93%	49
Once per month	17.46%	33
Less than once per month	32.80%	62
		n = 189



Q15: Which of the following have increased the traumatic impact of content you reviewed?

<b>Answer choices:</b>	<b>Responses %</b>	<b>Responses #</b>
When I wasn't expecting to see something traumatic.	36.26%	66
When I had to watch traumatic content repeatedly.	41.76%	76
When I viewed traumatic content that didn't end up being essential to preparing my case.	17.58%	32
When the traumatic content reminded me of something that had happened to me or someone connected to me.	18.68%	34
When the video had audio of someone crying out in pain or asking for help.	48.35%	88
When the traumatic content included victimization of children.	51.65%	94
		n = 182

Q16: How has reviewing traumatic eyewitness media impacted you in terms of your personal life?

<b>Answer choices:</b>	<b>Responses %</b>	<b>Responses #</b>
Positive impact on my personal life.	0.00%	0
No impact on my personal life.	23.81%	45
Low to moderate adverse impact on my personal life.	67.72%	128
High or very high adverse impact on my personal life.	10.05%	19
Please describe the impact. <sup>501</sup>	40.74%	77
		n = 189

Q17: How has reviewing traumatic eyewitness media impacted you in terms of your professional life?

<b>Answer choices:</b>	<b>Responses %</b>	<b>Responses #</b>
Positive impact on my professional life.	12.17%	23
No impact on my professional life.	34.92%	66
Low to moderate adverse impact on my professional life.	46.56%	88
High or very high adverse impact on my professional life.	6.35%	12
Please describe the impact. <sup>502</sup>	34.92%	66
		n = 189

501. For responses of the participants who selected the “Please describe the impact” prompt, see Comments to Survey Question 16, *infra* Appendix C.

502. For responses of the participants who selected the “Please describe the impact” prompt, see Comments to Survey Question 17, *infra* Appendix D.

Q18<sup>503</sup>: I force myself to avoid certain thoughts or feelings that remind me of my clients' difficulties.

<b>Answer choices:</b>	<b>Score</b>	<b>Responses %</b>	<b>Responses #</b>
Rarely or never	1	22.65%	41
At times	2	44.75%	81
Not sure	3	6.63%	12
Often	4	20.99%	38
Very often	5	4.97%	9
			n = 181

Q19: I find myself avoiding certain activities because they remind me of my clients' problems.

<b>Answer choices:</b>	<b>Score</b>	<b>Responses %</b>	<b>Responses #</b>
Rarely or never	1	40.66%	74
At times	2	35.71%	65
Not sure	3	9.34%	17
Often	4	9.34%	17
Very often	5	4.95%	9
			n = 182

---

503. Q18–Q35 are questions adapted from the mental health assessment tool developed in 1999 and refined in 2001. Motta et al., *Initial Evaluation of STQ*, *supra* note 201; Motta et al., *Validation of Modified STQ*, *supra* note 201. Each question is scored on a scale of one to five. A total score of thirty-eight or higher is “indicative of mild to severe anxiety and depression and also [is] related to problematic intrusion and avoidance symptoms,” while scores of forty-five or higher indicate the “possibility of significant emotional concerns as they are associated with moderate to severe anxiety and depression.” *Assessing Secondary Trauma*, *supra* note 202. Before the screening tool questions began, survey recipients were instructed to think about their clients in responding to Q18–Q35.

Q20: I have difficulty falling or staying asleep.

<b>Answer choices:</b>	<b>Score</b>	<b>Responses %</b>	<b>Responses #</b>
Rarely or never	1	20.77%	38
At times	2	34.97%	64
Not sure	3	2.73%	5
Often	4	25.68%	47
Very often	5	15.85%	29
			n = 183

Q21: I startle easily.

<b>Answer choices:</b>	<b>Score</b>	<b>Responses %</b>	<b>Responses #</b>
Rarely or never	1	50.00%	91
At times	2	29.67%	54
Not sure	3	3.85%	7
Often	4	12.64%	23
Very often	5	3.85%	7
			n = 182

Q22: I have flashbacks (vivid images or memories) related to their problems or cases.

<b>Answer choices:</b>	<b>Score</b>	<b>Responses %</b>	<b>Responses #</b>
Rarely or never	1	44.51%	81
At times	2	39.01%	71
Not sure	3	1.10%	2
Often	4	14.29%	26
Very often	5	1.10%	2
			n = 182

Q23: I am frightened by things my clients have said or done to me.

<b>Answer choices:</b>	<b>Score</b>	<b>Responses %</b>	<b>Responses #</b>
Rarely or never	1	74.86%	137
At times	2	21.86%	40
Not sure	3	0.55%	1
Often	4	2.19%	4
Very often	5	0.55%	1
			n = 183

Q24: I experience troubling dreams similar to their problems.

