Trapped in the Law? How Lawyers Reconcile the Legal and Social Aspects of their Work

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This Article addresses an immensely important, and often neglected, problem faced by legal practitioners in their daily professional lives: how do legal actors feel, and act, when the cases in which they are involved have evident, and disturbing, socio-economic implications? This situation is particularly uncomfortable for prosecutors, judges, and defense attorneys, whose criminal case workload often reflects much deeper social inequalities and problems, and whose defendant population is characterized by an overrepresentation of disempowered groups. Legal actors who engage daily with "the tip of the social iceberg" in the courtroom are keenly aware of the broader aspects of the problem; this awareness not only complicates their intellectual perceptions of their work, but also their professional satisfaction and morale.

Drawing on a synthetic theoretical framework based on cognitive dissonance theory, Luhmann's systems theory, and Merton's analysis of social strain and modes of adaptation, the Article identifies the legal/social divide experienced by lawyers as a cognitive dissonance on several levels: epistemological disharmony between doctrinal legal discourse and social policy discourse, problems with the lawyers' self-perception and sense of self-worth, and serious challenges to the lawyers' motivation to process cases that do not necessarily advance holistic solutions.

Based on this framework, the Article moves on to present an empirical study of legal actors who experience a legal/social dissonance, and analyzes their "modes of adaptation": the patterns they use to reconcile the dissonance and find meaning in their work. The study involves 40 in-depth interviews with prosecutors, defense attorneys and judges who handle unauthorized absences from compulsory military service in Israel. Unauthorized absences are criminal offenses, but they also stem from deep socio-economic inequalities and almost invariably involve indigent and/or minority defendants.

The vast majority of interviewees expressed discomfort about the process of conviction, imprisonment and stigmatization of disempowered young people;
however, participating in the process was part of their daily work. The interviews reveal five ways in which the lawyers coped with the dissonance between their beliefs about the problem and the need to do their work: loyalism (ignoring or downplaying the social aspect of the problem); bureaucracy (disengaging from deeper meanings and focusing on case processing); disgruntlement (venting anger and frustration about the futility of the legal solution to the problem); cynicism (expressing despair and pessimism about the solution), and divergence (finding ways to redefine their role and perform extra-legal roles). The sixth way, which was almost universally mentioned by interviewees, is a "classification" of the offender population into "bad" (manipulative) absentees, whose absences are a product of calculated free choice, and "good" (impulsive and miserable) absentees, who leave the army out of necessity and distress.

The analysis of the study's findings compares these "modes of adaptation" to Merton's categories, examines some differences in adaptation across legal role and seniority, and comments on the degree to which the actors feel bound by legal perspectives.

The conclusions offer some theoretical implications of the study's findings, and also make some policy suggestions about relaxing the boundaries between legal and social discourses in legal practice.
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I. INTRODUCTION

Most members of the legal community, save for extreme formalists, would agree that legal problems and cases have extra-legal aspects.\(^1\) Plaintiffs, defendants, witnesses, and victims have cultural and social backgrounds that inform their relationships and actions in ways legal provisions often fail to recognize or address.\(^2\) One setting in which these aspects are particularly salient is the criminal process, where research has consistently shown an overrepresentation of socioeconomically disadvantaged groups and racial minorities among the criminal defendant population;\(^3\) indeed, some offenses, such as vagrancy, panhandling, and other "quality of life" offenses, have been closely tied to issues of poverty management;\(^4\) while in other cases the criminal process has been used to "clean sweep" poverty and its unpalatable aspects off public space.\(^5\) In other cases, criminal prosecutions have been connected to issues of racial conflict,\(^6\) as in prosecutions for riots.\(^7\)

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\(^5\) A good ethnographic description of a magistrate conducting "waste management" hearings for vagrants and homeless people can be found in: Caleb Foote, *Vagrancy-Type law and its administration,*
These extra-legal characteristics of defendants are noticeable not only to legal academics, but also to practicing lawyers. Interviews with legal actors often reveal them to be well-aware of these aspects.\textsuperscript{8} Defense attorneys, who are constantly in close contact with the clients and their families, will often mention their economic or racial disadvantage as a factor motivating them to do their work.\textsuperscript{9} Prosecutors, too, are keenly aware of their cases' characteristics; this is particularly evident in studies of sexual offense prosecutions, where they pay attention to victims.\textsuperscript{10} These actors, as well as judges, often engage in conversation about the non-doctrinal aspects of their work, in a way that facilitates the transmission of this awareness to all actors in the courtroom "workgroup"\textsuperscript{11} or "elite".\textsuperscript{12} In some cases, prosecutors and defense


\textsuperscript{9}It should be mentioned, however, that race is a complex explanatory variable in the criminal justice system. Studies trying to identify the impact of race on criminal justice outcomes have resulted in contradictory findings, which may relate to the difficulties in conceptualizing and operationalizing race: Darnell Hawkins, Beyond Anomalies: Rethinking the Conflict Perspective on Race and Criminal Punishment, 65 Social Forces 719 (1987). For some attempts to factor in the stage of the trial, the race of the judge, and other variables, see: Arie Rattner & Gideon Fischman, Justice for All? Jews and Arabs in the Israeli Criminal Justice System (1997); James Eisenstein & Herbert Jacob, Felony Justice: An Organizational Analysis of Criminal Courts (1977).

\textsuperscript{10}Isaac D. Balbus, The Dialectics of Legal Repression: Black Rebels Before the American Criminal Courts (1973).

\textsuperscript{11}In addition, legal actors tend to be keenly aware of the real politik of the process, such as the overwhelming percentage of cases that are plea bargained and never reach trial: Malcolm M. Feeley, Two Models of the Criminal Justice System: An Organizational Perspective, 7 Law & Society Review 407 (1973); Malcolm M. Feeley, Pleading Guilty in Lower Courts, 13 Law & Society Review 466 (1979); Peter F. Nardulli, The Courtroom Elite: An Organizational Perspective on Criminal Justice (1978).

\textsuperscript{12}Emmelman, supra note 3. Also see: Lisa J. McIntyre, The Public Defender: The Practice of Law in the Shadows of Repute (1987). As McIntyre reports, while the lawyers mention their contribution to the framework of due process and constitutional aspect, they also speak of the necessity to assist indigent defendants in particular.


\textsuperscript{14}James Eisenstein, Roy B. Flemming & Peter F. Nardulli, The Contours of Justice: Communities and Their Courts (1988).

\textsuperscript{15}Nardulli, supra note 8.
attorneys express resentment at the external responsibilities foisted on them, such as acting as "social workers" for the defendants or the victims.\footnote{For defense attorneys resenting their additional informal role as social workers, see: MALCOLM M. FEELEY, THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT (1979). For prosecutors resenting a similar role vis-à-vis the victims, see Levine, The New Prosecution, supra note 10.}

The conflict between the doctrinal perception of legal work and its social aspects is difficult for several reasons. First, it requires lawyers to acknowledge different and inconsistent perceptions of criminal offenders. The paradigm of \textit{mens rea} and free will advocated by criminal law principles does not fit scenarios in which criminal offenses seem to be bred by predetermined social and cultural circumstances.\footnote{The contrast between free will and determination is a bone of contention in criminology, mostly between the discipline's two founding paradigms: classicism and positivism. See GEORGE B. VOLD, THOMAS J. BERNARD & JEFFREY B. SNIPES, THEORETICAL CRIMINOLOGY (5th ed. 2002); MICHAEL R. GOTTFREDSON & TRAVIS HIRSCHI, A GENERAL THEORY OF CRIME (1990); DAVID HORN, THE CRIMINAL BODY: LOMBROSO AND THE ANATOMY OF DEVIANCE (2003).} While criminal law makes some allowance for such impairments to free will,\footnote{A good example for such allowances is the existence of criminal law defenses, which decriminalize behaviors in which the defendant had no true choice, whether due to circumstances or to characteristics like insanity. See generally: GEORGE P. FLETCHER, BASIC CONCEPTS OF CRIMINAL LAW (1998).} it cannot acknowledge a lack of free will in most of the cases.\footnote{More on this debate will become clearer in Part II below.} Participating in a discourse of free will while being fully aware of its limitations can be cognitively confusing and professionally frustrating, leading a lawyer to conclude:

[most of the defendants do it] because of socio-economic problems. Period.\footnote{Interview # 9 for this study (on file with author; see methodological explanation in Part II below).}
most of my job helping clients has nothing to do with the courts, and it's basically running around the bureaucratic systems trying to get [evidence of the client's difficult circumstances].

Finally, it might create a serious moral discontent with the unproductive role played by the legal process in addressing multifaceted problems:

[it's] like somehow taking the miserable people and… screwing them over."

This Article offers an in-depth theoretical and empirical analysis of these conflicts, which is unique and revolutionary in several ways. First, it provides a multilayered theoretical framework for understanding the nature of this conflict, building on a synthesis of theories from various fields: cognitive dissonance, Luhmann's systems theory, and Merton's strain theory. Second, it utilizes a rich array of open-ended interviews with legal actors – defense attorneys, prosecutors, and judges – in order to understand what legal actors go through when they seek to reconcile the conflicting legal and social aspects of their work. Third, it demonstrates not only that lawyers acknowledge this conflict and engage with it, but also that the actors draw on different strategies for reconciling the two aspects, and that these may be somewhat related to the lawyers' seniority and role in the system. Fourth, by examining the empirical findings through the unique theoretical framework, the Article offers a nuanced approach to legal practice that goes beyond the divide between normative legal studies of lawyering ethics and sociological accounts of the legal profession.

The case study for this Article is the criminal offense of unauthorized absence from compulsory military service in Israel. As I explain below, due to the general service

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18 Interview # 22.
19 Interview #21.
law, low remuneration for soldiers, and multicultural population in Israel, unauthorized absences from service are strongly correlated to socio-economic difficulties, and members of disempowered groups in Israeli society are overwhelmingly overrepresented in the absentee population. Given these parameters, it should be mention that this problem, albeit a local Israeli one, is by no mean idiosyncratic, and therefore the findings can generate insights about a multitude of other criminal offenses which, in the eyes of all parties involved, are clearly linked to socio-economic disadvantages. The interviews allow an insight to the lawyers’ reflections about the cognitive aspects of legal analysis, their self-image as practitioners, and the moral and social value of their workdays, and, while the study merits further work for other social problems, it does highlight a universal challenge faced by legal actors who engage with social problems in their daily work routines.

Part II places the case study in context of the theoretical framework. It begins, in section A, by presenting dissonance theory, proceeds to examine the legal and social aspects of the unauthorized absence problem, and then demonstrates several dimensions in which these aspects collide to create a cognitive dissonance, including some epistemological dimensions derived from systems theory. Section B details various possible mechanisms for resolving this cognitive dissonance, some of them implemented from Robert Merton's strain theory.

Part III describes the study's findings. The interviewees revealed experiencing a strong sense of dissonance between the legal perception of unauthorized absences – namely, as a free will action of an offender resolved to shirk service duty – and the social aspects, particularly the unique demographics of the offenders. This part also reveals a universal mechanism used by the interviewees for coping with the cognitive

between the two populations, and the way they are treated by the Israeli military justice system, see: Hadar Aviram, How Law Thinks of Disobedience: Perceiving and Addressing Desertion and Conscientious Objection in Israeli Military Courts, 30 LAW & POLICY 277 (2008).
dissonance: classifying the offender population into "bad" offenders, seen through the legal lens, and "good" offenders, perceived through the language of social disadvantage. This part identifies five additional schemas used by some of the interviewees to reconcile the dissonance: loyaltyism (rejecting the social aspects of the problem); bureaucracy (immersing themselves in case management without thinking about the problem); idealism (expressing constant anger and frustration); cynicism (expressing the futility of reconciling the two aspects); and innovation (rejecting the legal aspects of the problem).

