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Kathryne M. Young

Hannah Chimowitz

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## Remorse, Relational Legal Consciousness, and the Reproduction of Carceral Logic

Kathryne M. Young and Hannah Chimowitz

*One in seven U.S. inmates is serving a life sentence, and most of these inmates will be eligible for discretionary parole. But little is known about a key aspect of parole decision-making: remorse assessments. Because remorse is a complex emotion that arises from past wrongdoing and unfolds over time, assessing the sincerity of another person's remorse is neither a simple task of lie detection, nor of determining emotional authenticity. Instead, remorse involves numerous elements, including the relationship between a person's past and present motivations, beliefs, and affective states. To understand how parole board members make sense of remorse, we draw on in-depth interviews with parole commissioners in California, the state with the largest proportion of parole-eligible lifers. We find that commissioners' remorse assessments hinge on their perceptions of inmates' relationships to law and carceral logic. In this way, relational legal consciousness—specifically second-order legal consciousness—functions as a stand-in for the impossible task of knowing another person's heart or mind. We argue that examining how second-order legal consciousness operates at parole hearings reveals the larger import of relational legal consciousness as a mechanism via which existing power relations are produced and reproduced, bridging the legal consciousness and law and emotion literatures.*

Suppose a 27-year-old man got drunk, stole a car, and ran over a pedestrian, killing her and her child. He was sentenced to 15 years to life in prison. Now in his early 40s, he attends his first parole hearing, and you and a colleague must determine whether he suitable for release. A crucial component of this decision involves deciding whether he is genuinely remorseful. A range of factors might influence your determination: his demeanor, the frequency and nature of his communications with the victims' family, what he says at the hearing, letters from people who know him, actions he has taken in prison, and more. But no matter how much information you take in, or how carefully you watch him, your task is literally impossible: you cannot read another person's heart and mind. Your assessment will be, at best, an educated guess.

In California, parole board members who sit on hearings for “lifers”—inmates<sup>1</sup> sentenced to life with the possibility of parole—make such determinations up to 12 times each work week. Although quantitative evaluations can tell us which factors correlate with parole release (e.g., Huebner and Bynum 2008; Matejkowski et al. 2011) and observations or transcript analyses can tell us about the social dynamics of parole hearing (e.g., Paratore 2016; Shamma 2019; Aviram 2020), how parole board members assess remorse remains largely unknown. Parole board members are notoriously difficult to access, and only a handful of scholars have examined parole decision-making from their perspective (Reamer 2017; Ruhland 2020).

Remorse is implicated in numerous stages of criminal justice processing, including guilt determinations, sentencing, probation officer decision-making, and parole hearings (Ward 2006; Bandes 2014; Bandes 2016; Bronnimann 2020; Gold and Weiner 2000; Jehle et al. 2009; Zhong 2015; Weisman 2016). Yet little agreement exists across disciplinary contexts, methodologies, scholars, or legal regimes about precisely what remorse *is* and how people assess it. While studies indicate that perceptions of remorse influence legal judgments, leading to more positive character assessments of offenders, more lenient sentences, and lower predicted risks of recidivism (Gold and Weiner 2000; Jacobson and Berger 1974; Pipes and Alessi 1999; Proeve and Howells 2006; Robinson et al. 1994; Rumsey 1976; Tsoudis and Smith-Lovin 1998), much of this research relies on assumptions that certain factors, then experimentally manipulated, in fact telegraph remorse. Few scholars have tried to understand what remorse means from the perspective of those who are supposed to evaluate other people’s remorsefulness (see Paratore 2016: 121–22; Shamma 2019).

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<sup>1</sup> We use the word “inmate” to refer to people who are incarcerated. “Inmate” is intended as a shorthand descriptor for the broad group of people living in prison, not as a reductive label. We also use the term “lifers,” as it is common in the literature and widely used by our informants and by people who are incarcerated in the prisons we visited.

This article considers remorse as a sociolegal puzzle. Parole board members cannot read inmates' minds, so what do they do instead? We investigate decision-makers' perceptions of remorse in the context of lifer parole hearings.

## **LIFERS AND REMORSE IN CALIFORNIA**

One out of every seven U.S. inmates is serving a life sentence (Nellis 2017), and three-quarters of these inmates will eventually be eligible for parole. Lifer parole decisions affect tens of thousands of inmates each year, with reverberations for their families, their victims' families, and their home communities. A third of all U.S. lifers are housed in California, where they become eligible for a parole hearing one year before their minimum eligible release date.<sup>2</sup> The state penal code says parole shall "normally" be granted at an inmate's first hearing (§ 3041.2), although the majority of hearings result in denials (Weisberg et al. 2011). If parole is not granted, the parole board sets a period of 3, 5, 7, 10, or 15 years until an inmate's next hearing.

The California Code of Regulations (CCR) lists nine criteria indicating suitability for release. Of these, "signs of remorse" is arguably the most subjective. The CCR defines remorse as an inmate having "performed acts which tend to indicate the presence of remorse, such as attempting to repair the damage, seeking help for or relieving suffering of the victim, or the prisoner has given indications that he understands the nature and magnitude of the offense" (15 CCR § 2281). The description is notably vague: Performed acts when? According to whom? How should the parole board assess the purity of the inmates' intentions? What "indications" signify understanding?

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<sup>2</sup> Minimum eligible release dates are calculated based on the minimum term of the sentence, pre-sentence credits, and in-prison credits (Mackay 2019).

Between 2002 and 2011, three California Supreme Court cases—*In re Rosenkrantz*, *In re Lawrence*, and *In re Shaputis*—collectively heightened the importance of remorse and insight in lifer parole decisions. *Rosenkrantz* held that the Board’s decisions and Governor’s review were subject to judicial oversight. The Court applied the “some evidence” standard, resulting in a limited review process: “the court may inquire only whether some evidence in the record . . . supports the decision to deny parole, based on factors specified by statute and regulation” (29 Cal 4th 616, 2002; see also Hempel 20110). Denials wholly reliant on the circumstances of the commitment offense were violations of due process. *Rosenkrantz* became more important to remorse determinations when the California Supreme Court found an unconstitutional violation of due process in Governor Schwarzenegger’s denial of parole to Sandra Davis Lawrence, who was serving an indeterminate life sentence (44 Cal. 4th 1181, 190).

*Lawrence* held that denials by the Board or Governor were unconstitutional if based solely on the egregiousness of an inmate’s commitment offense: a crime cannot “have independent weight as an unsuitability factor without an articulated nexus” between the original offense and the inmate’s current dangerousness. The emphasis on current dangerousness refocused suitability determinations to rehabilitative, rather than retributive, concerns. Still, the Court wrote, the commitment offense may serve as grounds for establishing the requisite nexus if no rehabilitative efforts have been made, or if the inmate “has shown a lack of insight or remorse” (190 P.3d 535 [Cal. 2008], emphasis added). In so holding, the California Supreme Court made remorse a cornerstone of lifer hearings and rendered assessing remorse a more crucial task for the parole board.