<b>Answer choices:</b>	<b>Score</b>	<b>Responses %</b>	<b>Responses #</b>
Rarely or never	1	57.92%	106
At times	2	31.69%	58
Not sure	3	1.09%	2
Often	4	7.65%	14
Very often	5	1.64%	3
			n = 183

Q25: I experience intrusive, unwanted thoughts of their experiences.

<b>Answer choices:</b>	<b>Score</b>	<b>Responses %</b>	<b>Responses #</b>
Rarely or never	1	42.08%	77
At times	2	39.89%	73
Not sure	3	1.09%	2
Often	4	14.75%	27
Very often	5	2.19%	4
			n = 183

Q26: I am losing sleep over thoughts of their questions.

<b>Answer choices:</b>	<b>Score</b>	<b>Responses %</b>	<b>Responses #</b>
Rarely or never	1	40.11%	73
At times	2	40.11%	73
Not sure	3	1.65%	3
Often	4	14.84%	27
Very often	5	3.30%	6
			n = 182

Q27: I have thought that I might have been negatively affected by their experiences.

<b>Answer choices:</b>	<b>Score</b>	<b>Responses %</b>	<b>Responses #</b>
Rarely or never	1	31.69%	58
At times	2	44.26%	81
Not sure	3	2.19%	4
Often	4	18.03%	33
Very often	5	3.83%	7
			n = 183

Q28: I have felt “on edge” and distressed and this may be related to thoughts about their problems.

<b>Answer choices:</b>	<b>Score</b>	<b>Responses %</b>	<b>Responses #</b>
Rarely or never	1	22.40%	41
At times	2	44.81%	82
Not sure	3	6.01%	11
Often	4	20.22%	37
Very often	5	6.56%	12
			n = 183

Q29: I have wished that I could avoid dealing with a particular client.

<b>Answer choices:</b>	<b>Score</b>	<b>Responses %</b>	<b>Responses #</b>
Rarely or never	1	11.48%	21
At times	2	48.63%	89
Not sure	3	1.09%	2
Often	4	25.14%	46
Very often	5	13.66%	25
			n = 183

Q30: I have difficulty recalling specific aspects and details of my clients' difficulties.

<b>Answer choices:</b>	<b>Score</b>	<b>Responses %</b>	<b>Responses #</b>
Rarely or never	1	58.47%	107
At times	2	31.15%	57
Not sure	3	6.01%	11
Often	4	4.37%	8
Very often	5	0.00%	0
			n = 183

Q31: I find myself losing interest in activities that used to bring me pleasure.

<b>Answer choices:</b>	<b>Score</b>	<b>Responses %</b>	<b>Responses #</b>
Rarely or never	1	51.37%	94
At times	2	34.97%	64
Not sure	3	1.64%	3
Often	4	8.20%	15
Very often	5	3.83%	7
			n = 183

## 2021] VIOLENT VIDEOS: CRIMINAL DEFENSE IN A DIGITAL AGE 399

Q32: I find it increasingly difficult to have warm and positive feelings for others.

<b>Answer choices:</b>	<b>Score</b>	<b>Responses %</b>	<b>Responses #</b>
Rarely or never	1	65.57%	120
At times	2	19.13%	35
Not sure	3	3.28%	6
Often	4	10.38%	19
Very often	5	1.64%	3
			n = 183

Q33: I find I am less clear and optimistic about my future life than I once was.

<b>Answer choices:</b>	<b>Score</b>	<b>Responses %</b>	<b>Responses #</b>
Rarely or never	1	42.86%	78
At times	2	30.22%	55
Not sure	3	3.30%	6
Often	4	19.23%	35
Very often	5	4.40%	8
			n = 182

Q34: I have difficulty concentrating.

<b>Answer choices:</b>	<b>Score</b>	<b>Responses %</b>	<b>Responses #</b>
Rarely or never	1	27.47%	50
At times	2	45.05%	82
Not sure	3	3.30%	6
Often	4	17.58%	32
Very often	5	6.59%	12
			n = 182



Q35: I feel threatened and vulnerable if I went through what my clients went through.

<b>Answer choices:</b>	<b>Score</b>	<b>Responses %</b>	<b>Responses #</b>
Rarely or never	1	4.92%	9
At times	2	14.21%	26
Not sure	3	10.38%	19
Often	4	32.79%	60
Very often	5	37.70%	69
			n = 183

Q36: I resort to drinking alcohol (or drug use) to cope with the stress I feel related to my clients' problems.