The discussion, in part IV, makes some observations about the patterns uncovered in the study. It examines the connections between the interviewees' role and seniority in the system and their preferred coping mechanisms. It also reconnects the study to the theoretical framework, relying on strain theory and systems theory to explain why these coping mechanisms were used.

Finally, part V offers some general thoughts on the study's implication for policymaking in problems with a strong socioeconomic component, and for individual practitioners facing these dilemmas in their daily workdays.

II. THE CASE STUDY IN THEORETICAL CONTEXT

A. Unauthorized Absences as a Cognitive Dissonance Problem

1. WHAT IS COGNITIVE DISSONANCE THEORY?

In order to understand how legal actors respond to the tension between the legal and social aspects of their work, we must understand the ways in which this tension threatens and challenges their professional cognitions, pride and sense of achievement and self worth. A useful way to frame these difficulties is the psychological concept of cognitive dissonance.
Cognitive dissonance theory, developed in the late 1950s by Leon Festinger and recently enjoying renewed interest and popularity among psychologists, addresses a situation in which a person has to come to terms with two coexisting, contradictory thoughts or values. Joel Cooper frames this situation in the following simple way:

[W]e do not like inconsistency. It upsets us and drives us to action to reduce our inconsistency. The greater the inconsistency we face, the more agitated we will be and the more motivated we will be to reduce it.

Since its classic formulation, social psychology literature has used experimental methods to identify a variety of situations in which people have reached a state of "arousal" – a state of alertness to an inconsistency between two dissonant cognitions – and have found ways to reduce their discomfort. Some of these examples demonstrated how people alter their prior opinions about groups and products, muster enthusiasm for boring and repetitive tasks and justify the effort they put into them to others, cope with failed Messianic prophecies, or place value upon forbidden behavior. Naturally, the amount of stress experienced by the individual increases when the conflicting ideas are more important.

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23 Cooper, supra note 22.
24 Ibid., 2.
30 Cooper, supra note 22.
Since its classic formulation by Festinger, the theory has been critiqued and modified in important ways. One of the important alternative conceptualizations of cognitive dissonance maintains that the dissonance arises not due to conflicting cognitions, but due to perceived harm to the person's self concept. In other words, when a person's public image or perception of self might be harmed by an action she engages in, rationalization mechanisms must take over to explain why the action, in fact, matches the individual's self perception, thus preserving the integrity of self despite the contradiction between self perception and the behavior in question. Newer approaches place more emphasis on the motivational aspect of the dissonance, which they identify as "a state of arousal that occurs when a person acts responsibly to bring about an unwanted consequence". This consequence may be undesirable to the individual based on his or her personal beliefs or on cultural and social standards. Again, the individual forms a rationalizing reaction, leading to an attitude change toward the consequence. This often requires reframing the activity or finding new ways to explain the consequence. Once the consequence is seen as non-aversive, the dissonance is alleviated.

While the different interpretations of the phenomenon place different emphases on the cause of dissonance, theorists agree that the dissonance brings about an activation of brain processes that are aimed at reducing the level of dissonance. If the dissonance stems from conflicting cognitions, this might be achieved by rejecting one of these

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33 Cooper, supra note 22, 78.

34 Cooper, id. (see chart).
cognitions; if it stems from having to act against one's desires or beliefs, it might be achieved by rationalizing the act as desirable.

We now move on to a description of the problem that raises the legal/social dissonance for the legal actors in the case study.

2. LEGAL AND SOCIAL ASPECTS OF UNAUTHORIZED ABSENCES

As mentioned above, one could think of abundant examples of legal problems that have strong socio-economic undertones. The case study is, therefore, an example that allows broader understandings of the dissonance problem. However, in order to understand the legal actors' responses and attitudes, it is important to have some background on unauthorized absences from service as a criminal offense and as a social problem.

Military service in Israel is compulsory by law; any failure to comply with this duty (ranging from failure to obey an order to desertion) constitutes a criminal offense, punishable under the Military Justice Act. Section 94 handles unauthorized absences, and reads as follows: "Any soldier who absents himself from his unit, or from where he is supposed to be at the time, shall be punished by three years imprisonment". The legal duty to serve, and the criminal process risked by its violators, is strongly supported by a well-established ethos of patriotism and egalitarianism, and advocated not only as an essential institution for defending the State of Israel, but also as an opportunity to create more equality through a

37 There is also an offense titled "desertion", carrying a ten-year maximum sentence. A legal presumption in the Military Justice Act makes states that any absentee for 21 days or more should be regarded as intending not to return; under this presumption, thousands of unauthorized absentees every year can be tried as deserters. Prosecution practice, however, is to charge all absentees, even those who have gone missing for more than a year, with unauthorized absence.
38 Military Justice Act, supra note 36, section 94. This offense requires regular mens rea. It should be kept in mind that Israel has a maximum sentencing system, so punishment would be up to three years.
multicultural “melting pot” military experience.\textsuperscript{39}

Unauthorized absence from service is a common problem in the Israeli Army. According to Military Police data, at any given time, between 2 and 3 percent of all soldiers are absent from service without leave.\textsuperscript{40} After an initial short period of time, in which the missing soldiers' units bear the responsibility for searching for them,\textsuperscript{41} their files are transferred to the personnel unit archives,\textsuperscript{42} and a special military police unit, popularly known as "the deserter catchers", is in charge of retrieving them.\textsuperscript{43} Given the overwhelming numbers of deserters, the Military Police does not search for each absentee individually, but rather conducts nightly raids on targeted neighborhoods.\textsuperscript{44} About 50 percent of absentees are apprehended in this way, and the rest voluntarily report to military prisons.\textsuperscript{45}

Unauthorized absentees are immediately and automatically arrested, interrogated, and the vast majority instantaneously pleads guilty.\textsuperscript{46} At this point, a special prosecutorial


\textsuperscript{40}Military police data from Gahelet documentation (2000; on file with author). It should be noted that, during the escalation of the Israeli-Palestinian conflict since 2000, there was an increase in numbers of unauthorized absentees, which was attributed in the media to the worsened economic condition: Ethan Gluckman, "Due to the Economic Condition: People Desert and Go to Work", MA'ARIV, Feb. 2, 2003, at 9; Ethan Rabin, "The IDF is Preoccupied due to the Numbers of Deserters", MA'ARIV, July 23, 2003, at 5; Amos Harel, "Sharp Increase in Numbers of Deserters in the IDF: The Reason: Economic Difficulties", HA'ARETZ, Nov. 18, 2002, at 7; Amir Rappaport, "Due to the Economic Condition: Many More Deserters", YEDIOT ACHARONOT, July 11, 2001, at 4.

\textsuperscript{41}Instructional brochure for deserter catchers (on file with author, obtained 2003); interviews with prosecutors.

\textsuperscript{42}Standing Instruction Personnel Unit 33.0903


\textsuperscript{44}As in various other police activities, sometimes the deserter catcher unit performs massive catching operations: Ethan Rabin, "A Hundred Deserters in Regular and Reserve Service Caught in a Military Operation", MA'ARIV, Sep. 20, 1998, at 4.

\textsuperscript{45}Data obtained from quantitative sample collected for this project Interviewees attributed this tendency to the absentees' understanding that they will eventually be caught; also, the absentees often leave their units to work for a few months and return once the economic situation at home is stabilized.

\textsuperscript{46}After all, once an absentee is caught, there are virtually no benefits to denying involvement, because the offense is rather straightforward. Only in rare cases, in which soldiers were not aware they had to report for enlistment, is it helpful to plead not guilty, and even these cases invariably end with a plea bargain. In all other cases, once a soldier has left his or her unit, or did not report for duty, the elements of the offense have been proven and any argument is futile.
unit, the Deserter and Absentee Prosecution, makes a decision about charges: cases which raise technical issues pertaining to the draft are closed. Out of the remaining cases, between 70 and 80 percent are diverted to disciplinary proceedings, leading to a short imprisonment period and no criminal record. The remaining 20 to 30 percent, which amount to between 2,000 and 3,000 cases per year, are charged in military courts, and constitute more than 60 percent of the military courts’ caseload.

All absentees tried in military court are awarded free representation by a military defense attorney, and over 90 percent of them take advantage of this right. During their initial meeting with clients, defense attorneys compile a “defendant profile” based on the reasons that led the client to absent himself or herself from service. The defense attorneys then send requests to various psychiatric and welfare professionals in the military prison, asking them to provide the defense with written reports they can later use in court. In many cases, defense attorneys also work relentlessly to secure their clients a discharge for service based on welfare reasons, under the

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47 The unit was established in 1998 in order to make deserter and absentee processing more efficient: Amos Harel, “The Military Advocate General Has Established a New Jurisdiction for Handling Deserters”, HA’ARETZ, June 22, 1998, at 7.
48 Disciplinary hearings are simplified, quasi-judicial procedures held by lay officers and designed to quickly deal with lesser offences. Every IDF officer ranking Lieutenant and above has the authority to hold a hearing for certain offenses and inflict punishments ranging from light reprimands to confinement (length of confinement depends on the officer’s rank. The process is relatively short, does not conform to evidence rules, and conviction does not carry a criminal record (Military Justice Act, 1955, sections 136-176).
49 The threshold criterion for court martial charging is based on a technicality: the length of absence from service, in days. Until the end of 2000, the prosecutors were instructed to charge soldiers who were absent for more than 45 days; in interviews conducted with prosecutors (particularly interviews #29, #40) I was told that, as the rates of unauthorized absences rose, the Military Advocate General asked that the threshold be raised to 60 days.
50 ACTIVITY REPORT, MILITARY ADVOCATE GENERAL UNIT (2001); ACTIVITY REPORT, MILITARY ADVOCATE GENERAL UNIT (2002) (both on file with author).
51 This is mostly due to their economic situation, which will be explained below.
52 Interviews, observations. Occasionally the defense uses documents from the family, or from civilian welfare authorities, but almost always the defense case is built on this gathering of paperwork. One such institution provides a full profile on the defendant and an evaluation of his or her chances to return to military service after serving his or her sentence. See: Gahelet presentation for military judges, 7,8,2003 (on file with author).
53 Standing Instruction Personnel Unit 30-10-07 (text on file with author).
assumption that most clients will be recidivist absentees unless released.54

In court, virtually all defendants plead guilty, whether a plea bargain in their affair has been reached (as in about 50 percent of all cases) or not.55 A quantitative regression model of sentencing in absentee cases shows that the length of sentence imposed – which is invariably imprisonment and rank demotion – is a function of the length of absence and of previous absences. Socio-economic factors have not been found to have a significant impact on sentences.56 One factor the judges do take into account is the likelihood that the defendant will be released from service: the more likely the defendant is to be released soon after completing his or her prison sentence, the more lenient the sentence, probably assuming that the system will not have to handle repeated absences any longer.57 An unauthorized absence conviction becomes part of the defendant's criminal record later in civilian life, and can only be expunged, as with all criminal records, by the President of Israel.58

The common occurrence of unauthorized absences is particularly problematic given the social aspects of the problem. All research done on the military deserter and absentee population consistently links absence from service to socially and culturally disadvantaged groups. As early as 1965, a thorough study by Yehuda Rosenberg and Asher Gorny59 found an overrepresentation of poor soldiers with few years of education among absentees, as well as a disproportionally large percentage of Mizrahi

56 Aviram, Ibid.
57 Ironically, one of the factors taken into account by the discharging committee is the number of days spent in prison; this means that, for a defendant intent on getting discharged, and for whom the price of imprisonment and criminal record is not too high, there actually is an economic incentive to commit repeated offenses. This, however, often turns out to be a bitter victory, because the discharged soldiers often face difficulties finding employment with their criminal record.
58 Criminal Record and Rehabilitation Act, 1981. The military defense has actually started to provide all defendants with a form detailing how to submit a request to the President.
Jews, who were new immigrants at the time.\textsuperscript{60} Newer data collected by the military police in the 1990s confirms this trend, correlating unauthorized absences with economically disadvantages and new immigrant status.\textsuperscript{61} Data collected by the deserter and absentee prosecution unit demonstrates that, the worse a soldier's economic situation is (measured by military standards that award the soldier special assistance), the higher his or her tendency to commit an unauthorized absence.\textsuperscript{62} A psychological study by Haim Borkov of absentees' personality types showed that most absentees had siblings or friends who committed absences from service, a finding which, in Borkov's opinion, pointed to a "subculture of desertion".\textsuperscript{63} The data collected for this project confirms these findings; in a random sample of 853 cases from the years 2000-2002, 30% of absentees were new immigrants from Russia; 31% of them were Mizrahi Jews, and only 4.3% were Ashkenazi Jews.\textsuperscript{64} Given this profile, and the fact that military salaries for duty soldiers does not exceed the Shekel equivalent of 100 dollars, it is no wonder that, in court, absentees almost always mention socio-economic reasons that led them to leave service, mostly having to do

\textsuperscript{60} Rosenberg and Gorny attributed unauthorized absences to a combination of what they termed "personal factors" (family problems, economic problems, adjustment challenges) and "system factors" (the military authorities' responsiveness to soldiers' needs).