In *Shaputis*, the Court recognized the subjectivity inherent in decision-makers’ interpretations of insight, which the court described in the same breath as remorse:

*We note that expressions of insight and remorse will vary from prisoner to prisoner and that there is no special formula for a prisoner to articulate in order to communicate that he or she has gained insight into, and formed a commitment to ending, a previous pattern of violent behavior. (44 Cal.4th 1260).*

By 2011, the Board and Governor's increased reliance on "lack of insight" as grounds for denial was staggering. Before *Shaputis*, the Governor cited "lack of insight" in 12 percent of his decisions to reverse parole grants; the following year, this jumped to 78 percent. Lack of insight was cited in twice as many appellate opinions that year as it was throughout the 31 years prior to *Shaputis* (Wattley 2013; see also Paratore 2016).

In response to concerns that assessments of insight are subjective, and the fact that "insight" was not explicitly listed as a suitability factor, the court held that insight was already within the purview of the CCR, which "direct[ed] the Board to consider the inmate's 'past and present attitude toward the crime' (Regs., § 2402, subd. (b)) and "'the presence of remorse,' expressly including indications that the inmate 'understands the nature and magnitude of the offense'" (Regs., § 2402, subd. (d)(3)). Here, the court tethered insight to remorse and confirmed its comfort with the centrality of remorse in lifer hearings. Moreover, the court underscored its trust in commissioners' judgment by acknowledging that there was "no special formula" for determining remorse. Since *Lawrence* and *Shaputis*, remorse has continued to play an instrumental role in lifer hearings, and members of the parole board have largely been left to their own devices to decide whether inmates' words and actions constitute remorse.<sup>3</sup> In the section that follows, we consider the definitional imprecision that characterizes remorse, and the approaches used to study remorse perception and related phenomena.

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<sup>3</sup> "Insight" and "remorse" are usually discussed in the same breath by parole commissioners, and some legal scholars have concluded that they are too closely connected to separate (Paratore 2016). While we do not treat them as perfect equivalents here, we focus on remorse and do not attempt to disentangle insight as a separate concept.

## DEFINING REMORSE

Remorse, along with shame and guilt, is considered a retractive emotion involving withdrawal from one's action, omission, or state of being (Proeve and Tudor 2010). The distinctions between shame and guilt are well-established (Barrett 1995; Tangney 1999; Baumeister et al. 1994), but the unique features of remorse remain unclear. Remorse has been described as moral or emotional distress stemming from a wrongdoing for which one takes responsibility (Rumsey 1976; Proeve and Tudor 2010), and tends to be characterized by internal suffering, the desire to atone and be forgiven, and action-taking towards these goals (Weisman 2009; Proeve and Tudor 2010). Rather than a discrete emotion, remorse signifies a dynamic internal state, unfolding over time (Bandes 2014). Within the legal system, remorse has come to stand for a constellation of emotions and behaviors that serve as a proxy for moral character and future dangerousness (Gold and Weiner 2000; Zhong 2015; Bandes 2016).

Within legal institutions, emotions are restricted, encouraged, and ritualized in conflicting ways. Remorse is unusual in that it is characteristically welcomed and rewarded within the criminal legal system (Sarat 1999). One explanation for the criminal legal system's penchant for remorse is that, as Sarat poses, "remorse, unlike some emotions, does not challenge reason but seems instead to be a reasonable/rational response to transgression" (1999: 169). Proeve and Tudor summarize the cognitive content of remorse to be "I have wronged another person" (2010: 37), such that remorse necessitates recognition of: voluntary wrongdoing; oneself as wrongdoer; and the person one has harmed. These cognitions imply that a remorseful individual has internalized responsibility for harmdoing to an identified victim. The direct interpersonal relationship between transgression and victimhood reflects a view of harm and blame Carter calls 'bilateral individualism', which "emphasizes the notion of individual responsibility based

on the bilateral relationship—what one individual does to another” (1998: 422). In this sense, the cognitive basis of remorse aligns with straightforward notions of crime, blame, and punishment. Such cognitions are thought to prompt desires to rectify wrongdoing through “expression of remorse, reparation, expiation, healing, or forgiveness” (Proeve and Tudor 2010: 44). These behavioral indicia are reflected in the CCR’s explication of remorse.

The legal significance of remorse rests on two assumptions. The first assumption is that remorse inhibits future criminal behavior—a proposition that has rarely been tested. The closest research examines guilt and shame, finding that guilt is associated with lower levels of recidivism, and shame either with higher levels (Hosser et al. 2008) or no relationship (Tangney et al. 2014; 2011). The second assumption, more pertinent here, is that people can recognize remorse when they see it. The assumption of recognizability lacks empirical support, and there is reason to doubt that people share a common understanding of how a remorseful person appears and behaves (Zhong et al. 2014). Authenticity is particularly difficult to discern. As Weisman has described, the demand for genuineness is one of the central paradoxes of factoring remorse into punishment decisions; the expresser has every incentive to appear remorseful, which automatically calls the sincerity of remorse into question (2009: 53; see also Bandes 2013).

The limitations of the psychological literature on remorse detection may owe to the complexity of remorse itself. It falls squarely into neither the lie detection literature, nor the literature on identifying emotional expressions, although both are relevant. The lie detection literature focuses on testing the speech patterns, facial expressions, and body language present when people lie versus tell the truth. For example, deception may be associated with fewer illustrative gestures, increased self-manipulations (i.e., touching one’s face or body), slower speech rates, decreased detail, and repeated words and phrases (DePaulo et al. 2003; Porter et al.



2008; Vrij 2008). However, these studies typically yield small effect sizes, and meta-analyses demonstrate no clear evidence of cues consistently related to deceit (Masip et al. 2005; Sporer and Schwandt 2006; Vrij 2005). Moreover, inauthentic remorse is different from deceit. Although some statements related to remorse could be true or untrue (e.g., "I think every day about the pain I have caused"), detecting inauthentic remorse is more complex than catching someone in a lie because remorse itself is so complex. It encapsulates acceptance of personal responsibility, emotional displays that express internal distress, and a relationship between past and present affective states.

The emotion detection literature on remorse is also limited in its ability to explain how legal decision-makers think about remorse. Remorseful facial expressions have been described as sharing characteristics with other expressions of unhappiness, including sadness, shame, and guilt (Ekman 1993), and facial expressions akin to sadness are perceived as expressing remorse (Funk et al. 2017). However, emotion perception is highly contingent on social context, including situation-specific norms, characteristics of the expresser, and the perceiver's emotional state and motivations (Thibault et al. 2006; Ickes and Simpson 2004; Masuda et al. 2004). Moreover, judges evaluating remorse report interpreting the same behavioral cues (e.g., eye contact, slouched posture) in contradictory ways (Zhong et al. 2014). Amid ongoing debates as to whether *any* emotion can be consistently identified by external markers across cultures and contexts (see, e.g., Ekman 1992), the emotion detection literature provides little guidance on how decision-makers try to detect falsified remorse displays.

Certainly, legal decision-makers attend to facial expressions, body language, tone of voice, and speech content. However, neither the lie detection nor the emotion detection literature investigates how decision-makers assess remorse in a more holistic sense. Expressing remorse

goes beyond merely confessing to an event stored in one's memory and cannot be reduced to a verbal apology or a fleeting feeling of sadness. Moreover, as discussed above, experimental investigations focused on remorse assume that certain indicators embody remorse, then test whether these conditions affect outcomes. But the conscious processes through which decision-makers interpret remorse assessments remains largely unknown. To broaden our inquiry of remorse to include legal decision-makers' understandings, we turn to the literature on legal consciousness, a sociolegal literature concerned specifically with how people think about various aspects of the law.