<b>Answer choices:</b>	<b>Responses %</b>	<b>Responses #</b>
Rarely or never	49.18%	90
At times	35.52%	65
Not sure	1.64%	3
Often	10.93%	20
Very often	2.73%	5
		n = 183

## 2021] VIOLENT VIDEOS: CRIMINAL DEFENSE IN A DIGITAL AGE 401

Q37: My workplace culture is such that I would feel comfortable asking for support in handling traumatic content and stress relating to traumatic content.

<b>Answer choices:</b>	<b>Responses %</b>	<b>Responses #</b>
Strongly agree	28.73%	52
Agree	26.52%	48
Neither agree nor disagree	17.68%	32
Disagree	19.89%	36
Strongly disagree	7.18%	13
		n = 181

Q38: If I felt adversely affected by handling traumatic content at work, I would feel comfortable discussing my feeling with my supervisor.

<b>Answer choices:</b>	<b>Responses %</b>	<b>Responses #</b>
Strongly agree	24.73%	45
Agree	31.87%	58
Neither agree nor disagree	15.93%	29
Disagree	18.13%	33
Strongly disagree	9.34%	17
		n = 182

Q39: Check the topics your office has had training sessions about.

<b>Answer choices:</b>	<b>Responses %</b>	<b>Responses #</b>
Dealing with vicarious trauma or secondary trauma	35.36%	64
Handling graphic media	7.18%	13
My office has had no training on either of these topics	62.98%	114
		n = 181

Q40: What strategies do you use to deal with workplace stress?  
(check all those that apply)

<b>Answer choices:</b>	<b>Responses %</b>	<b>Responses #</b>
Talking with peers	88.46%	161
Debriefing with my supervisor	28.02%	51
Individual counseling	19.78%	36
Vacation and taking breaks from work	78.57%	143
Work in teams rather than alone	31.87%	58
Attend trainings on dealing with workplace stress	14.29%	26
Exercise	62.64%	114
Alcohol or drug use	45.05%	82
Dark humor	78.57%	143
Other (please specify)	11.54%	21
		n = 182

Q41: What do you think your office could do to better mitigate the effects of vicarious trauma and exposure to graphic media?

<b>Answers on file with the author:</b>		
		n = 149

Q42: Would you be open to being interviewed as follow-up to your answers in this survey? (All interviews can be included in the research anonymously.)

<b>Answer choices:</b>	<b>Responses %</b>	<b>Responses #</b>
I would be happy to be interviewed.	40.66%	74
I would be reluctant to be interviewed, but if you think it would help your work, I'm willing to do it.	22.53%	41
I am not willing to be interviewed.	36.81%	67
		n = 182

#### **Summary of Mental Health Screening Tool Results**

Results of survey takers who completed every item in the screening tool (i.e., Q18–Q35).

Mean Score	38.71751	
Median Score	37	
Minimum Score	18	
Maximum Score	85	
Number of survey takers at or above 38-point threshold	86	48.58757%
Number of survey takes at or above 45-point threshold	51	28.81356%
		n = 182

APPENDIX B

Comments to Q13: Describe the video or image that has impacted you the most strongly.

- Police body cam video of client who was subsequently arrested for domestic violence. Client was extremely intoxicated, his penis was exposed, the alleged victims (wife and children) were present and audibly distressed during the encounter. Client belligerent and was tazed by law enforcement.
- Watching my client actually commit a [domestic battery] while the police are trying to arrest her.
- I spent 6 hours one day watching an interview of a teen who claimed my client (also a teen) had raped her.
- Murder on video. Child abuse resulting in death on video.
- Body cam footage that shows any type of violence or footage where officers are violating the law.
- Pictures of dog that was stabbed to death.
- I can't make this evaluation. It is probably a cumulative impact.
- Child Pornography
- BWC of blatant [Fourth Amendment] violations with child clients
- N/A
- Murder
- A body cam video capturing the last moments of a victim's life, audio and visual, from the victim's perspective
- Public masturbation
- Child pornography
- Not applicable to my assignment.
- Body Cam

- Photos of deceased persons and child pornography
- Child porn
- I can't think of anything specifically that has impacted me most strongly. In my homicide case you can see the decedent being shot and killed which was shocking the first time I viewed it. Those videos probably have an effect on me
- Body camera footage—used in motions to suppress and preparing for trial
- Traffic stop involving convicted felon with semi-automatic rifle in vehicle. Defendant went back into car, when officer noticed rifle and instead of shooting him pulled him out of the car. Very tense.
- No one image or video stands out above others. Seeing pictures of naked dead bodies on the printer without warning is startling generally, or seeing photos of dead bodies when I know facts about the victim are worse than others
- The image of police attacking a 19-year-old young man and tackling him to the ground with him saying “I'm only 19.”
- Child pornography
- Body camera in assault against law enforcement case.
- N/A
- Use of force videos from body-worn-cameras
- Body cam from 1st officers on scene at a shooting w multiple victims (all teens), inc death & paralysis
- Medical examination photos on murder case, and body cameras showing crimes scenes involving murders have been the most dramatic. Also body cameras where police are outside active shooting incidents.
- Autopsy photo