\textsuperscript{61} Gahelet presentation to military judges.

\textsuperscript{62} Interview #40; data on file with author.

\textsuperscript{63} HAIM BORKOV, THE POWER OF DETERRENCE IN PUNISHING FOR UNAUTHORIZED ABSENCE FROM SERVICE (1992). Interestingly, despite this "social" finding, Borkov's research focused on the deserters' individual psychology, and did not include any broader social or demographic considerations.

\textsuperscript{64} Aviram, supra note 20. It should be mentioned that the Mizrahi Jewish population, at least in the military context, is still a disempowered group. Various studies of the army's socio-economic strata confirm that Ashkenazi Jews have, until recently, held powerful positions in the army, and that other groups' upward mobility in the army has therefore been limited: Sami Smoocha, Ethnicity and Military in Israel: Theses for Discussion and Research, 22 STATE, GOVERNMENT AND INTERNATIONAL RELATIONS 5 (1984); Meir Amor, The Mute History of Social Refusal in Israel , paper presented at the ASSOCIATION OF ISRAEL STUDIES ANNUAL MEETING (2003). It is possible that the army's classified personnel placement tests contain proxies to ethnicity, which block the advancement of the Mizrahi population: Ronnie Mash & Amilia Dinai, The Correlation between Tyres of Families of "Macam" Soldiers and their Sons' Adjustment to the IDF, 35 MEGAMOT - A BEHAVIORAL SCIENCE QUARTERLY 375 (1994).
with family difficulties.\textsuperscript{65} Discourse in court, testimonies, and closing remarks, invariably revolve around the defendant's personal circumstances, and the extent to which he or she tried to "manipulate" the army into providing discharge or left due to genuine problems.\textsuperscript{66}

From this problem description, it is evident that there are two different ways to perceive the issue of unauthorized absences. The legal perspective would see unauthorized absences as personal decisions made by the soldiers, and would justify punishing them for that choice in order to deter them from repeating the offense and to deter others from following in their footsteps. The social perspective would emphasize the way in which the offense of unauthorized absence, given the Israeli social infrastructure, low military salaries and the lack of substantial welfare assistance, entrenches and increases gaps between people located higher and lower on the socio-economic ladder, and would question the contribution of criminal trials, imprisonment sentences and criminal records to the alleviation of these inequalities.

3. Applying Cognitive Dissonance Theory to Unauthorized Absences

From the description of the unauthorized absence problem, it is evident that prosecutors, defense attorneys and judges who engage with it on a daily basis experience several forms of cognitive dissonance. In fact, the different psychological

\textsuperscript{65} In a quantitative analysis of a random sample of 853 absentee cases between the years 2000 and 2002, 55\% of all absentees attributed their absences to economic difficulties; 32\% mentioned health problems of parents or other relatives; 22\% mentioned personal medical or emotional issues; 6\% referred to domestic violence problems at home; and 5\% mentioned drug or alcohol abuse as a factor. Hadar Aviram, Managing Disobedience As Crime: Legal and Extra-Legal Discourse in Addressing Unauthorized Absences and Conscientious Objection to Military Service in Israel (Feb. 2, 2005) (unpublished Ph.D. dissertation, University of California, Berkeley) (on file with author).

\textsuperscript{66} This dichotomy is congruent with the typology of deserter personality types advocated by Borkov (supra note 58), who distinguished between "manipulative" deserters – who intentionally commit absences in order to create problems and be discharged from service - and "impulsive" deserters. For a critique of this distinction see Aviram, supra note 20.
definitions of the concept (contradicting cognitions, damage to self perception, motivational problems) are all manifest in this problem.

All legal actors involved in processing unauthorized absence cases might be frustrated and demoralized by other clashes between the legal and social perceptions. As mentioned above, the motivational explanation for cognitive dissonance addresses a situation in which one is compelled to act in a way that is undesirable to her. Legal actors who are aware of the social dimensions of the unauthorized absentee problem may be rather frustrated by the outcome of their daily labors: the numbers of absentees do not decline; they acquire a criminal record, in addition to their prison sentence, which is likely to make their difficult lives even more difficult upon discharge; and, according to the statistics mentioned earlier, they are very likely to repeat their offenses until the army discharges them, thus disproving the deterrent effect of legal punishment. This feeling of futility could be rather harmful to morale, particularly for those who would like to see their legal work change their social surroundings for the better.

The dissonance also has an element of self-perception, and, in particular, of one's sense of professional worth. Technical prosecution standards and bureaucratic defense work in search of documentation for mitigating circumstances are not doctrinal legal work in the narrow sense of the word. Legal actors find themselves engaging, on a daily basis, in a series of activities that stem from the numbers and demographics of the offenders, and that offer no professional challenges. This might also involve a certain challenge to the actors' moral self-perception; legal actors who are aware of the poverty and disempowerment of the defendants may feel guilty about their
complicity in exacerbating the problem by doing exactly what their job description requires they do: process unauthorized absentee cases.\textsuperscript{67}

However, there is one more important aspect in which the legal/social dissonance might be problematic, and that is the difference between legal and social discourses as systems of knowledge.\textsuperscript{68} One useful way to conceptualize this disconnect is through Niklas Luhmann’s systems theory,\textsuperscript{69} and in particular, his concept of legal autopoiesis.\textsuperscript{70}

Luhmann’s systems theory is concerned with the boundaries of different systems and their interactions with each other. In the case of law, the theory allows us to observe the relationships between the legal system and other social systems. In particular, . . . the theory would be able to examine the social conditions of law’s autonomy: the ecological dependencies of the system.\textsuperscript{71}

\textsuperscript{67} This concern might apply more to prosecutors and judges than to defense attorneys; however, defense attorneys who know that their cases will inevitably end in imprisonment might be induced to participate in the courtroom’s routine of case processing, either through bargaining with the prosecution, or merely by pleading guilty and hoping for the best. For some studies of defense attorneys and their participation in the organizational culture of guilty-plea-driven courts, see: \textit{Eisenstein & Jacob, Felony Justice, supra note 6}; Feeley, \textit{Two Models of the Criminal Justice System, supra note 8}; \textit{Feeley, The Process Is the Punishment, supra note 13}; Abraham Blumberg, \textit{The Practice of Law as a Confidence Game: Organizational Cooptation of a Profession}, 1 \textit{Law & Society Review} 15 (1967).

\textsuperscript{68} Paying attention not only to the individual actors, but also to the discourse itself, has long been an oversight in law and society scholarship. As Doreen McBarnet argues, Sociologists have taken the question of how the criminal justice process works in relation to the principles of law by investigating only one side of the equation, the operation of justice, not the law itself. Explicitly or implicitly the question underlying sociological analysis of the criminal justice process always seems to be concerned with why the people who routinely operate the law also routinely depart from the principles of justice… What is barely touched on is the nature and role of the law itself… The assumption has been in effect that law incorporates rights for the accused, and the problem has been simply to ask why and how the police and courts subvert, negate or abuse them.


\textsuperscript{71} introduction to \textit{Luhmann, Law as a Social System}, supra note 65, 47.
TRAPPED IN THE LAW

The unit of analysis for systems theory is the “communication”. The legal system is comprised of a set of legal communications (verdicts, oral arguments, correspondeces, charge sheets, law review articles), which converse with each other and refer to each other. It is through these communications that law attains a “mind” and a perspective entirely independent from, and unrelated to that of the human legal actors.\(^\text{72}\) Law “thinks” about the problems it faces by creating universal, objective categories, or ideal types, and subsequently applying them, directly or through interpretation, to the specific cases presented to it; the classification yields a conclusion about the outcome of the case (“legal/illegal”) and normative provisions as to what should be done with it.\(^\text{73}\)

Like other systems, law is an autopoietic system, in which “everything that is used as a unit by the system is produced by the system itself”.\(^\text{74}\) Since the system consists of communications, and the communications use distinctions unique to law, it can only converse with itself, using its own terms and distinctions (such as referring to precedents and statutes). By becoming a self-sufficient, self-perpetuating system, law supplies its own legitimacy using internal tools and referring back to them for validity.\(^\text{75}\)

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\(^\text{72}\) Teubner, How the Law Thinks, supra note 65; MOELLER, supra note 64. For a critique of systems theory’s inapplicability to individuals, see ROGER COTTERELL, LAW’S COMMUNITY: LEGAL THEORY IN SOCIOLOGICAL PERSPECTIVE (1995); Roger Cotterell, The Representation of Law’s Autonomy in Autopoiesis Theory, in LAW’S NEW BOUNDARIES: THE CONSEQUENCES OF LEGAL AUTOPOIESIS 80 (Jiri Priban & David Nelken eds., 2001).

\(^\text{73}\) WILLIAM TWINING & DAVID Miers, HOW TO DO THINGS WITH RULES: A PRIMER OF INTERPRETATION 6 (1999); KENNETH J. Vandevelde, THINKING LIKE A LAWYER: AN INTRODUCTION TO LEGAL REASONING (1996); Teubner, How the Law Thinks, supra note 65.

\(^\text{74}\) ANDERSEN, supra note 64. However, there are some unique features to law’s autopoiesis, which are discussed at length elsewhere: Jean Clam, The Specific Autopoiesis of Law: Between Derivative Autonomy and Generalised Paradox, in LAW’S NEW BOUNDARIES: THE CONSEQUENCES OF LEGAL AUTOPOIESIS 45 (Jiri Priban & David Nelken eds., 2001).

According to Luhmann, law operates in a universe of (autopoietic) systems, and addresses issues which are also addressed by other systems. The different systems, however, are “cognitively open” but “operationally closed” to each other; they can communicate about each other but not directly to each other. Whenever a system is “irritated” by an external event, or an external perspective from a different discipline, it may choose, through its own operations and distinctions, to select it; it then communicates about it using its own distinctions, vocabulary and inner logic.