## LEGAL CONSCIOUSNESS AND EMOTION

Silbey defines legal consciousness as "the way in which law is experienced and interpreted by specific individuals as they engage, avoid, or resist the law or legal meanings" (Silbey, 2001: 8626; see also Nielsen 2000). As a conceptual lens, legal consciousness can elucidate the ways state authority is maintained (Silbey 2005)—identifying the "pixels of perception" (Silbey 2005: 358) that comprise legal hegemony. Legal consciousness is not a staid cognitive state, but a set of social processes that comprise a person's attitudes, perceptions, feelings, and beliefs about law, legal actors, and legal structures.

Sociolegal scholars have long acknowledged that legal consciousness cannot exist in a vacuum. The production and reproduction of legal consciousness necessarily involves relationality, because a person's legal consciousness will be influenced by what the person thinks *other* people think and feel about the law: what others believe, heed, and know. Indeed, as Chua and Engel write, "In a sense... all legal consciousness research is and always has been relational" (2019: 344).

As a theoretical construct, however, relational legal consciousness is not yet well-developed. Legal consciousness scholarship has always touched implicitly on relationality, but was first made explicit in Young's examination of Hawaiian cockfighting, where she used the terms "second-order legal consciousness" and "relational legal consciousness" to describe the ways that a person's legal consciousness is shaped by their perceptions of others, but did not distinguish between "relational" and "second-order" legal consciousness (2014). Since then, scholars who have written explicitly about legal consciousness and relationality have oscillated between the terms "second-order" (e.g., Headworth 2020) and "relational" legal consciousness (e.g., Abrego 2019; Chua and Engel 2019; Wang 2019). Whether the two concepts are discrete has been unclear.

To build a more comprehensive understanding of the perceptual and interpersonal processes that influence legal consciousness, it is first useful to disaggregate the two directions in which scholars have taken the terms "relational" and "second-order" legal consciousness since 2014. We can think about *relational legal consciousness* as an umbrella term referring to any way Person A's legal consciousness is shaped by his relationships to another person or group. This might include group membership, family dynamics, culturally constructed beliefs, and so on. In contrast, *second-order legal consciousness* can be understood as a more specific term that refers to how Person A's legal consciousness is shaped by his perceptions of Person B's or Group B's legal consciousness—not simply by his relationships to a person or group generally. In other words, second-order legal consciousness refers to Person A's beliefs or impressions about the beliefs, attitudes, impressions, and inclinations of Person B (or any group) *with regard to law*. To illustrate this distinction, consider a friendship between Amir and Barbara. If Amir's relationship with Barbara makes Amir more likely to jaywalk because he believes thinks Barbara

thinks jaywalking laws are silly, this would be an example of both second-order legal consciousness (specifically) and relational legal consciousness (more generally). On the other, if Amir's friendship with Barbara makes Amir more likely to jaywalk because Amir is happy and this affective state leads him to jaywalk, this would only be an example of relational legal consciousness. Understood this way, both "second-order legal consciousness" and "relational legal consciousness" are useful as discrete terms. The former is a subset of the latter.

Legal consciousness is continuous and iterative, produced and reproduced via interdependent social processes. In this way, its function in perceptions and decision-making bears similarity to the function of emotion itself. Bandes and Blumenthal describe emotion's role in decision-making (2012: 163–4):

*Emotions are a set of evaluative and motivational processes... that assist us in appraising and reacting to stimuli and that are formed, interpreted, and communicated in social and cultural context. They influence the way we screen, categorize, and interpret information; influence our evaluations of the intentions or credibility of others; and help us decide what is important or valuable.*

If this excerpt substituted "emotions" with "legal consciousness," it would be just as accurate. Legal consciousness is narrower since it comprises appraisals, reactions, interpretations, and evaluations *with regard to law*. But its function as a set of inherently relational processes is strikingly similar.

Wang's 2019 case study of a Taiwanese family offers one example of how scholars investigating relational legal consciousness might think about the role of emotion. Detailing how family members' emotional relationships and cultural commitments shaped their legal consciousness around issues of elder care and inheritance, Wang argues that a greater focus on emotionality is key to understanding legal consciousness: "The case study of the Lee family conflict... demonstrates that legal consciousness is dependent on emotions that are deeply

connected to one's perception of the self-other relationship, the level of affinity shared with others, and the life objectives of all those involved" (Wang 2019: 784). While Wang's construction of relationality is somewhat general—to employ the distinction above, the legal consciousness Wang depicts is relational, not second-order—it illustrates the capacity of law and emotion scholarship as a conceptual lever for thinking in new ways about the co-constitutive nature of legal consciousness.

Previous work on relational and second-order legal consciousness has focused on a variety of settings. Young (2014) and Headworth (2020) each examined opposite sides of the enforcement coin, looking at how the legal consciousness of enforcer/subject is influenced by each group's beliefs about the other group's legal consciousness. Abrego (2019) and Wang (2019) show the manifold relational ways legal consciousness (specifically, understandings of citizenship in Abrego's analysis; disputes over eldercare and inheritance in Wang's) are produced and shaped within families. All of these scholars, as well as Chua and Engel, have called for additional work focusing more systematically on legal consciousness's relational aspects. Silbey, too, has argued for greater focus on relationality to develop a comprehensive social scientific understanding of law. She writes, "We need to get beyond conceptions of compartmentalized social action by depicting the relational interdependence that may be elided in efforts to produce reliable and valid depictions of 'social facts as things'" (2019: 16).

Our investigation of parole hearings bridges the relational legal consciousness literature with the literature on law and emotion, putting them into conversation to investigate what parole board members believe they are doing when they assess remorse. How do they understand the mandate to assess another person's affective state? Like Headworth, we are particularly interested in how the second-order legal consciousness of legally empowered actors may

“provide insights into how people with legal power believe people subject to their authority understand the law” (2020: 328). In a sense, parole commissioners’ legal gatekeeping function *per se* implicates second-order legal consciousness. After all, they are tasked with determining whether an inmate possesses remorse and insight, complex affective states endowed with legal meaning. The process through which they translate these abstract concepts into legal determinations is the central puzzle this article seeks to solve.

## DATA AND METHODOLOGY

As Gomez has argued, qualitative methods are well-suited for “illuminat[ing] the process of meaning making” to understand legal consciousness (2016: 1075). We draw primarily on 25 in-depth interviews with parole commissioners, who fall into two categories: Deputy Commissioners and Commissioners. Deputy Commissioners are civil servants hired by the Department of Corrections and Rehabilitation, and usually have experience in corrections, enforcement, or criminal legal practice.<sup>4</sup> Commissioners, appointed by the Governor, are subject to confirmation from the Senate Rules Committee and serve renewable three-year terms. We refer to Deputy Commissioners and Commissioners collectively as “commissioners.” Nearly all California lifer hearings are conducted by one Deputy Commissioner and one Commissioner.