- Cannot really say as we see little at the pre-indictment stage. Probably severe physical child abuse photographs
- Bodycam of the police assaulting my client.
- Officers beating/aggressively attacking clients; a man being stabbed with a knife
- Client on motorcycle being broadsided by semi while being pursued by law enforcement (felony evading) that was captured by the pursuing vehicle's dash cam
- Client on PCP fighting with police in a case of mine, but far worse was video of a mentally ill client arrested for suspicion of murder—[504—naked and fighting police in the hospital. Both similar, now that I think of it
- Kiddie porn
- Squad dash footage
- An animal abuse case that involved photographs of mutilated and dismembered dogs.
- Video of a murder where victim and defendant's children were on the porch and could be heard yelling in the 911 call.
- Hostile, violent, disrespectful cops taking advantage of people
- Child's throat cut and partially severed?
- An autopsy photo of a domestic violence victim. She'd been stabbed in the back and something about the sight of her bra strap severed really bothered me. She was a mother and this is what she'd been reduced to.
- Body-cam video showing an officer choke my client while he was handcuffed.

---

504. Identifying information removed to protect anonymity of respondent.

## 2021] VIOLENT VIDEOS: CRIMINAL DEFENSE IN A DIGITAL AGE 407

- Photograph of young girl as she was found in a river after rape and strangulation. Half the jury cried when they saw it, I wanted to but did not.
- Crime scene pictures of the homicide of a child who was under 5 years old.
- None really
- Too many to choose from
- Child Abuse/Neglect
- Video that diverges from the “official” narratives provided by police or the complaining witness.
- Murder victim bodies
- Police brutality. Their escalation of a simple stop becomes brutal and I have to leave and return in order to process the whole video. Although I know a shooting is not involved, I am constantly watching to see if someone almost got shot.
- Interview with 10 year old alleged sex offender and interview with his 7 year old victim.
- SART [Sexual Assault Response Team] exam
- Child pornography and certain homicide
- Autopsy
- Client speeding away during a police chase and crashing her vehicle into a boulder.
- Injuries of alleged victims (graphic)
- Store video of suspect who was not the defendant
- The image of a half-nude, five-year old girl, who was raped, sodomized, and hanged by the neck until dead.
- Dead baby case where Defendant was trying in vain to revive the infant on police body worn camera video.
- Autopsy photo
- Video of a 13 year old being killed by being shot in the head
- None come to mind as having significant impact
- Nothing stands out.



- Police officer body cam
- Child sex abuse still image—infant female genital injury
- Images of child pornography
- Child pornography
- Police brutality
- Child pornography
- Body camera
- Child pornography
- Surveillance
- I don't believe I have been impacted strongly by any image
- Dead children.
- Photos of burned bodies
- Oddly, a photo of a man shot next to a toilet
- Seeing someone get brutally beat up by someone else with their bare hands and then left bloody on the ground
- Photos of murder crime scene, excavation of victim's body; photos of crime scene blunt force trauma murder
- Body cams. Those typically have raw interviews at the time an arrest or investigation is just beginning, and the files are large and difficult to copy, and can be very long. Which takes a lot of time to analyze and determine the impact on a case.
- I had to watch child pornography as a part of discovery for a case. It very extremely hard to watch. I felt like I was almost physically sick.
- Child being beaten
- 400+ child porn photos in one case
- Photos of a murder scene.
- Listening to detailed accounts from a child-victim of rape or sexual assault of that child during interview.
- Having to look at child pornography.

- Client being beaten and pepper sprayed by law enforcement officers.
- Homicide cases, crime scene photos. deaths involving children. I remember all of them.
- GSW through the chest of a victim. The caliber was large and created a very large exit wound.
- Police mistreating clients
- Picture of a badly ulcerated leg
- Coroner photos of vivisections
- Watching someone die.
- Video of shooting of victim, even if the video appears that a different person was the shooter and not my client.
- Officer shootings (though few and not for years)
- Child pornography and autopsy photos
- Police shooting
- Autopsy photos (generally) specifically, a picture of murder victim with skin peeled down and skull cap removed exposing brain. This was part of the autopsy and not a result of injuries in the case.
- The photographs of a young child set on fire after being beaten.
- An officer used a racial slur on a bodycam, it resulted in dismissal of the case; another officer's bodycam was instrumental in a suppression hearing.
- Autopsy photos of deceased infants
- Child pornography—photos
- A photo of my client's codefendant after he shot himself in the head- not relevant to the litigation and extremely upsetting to receive unexpectedly from the DA
- I can't really think of one
- A murder case where bodies were burned.
- Autopsy photos of a two-year-old toddler who was beaten to death. That stayed in my mind for many

years and would pop up when I would see a toddler that looks kind of like the one who had died.