Law’s form of operative closure is “normative closure”; while maintaining cognitive openness, and being exposed to other systems through the cases presented to the system or the operation of political institutions that surround it, law selects to assimilate issues and events based on its fundamental distinction of legal/illegal. According to systems theory, the autopoietic, normatively-closed nature of law hinders it from directly incorporating socio-economic and political perspectives into its framework. What remains unclear is the position of the individuals who engage with the legal system, who are exposed to, and influenced by, a variety of systems they are involved in.

Part of what creates this autopoietic effect between law and other systems stems from the unique analytical perspective of criminal legal doctrine. Criminal law, in this manner, for example, if criminal law needs to address a problem with social dimensions, such as unauthorized absences, it will be limited in the extent to which it can incorporate the full perspective of stratified social structure. At most, the defendant's affiliation with a disempowered class can be incorporated into legal discourse in the form of mitigating circumstance arguments made in the specific case, for the individual in question.
The contradiction between the legal and social systems can easily be framed as a dissonance between cognitions. As can be discerned from the description of the problem, the legal and social dissonance reflects two very different perceptions of the unauthorized absences. As seen in subchapter 2, the legal concept of unauthorized absences, as a criminal offense, depends on the absence's definition as an act of free will by the absentee, namely, a conscious choice between complying with one's duty to remain in the army and going home to serve one's interests. The existence of a choice – and the awareness of the choice – is fundamental for justifying criminal punishment and constituting the mens rea of the offense. Legal actors could, therefore, perceive the offenders as free agents who make choices and must pay the price (imprisonment, a criminal record) for these choices, which is the offenders' just desert and also might provide personal and general deterrence.

On the other hand, the socio-economic perception of the problem might incorporate the awareness of the offenders' demographics to conclude that unauthorized absences are an act of distress and necessity, rather than one of choice. The defendants could be seen as trapped in a set of circumstances which debilitates and distresses them, and since the army does not provide any relief from their familial and economic difficulties, they are pushed to help their family. Naturally, this explanation would not suffice for a genuine necessity defense under criminal law. Moreover, criminal law deals with individuals, not with groups, and would therefore inquire about the personal circumstances of the individual in question, rather than merely acknowledging his or her belonging to a disempowered minority.

\[\text{FLETCHER., supra note 15, 138.}\]

\[\text{For another example of a broad issue that needs to be framed in an individual way in order to be acknowledged by criminal law, see: Judd F. Sneirson, Black Rage and the Criminal Law: A Principled Approach to a Polarized Debate, 143 U. PA. L. REV. 2251 (1994). In the case of Black rage, attorneys have had to frame the issue not as a general product of racism, but as a subset of the (very individualized) insanity defense.}\]
Naturally, the dissonance between the legal and the social is not the only dissonance lawyers face during their workday. In an article from 1980,78 Erwin Chemerinsky addresses the psychological dilemmas faced by attorneys who represent views they disagree with, given what he frames as the traditional approach:

The lawyer's task is to zealously represent the client, and it is not for the attorney to decide which side is right or deserves to triumph. It is assumed that the conflict of arguments in the court will ensure that justice is done.79 This approach, argues Chemerinsky, places lawyers in a cognitive dissonance situation, and, in addition to causing them stress and discomfort, it impairs their professional performance. He therefore argues that the dissonance should be avoided by redefining the attorney's role and allowing her to "not argue positions which are at odds with views important to him or herself".80 This is, arguably, a sensible and humane solution to the ethical dilemma he addresses. However, in the situation portrayed by this Article, refraining from trying cases which trigger the legal/social dissonance can be impossible. To remove the dissonance from their workday, legal actors would have to cease any involvement in cases that bring up extra-legal issues pertaining to the social structure; given what we know of the overrepresentation of indigent and unprivileged social groups in the criminal defendant population, this is an impractical solution.

We therefore remain with a difficult question: how do lawyers manage to live with this complexity, which, in addition to its epistemological aspects, can be

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79 Chemerinsky. Ibid., 31.
80 Id. at 34.
pragmatically, professionally and morally confusing? We continue by examining how the theoretical framework suggests legal actors may bridge the dissonance.

**B. Reconciling the Dissonance: Insights from Robert Merton’s Strain Theory**

A useful insight about the reconciliation of contradicting cognitions comes not from psychology, but from Robert Merton’s classical sociology, and in particular from his seminal book *Social Theory and Social Structure*, in which, among other things, he develops his Strain Theory of crime. In the book, and in related writings, Merton seeks to explain crime as a mechanism for resolving the inherent strain in American capitalist society between socially endorsed goals – namely, the acquisition of wealth – and the unavailability of legitimate means for achieving the goals. The overpowering effect of capitalist discourse as definer of cultural goals is such that the limited and unequal opportunity structure, and the resulting limited institutional means, upset the social equilibrium and requires society members to find ways to cope. Merton identifies five patterns of adjustment to strain, based on their acceptance or rejection of the goals and means.

**Figure 1: Typology of modes of individual adaptation**

<table>
<thead>
<tr>
<th>Modes of Adaptation</th>
<th>Cultural Goals</th>
<th>Institutional Means</th>
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<tbody>
<tr>
<td>I. Conformity</td>
<td>+</td>
<td>+</td>
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<tr>
<td>II. Innovation</td>
<td>+</td>
<td>-</td>
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<tr>
<td>III. Ritualism</td>
<td>-</td>
<td>+</td>
</tr>
<tr>
<td>IV. Retreatism</td>
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<td>-</td>
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</tbody>
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81 ROBERT MERTON, SOCIAL THEORY AND SOCIAL STRUCTURE (2nd ed. 1964).
82 Robert Merton, *Social Structure and Anomie*, 3 AMERICAN SOCIOLOGICAL REVIEW 672 (1938).
83 Merton calls this upset “anomie”, a term originally used by Emile Durkheim in a somewhat different way: EMILE DURKHEIM, THE DIVISION OF LABOR IN SOCIETY (1933).
84 Source: MERTON, SOCIAL THEORY AND SOCIAL STRUCTURE, *supra* note 76, 140.
V. Rebellion

Conformists are those who accept the cultural goal of wealth accumulation, and continue to use the institutionally permitted means (hard work) in order to obtain it. Innovators value the cultural goal, but pursue it using illegitimate means (such as crime; Merton refers to them as "rogues"). Ritualists are those who have given up on achieving the cultural goal, but continue to routinely "abide almost compulsively by institutional norms". Retreatists, who are "in the society but not of it", reject both the cultural goals and institutional means; this category may include "psychotics, autists, pariahs, outcasts, vagrants, vagabonds, tramps, chronic drunkards and drug addicts". Finally, rebels are those who replace society's means and goals with their own, creating meaningful experiences outside the prevailing capitalist structure.

While Merton's typology was developed to address a very specific aspect of his theory – namely, the gap between cultural goals and institutionalized means – it is very valuable for this Article's enterprise. The Mertonian strain can be framed as a type of cognitive dissonance; the difficulty to reconcile one's commitment to the capitalist ethos and one's failure to achieve its mandated goals through the advertised means (hard work) is a conflict between two cognitions that are extremely important to the individual. As Merton's typology shows, each mode of adaptation involves an attempt to reconcile these two cognitions which, for most people, become

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85 Ibid., p. 143.
86 Ibid., p. 149-150.
87 Ibid., p. 153.
88 Ibid., 156.
89 Despite the fact that Merton's work preceded Cognitive Dissonance theory, it uses behavioral and cognitive terminology when discussing the individuals' different modes of coping with the incongruence between goals and means. However, the link between Mertonian strain and cognitive dissonance theory is rarely made, which I attribute mostly to disciplinary boundaries: Douglas A. Parker, Status Inconsistency and Drinking Behavior 22 THE PACIFIC SOCIOLOGICAL REVIEW 55 (1979); Robert J. Oxoby, Attitudes and Allocations: Status, Cognitive Dissonance, and the Manipulation of Attitudes, 52 JOURNAL OF ECONOMIC BEHAVIOR & ORGANIZATION 365 (2003).
irreconcilable because of the differential opportunity structure. For the purpose of this project, it is helpful to create a similar typology of modes of adaptation to the cognitive dissonance between the legal and social perceptions of criminal justice work, and to compare them to Merton's models.90 Applying Merton's typology to the dissonance faced by the lawyers provides several insights about the problem. First, as mentioned earlier, we know that the actors face a considerable amount of strain, which stems not only from the incongruence between the legal and social paradigms, but also from their sense of fulfillment, task at hand, and professional self-image. It is therefore to be expected that legal actors feel this strain and engage with it on different levels. Given Merton's typology, we hypothesize that their attempts to reconcile, and rationalize, the dissonance, may take different forms, but will not allow them to maintain the contradicting ideas intact or to continue acting within the legal framework without engaging in some form of rationalization. Some actors may reject the social framework, thus making it easier to continue their legal work irrespective of its social aspects and repercussions; others may find ways to rationalize their work and explain it differently; and if there are any who might reject the legal framework in favor of the social one, we might expect to see them take on new, extra-legal roles during their workday.

The empirical study aimed to test these hypotheses, and to uncover the extent to which the actors felt the dissonance in their workdays, and the different paths they took to alleviate it.

III. THE STUDY

90 There is a body of literature in sociology that examines and offers critiques of Merton's typology, e.g. Sanjay Marwah & Mathieu Deflem, *Revisiting Merton: Continuities in the Theory of Anomie-and-Opportunity-Structures*, 7 *Sociology of Crime, Law, and Deviance* (2006), but its uses are often confined to the particular problem of social structure, rather than broadened to examine modes of adaptation to other situations of conflict.
A. Methodology

The empirical findings are based on an ethnographic research design, which included, in addition to courtroom observations, 40 open-ended, semi-structured, in-depth interviews with judges, prosecutors and defense attorneys in the Israeli military justice system.\(^91\)

The interviewee sample was drawn from the Military Advocate General’s personnel lists, and stratified to represent all groups of legal actors, based on their role affiliations (prosecution, defense or judiciary), seniority, type of work, service status and professional involvement in desertion and conscientious objection cases. Within each category, my choice of interviewees was random.\(^92\)

The sample (presented in Fig. 2 ahead) was comprised of 19 prosecutors, all of them in regular service, and 17 defense attorneys: 10 in regular service, 5 in reserve service (in addition to a private practice in which they handled military cases), and 2 civilians in private practice whose appearance as defense attorneys in military court was ad-hoc. In addition, and in order to overcome the limitations on interviewing military judges, I interviewed 3 ex-judges who, at the time of the interview, were civilians in private practice; one military judge who approached me on his own initiative; and 2 high-command officers, in prosecution and defense roles respectively, who had been judges in a previous assignment.\(^93\)

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\(^91\) This system is compact in size (spanning five geographical locations and manned by 200 legal officers), and yet remarkably similar to any large scale adversarial civilian system, both in the types of offenses it addresses and in its procedural provisions. These characteristics made the system an ideal “laboratory” for examining its operations and interactions in their entirety, as well as enabling me to build the sample in a way that represented all jurisdictions and legal occupations.

\(^92\) There were several factors which I expected to be significant to the interviewees’ experiences and opinions: their seniority in the system, the type of work they did (fact-finding court litigation, appeal court litigation or administrative tasks), and the amount of unauthorized absence cases in their total workload. These factors were taken into account in stratifying the sample, which represented trial and appeal courts, all military jurisdictions, and a broad range of ranks and seniority.