Our semi-structured interviews took place with the permission and support of the California Board of Parole Hearings (BPH), and focused on commissioners’ conduct of lifer parole hearings, their preparation for hearings, and the decision-making process. Sixteen interviews were conducted by the first author, and the remaining nine were conducted by a

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<sup>4</sup> A few years after these data were collected, the CDCR put a new requirement into place that Deputy Commissioners must hold law degrees, and are now technically designated as Administrative Law Judges. Governor appointees are not required to hold law degrees.

trained research assistant. We interviewed 10 Commissioners and 15 Deputy Commissioners, which in total comprised a third of the state's parole commissioners.

A great deal of flexibility was built into the interview structure to follow commissioners' lines of thought. Most interviews were one to two and a half hours in length. For commissioners' convenience, nearly all of the interviews were conducted near a prison where a commissioner was conducting his or her week's hearings. Before or after commissioners' work days, we met them at coffee shops or diners. Interviews were audio recorded and transcribed into approximately 350 single-spaced pages. All commissioners were promised confidentiality; we use pseudonyms herein.

Several other sources of data informed and contextualized our interviews and analyses, including attendance at lifer parole hearings, in-person visits to support groups for lifer inmates, review of commissioner training materials, visits to BPH headquarters in Sacramento, attendance at trainings for attorneys representing lifer inmates at hearings, informal interviews with six of these attorneys, informal conversations with numerous BPH and California Department of Corrections and Rehabilitation (CDCR) employees, and reviews of newsletters and support group materials for lifers' family members.

We used open coding to identify topics related to any and all aspects of parole hearings. The purpose of using an open-coding process, as opposed to determining codes ahead of time, was to allow prominent codes to arise from the data. Examples include: commitment offense, VNOKs (victims' next of kin), demeanor, remorse, governor review, BPH politics, psych evals, prison discipline, commissioner preparation, and dozens more. Next, we grouped codes thematically into code families such as "assessing rehabilitation and dangerousness" and "nature

of the job." Commissioners' discussion of remorse and insight emerged as a prevalent theme and comprised 70 single-spaced pages of field notes and interview transcripts.

Within the "remorse and insight" code family, we conducted a new round of open coding. We did so to develop a more granular understanding of the patterns and themes that emerged *within* commissioners' discussions of remorse and insight. This phase of coding was conducted separately by each author for the entirety of the data from this code family. We then discussed the thematic trends we found, reaching full intercoder agreement (Campbell et al. 2013) over several weeks of in-depth discussion.

## RESULTS

Four themes emerged in commissioners' descriptions of remorse and their explanations of how they determined whether an inmate was remorseful. As they understood it, a remorseful inmate: (1) attested implicitly and/or explicitly to the truth finding function of the criminal justice system; (2) viewed the cause of their commitment offense as a deficit within themselves; (3) described the state as playing a key role in their transformation into a "new" person; and (4) demonstrated that they had internalized the moral logic of the carceral apparatus. We discuss each finding in turn.

### *Attestation to the Criminal Justice System as Truth-Finder*

Inmates are not required to discuss their life crimes, and we might imagine several reasons they would refuse, including discomfort, shame, innocence, lack of memory, or following the advice of an attorney. While commissioners acknowledged these possibilities, many explained that refusing to discuss the commitment offense was still harmful to an inmate's



chance of parole. As DC Patricia Berry put it, "The crime is *always* going to make a difference." DC Gibson explained that without hearing an inmate discuss his crime, it was difficult to render a decision, because the omission stymied commissioners' capacity to assess remorse. Other commissioners made similar statements. Commissioner David Boseman said, "A lot of times they say, I'm not going to talk.... [And] it does affect [my] decision." We asked how he assessed remorse in those cases, and he nodded and said, "*That's* the issue." Indeed, DC Denise Rivera said that her "number one" piece of advice for prospective parolees would be to "answer any questions, even if it relates to the commitment offense. Because sometimes it makes a clearer path to defining or to realizing remorse."

In addition to whether an inmate discusses the commitment offense, *how* he talks about it influences commissioners' remorse assessment. First, the inmate must corroborate the version of the case presented at trial. Contradicting a prosecutor, police report, or another official state source is problematic. For example, Commissioner dePaola described an inmate who recounted firing one gunshot, whereas the autopsy report documented two bullets. This meant that the inmate "couldn't wrap his head around the fact that he had shot the victim twice in the head."

An inmate's contradiction of his own, previous statements gives commissioners pause as well. "I usually dig into prior transcripts to see if we've got inconsistencies, to see if the inmate is lacking insight," said DC Dennis Douglas. DC Ronnie Gibson did the same: "If you [the inmate] give us a version and change that version down the road, you'll find yourself in trouble because we're looking to see whether you understand your crime and accept responsibility for it." In these examples, commissioners make sense of changes in inmates' stories not as evidence that memory is fallible, but as evidence that an inmate lacks remorse.

Commissioners also preferred detailed crime descriptions. They interpreted conclusory

statements about remorse, absent details, as a sign that the inmate had not “internalized” that he committed the offense, and thus cannot be truly remorseful.<sup>5</sup> For many commissioners, remorse entails accepting not just responsibility for the crime, but for its grisly constituent parts—again, attesting to those parts as told in the state’s accounts. DC Denise Rivera recounted a hearing for an inmate whose in-prison record was excellent, but who would only discuss the commitment offense in vague, conclusory terms:

*He had done everything imaginable in custody. I think he came in with a binder this thick of all of his accomplishments. Including, I think, a four-year degree. He had lots of support letters, three or four employment offers, just a marvelous plan for parole. He would seem like the ideal candidate. And when you asked him about this or that, part of the commitment offense included burying this... person alive. It was very very bad. And we kept asking him, without going into specifics, how did you react when the victim was screaming... And the only thing he kept saying over and over again was ‘I just made a bad judgment.’ Well, you know what? A lot of people make a bad judgment. ...[P]erhaps they’ll get into a car and drive drunk. That’s a bad judgment. But doing what he did goes a little further than a ‘bad judgment.’*

Despite being suitable for parole in every other way, the inmate’s refusal to delve into details convinced commissioners he was not reflective, and they deemed him unsuitable for release. Although she didn’t expect to “retry the case,” DC Rivera said, equating an extreme moral wrong with bad judgment meant the inmate had not internalized his crime and could not be remorseful. She emphasized that she did not deny parole for his refusal to talk about the crime, but for the disconnection between the crime and the *way* he talked about it. As DC Lyon told us, “Our job is to assess dangerousness, so if they don’t want to discuss the nature of the crime, and what was really going on, and how they felt about it, how they feel about it now, and how they would prevent it from happening again, then we’re missing a piece of the pie.”

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<sup>5</sup> Like remorse and insight, remorse and internalization go hand in hand, and commissioners generally spoke of them together. For example, DC Douglas said, “I have inmates who will say... ‘I take responsibility for all of *that* that you just read. [But] there’s not—they haven’t internalized it. They’re [not] remorseful.”