- Cops taking away a mother from her child.
- Body-worn camera takes the most time to review.
- Rape kit photographs of a violent rape
- BWC footage of first responding officer as he arrived on scene, started doing CPR, and helped the person into the ambulance following the fatal stabbing in a murder case.
- I don't find the videos particularly impacting.
- Child porn, child molest videos by clients, homicides, particularly body worn camera footage of homicide scenes
- Surveillance during a robbery where victims screamed for help and then laid on the ground while a replica firearm was pointed at them. They were shaking and began to hold hands as they laid face down on the floor near the safe.
- Child Pornography
- Child pornography and autopsy photographs
- Video of a dog being beaten with a stick with nails sticking out of it, while the dog audibly cries. Pictures of victims that have been dismembered. Pictures of victims with organs falling out of their body.
- The death of a victim, caught by a street camera.
- Body Worn Camera
- Attempt murder and child molest aftermath videos.
- Dead bodies, dead babies, child pornography
- Body Worn Camera Videos
- Video of child pornography and watching video of child molest that was recorded
- People getting Tased on video
- Video of officers using excessive force on my clients. One comes to mind of an officer using force

like a UFC fighter after tasing when client was incapacitated. Also cell phone video of violent assaults. One comes to mind of a fight where one participant got knocked out unconscious and the other fighter used both feet to jump as high as possible in the air and stomp the unconscious persons head a few times. Another involved a stabbing (over 10 shanks) at a bus stop where a camera captured the victim bleed out and die over the course of 2 minutes.

- There is a dramatic increase in surveillance videos since I've started working. There had also been an increase in BWV, but it seems that lately, there is always a police canvass for surveillance videos during an investigation and often they are able to find some video
- Homicide victim photos
- Child pornography
- I had a client who was involved in a high speed chase down a residential street. When his car crashed, he ran away. As he hopped a fence, the police offer drove his vehicle into the fence and ran over the client, who was on foot.
- The body worn camera footage of a cop chasing my client and shooting and killing my client.
- Footage of dead bodies.
- Videos involving serious injury or death; photographs of especially graphic injuries; coagulating blood; videos or photos involving children.
- A young defendant being arrested in the winter was held at gun point while in his socks and not very much clothing on. He was face down in the snow shaking uncontrollably. It was a small amount of meth that had been recovered on the ground. He

begged to be moved inside or to get his shoes. The officers pointed guns at his head. He was 18.

- Recently—photos from an elder abuse and extreme neglect case
- Surveillance
- Photographs of dead or mutilated bodies
- Video of a man having oral sex with a passed-out woman on a public sidewalk and no one stopping
- Watching child pornography is traumatizing. Also, our client Eric Garner was killed on video, and watching that video or arrests with similar levels of violence or hostility traumatize me.
- Videos of my clients being brutalized by the police
- Bodycam footage makes motions to suppress a little harder; but a lot of times the cameras are turned off
- Body cam video of my black client being dragged by police officers up a creek embankment.
- Body camera videos, dash cam videos
- Body worn camera footage of police discovering victim of attempt murder
- Autopsy photo of child
- Child Porn
- Body worn camera
- Autopsy photos
- A brick was being thrown repeatedly at someone's head after he was unconscious. Folks just calmly walked away as he was bleeding out. The photographs connected to this had brain matter coming out of the victim's skull.
- Video taken by a client who was assaulted by an officer and as charged with assault
- Acts caught on video
- Child pornography
- All of them. In a way it's desensitizing to have seen more and more to see cadavers or crime scene

photos, but images of children being hurt are always the worst.