\(^93\) Many of the interviewees had previously held other roles in the system; during the interviews and their coding I was aware of the possibility that some interviewees might project their present opinions
The interviews lasted between 40 minutes and 2 hours, and covered issues regarding the typical workday, thoughts and opinions about military service, unauthorized absences, and the legal system, prosecution, negotiation and punishment practices, interaction with defendants and other actors, as well as feelings about the job.\textsuperscript{94}

The interviews were recorded and transcribed, save for three interviews with judges who exhibited caution about the content. The transcribed interviews were coded according to the ideas and themes which appeared in them, which were, upon subsequent readings, grouped into more general schemas and patterns. The demographic aspects and their correlations to the revealed schemas and patterns were analyzed using SPSS version 12.0.

\textit{B. Identifying the dissonance}

The interviews uncovered the legal actors' "bilingual" approach to the problem of unauthorized absences; almost all of them were well-versed in both the doctrinal legal perception of the problem and in its socio-economic dimensions. They were very mindful of what the legal system's premises were, and what it was trying to achieve, onto their reflections on past roles. However, the diverse construction of the sample, which included a variety of present (and past) careers, as well as a good balance between active army members and civilians, somewhat compensated for these possible biases.

\textsuperscript{94} As is customary in similar studies, interviewees were offered full confidentiality so they would feel comfortable speaking their minds. Their honest disclosures in the interview snippets below are an indication of their level of comfort and trust.
and at the same time expressed their belief in the futility of addressing a deeply rooted social problem through legal means.

Unsurprisingly, all interviewees, including those who most disagreed with the idea of compulsory service and its implications for defendants in unauthorized absences cases, were well-versed in the official military legal policy regarding unauthorized absences, as stemming from the broader ethos of compulsory and egalitarian service. When describing the army's official policies, they referred to the duty to obey the law, the military necessity for conscription, and the egalitarian aspect of a general draft:

Israel has a Security Service Act which is compulsory, due to the special circumstances the State of Israel is experiencing ever since its inauguration. Therefore, there is no right, it is not a legal right to be exempted for pacifism reasons, it’s a matter of discretion.\textsuperscript{95}

Everyone knows that [people with harsh circumstances] are expected to… they are drafted to preserve the ethos that everyone goes to the army.\textsuperscript{96}

However, all interviewees, regardless of their level of sympathy for absentees, were deeply cognizant of the socio-economic aspects of the problem. Moreover, all of them stressed that the economic crisis following the recent escalation of the Israeli Palestinian conflict had led to an increase in desertion.

Well, desertion usually stems from harsh miseries, and I was not exposed to these miseries in my [personal] lifestyle. Every time you read a deserter’s file and you’re just – you’re shocked! I almost haven’t heard of people who are happy, and they don’t… usually it’s people that… you – your heart aches… there’s no bed and no food and provide for your brothers and your parents are sick and… stuff I haven’t seen. All the time [the media] talk[s] about the situation in the country, the situation in the country, and when you see it on concrete people it really hurts.\textsuperscript{97}

When gently prompted to evaluate the legal response to unauthorized absences (“do you think the system works well in addressing desertion?”) the interviewees made empirical observations questioning, and even disproving, the merits of handling

\textsuperscript{95} Interview #14.
\textsuperscript{96} Interview #12.
\textsuperscript{97} Interview #13.
desertion through conviction and deterrence. 35 out of the 40 interviewees identified a “vicious cycle” in deserrter litigation, manifesting itself in a "revolving door" of prison sentences, worsening economic conditions, and repeated absences, until the offenders are released from service. This cycle made the 35 interviewees see the system as futile and encouraging recidivism.

Actually, if someone decides not to serve he won’t serve eventually and it will happen, what can you do. People that have just decided they won’t serve and no matter how much you fight them and how many times you put them in prison, eventually there has to be an end, you can’t continue with it, there’s a limit to how much the system can hit the person. ⁹⁸

Eventually we have a vicious cycle, where if you send him to a long imprisonment, he’ll be in worse economic distress, he doesn’t get financial assistance or a salary during this time, so he does another desertion to pay his debt, and again, and again. We know this. ⁹⁹

Another realist observation made by some of the interviewees was lack of faith in the “myth” or “sham” that “everyone can serve”. While familiarity with military welfare provisions varied among interviewees (defense attorneys being the most familiar with them), the 36 interviewees who referred to welfare in their interviews felt the system was flawed and benefits were distributed in an arbitrary and unprofessional manner, leading people to desert in order to better their economic situation:

The welfare officers… I don’t want to blame them for everything, but there could also be a bureaucratic thing that has a substantial role in this matter. If the welfare officer can’t help a deserter get welfare money, because in his family, she checked and in his family there’s a vehicle, say, a 1979 Opel… and that means he doesn’t qualify under the criteria, then he won’t get the money. ¹⁰⁰

All interviewees felt that a complete solution to the deserter problem was beyond the reach of the legal system – either because the problem would always be impossible to solve, or because its causes were external to the army. When prompted to offer possible solutions, all interviewees offered extra-legal solutions, such as an increased
salary, better welfare benefits, better education, or a less inclusive draft policy. Even
the interviewees who had faith in the punishment’s deterrent effect did not consider it
the only possible solution, or even the dominant one.

Taking care of this problem from the root should happen elsewhere. In society.
We are taking care of it ‘from the leaf’… from above. It’s too late. It’s the
end… the root [treatment] has to be done elsewhere. The prevention, education,
explaining… the assistance, the welfare. All this needs to be done elsewhere.101

Given the dissonance between the two perspectives, and particularly between the
stated purpose of their work and its perceived worth, the interviewees resorted to a
series of reconciliation mechanisms, which allowed them to make sense of the legal
process and their role in it.

C. Reconciling the dissonance: loyalism, bureaucracy, disgruntlement, cynicism, and
divergence

1. OFFENDER CLASSIFICATION: A UNIVERSAL MECHANISM

In analyzing the coping mechanisms used by legal actors to reconcile the tension
between the legal and social perspectives, all of them resorted to an interesting
distinction between whom they perceived as “good” and “bad” absentees. The "good"
absentees were described as “genuinely miserable”, “poor” or “honest” deserters,
whose absences were an impulsive response to acute emergencies at home, and
therefore could not be fully construed to be making a free-agent choice. On the other
hand, there were the "bad absentees", which were also described as “liars”,
“charlatans”, or “just looking to be released from the army”. This latter group was
seen as manipulatively and coldly deciding to commit the absence in order to wrestle
the authorities into despairing of them and discharging them from service. The

101 Interview #35.
interviewees emphasized their sympathy with the first group and antagonism toward the second, which they expected to be reflected in prosecution policy and punishment. While this distinction was universally recognized, there was a great amount of variance in the actors' self-assessed ability to distinguish between them. Young prosecutors (with two years or less of professional experience) and judges were the most confident in their ability to tell the two groups apart, while defense attorneys and more experienced prosecutors mentioned that the issue was more complex, and that distinctions were blurry. Another important difference was in the interviewee's assessment of the respective sizes of the "good" and "bad" groups. By using this mechanism, the interviewees could resolve the dissonance by assigning the legal discourse of responsibility, free agency, deterrence and punishment to the "bad", manipulative group, and the social discourse of disempowerment and welfare to the "good", impulsive group.

In addition to this universal mechanism, the interviews exhibit several schemas of dissonance alleviation, not dissimilar (albeit not identical) to the Mertonian categories. I was able to identify five more patterns: loyalism, bureaucracy, disgruntlement, cynicism, and divergence. The patterns were not mutually exclusive; each interviewee assumed at least one of these roles, and most of them assumed a combination of roles. Also, the choice of schema was not dictated by official roles in the system, though different roles and seniority did have some influence on it.

2. LOYALISM

Seven interviewees exhibited loyalism by expressing strong adherence to the system’s legal ethos. Their belief in it ranged from occasional expressions echoing the military service ethos to an acceptance of the entire doctrine as undisputed gospel (expressed
extremely and almost to the exclusion of the other schemas, by three interviewees, all of them relatively inexperienced prosecutors).

Loyalists adhered to a classicist view of offenses and offenders, viewing offenders as autonomous agents of free choice. The unauthorized absence was attributed to their lack of civic values, selfishness and anti-patriotism.

We’re talking here about people who have just begun being citizens. And as citizens, they should understand that a law is a law, and you obey a law even if it is a little uncomfortable to you. Even if it’s the Security Service Act or the Military Justice Act, it’s not a little military thing that you can ignore. A law is a law. And when you educate people that you break the law and don’t get the suitable punishment, these are the citizens you give your country. Citizens who know that even if they break the law they don’t get the punishment. Because they’re going to be felt sorry for. So right, you don’t have the easiest circumstances, and you have problems, but it still doesn’t give you justification for breaking the law. And if we’re a country that says we have laws but on the other hand if you break the law and you’re miserable enough you won’t be punished, then why is there a law? Is it a law for normative people? Normative people don’t need laws. Normative people usually won’t break the law even if it won’t exist. Who breaks the law is usually not those normative people, and the enforcement system has to… suit itself. You can’t say the suitable punishment is X, but it’s X for the normative person only. The normative person doesn’t usually commit the offense.\textsuperscript{102}

I think that every person in this country who on one hand is entitled to some benefits as a citizen, wants to be a citizen of this country, and wants to remain a citizen of this country, but doesn’t want to remain in its army, and by doing so puts a heavier burden on the rest of the people, this inequality doesn’t appeal to me, isn’t acceptable to me. The fact that… actually once you get to a certain unit and you have a certain job and on day you just get up and go and someone else has to do this job… The system runs… maybe everyone thinks, I’m just a small bolt in the system, but the system runs on these little bolts. If one bolt gets released and doesn’t work the system doesn’t work. And I don’t accept that “you’re the big army, why do you need me of all people”. Because you have a job. And if you don’t do your job someone else will have to do it and so on. Everyone has a job.\textsuperscript{103}

Social and cultural factors were either ignored or downplayed; the defendants were often compared to the loyalists themselves and judged by their own parameters and values, allowing very little for the different social circumstances.

\textsuperscript{102} Interview #24.
\textsuperscript{103} Interview #24.
I don’t know, you should ask them. I can tell you what they say. Many claim that they have economic reasons, helping their families. Many people don’t want to serve in the army. And one of the stages is desertion, and they repeat the desertion until the army throws them out.\textsuperscript{104}

It was so clear to me that I’m going to the army and to officers’ course and all that. I grew up in such an environment, with a high-ranked reservist father and a brother who went to military school and the stories at home were military stories. And.. when I was little I wore soldier costumes and there was… I would read books about wars and paratroopers… so my mind was ‘poisoned’ from an early age [smiling].\textsuperscript{105}

I can tell you, I think, I can say what I would do. I don’t see myself, in any situation, deserting from the army.\textsuperscript{106}

Loyalists assumed that military service could be performed in any circumstances, and had faith in the military welfare system’s ability to allow for that despite its imperfections, which could not, in themselves, excuse a lenient treatment of offenders. They emphasized the formal legal concept of autonomy and free choice.

Some people have more problems and their choice is more difficult, and some people have less problems and their choice is easier. The easier the choice, the harsher (so I think) the punishment should be. If their choice was easy and they chose this path. If their choice was difficult than the punishment will be less severe, and the question is how much less severe. The courts, I think, satisfy themselves with too lenient a punishment.\textsuperscript{107}

Loyalists had a strong belief in the legal process as an optimal mechanism for uncovering the truth. They expressed skepticism toward the absentees' claims of economic hardships, seen as exaggerated and self-serving, and strongly believed in cross-examination of these defendants as a mechanism to expose their lies. Loyalists expressed the least amount of discomfort about cross-examining the absentees’ family members regarding their economic situation; they trusted the courts, and themselves, to properly utilize this tool to uncover the "bad" absentees, distinguish them from the much fewer "good" absentees, and punish them accordingly.