The supremacy of the criminal justice system's official account is underscored by the presence of a prosecutor from the county where the crime was committed. Not all commissioners supported prosecutors' presence at hearings, but those who did appreciated having an "expert" on the crime<sup>6</sup> who could hold inmates accountable to the state's version of the facts. DC Marion Lyon said:

*[W]e're really happy to hear [from the prosecutor], like, 'That's not what he said in court, and I'll just read that you said right here. Would you please ask the prisoner if this is really what he said at that time versus what he said today?' And all of a sudden we think, 'Wait a minute.' That [conflict] weighs heavily on if we think that the inmate is lying to us whether or not he has really come to terms with the crime.*

Commissioners also reported paying special attention to inmates' discussion of the direct personal harm they caused the victim or VNOKs. The kind of empathy commissioners associated with remorse was specific rather than general, and the harm was to an individual person rather than the violation of a social contract. No commissioners mentioned hoping inmates would acknowledge the financial toll of their incarceration on the state, or a community's deprivation of a store clerk or a teacher. Rather, remorse meant understanding harm in direct interpersonal terms. Several commissioners cited an inmate's not knowing a victim's name as evidence of unremorsefulness. DC Gibson explained: "[I ask,] Do you know anything about the clerk [you shot]? What's the clerk's name? You went to trial for however long, and this person was supposed to have impacted your life. You're supposed to have an understanding, and you don't even know their name."

Commissioners also expected inmates to talk about victims in respectful, uncomplicated terms. Saying anything disparaging about a victim could count heavily against an inmate. For

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<sup>6</sup> Prosecutors are invited to offer an opinion about the inmate's suitability for release. They almost never endorse release, and only occasionally offer no opposition. Research suggests that commissioners find these recommendations persuasive (Young et al., 2016), although they claim not to (Young 2016). Aviram details how recommendations may be swayed by political considerations (2020).

example, DC Seaver said, some inmates say things like, "Oh, everyone's saying the victim was perfect, but really she was a drug dealer." He viewed this as a lack of insight; by criticizing a victim, an inmate was minimizing the crime's impact, which suggested that he lacked remorse. Other minimizing behaviors that indicated remorselessness included inmates' explanations of why they committed the crime, or why they committed it in a particular way. DC Lyon explained her reaction to these kinds of "self-justifications":

*[I]t's like, why did you dispose of the body that way instead of that way? They will say, I really didn't want to watch him suffer anymore, so I shot him in the head. In their own criminal mind, they're actually doing the victim a favor. So as they talk about the crime, you begin to get a sense of how they're thinking, how they are justifying what they did in their mind and how they might then justify another bad act in the community... the spirit must be able to come to terms with what it does. And they do that by lying to themselves, denying, and justifying. I did my best under the circumstances, or I had to do it.... Why didn't you just walk away? Why didn't you just leave the house? Well, because she was manipulating me. She was lying to me. I know she was sleeping with my cousin. See? So he's justifying.*

Blaming others is tantamount to failure to accept the crime's "true" cause—which, as we will detail, is a flaw in the inmate himself. Most commissioners explained that pointing to someone else as even a partial cause meant a dearth of remorse. Their examples included: "The court screwed me" (Deputy Commissioner Ethel Teng-hui); "I [only] took a gun for protection, or I *had* to shoot him, or I wish the victim would have acted differently" (DC Do); "This lady was this, this lady was that, this guy was gay, this guy was this... [an inmate who says things like that is] going to be in prison for probably the rest of his life" (DC McNally). Whether technically accurate or not, commissioners interpret these statements as self-justification—and self-justification is incompatible with remorse. Again, we see that commissioners prefer discussing crimes in black-and-white terms—terms akin to the criminal justice system's verdict—not in terms that bespeak a more textured story.

Commissioners were also attentive to inmates' demeanor toward victims and VNOKs. In California, victims and VNOKs are permitted to speak at lifer hearings with virtually no restrictions (Appleby 2013). DC Douglas said, "I kind of watch their facial features. How they—how their demeanor is, how they handle themselves." Disrespect or insensitivity toward the victim undercuts remorse. DC Merry described her dismay at an inmate's reaction to the determination that he was suitable for parole: "[H]is demeanor while we read [the decision] made me feel like we made a mistake. High fiving his attorney when the VNOK was right there! That, to me, showed he wasn't remorseful. If I could've changed my mind at that point I would have." For DC Merry, expressing joy about a parole grant in front of a victim's family member disrespected the victim, and convinced DC Merry she had made the wrong decision.

Inmates were also viewed unfavorably if they pointed out that they, themselves, were affected by the crime. "What I like to hear is, 'It affected the victim, the victim's family, my family,'" DC William Do said. "What you *don't* want to hear is, 'I was affected by it.'" An inmate who says he should not have committed the crime because prison is terrible, or because it took him away from his family, conforms inadequately to commissioners' understanding of remorsefulness. DC Seaver explained, "One way to get at remorse is to ask, 'Who's the victim?' A lot of them will name themselves [along with the victim and VNOKs]..." Inmates who included themselves on the victim list, he said, were not ready for release.

### ***Individual Deficits as Causes of Crime***

As commissioners understand it, a large part of an inmate's rehabilitative task involves understanding why he committed the crime and remedying this cause. Without understanding this, remorse is unattainable. But there is an important caveat: the stated causes need to be

individual, not systemic. Inmates are not rewarded for suggesting that crime is rooted in social or structural causes, but rather for explaining it as the product of individual deficits—deficits that were, and continue to be, within the inmate’s control. The inmate might discuss his alcoholism or anger management problem, then explain how it has been remedied—as DC Neal put it, “changing yourself so it never happens again.” Commissioner Merrick Horn explained this process in more detail:

*[I ask,] have they changed whatever behavior appears to have led them on the path that brought them to commit the crime, and what that might be—have they addressed their substance abuse, have they addressed their gang violence, have they addressed their mental illness with treatment. If those were present... have they addressed those. That can be an expression of remorse because it may reflect that the inmate has developed some insight into what caused them to malfunction and if they’ve decided that I don’t want to malfunction like this anymore, I’m going to have to change and if they make that conscious decision to change, it suggests, perhaps, that they recognize that what they did before was destructive and harmed people and that they no longer wish to do that.*

Commissioner Kramer echoed this: “What I want to know is, what was *in them* that allowed that to happen? Number one is, have they addressed that?” Addressing a “malfunction”—something “in them” that caused the crime—is an essential part of articulating remorse. Note, too, that an inmate need not just recognize a deficit, but perceive himself as having agency over it. This distinction was illustrated by commissioners who explained that some inmates discussed disabilities or maltreatment as a source of their problems and framed these characteristics or experiences as beyond their control. For example, DC Gibson explained of an inmate who was denied parole:

*He claims to have a learning disability, and he can’t learn to read. So he’s not been able to get a vocation either. And he told me right to my face, you have to let me go because I have a disability. ...[But] I don’t care if you have a disability. I really, really don’t. Because you make no effort to do anything else around it. I mean, with a disability, there are things you can do instead of sit around here and bitch about having a disability. And frankly, they always do that. You know, ‘I’ve got a disability, I’ve got anger issues.’ Well, my job is primarily public safety. And if you are an unreasonable risk to society, you’re not going anywhere. And so, disability or not, I don’t play by excuses.*

Here, "playing by excuses" means seeing one's self as non-agentic. While commissioners look favorably upon inmates who recognize problems and work on them, they have little patience for those who think of problems as permanent obstacles. "I tell them, *you* got yourself into this mess; *you* need to get yourself out," Commissioner Kramer said.