- Child pornography
- Child porn
- Prison assault resulting in fatal injuries
- It was child torture porn that appeared to be filmed in the Middle East. Two boys were restrained and being physically tortured and forced to kiss/touch each other. They were clearly injured.
- Violence captured on any type of video, police violence.
- NYPD street Video camera that exculpated my client
- Child pornography of what was alleged to be a father having sex with his 8 year old daughter
- A video of a complaining witness falling down a flight of cement stairs and landing on his head where a pool of blood begins to form.
- BWC
- Child pornography
- It is incredibly helpful to see body cam footage. I wish cops just had it running 24/7.
- Autopsy photos in a dead baby case
- Child pornography
- Complainant stabbing my client repeatedly during an alleged assault.
- Cell phone video of assault with a weapon
- A graphic photo of the complaining witness in a case of aggravated assault where the knife wound penetrated down to the bone
- Graphic child pornography and body-worn camera showing police assault on a client
- Video exonerating my client.

APPENDIX C

Comments to Q16: How has reviewing traumatic eyewitness media impacted you in terms of your personal life? Please describe the impact.

- Our work as public defenders requires a certain amount of desensitization and compartmentalizing. This mechanism for dealing with stress professionally creeps into personal relationships as well.
- It's hard to forget, and stays in my mind
- Thus far, low to moderate as most of my eyewitness media involves DUI's
- On occasion some of the cases will cause nightmares but this is true for me of the violent cases that do not include video images as well.
- Sometimes cry a lot about it or vent to fellow attorneys if it does affect me
- I feel like it's hard to talk about it and that family and friend don't want to hear about such awful things
- I would say it's very stressful. I have had to learn to inoculate myself by basically building barriers around it
- I don't know
- I would characterize it as a moderate, in that it effects my emotional state, but there's also a de-sensitizing effect in that I forget that things are traumatic or triggering for other people, so occasionally bring them up in conversation and shock people by accident. I think the impact on me is more subtle than anything, but definitely is affecting my consciousness and how I move about the world.
- Left me shaken for a bit

- The impact is usually compassion for all parties, to increase efforts to ameliorate the situation
- Stress, insomnia, anger
- Has changed what movies I watch.
- Hard to separate this from all the rest in the work that's not media
- Unable to forget the scenes, specifically a toddler wearing a mask so that they couldn't be identified during the sexual abuse
- Profound sense of hopelessness regarding the safety of children in my jurisdiction.
- The sound of screaming and keening in a 911 call—if it's bad enough I can't stop hearing it. It makes it hard to attend to what I'm supposed to be doing when I come home.
- I have accepted there is an impact, still trying to deal with it.
- I take the stress of my work home and it is hard to leave the day at the office—keeps me awake at night.
- Although I try to separate the content from my life, it is hard because I want to be aware of the impact he had on my client in order to best represent him/her.
- Anger at all involved
- Withdrawn, not being able to sleep, anxious, angry
- Witnesses general suffering of folks
- Simply has changed my perspective of the world, engaging in romantic relationship or interactions with children.
- At some point, I feel de-sensitized to it all.
- I am not sure I can describe what impact if any it has had on my life. I have never thought about that question.
- While I have seen many images of people who have been killed it has caused me to be somewhat numb to



such images. However, I have begun to realize it has made me more depressed in my overall affect

- I was diagnosed with anxiety disorder 11 years ago. The cumulative effect of several cases involving trauma along with other occurrences in my personal and professional life triggered a major anxiety incident that I haven't experienced in over a decade.
- More paranoid about protecting my own daughter, somewhat desensitized to violence in general
- I go home and tell my family how much I love them. I thank my husband for not being abusive. I warn my kids about substance abuse.
- Makes you think about negative things
- Increases concern of my children becoming victims. can take my mind away from my family or ruin my mood when I think about it
- Occasional bad dreams.
- Anxiety when remembering the images; inability to trust others to babysit my children; withdrawal from criminal defense as an area of practice
- I've had a hard time dealing with child sex abuse cases now that I have children. Any little thing makes me paranoid and suspicious—even of my own husband who is the most kind and gentle hearted person. Working these cases can definitely mess with my mind.
- I left the PD office about 6 months ago to move into a more administrative role. I realize now that I was definitely suffering from the effects of compassion fatigue and constantly operating at a high level of stress.
- I am very, very protective of my children and my loved ones. I'm probably too protective. When I worry about them, the images I have seen in the past go through my mind and provoke anxiety.