\textsuperscript{104} Interview #38.
\textsuperscript{105} Interview #1.
\textsuperscript{106} Interview #38.
\textsuperscript{107} Interview #24.
Yeah, [just like the absentees' mothers who cry on the stand – H.A.] I also can produce tears when required. [My assessment of their truthfulness] depends on the intensity – depends how reliable they sound to you, depends what they say.\textsuperscript{108}

Sentencing was seen as an intricate balancing process of various considerations, guided by the “ends of punishment”: deterrence, retribution and rehabilitation.\textsuperscript{109}

When you sentence someone, I think, you take several elements into account. You take the retributive elements, how much he deserves, how much he deserves rehabilitation-wise, how much he deserves single and general deterrence-wise. And in my opinion when you take all the… all these considerations, the level of punishment is not harsh enough to fit the… criteria.\textsuperscript{110}

Loyalists were the only interviewee group who either did not mention, or downplayed, the existence and ramifications of the “vicious cycle” of desertion and release. They expressed strong belief in the deterrent effects of punishment, on its contribution to recidivism reduction, and on its role in encouraging people to serve properly in the army:

It’s a well-known rule in penology. Of course the harsher the punishment, the less people will commit desertions. Only the court and the state choose the balance [under which] it is prepared to do this. The bigger the punishment, the equation… the harsher the punishment, the amount of criminals will go down. Of course if whoever deserted would get five years on the spot he wouldn’t desert. You have to decide what balance you do. Clearly if the level of punishment were high there were fewer deserters, it is clear.

Q. Do you think that there are people who would desert in any case, even if the punishment were very, very severe?
A. There are always people like that… like there are for example people… who murder despite the fact that the US has a death penalty. You can’t find anything more [deterrent] than that. Not that I’m comparing deserters to murderers, of course.\textsuperscript{111}

Everybody always asks, ‘and what will happen after [the punishment is served]? What, you’re going to keep putting them in prison?’ So the answer is first and foremost, that past experience shows that people have surrendered [and returned to service]. It’s important. Past experience shows… the fact that he’s an

\textsuperscript{108} Interview #24.
\textsuperscript{109} For more on the conceptual framework behind the ends of punishment, see: Joel Feinberg, \textit{What, if Anything, Justifies Legal Punishment?: The Classic Debate, in PHILOSOPHY OF LAW} 727 (Joel Feinberg & Jules Coleman eds., 2000).
\textsuperscript{110} Interview #24.
\textsuperscript{111} Interview #38.
offender doesn’t mean that we should give in to him. And the fact that the offender declares he is an offender doesn’t mean that we should give in to him… surely you won’t start by giving in to the offender because he persists in his offenses. It’s absurd. It mocks and ridicules the aims of criminal law.\textsuperscript{112}

3. BUREAUCRACY

Nineteen interviewees expressed, to various extents, a bureaucratic approach, which perceived the problem mostly through the framework of caseload and efficiency. Bureaucrats therefore emphasized the massive amounts of deserter cases, as well as their routine nature and lack of specific interest.

There’s lots of deserters, there’s a lot to do with them, the military prison is full… and it’s transporting them, their paperwork, everything. Time-wise, too. It’s very time consuming, handling them, talking to the families, appearing in a detention hearing… it takes up so many resources of the legal system, or the prison, of the military police… so… eh… once there was this practice of, sort of, finishing a case after a lot of time, and it created lots of pressure, lots of overwork. I’m not saying they didn’t… they had to end this at this point, because personnel-wise, there wasn’t enough manpower. Eh… they’re trying now to make the treatment more efficient… but if we finish all cases in the first detention hearing, it’s a stage when not all the paperwork is there . . . \textsuperscript{113}

I had a list of things to check… checking… date of birth, country of birth, date of draft, [criminal and disciplinary] past… profile… the questions, unless there’s something special, the questions are quite standard, , that is, an attempt to understand why he committed desertion, what he did during desertion.\textsuperscript{114}

Desertion is an offense where the evidence is pretty much the same [in all cases]. Cross examination is also the same, so I prepared a form that all prosecutors here use.\textsuperscript{115}

Bureaucrats detached themselves from the intense socio-legal dichotomy by focusing mostly on the technical aspects of their work; their professional goals were to maximize efficiency by creating specified, “assembly-line” type processes, and reaching useful "tariffs" to facilitate plea bargaining. The following two quotes, from

\textsuperscript{112} Interview #14.  
\textsuperscript{113} Interview #10.  
\textsuperscript{114} Interview #25.  
\textsuperscript{115} Interview #20.
a high-ranked District Prosecutor, illustrate the interviewees’ satisfaction in facilitating efficient bargaining between the parties:

“I think in this field there was further excellent efficiency, in that we told the prosecutors, you start negotiating with the defense, come to the deputy or the District Advocate when you’ve already minimized the range of conflict and you actually already know what the defense’s “red line” is, what they will agree to, what they won’t agree to, and with this [information] approach the deputy or District Advocate, and many times I made the decision without even talking to the defense attorney. It was enough to meet with the prosecutor…if the defense attorney accepted it and agreed, we… ended the case without the District Advocate even meeting the defense attorney. And if not, he still had the right to come back to the case and say ‘listen, I still want you to pay attention’ or to convince me to make a different decision”. . .

As time went by we established a practice, that is… eh… the defense attorney sort of knew how to read the prosecution’s mind and the prosecution knew how to read the District Advocate’s mind, and so very quickly they agreed on ranges of punishment, and then the deputy, or whoever came to close the deal, could easily accept [it].

In matters of punishment, bureaucrats were well familiar with the existing precedents and levels of punishment, and took pride in their ability to predict the “going rates” of punishment for defendants. A senior prosecutor recalled his past days of endless deserter cases:

Today I’m forgetting the price list, I didn’t learn it by heart… I used to look at verdicts and understand more or less what the tariff was. But before appearing in court I could more or less predict what the result would be, when a price… simply, to the parameter of number of days this deserter was absent you had to add additional parameters such as economic and family situation, eh.. the quality of the soldier, good or not, put everything in the mixer, the result is often known beforehand.

The bureaucrat’s sense of satisfaction from work arose in two cases: when a tedious process was facilitated, or when non-routine, interesting doctrinal questions came up and alleviated their professional boredom. Several interviewees mentioned their pleasure handling cases that offered some doctrinal challenge:

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116 Interview #5.
117 Interview #6.
But I can tell you that since I’m here, part of the most beautiful questions appear in deserter cases, and those that require the most effort.

Q. What’s beautiful about them?
A. That… what’s beautiful is that from one article of the law that keeps being amended, and it seems they did the best job possible, you can still build up structures upon structures of [legal] interpretation. This might not be a desirable situation, but from the legal aspects it is a beautiful situation.118

These efficient mass processes, spiced up by the occasional interesting case, offered bureaucrats some respite from the intensity of the conflict. One interviewee explicitly expressed her discomfort when confronted with the deeper issues behind the cases:

If we start getting emotionally involved in each case, we won’t be able to work.

Q. So what do you tell yourself when you get up in the morning to go to work?
A. If it’s a deserter day, I say ‘oof’ [laughs].119

4. DISGRUNTLEMENT

Twenty-one interviewees expressed disgruntlement in various points throughout the conversation. Although this category was more common with defense attorneys (11), notions of disgruntlement were expressed by no less than 7 prosecutors and 3 judges.

The disgruntled were keenly aware of the political and socio-economic problems underlying the military service ethos. They considered the policy-ascribed and judicially-proclaimed image of free choice agents to be a legal fiction, far from the truth for deserters, and were strongly disturbed by its prevalence, which they considered contrary to the “realities” of unauthorized absences.

Many of [the prosecutors] do [believe in classicist, self-serving offenders]. And I ask them sometimes… outside the court, ‘tell me, do you really think he’s such a criminal?’ … and many of them say they do. And at the beginning I didn’t believe them, I thought it couldn’t be true, but with time as you speak with so many people you think ‘whoa, they genuinely think so’.120

[desertion cases are] like somehow taking the miserable people and… screwing them over. And I think it’s… it’s some madness of the system that just does the

118 Interview #25.
119 Interview #19.
120 Interview #9.
things because that’s how they’re done. I doubt that anything is achieved by this, and it’s a lot [of time in prison]... I mean a year out of someone’s life, for not being in the army. Inconceivable! Eh... and they, like, don’t think about it. It’s supposedly perceived as logical.121

The army should tell the truth. [It should] come and say: I think that... the right to live with minimum dignity prevails over the duty to serve the country. That’s what it should have said, and that’s what our legal system requires that it say, but... everyone is afraid to talk about it. This is the reason everyone is scared to bring this up for discussion. And if we said it, we would say one of two things: [middle class] soldiers have the right to live with dignity... and [poor] soldiers don’t... So as a system I have two choices: I can either give them this right, or give up their service.122 (interview # 23)

The disgruntled expressed their strong sense of indignation at the injustice of treating the absentees as criminals not only through general arguments about social consciousness, but also through emotional identification with the absentees' fate:

With the [large] numbers [of deserters], and the army’s involvement in this affair, it’s considered, like, the most dangerous offense... and they bring them in with handcuffs, and with leg cuffs, eh... because of one attempt we had of someone attempting to escape, and I don’t even remember if he was a deserter at all, they sit in our office with leg cuffs. And it’s very, very difficult. It’s difficult for them, too.123

However, despite their strong resentment, the disgruntled were still internal players in the legal system, who had to work within the system’s rules with an ambiguous, emotionally taxing feeling that they were cooperating with a flawed, arbitrary and socially insensitive system. Disgruntled defense attorneys described their problems with trying many cases of the same sort one after the other, often using the term “assembly line”, as well as parading their client’s misery in open court and their futile encounters with military bureaucracy; disgruntled judges expressed the lack of rehabilitative tools at their disposal and the limiting precedents; and disgruntled prosecutors resented being put in a position in which they had to cross-examine poverty-stricken families about their circumstances and income. Interviewees often

121 Interview # 21.
122 Interview #23.
123 Interview #39.
raised their voices, shook their heads, or sighed, as they described the frustration of acting within the legal system:

Telling the person’s life story in the courtroom is something I strongly dislike. 
Q. What is unpleasant about it?  
A. It’s very non-private. I feel bad for him that everyone has to hear. But there is no choice, you must do it, because if not, you’re not doing your job the way you should and he won’t get the punishment he really deserves, but more. This is partly the reason why I don’t like them to testify. Because I don’t feel it’s fair to let them tell all their story when it’s documented in papers… yes, it’s awful, despite the fact that supposedly he’s… facing the court, with his back to everyone [in the audience], but he knows that everyone’s there… there’s the special files that you usually try to leave until the end because of it.  

There’s a problem, that we [defense attorneys] create easy work for the judge. To the judge, it’s much more convenient to hear things in lacquered-over words from a defense attorney that tells them ‘difficult economic situation’ or ‘very difficult economic situation’ or ‘catastrophic economic situation’. What’s the difference, it sounds so similar, difficult/very difficult. And in this respect we’re doing a great service to the judge, and to the deserters – a much worse service. And that’s equally to everyone. That’s why what we say is so important. Eh… could be that in arrest hearings, to break down the discourse, it would be better if they represented themselves… perhaps, if these people would say time after time after time to the judge, tell him a story, sometime… [sighs].

With the family, I tend never to cross-examine. In general, I don’t thing that young people in the army who have just graduated from the university, eh… can, eh… criticize the life of a family or… tell them how they should have acted. Because… never judge someone as long as you haven’t been in their place, though in most cases we do it, but it’s… too rude. Unless there were cases where I really saw that… I felt it was half a lie, then I would do it. In most cases I wouldn’t.