Commissioners often talk about the idea of releasing a "different person" from the one who entered prison. Transformation and remorse are closely connected. Deputy Commissioner Alexander Babcock said:

*[When] that person, the life prisoner, is being interviewed or examined and he and his attorney and the board can say this is what he has been doing, he's not the same person that had no job skills and hadn't finished high school and had a substance abuse problem. And you look at this person today, there's apples and oranges. That's how you show remorse.*

The next section will detail these narratives of transformation. For now, it is worth noting that successful narratives describe a process of change over years or decades, as opposed to a single epiphany. Several commissioners mentioned distrusting epiphanies as evidence that an inmate had changed. As DC Vivian said, "Some prisoners... they've got religion. I mean, 'I found religion while I was in prison, you should give me a parole date because I found religion, I found the Lord.' Well, you know, sometimes the Lord stays at the gate when they walk out and they leave him behind." There could be "value to an epiphany," Commissioner dePaola said, but only when it was part of a longer narrative that explained how the inmate had become a different person from the one who committed the crime. Similarly, DC Babcock said:

*I've had a couple of guys tell me that they're Buddhists... Well, if you think about that, somebody who's a Buddhist at age 46 or 50 years old, that wasn't a Buddhist when he committed the crime. He sure didn't have any reverence for life at that point. So, how do you—how does that happen? That's the question I'm going to be asking [the inmate]... Tell me how you went from having no reverence for life to complete reverence for life.*

In DC Babcock’s formulation, the inmate is not an essentially good person who acted in a moment of weakness or anger, but rather someone who, when he committed the crime, possessed “no reverence for life.” By the time of the hearing, as DC Babcock understood it, the inmate was not simply a person who could control violent impulses, but a person who possessed “complete reverence for life.” In this narrative, the inmate is transformed—the core internal deficits that caused the crime have been fixed.

### ***Personal Transformation Via the Carceral Apparatus***

While inmates are rewarded for framing the source of the crime as a personal deficit or malfunction, they are rewarded for crediting the carceral state with their redemption. All inmates are expected to avail themselves of in-prison programs (usually referred to as “programming”) and be transformed through them. DC Douglas described the connection to remorse:

*I am really looking at, does the inmate have a sense of true remorse. Have they made efforts to program and to look into themselves... and if they do it fairly consistently. What I find sometimes is that they’ll take a course and then drop out. And I’ll say, ‘Why did you drop out, how come [you programmed for two years] and then nothing?’ Oh yeah, I was busy working. No, that [explanation] is not going to work, because those three years that you are not [programming], you haven’t dealt with the violence that was taking place during the murder.*

Not programming is equated with making no progress towards transformation.

Commissioner Melford Bryant described the programming-insight relationship:

*[W]hen they’re ready and they program... [you can see inmates’] insight and understanding... With these heinous crimes they’ve had to address it every day of their life and they’re actually working towards it. It’s impressive, so once you see that, you know the system’s working right... the system’s set up so that if you want to work, it’ll work for you.*

For commissioners, an inmate’s transformation via incarceration means “the system’s working right.” As Commissioner Elaine Cohen put it, “It’s nice to see offenders’ evolution, that



the process can work." An inmate's transformation entails his acceptance and use of the carceral system as the source of his change.

At hearings, commissioners sometimes directed inmates to take advantage of particular programs. Inmates who do not follow these recommendations are, according to commissioners, likely to be deemed unsuitable for release at the next hearing. DC McNally said, "You come in here and you're crying in the hearing, and you know what? That's good, but there's things that the last Board... I'll go back to the last five hearings. They told you to do self-help and you didn't." He explained that inmates' failure to follow Board recommendations was one way he could tell that remorse was not "genuine." Conversely, commissioners rewarded inmates who followed recommendations. With a broad smile, Commissioner Kramer recounted a grant he had given a few hours before we spoke: "This guy in today's decision was doing exactly what he said he was going to do. He's involved in AA, he's trying to work with at-risk youth, is continuing his education. All the things we told him to do before."

Of course, which programs are available hinges partly on where an inmate is housed—which, itself, is based partly on chance. Yet inmates who pointed this out were seen as fabricating excuses. "A guy might say there aren't any programs. But you know what? There's programs," DC McNally said. We asked DC Gibson whether he took into account the amount of programming available at each institution. He responded, "...I don't believe you deserve anything. When I see those commercials—'you deserve this' and 'you deserve that'—no you don't." That is, the commissioner responded to the assertion that programming is limited by suggesting that inmates are not "entitled" to programs. He said lifers who claimed that they couldn't get into appropriate programs were wasting their time "catching a tan on the yard."

The few commissioners who did not expect programming if no suitable formal programs were available expected inmates to create their own rehabilitative tools using whatever was available to them in prison. Commissioner Kramer said:

*I want them to be reading about their substance abuse. Book reports are good for me. If they can tell me that they, you know, if they read a book on how to deal with, you know... If you have a question about something, you're going to read about [it], you're going to want to know something about it. Right, so I want to make sure that they can do that, too. None of us got all the answers, but in today's society, most of us can very easily get the answers.*

In other words, if inmates gain insight through programming, commissioners attribute it to the success of the carceral state; prison programming has enabled inmates to remedy their deficits. But if this does *not* happen, it is not a failure of the carceral system, but as an inmate's individual failure.

In addition to participating in programming, inmates must demonstrate that the programs have changed their outlook. Commissioners looked for evidence not just of participation, but of resultant changes in inmates' consciousness. Commissioners often talked about this in terms of "internalization"—that, as Commissioner Bennie Hull put it, an inmate "gets it." Commissioners were highly attuned to the possibility that an inmate's transformation was not genuine. For example, DC Cordero tried to ensure that inmates were not simply reciting rehearsed statements: "Some of them come in with appearances that they are [suitable], but then when you start delving in and asking questions, you find out that it's superficial and they really just want to say what they think you want to hear." Other commissioners, too, were skeptical if inmates seemed "too rehearsed." DC Merry asked questions designed to elicit "unprepared" responses. "Especially lately I feel like someone's helping them prepare too much," she said. "They come in with the buzzwords. It makes my job a little harder actually. They've got reentry classes. And they're almost preparing too much. Because they're able to answer some questions [with

answers] that aren't from the heart.... It's all the right words but too often it's not believable."

Commissioner Bryant said that "[Some]times this guy looks really good on paper, he's got good things, but when he comes in, in person the feel you get is that he's superficial. He's just reciting. His 'remorse' is a dissertation that he's memorized for two weeks."

The balance between preparation and spontaneity is tricky. Commissioners wanted inmates to speak "from the heart" and avoid "buzzwords," yet they valued preparation, as long as it was not "too much." DC Babcock said she preferred inmates who seemed unrehearsed, but also said, "I like to see inmates that are prepared, because—think about it for a second—if a person prepares for their lifer hearing, that means that they're probably going to be prepared for a job interview, they're probably going to be prepared to meet, you know, other challenges." DC Merry said that inmates should go "over and over" their statements, yet not "sound rehearsed." Commissioner Clara Connery explained how she determined whether an inmate had internalized change:

*One guy said, I don't speak well, but he had a piece of paper that he had written on. He wrote the buzzwords. You know, he had been coached by another inmate and I saw that. And I go, why do you keep on looking at that yellow piece of paper? And he goes, well I don't speak well. I said, but you're just, you're looking at number two now, aren't you? I mean, I saw him. I go, you're just going to give me the buzzwords. And, he didn't get it.*

Similarly, DC Gibson used questioning to distinguish real remorse from feigned remorse:

*So I guess it's more with exploring questions to really get to remorse. Because these guys can—and it's getting to be an art form—with the attorneys whipping up [prepared] remorse statements. But those fall apart pretty quickly when you start getting underneath it with the inmates. And a lot of it's through the questioning.*

Commissioners needed to "get past the buzzwords and try to understand if [inmates] know what the heck they're saying," or whether they are "con men," DC Cordero explained.