- It has made me very quiet about my work. Just writing this brings back images I wish I could scrub from my brain.
- Cannot participate in any form of entertainment (i.e., movies, books, etc.) that contain similar content to what I already have enough exposure to at work. High stress or traumatic days also impact my behavior towards family/friends, at least for the duration of that day. Usually, I want to be left alone and not engage in conversation in that circumstance.
- This job infiltrates your life in a lot of ways. The traumatic media I've seen tends to affect my mood in the immediate and sort of creeps into my mind in the long term—I'll start thinking about some crime scene photo etc. for seemingly no reason even when I'm not at work.
- Images linger in my mind long after viewing. This can distract me from unrelated activities and family interaction.
- Anxiety and feelings that family and friends just don't understand. Over-analyzing events from work and becoming over protective of my own children.
- Most of the time it is fine. I've only had a few cases that bother me.
- In therapy and left my job to move to the private sector.
- Sometimes can't sleep because of images
- It's just part of the job. I think the impact is difficult to quantify specifically. I think that it contributes in a cumulative way with other stuff that I experience in cases, e.g., written reports, audio, allegations, anxious and angry clients/ witnesses/ prosecutors etc. It's difficult to explain how I feel at the end of the day to people who don't have a similar set of experiences or to whom I am otherwise unable to

discuss these matters because of privilege. I have a very supportive family. There is a distance, however, between us. It's difficult for me to leave "work" at work.

- Seeing the images in my head
- It takes me a couple hours after getting home to set it aside and stop thinking about it, but I'm usually able to.
- Went home and spent time with my family but also made me super mad at the cops and upset.
- It caused bouts of depression and a suicide attempt.
- Secondary trauma. Feel the weight of clients'/victims' grief and shock.
- I try not to bring my work home to my loved ones so it tends to have more of an impact on me personally like lying awake in the middle of the night and the unwanted images come to mind
- Caused me to become disgusted with my client, made me feel more for the victim, also made me realize that these images do affect me in a real way
- Talking about crime-related topics in casual conversation causes me stress. I've seen a therapist for stress related issues, who recommended that I take antidepressants.
- I tend to feel numb when I see things that others believe are traumatic. I tend to make jokes about serious things in order to hide the trauma.
- There are moments of depression that I have experienced but I'm lucky to be married to someone not in my line of work and try not to bring the work home with me.
- At times I feel very desensitized to trauma and am unable to empathize with how it actually makes other people feel. I can take it for granted in conversation

and dismiss it as being ordinary or not a big deal. Other times, it makes me withdraw and space out.

- I try to be disciplined about leaving work at work, and not dwelling on traumatic things in my personal time
- Makes me less likely to engage emotionally with friends or family in the hours or days that follow, makes me feel fatigued and less interested in social activity.
- I do sometimes have flashbacks when I've viewed a particularly traumatic video, and they can also show up in my dreams.
- I'm able to function, but have little emotional reaction to terrible things. I remember realizing that I didn't "feel" like other people do. I have to remember not to talk about some of the sadder or more violent aspects of my work life with normal people because what I now see as benign is very distressing to some.
- Overall it usually isn't an issue, but on some gruesome cases or cases involving animal abuse the images can stick with you and pop into your mind randomly and ruin your mood for a bit. It's uncommon though.
- I have less energy to put toward my personal relationships and pursuits, due to the fact that I feel depressed or emotionally depleted.
- Desensitization of violence
- Sometimes I have bad dreams or want to talk about it with my partner and family.
- It impacts me because I feel the need to discuss my work more than otherwise.
- I alternate between feelings of sadness and indignation and it makes me work more, meaning I spend less free time with others outside work.

- I've woken up at night thinking about it and then unable to fall back asleep.
- It can galvanize you to work harder to fight injustice but it can also cause secondary trauma.
- You can't compartmentalize traumatic video
- Watching the difficult images definitely makes me question my choice to be a public defender. On the one hand, I definitely believe in upholding the constitution and making the government meet their burden, on the other—it's a thankless job made harder by mental health illnesses (which the judges acknowledge, but do very little to resolve) and the stress of our caseloads.
- It is very stressful, but it is part of the overall stress of the job, which is very stressful
- Viewing this material does sometimes affect me emotionally. Sometimes I need a little down time to recover.
- Difficult when having kids seeing kids abused. Makes me more cautious and triggered by news accounts.
- Sometimes it triggers personal trauma

## APPENDIX D

Comments to Q17: How has reviewing traumatic eyewitness media impacted you in terms of your professional life? Please describe the impact.

- Viewing body cam video and recorded statements from my clients has made me more aware of the tactics police use. This media in particular has allowed me to better prepare and defend my clients.
- You become desensitized
- I feel resistance to reviewing materials
- More compassionate
- Makes me want to fight harder when seeing injustice
- Prepares me for anticipating how jurors and judge's will react to the media, and allows me time to prepare a plan to deal with those reactions
- It has made me angry and bitter, sometimes. It has eviscerated whatever shred of respect I had for cops. It has made me have trust issues.
- It begins to feel normal and it so isn't.
- better able to imagine awfulness & prepare for witness/victim testimony
- It has increased my tolerance for violent imagery, and sometimes makes it difficult for me to imagine how a jury might see things fresh (de-sensitizing effect).
- Problem with judges acting as prosecutors and permitting overly graphic images for juries who may convict upon images rather than law and facts.
- Frustration
- Cumulatively
- I handle mostly murders. It is frustrating how many of my cases now are on video. 20 years ago I would

never have imagined I would have even one murder on video.