If [the welfare authority] will write a little piece of paper, according to which the soldier really has very difficult problems, eh… and that’s why he can’t serve or he can serve only in certain terms, it can strongly influence. If another soldier has very difficult problems but not the little piece of paper… and that’s what’s so frustrating. And that’s why the defense’s main task in helping clients is not in court at all, but with these bureaucratic internal systems in an attempt to get the little piece of paper.

As the above quotes illustrate, the disgruntled felt “trapped” in the system and their resistance techniques further supported this point. Disgruntled actors tried to subvert

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124 Interview #9.  
125 Interview #12.  
126 Interview #21.  
127 Interview #23.
the system within its limits, using the only tools they perceived as available to them: case-management and articulation. Defense attorneys attempted to manipulate the order in which the cases were heard in a way that would be least detrimental to the group of defendants in a given day; prosecutor tried to articulate their concluding comments, or written communication with the court, in a manner that signaled their ambivalence and reluctance to the court.

Look, it’s terrible. Actually, throughout the day you feel distress. I don’t feel distressed anymore, but somehow... a situation is created when without noticing you distinguish [your present case] from other cases, including all the cases that happened that day. And it includes cases that you’ll try later! You say ‘this defendant is not as bad as a defendant which…’ and later, twenty minutes later, you represent the ‘defendant which’... I mean, it’s awful and terrible for the next defendant. You try to think about it a little bit beforehand. What I used to do in the past was that I tried to start with the plea-bargain cases, and... on the next step I would move on to the more severe cases, with the longer absences, and they created some sort of a top limit for the lighter cases. Some sort of maximum punishment threshold for the day. So... the severe cases will get whatever they get that day regardless of others. At least the light ones will gain from the fact that there’s a pre-established maximum.128

In any case, if I feel uncomfortable and... I’m not feeling well and am not at peace with it, if they tell me to submit an appeal I appeal. Eh... I’ll write it not in a way that will imply it’s a murder case if you understand what I’m talking about [smiles]... I’ll write it more subtle, more laconic, the way I feel matters, the way I feel this is the weight that should be given to the circumstances.129

5. Cynicism

Cynicism, expressed by 17 actors (defense attorneys and prosecutors alike), shared certain common features with the bureaucracy and disgruntlement; however, it was distinctive enough to merit a separate category. Usually, it involved expressing feelings of futility and burnout, either from having seen the futility of bureaucratic case processing, or from having lost the energy to protest the system's arbitrariness and inequality. Cynics exhibited a unique blend of mindfulness to the socio-economic dimensions of the unauthorized absence problem, apathy toward any initiative to

128 Interview #9.
129 Interview #7.
resolve the problem, and occasionally a certain degree of animosity toward the
absentees themselves, who personified it.

[the deserter] puts all his problems on your shoulders, and you explain to him
time after time that you don’t make the decisions, the judge does, and.. you tell
him ‘go explain your problems to the judge…’, and then he calls me again and
says ‘I have to be discharged, I have to be discharged’, I told him, ‘it’s not me
[who makes the decisions]…’. I exploded. It’s only lately, I never had these
explosions [before].

Q. Did anything happen lately? Did you get tired?
A. I think so. I think there’s a level of burn out. I think that, eh… there are very
unique characteristics to this population of draft-evaders, and you handle lots of
them. In average you handle lots of them, it’s the most difficult deserter
population.130

Cynics tended to attribute the socio-economic dimensions of the problem to broader
inequalities in Israeli society, rather than to the legal system itself. They were
convinced the roots of the problem ran much deeper than anything that could be
grasped by the legal system, and were therefore pessimistic (occasionally to the point
of indifference) about the prospects of change. These were the interviewees who most
emphasized the "vicious cycle" of recidivism, imprisonment and release, using it to
explain the futility of solving the problem through law. To the cynics, even extreme
measures that lay within their authority, such as pleading not-guilty in absentee cases
and bringing up social issues, were doomed to fail. They could not envision any
overarching successful policy for addressing the problem of unauthorized absentee
through law.

The question is, what are you going to do? [you can’t] take the system down.
There isn’t some bad buy sitting up there and saying, let’s do it this way. It’s a
process created by Israeli society so there’s no one to take on at the High Court
of Justice, there is no legal tool. You’re a jurist, you’re not a… if I were a
Knesset member I might have done it. Eh… and there’s no way to handle it, it’s
not that it’s frustrating, there’s just no way to cope. If you try… I mean – no one
in the Knesset will understand any of this because it’s part of the framework of
the… the understanding that serving in the army is very important, no one will
mobilize for the deserters if we approach Knesset members. Same thing with
media. High Court of Justice, you don’t have a malicious person doing this. It’s

130 Interview #12.
just the way it is. You haven’t got much to do. You have to handle each specific battle and hope it works out. It’s a social solution, you have to give more money to weaker populations, but there is no money.\footnote{Interview #12.}

And it’s clear to anyone who has eyes in their heads that this will hold for about a year. Eh… these people won’t disappear. They’ll go back, do another desertion and return again and overfill the prison, until at some point two cohorts will clash, those who should have gone home already and did another absence, and the new cohort, and then they’ll have too many [people] in prison and they’ll understand they don’t have a choice. People… are getting crushed. Never mind.\footnote{Interview #12.}

You know, I would expect the military legal system not to be… like the military bureaucracy which is… either stupid or evil, and it’s sometimes hard to tell which [of the two], but that it would have some… it’s a system, I think, that… [they do things] just because. Because that’s how it’s done! Eh… because that’s how we have always done it.\footnote{Interview #21.}

The cynicism was directed not only toward the futility of the entire situation, but also toward the way the actors themselves were required to perform their jobs. Cynics could not see logic beyond the irrational requirements and constraints of the system, but still abided by them; they did not accept these as given or like them, but they are beyond being angered by them.

Now, it’s a lot easier to arrive with one case as a special case, than to arrive with thirty cases, and somewhere, in the seventeenth case, when you explain that this case is very unique, when the previous sixteen were unique, and the twelve that follow will also be unique, but this one, too, is very unique, I’ll even remember why if you give me a second, and this is problematic.\footnote{Interview #33.}

Q. What qualities does a prosecutor need?
A. A heart of iron.
Q. A heart of iron?
A. That depends on how you define a good prosecutor, a prosecutor that’s good for society in general? Or one that brings severe punishments? It’s an entirely different philosophical question.
Q. Which qualities does each of the kinds need?
A. The one that’s good for society and sees a case for its circumstances needs humanity. Eh… the other one needs a heart of iron.\footnote{Interview #20}
Some cynics wryly mentioned their growing desensitization and indifference toward the absentees and their problems, which they saw as an inevitable side effect of prosecuting, defending and sentencing the poor. Their self-awareness of this process was remarkable. Many mentioned feeling "tired” or “burned-out”. In one instance, a prosecutor told me of how she and a defense attorney played a practical joke on a defendant in the courtroom:

Once there was one [deserter] that really pissed me off... so he addresses me ‘how much do you want on me?’ So the defense attorney tells me ‘let’s play a joke on him’. So we started telling him ‘five years’, and all that... so he yelled at me, ‘you’re going home from here, but we’re going to prison’, so I yelled at him: ‘I didn’t commit an offense’. So he sort of whispered ‘me neither’, and the defense attorney calmed him down.136

Others described the process they went through in more general words:

The thing is that I’m not sure that real thinking [about the problem] would make a difference, because people become somehow... desensitized when they are in the system. Eh... somehow you internalize it. You internalize that it’s just. And it’s – deserters, for example, is a phenomenon where I don’t understand how it can be internalized, but it’s a fact that it happens.137

6. DIVERGENCE

Only four interviewees – one reserve defense attorney and three judges – exhibited a different, more optimistic approach. Like the disgruntled and the cynics, all four acknowledged the socio-economic dimensions of the deserter problem, and felt that the legal system was not handling the problem properly. However, their outlook on the situation was more optimistic. In defining the problem, one of them chose to use terms that did not map into the legal “grid” of free choice and responsibility, to which all previous actors agreed. Rather, she left the question of personal circumstances open and used a quasi-psychological definition:

136 Interview #20.
137 Interview #21.
People who desert are people who . . . for various reasons their muscles are weak. Their weak muscles have side effects in various fields, in their self image, in their inability to disconnect from their growth [process].

All divergent actors felt that the legal method of addressing the problem was not the best, or even the main, way in which they should handle it. The three judges described how they tried to make the process more flexible and how they discouraged prosecution attempts to cross-examine families. However, only one of the three judges, and the reservist defense attorney, exhibited a dramatic diversion from the prescribed legal process, illustrated by the extra-legal steps they took to solve the individual defendants' problems. The defense attorney went as far as to redefine her role:

I see my role as a defense attorney and a defender or deserters differently: as someone who needs not to limit herself to defending the soldier in court, but as someone who is supposed to help the soldier identify the needs and emotions and important issues, so he can be in a situation where he can consider by himself his ideas about his future service in the IDF. It’s true that we take care of the sentencing business as well, but the punishment is not the central part. Even in my conversations with them, when I talk to them in prison, the punishment issue is marginal to the conversation. And very often we reach the conclusion that it doesn’t matter at all what punishment he’s going to get. In some cases we understand that the punishment is not the important part. One month more, one month less. What’s important is what happens afterwards.

Not adhering to legal roles, the two strongly-identified divergent actors came up with non-conformist approaches to assist the defendants. The methods adopted by both innovators were proactive, original and based not on an attempt to reform the system, but on individual initiative. While the defense attorney reported her attempt to organize mediation seminars for welfare officers, an attempt which had not met with military cooperation, she had more success with her partisan, personal methods, such as giving former clients her personal telephone number and talking to commanders.

138 Interview #28.
139 Interview #28.
The judge had an easier time, using his position of authority to conduct informal discussions in the courtroom with unrelated parties.

Often it happens that I mediate between the commanders and the soldiers. The commanders are very happy with it because I don’t give the soldier support, but send him to make his achievements on his own. He has to conduct the negotiation. I don’t arrange anything for them, all I do it whisper in the commander’s ear that he has to listen and that he should make conditions about their behavior, that he should do whatever he understands, as long as he listens. All I ask of them is that they listen… because if they listened to the soldiers there would be a lot less deserters.140

I preferred to hear these cases in an attempt to save those souls, as they say, or sometimes it was connecting them better to welfare authorities in prison, and connecting them to the unsuitability committee, and connecting even to the defense attorneys: ‘come and convince me to give a lenient punishment, how are you going to help him as your job and assistance’. Many times I tried to see if he had some relative with status or good connections or resources, that will take care of him that he doesn’t commit another desertion but goes through his service. All these [things], I saw them as challenges. And that’s why I asked for these cases and I would do these connections all the time and the defense attorneys were upset at me because of that. Because it wasn’t in the definition of my job, and they were right. But… it… was very important to me. Very important to create a situation where I won’t see the same guy once more before me.141

When prompted, both divergent actors, and the two “lesser divergent” judges, had a variety of original suggestions for general policies, such as media campaigns and employing military veterans as “foster parents” for soldiers; however, on a day to day basis they were more focused on how they could take personal informal steps to make the situation better one defendant at a time.