In these examples, commissioners not only look for inmates' remediation of personal crime-causing deficiencies via the carceral apparatus, but for evidence that this is the way that

the *inmate* understands the rehabilitative process. Nor is mere participation enough; the change in an inmate's outlook must hold up to commissioners' scrutiny. In this narrative, lifers arrive in prison with a personal failing that is remedied by the state. If inmates appropriately internalize this understanding, they are rewarded; if they do not, they may be seen as unremorseful.

### **Internalization of the System's Moral Logic**

In the previous section, we explained how inmates demonstrate personal transformation via the carceral apparatus. In this section, we detail a related process—one through which a remorseful inmate demonstrates adherence to the carceral system's rules and moral logic. Disciplinary citations were the most straightforward way commissioners discussed rule-following. DC Lyon explained:

*Their behavior in the prison is very reflective of we could expect from them on the outside. And we actually tell him that. If you cannot follow the rules in an extremely restrictive environment like a prison when people are watching you, counting you, documenting everything you do, good and bad, and you can't function here, you certainly cannot function on the outside.*

At first, this explanation seems obvious: if you can't follow prison rules, you won't follow the law. But it is also worth considering that since prison is a restrictive environment, there are many more rules to break. Disciplinary citations are given for a wide range of behaviors, from nonviolent offenses that would be permissible outside prison, such as possessing a cell phone, to violent offenses such as assault. And although commissioners sometimes distinguished between varieties of disciplinary citations, they often pointed to the presence of any citations as evidence of unsuitability. For example, DC Connery said that all 115s, especially recent ones, were important "because it shows you still lack impulse control." Disciplinary

infractions were evidence that the inmate has not “disassociated themselves from their criminal behaviors,” Commissioner Kramer told us.

Inmates were also deemed unsuitable if commissioners believed that they demonstrated a propensity for manipulative behavior, or a tendency toward a thought pattern that commissioners called “criminal thinking.” Criminal thinking was a telltale sign that an inmate was not ready to rejoin society—a litmus test that indicated he might commit another “failure of the human condition.”

To illustrate criminal thinking, Commissioner Motoko Takada recounted an inmate who had committed a violent offense on behalf of his gang. When he entered prison, the inmate’s right arm had been covered in gang tattoos. At his most recent hearing, when commissioners asked if he was still associating with the gang, the inmate said no, and pushed up his right sleeve to reveal an enormous prison tattoo of a cross, which now covered up his gang tattoos. The inmate said that when people asked about his affiliation, he showed them the cross and said that his only affiliation now was his religion. Commissioner Takada looked at [the interviewer] in a way that seemed to convey that this was evidence that the inmate should not be released. [The interviewer] confessed that [he or she] did not understand; wasn’t covering gang tattoos evidence that the inmate had repudiated his gang affiliation? The commissioner told [the interviewer] that since it was against prison rules to get tattoos at all, the inmate’s cross proved he was unsuitable for release. “There *is* no right reason to do the wrong thing. That’s criminal thinking,” Commissioner Takada said. He gave another example of an inmate who had flagrantly committed a small rule violation—possession of a lighter—so that as “punishment,” he would be put into a cell with just one cellmate. The inmate did so in order to escape the crowded triple-

bunk dormitory in which he was housed. "That's manipulation. That's criminal thinking," Commissioner Takada said.

A similar theme arose with other commissioners. Commissioner Kramer said inmates who "think like a criminal" could not rehabilitate. He recounted an inmate who had tried to illustrate his newfound capacity to deescalate violence. The inmate proudly described talking a fellow inmate out of stabbing another inmate in the prison yard. Commissioners asked the inmate if he reported the incident to prison staff. The inmate said he had not, because he was "not a rat." Commissioner Kramer was incredulous:

*Well, then, guess what? You are still a criminal. I mean, you haven't learned anything... You still have criminal thinking... [W]hat's going to happen in the community if we let you out? If you see somebody with a gun, you don't call the police, because you're 'not a rat'?*

It is not enough for an inmate to be nonviolent, or to prevent violence, on one's own. As commissioners saw it, an inmate who was suitable for release would have involved state authority. Even though his failure to do so was not technically against prison rules, it was against the moral logic of the carceral system.

Commissioner dePaola's example of criminal thinking involved an inmate who claimed that although he was friends with gang members, he had not joined a gang. The inmate had no disciplinary citations, tattoos, or gang paraphernalia, but there were two videos of prison riots in which fighting broke out between gangs. The tapes showed the inmate defending his friends when they were attacked. Someone unaffiliated with the gang, Commissioner dePaola said, would have stayed out of the fighting altogether.

One interpretation of the actions that commissioners categorized as "criminal thinking"—defending one's friends, escaping a crowded living environment, or avoiding being labeled a snitch—might be that prison is a difficult place to survive, and that sometimes inmates act for

reasons of self-preservation. The commissioners, though, took an absolute stance. DC Neal explained that she wanted to release the kinds of people who stopped at a stop sign even if they were in the middle of nowhere and no one was coming from either direction—someone who adhered to the law, regardless of circumstance.

Another way inmates could evidence failure to internalize the proper consciousness with respect to the carceral system was to challenge its hierarchies. Inmates who sounded entitled or arrogant were likely to be found unsuitable. DC Gibson said:

*[S]ome of the worst things I've seen [at hearings] is more of the subtle stuff. I've had guys who are arrogant and want to be basically at the same level as the panel. Kind of like we're all gonna go golfing later... but that's a horrific mistake. Because they're asking for something, to be in camaraderie with us, and the big thing that's in the courts all the time now is the insight. They wanna talk about insight but they don't have any.*

An inmate who saw himself as the commissioners' social equal failed to mirror the system's construction of him as a subject in need of reform. An inmate who thought he was entitled to rejoin society had a problematically unhumble view of himself. DC Lyon described an inmate who exemplified this:

*[H]ad an attitude of real entitlement... an attitude of, 'I'm one of you, I'm not really a bad guy, I just had a bad day.' And he's got some arrogance... he's like, 'You know, I know what to do when I get out, you know, I'm probably going to try to be a security guard.' It's the disconnect there.*

An inmate who perceives himself as a regular member of society, as opposed to someone who is still subject—and still *should* be subject—to the system's control is seen as "arrogant"—particularly if he puts himself on the "same level" as the commissioners. To commissioners, challenging the carceral hierarchy suggests a lack of insight. An "insightful" inmate views himself the way the system views him—he has internalized the social hierarchy as constructed by the criminal justice system and relates to the commissioners accordingly.