- It wears you out. So I would say that you stop wanting to listen to/see all of the available audio and video. It's also very time consuming.
- Making others aware that it does impact you, acknowledge it, find ways to address it.
- Causes me to not look forward to that aspect of the job.
- Cases involving trauma usually require more time and work, thus are more lucrative to defend. Also, these cases tend to have a higher profile so successfully defending them tends to be a good catalyst for generating new clients.
- See above
- I am close to retiring and I wish I could go now.
- I left my position as a line attorney to get away from the impact.
- Makes it hard to keep doing the work
- It helps to understand the cases, which makes me more prepared
- Sadly, part of being a public defender is having to look at things that the general public would never want to look at.
- Makes it more difficult to objectively represent a client.
- I cannot recall exact examples. But I know that it numbs you to the violence you see in a particular case, or in the alternative, you know that police are violent and that makes you look for it more because you are picking up on their tactics on their BWC
- I worry that juries and laypersons may believe that I am cold and uncaring about the trauma of what has occurred to victims of crime at the hand of my

clients. I tend to possibly overcompensate in trying to make sure I don't appear that way

- Because of the incident I described above, I've realized that a lot of people don't understand anxiety disorders. While everyone was understanding at the time it happened, now that we are a few months after the fact, I feel as I am now being "punished" for having had the anxiety attack (e.g., I was a supervisor in the office but no longer am; one particular judge is harder on me because I had to delay a trial; higher ups in office don't seem to have as much confidence in me to the point that I sometimes am fearful I may lose my job, etc.)
- More desensitized to violence, not sure how to determine if impact on my professional life otherwise
- I am better educated, empathetic and able to handle conflict from my clients
- Made me more sensitive to the needs of people in the community
- I don't know if I can point to anything specific, but I assume it has.
- Withdrawal from criminal defense
- Delving into it and not ignoring it has led to getting some particularly gruesome videos/photos excluded pretrial as more prejudicial than probative. A rape video that clearly no one but me watched showed the encounter was consensual and without a weapon (knife) as alleged.
- I think it has made more aggressive
- I believe I have become proficient in limiting emotional reaction to such content.
- Anxious, over-analytical, compartmentalize traumatic events and put them in a box to the point you come off as un-feeling or insensitive.
- I just view this as part of the job.



- I changed jobs.
- It's unpleasant but necessary to see. To effectively represent a client and confront the evidence and develop defenses it's necessary to be able to view the evidence objectively and often repeatedly. It's a good skill to have in my opinion.
- I am more cynical, tougher than before.
- When the day already feels like a slog, viewing traumatic images tends to drag my productivity down further
- Time. We are already slammed. Body cam adds so much time to a case.
- I don't think it has impacted me in terms of advancement but it certainly has impacted how much time I allocate to reviewing media in cases.
- Developing thicker skin
- More time spent reviewing takes away from other tasks.
- Same as above
- Same reasons stated in #16, but it also gives me compassion fatigue. At some point, after seeing so much misery, I just stop caring. Trauma becomes a fixed constant devoid of any meaning.
- I hope there hasn't been an impact on my professional life
- The content of squad and body worn camera recording takes their toll, in their repetitive nature, and take longer to review, or more than one sitting to review. Autopsy and homicide photos are difficult to see when required to apply an appropriate level of scrutiny to the evidentiary implications of the image.
- I think a good criminal lawyer has to be clinical about their cases. Being able to focus on what is relevant, rather than what is gross or distressing, is important. That said, it is important to step back and

consider how evidence will be interpreted by people who are not usually faced with murder, rape, assault, etc.

- Not sure
- It makes it harder to work on certain cases, makes me tired and anxious.
- It drives me to dig deeper into my clients' cases.
- Motivating to work up the case and I have been able to use some of the videos to get better deals for my clients.
- Steeled me to later imagery
- It cuts both ways. Sometimes it makes the work involved in a case easier if it's extremely inculpatory. Of course it has a draining emotional impact on sleep, urges to engage in negative coping mechanisms which have a tangential impact on my professional life.
- Helpful for investigation
- Some desensitization has occurred
- It is necessary for my profession and each time I do it I am better prepared for the next time.
- It's what we sign up for
- We engage in a lot of gallows humor to deal with extremely violent and or gory material.
- Makes me sensitive on how to approach client if they are in the video or a witness if we are doing an investigation.