IV. DISCUSSION

The study's findings confirm the theoretical analysis of cognitive dissonance and system irritation: all modes of adaptation exhibited by the interviewees reflect the irreconcilable nature of legal and social perceptions. The perception of offenders as autonomous free agents whose individual choice could be modified through the threat,

140 Interview #28.
141 Interview #36.
or consequences, or legal action, dramatically contradicted their perception as people constrained by a set of circumstances beyond their control. Also, almost all interviewees found it difficult to reconcile the normative promise of the legal process with its lack of efficacy given the demographic features of the problem. Therefore, the path to alleviate the dissonance had to rely on one of the following mechanisms: rejecting one of the perspectives, detaching from both perspectives, or relegating each perspective to a separate realm. And, indeed, the different modes of adaptation conformed to these strategies. As illustrated in Fig. 3, loyalists chose to adhere to the legal discourse and reject social discourse; divergent actors chose to adhere to the social discourse and reject the legal discourse. Bureaucrats, and to a certain extent cynics, chose to detach from both perspectives, pushing the dissonance away. The universal mechanism of distinguishing between the "good" and "bad" absentee alleviated the dissonance by allowing the actors to use legal and social discourse in mutually exclusive circumstances, for different people whose circumstances and motivations for action were constructed as monolithic and one-dimensional. In fact, as illustrated in Fig. 3, offender classification was the only mechanism that allowed the actors to maintain strong ties to the two discourses they were engaging with; the other mechanisms required an entire rejection of one of the frameworks (loyalism, divergence), a considerable disengagement from one of the frameworks (cynicism, disgruntlement) or from both (bureaucracy).

Figure 3: The relationship between adaptation modes and the dissonant frameworks

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142 For similar mechanisms in verdicts of conscientious objectors, who were classified as either morally fragile flower children or well-poisoning politicos, see Hadar Aviram, Discourse of Disobedience: Discourse of Disobedience: Law, Political Philosophy, and Trials of Conscientious Objectors, 9 Journal of Law in Society 1 (2008).
The other interesting feature of the different schemas is the strong commitment almost all actors had to legal discourse, even when it contradicted their daily experiences. Despite this almost unanimous dissatisfaction with the legal paradigm and its performance in addressing the problems, the interviewees' responses and practices, save for a few examples of divergence, reflected the overpowering effect of their legal professional training. Even the disgruntled and cynical, who felt a strong antagonism toward the process of punishment and deterrence, preferred to live with the dissonance, or to vent it through anger and wry commentary.

Given the fact that only seven interviewees, who were notably young prosecutors, spoke in system-induced “mantras”, such as free choice, deterrence and patriotism, it seems that the majority of actors continued to act within the boundaries of law not because they truly "bought" the legal rhetoric surrounding unauthorized absences, but because they could not see a way to break free from the discursive demands and expectations of their job.

The divergent mode of adaptation will be discussed in more detail below.
The six modes of adaptation offer several additional insights. First, as can be seen from the "count" of actors exhibiting the different modes of adaptation, the six patterns were not mutually exclusive. Almost all interviewees invoked more than category, the most popular combinations being bureaucratic and disgruntled, bureaucratic and cynical, and (to a lesser extent) some combination of the three; also, as mentioned above, all interviewees used, to a certain extent, offender classification as an alleviating mechanism. A simplistic construction of individual motivation and character might make it seemingly impossible for a single actor to express anger and emotional distress at a defendant’s plight, and then fall into discussing his work as if “going through the motions”. It is helpful, therefore, to think of modes of adaptation not as fixed personality traits, but as part of the cultural and emotional "tool-kits" available to the actors. If behavior and response patterns exist in the cultural reservoir and are at the actors’ disposal, they might invoke different strategies whenever one, or more, might be more helpful to them in alleviating the stress associated with cognitive dissonances. This way, the actors can draw, at any given set of circumstances, on the method best equipped to help them achieve productivity, peace of mind and a sense of self-worth. Sometimes, an actor's sense of justice might require acknowledging her dissatisfaction with the legally indoctrinated downplay of socio-economic inequalities, and she will exhibit disgruntlement; at other times, her need to be productive at work, and not to “jam” the system, might require a more pragmatic approach toward case management (through bureaucracy). A different actor might need to balance his self-image as a person who understands the “real”

intricacies beyond the system (through cynicism), with the day-to-day need to get along with colleagues and clients (through bureaucracy).\textsuperscript{145}

However, it is important to remember that not all patterns were equally popular among interviewees, and that there were some differences between actors in different roles and with different work histories, which merit more detailed attention.

Despite the availability of all patterns to the actors, the different patterns were not evenly distributed. The overwhelming reliance on offender classification – an adaptation mode mentioned by virtually all interviewees – could, perhaps, be explained by the fact that this was the only adaptation mode that allowed the actors to hold on to the two contradicting discourses. The small number of divergent patterns could be explained by the risk of stepping outside of the legal role and engaging in extra-legal activities on behalf of defendants and clients.\textsuperscript{146}

In addition, as the findings show, the patterns used by the interviewees to cope with the legal/social dissonance could, in some cases, be clearly be correlated with the interviewees' respective roles in the system and with their seniority.\textsuperscript{147} Loyalists were mostly young prosecutors, who were being trained for their role and may have internalized the system's norms to a greater extent than their more jaded colleagues. It is possible that, as caseloads add up and the actors get more exposure to the realities of the system, they lose a certain degree of adherence to the doctrinal framework.

\textsuperscript{145} This observation can be illustrated by the actors' responses to a question I asked all of them: “If you had unlimited resources, how would you solve the unauthorized absence problem?” As mentioned above, all actors acknowledged the socio-economic roots of the problem, and when offered the possibility to theorize without their day-to-day job-related constraints, even the most pessimistic cynics and the least self-aware bureaucrats elaborated on the need to improve social security, pay higher salaries to soldiers and perhaps move to a more selective draft method. In the context of unconstrained general policymaking, apparently, offering extra-legal solutions was the optimal coping method for all actors. In real life, where actors had to deal not only with their theoretical observations of the problem, but with the defendants, the other parties, the welfare authorities and their job descriptions, their strategies and perceptions were quite different.

\textsuperscript{146} More on this pattern below.

\textsuperscript{147} Qualitative research methods, while offering rich and deep understanding of the actors' modes, are less helpful in enabling us to draw statistical correlations due to the number of interviews, which is substantial for this research design but not large enough for sophisticated quantitative analysis.
Divergence perspectives, on the other hand, were expressed by people who were, to a certain degree, outsiders in the system (such as the reservist defense attorney), and by people who wielded a considerable amount of power (such as the judges) and could therefore afford more creativity in their role definition without suffering any consequences.

However, as other findings show, other modes of adaptation did not reflect clear distinctions based on role or seniority. Disgruntlement and cynicism, which, indeed, characterized a significant percentage among defense attorneys, were also exhibited by a considerable number of prosecutors. Another mechanism that was not entirely confirmed was the possible transition from bureaucracy and disgruntlement to cynicism. Exhibiting the latter pattern was, in some cases, a function of "veteran status", but in other cases it seemed to be simply a personality trait, rather than a feature acquired in time. This finding may be attributed to the fast burnout reported by relatively new defense attorneys and prosecutors who dealt almost exclusively with unauthorized absentees.

Returning to the theoretical framework, it is interesting to compare the modes of adaptation discovered in this study with the original Mertonian categories. Despite the fact that the two categorizations deal with adaptation to different dissonances, they seem to share some common understanding of human adjustment mechanisms. This becomes clearer if we compare Merton's "cultural goals" to those of the legal system, and his "institutional means" to the legal process. The most obvious resemblances are between the loyalists and Merton's conformists; both groups accept the goals and means of the system within which they operate. Additionally, the bureaucrats seem to

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148 It should be noted that three interviewees, defense attorneys who had previously served as prosecutors, did not believe that "changing sides" had added any knowledge or altered their perspectives about the problem.

149 MERTON, SOCIAL THEORY AND SOCIAL STRUCTURE, supra note 76; Merton, Social Structure and Anomie, supra note 77. Also see Fig. 1 above and text around note 79.
be the equivalent of Merton's ritualists, in their loss of faith in the system's lofty goals while still "going through the motions" of prosecution and case processing, and the divergent actors seem to substitute the legal system's goals and means with their own agendas and practices of social betterment, somewhat like Merton's rebels. Other comparisons are somewhat vaguer; while cynics seem to have some features of retreatism, in losing their interest in the legal process, they seem to harbor more of a critique than Merton's retreatists. The disgruntled, also, offer a rejection of the goal, but their deeper resentment of the legal framework cannot be neatly captured by their reluctance to "step outside the box". Merton's typology offers no counterpart to the offender classification technique, which seems to preserve the two discourses, but attach each of them to different offenders.

V. CONCLUSION: IMPLICATIONS FOR THEORY, POLICY, AND PRACTICE

There are several directions in which the ideas in this Article can be developed. Theoretically, the study offers ways in which Merton's strain theory can be applied to other areas of strain and conflict beyond crime and social status. In other words, it suggests that social agents search for "modes of adaptation" not only in situations when they experience strain between social goals and institutional means, but also between conflicting social, epistemological and professional discourses.

It should be mentioned that, by examining the actors' individual modes of adaptation, the Article does not mean to discount the broader cultural sources of these modes and of the particular cognitive dissonance discussed here, between the legal and the social; and, indeed, one of the great strength of Merton's theoretical work lies in its ability to
speak both of macro-level societal features and of individual responses to these features.\(^{150}\)

In addition, the paper suggests that the Mertonian grid for strain reconciliation techniques may not be complete.\(^{151}\) In particular, it demonstrates that one popular way of reconciling strain consists of classifying professional experiences as fitting two different models. It also offers some other modifications to Merton's categories.

The paper also strengthens Chemerinsky's argument\(^{152}\) about the usefulness of cognitive dissonance theory as a powerful explanatory mechanism for the behavior of legal actors. While Chemerinsky used this framework to provide a theoretical account of ethical dilemmas, this Article combines it with other powerful frameworks and expands its application to address discursive and epistemological dissonances faced by legal actors in their daily work. Indeed, this enterprise is much more controversial and problematic than the one addressed by Chemerinsky, who, as we have seen, used these psychological insights to reach the conclusion that "a lawyer should not argue positions which are at odds with views important to him or herself".\(^{153}\) While his position seems not only sensible, but also humane from the psychological perspective when ethical dilemmas are concerned, it will not resolve the dissonance felt by actors whose dilemma stems from the very rules of their discipline and profession. The reason is the discursive incongruence between the legal and social perceptions.

Policy-wise, this irreconcilable dissonance leaves lawyers to face serious challenges to their professional roles and sense of self-worth. It is difficult to suggest operative


\(^{151}\) Some Merton scholars have suggested other critiques of his work along these lines, albeit not in the context of an empirical study: Richard Featherstone & Mathieu Deflem, *Anomie and strain: Context and consequences of Merton's two theories*, 73 *Sociological Inquiry* 471 (2003); Marwah & Deflem, *supra* note 85.

\(^{152}\) Chemerinsky, *supra* note 73, 34.

\(^{153}\) Id.
solutions to this challenge. However, one constructive possibility might be to offer legal actors a dialectic approach. If every legal institution would explicitly acknowledge the extra-legal dimensions of the problem, the actors would at least feel more comfortable knowing that the conflicts they experience are natural when systems collide. There would, perhaps, be lesser disappointment and more understanding that the prescribed legal solution does not always address the problems which legal doctrine cannot, by nature, acknowledge. Some of these alleviating effects could be achieved through the increasing inclusion of socio-legal perspectives in the law school curriculum, and some by encouraging open discussion of these perspectives, and the discomforts they entail, in legal practice.

A final policy-related insight pertains to the emergence of problem-solving courts over the last decade.154 These interdisciplinary institutions, which bring together professionals from a variety of fields and perspectives, might be sites in which the dissonance between the legal and the social is felt less acutely by the legal actors. It is worthwhile to examine the extent to which the experiences described in this study are shared by actors whose role definition is more flexible and allows more incorporation of broader solutions and divergent perspectives.