## DISCUSSION

Considering the task of remorse assessment from commissioners' perspective reveals that legal consciousness, particularly second-order legal consciousness, is a cornerstone of their decision-making calculus. Although commissioners attended to some physical indicia, such as facial expressions and body language, these were not their primary means of assessing remorse. Instead, they mostly described trying to ascertain inmates' cognitive and affective states by looking for expressions of particular attitudes, feelings, and beliefs—often about law, incarceration, and rehabilitation. Indeed, some had even developed questioning strategies to catch inmates off guard, which commissioners believed increased the likelihood of receiving authentic answers to their questions about remorse.

Our data demonstrate that second-order legal consciousness can become a stand-in for having the "right" subjective emotional state. An ideally remorseful inmate: (1) attests to the criminal justice system's truth-finding function; (2) explains the crime's cause in terms of his own personal deficit(s); (3) describes how he has used the carceral apparatus to transform into a "different" person; (4) mirrors the moral logic of the carceral system—and certainly does not challenge it. Conversely, inmates who view their offense as precipitated by circumstance, or who challenge the system's assumptions and hierarchies, are seen as unremorseful. That is, commissioners considered not only whether inmates exhibited appropriate emotional responses, but the degree to which inmates internalized the norms, structures, hierarchies, and values of the criminal justice system: a legal consciousness conveying acceptance of the hierarchies, social logic, and moral logic of the system that has incarcerated him.

Drawing on the legal consciousness literature, Sexton uses the term "penal consciousness" to describe the subjective meanings inmates derive from incarceration (2015).



Her work highlights the differences between how inmates understand punishment versus how government actors understand it; the perspectives are related, but inmates' penal consciousness is distinct. Although Sexton focused specifically on inmates' perceptions of punishment, our data suggest an analogous perceptual rift. Consider the inmate who proudly showed commissioners his cover-up tattoo, or the inmate who explained his violence de-escalation tactics on the prison yard. For inmates, these were triumphs—examples they shared to demonstrate that they were changing for the better. But the commissioners received this information as examples of “criminal thinking”—deviations from the carceral logic they wanted inmates to internalize. The processes of relational legal consciousness that take place at parole hearings implicitly reject a penal consciousness lens. Commissioners scrutinize inmates' perspective not to understand inmates' unique subjectivities, but to assess inmates' alignment with the system's values. Successful parole candidates discuss their punishment in the same way lawmakers and criminal justice officials understand it. This alignment is key to remorse.

Thus, second-order legal consciousness is part of a system of mechanisms wherein “The dominated apply categories constructed from the point of view of the dominant to the relations of domination” (Bourdieu 1998: 35; see also Abrego and Menjivar 2012). From a Durkheimian perspective, demanding sincere remorse as a condition of release highlights the expressive function of the penal institution. It is not simply that violations of collective values and sentiments rouse impassioned or punitive reactions among commissioners. Certainly, there was some of this, such as the commissioner who declared that an inmate had committed a “failure of the human condition.” But our results demonstrate something subtler: commissioners expect inmates to exhibit reparative expressions of remorse that reinforce the criminal justice system's integrity and affirm values inherent in the carceral system.

An inmate who describes the causes of crime as structural or environmental, rather than pointing to his own deficits, is suspect. So is an inmate who uses the system's rules for his own purposes, such as provoking a minor behavioral citation to get out of a crowded housing situation. A remorseful inmate articulates an understanding of the criminal justice system that echoes the way the criminal justice system understands itself. He also articulates an understanding of *himself* that echoes the way he is understood by the system. These requirements constitute the prescriptive and proscriptive norms for expressing the complex emotion of remorse during hearings. An inmate's description of the victim, the crime, his rehabilitation, and his incarceration must create an impression of his attitudes and beliefs about law and the carceral system that leads commissioners to understand him as suitable for release. Second-order legal consciousness, then, operates as an ongoing, interactive set of social processes through which existing power relations are produced and reproduced.

Authenticity is key for the system's moral logic to work. Weisman and Bandes each describe the demand for genuine remorse a central paradox of factoring remorse into punishment decisions; the expresser's strong incentive to appear remorseful automatically calls the sincerity of the remorse into question. Our results echo this. Inmates are scrutinized for signs that their remorse is genuine, versus following a script. This finding echoes Headworth's description of welfare fraud enforcers, who expressed frustration that welfare recipients shared advice with each other about what to say or how to act to ensure that they would receive food stamps (Headworth 2020: 332). Headworth found that the enforcers he studied do not want to reward people who "game" the system or do not truly "buy into it." So, too, parole commissioners sought signs that an inmate was not so rehearsed that his remorse appeared artificial. This finding has been echoed in recent work on parole board members in other jurisdictions (Ruhland 2020:

652). An inmate must appear prepared enough to be taking the process seriously, but not *too* prepared—not, as one commissioner put it, as though “his ‘remorse’ is a dissertation that he’s memorized for two weeks.”

Striking a balance between preparedness and spontaneity likely requires some degree of cultural capital (i.e., education, linguistic competence, and access to lawyers or other advisors) on the part of an inmate to facilitate an in-depth understanding of the interactional rules governing expressions of remorse. Drawing on observations of 20 lifer parole hearings, Shammass suggested that adequate preparation for hearings “demands a particular linguistic and scholastic competence that is quite often thoroughly lacking among inmates” (2019: 156). Although we found no evidence that commissioners would agree with this statement, the characteristics they described seeking do tend to require a certain level of perceptual agency and skill at self-expression (see Schwartzapfel 2016). In other contexts, cultural capital has been found to shape interactions between criminal defendants and their attorneys (Clair 2020), and between lay citizens and police officers (Young and Billings 2020). Documented racial bias in basic emotion perception (Hugenberg, 2005; Wang et al., 2014) also suggests potential for inmates’ characteristics to shape the way their descriptions of emotion are received.

For an inmate to appear remorseful, is insufficient to recognize the error of his ways and vow not to cause future harm. Instead, a suitable inmate is a “new person”—one for whom it would be virtually impossible to commit the crime for which he is incarcerated. Goffman’s work on remedial exchange—a process by which apologies signify “a splitting of the self into a blameworthy part and a part that stands back and sympathizes with the blame giving” (1971: 113)—offers a helpful framework. Through expressions of remorse, a transgressor effectively “splits” the self between the blameworthy actor who committed a wrongdoing, and a “true”

stable self that condemns the violation. The remorseful inmate sympathizes with blame-giving such that "the separation between act and being is concretized as the offender sheds the self that perpetrated the transgressive act by embarking on a project of self-transformation" (Weisman 2016: 36). Drawing from Goffman's splitting of self and Tavuchis's notion of moral community, Weisman describes remorse as a process of moral performance, after which "the attribution of remorse serves to attach or detach the perpetrator from the deed and to qualify or disqualify the doer as a member of the moral community" (2016: 25). As DC Babcock said, a remorseful inmate is "not the same person" who entered prison. Remorse means that the split has been successful, and "serves as a signal to others that the crime confirms or disconfirms the offender's fundamental identity" (Proeve and Tudor 2010: 76).

The split self is consistent with commissioners' expectations of how remorseful inmates will explain the causes of their commitment offense. "Remorse affects determinations of an individual's moral character and, thus, in all likelihood, perceived internalization of the group's moral code." (Gold and Weiner 2002: 299). An important part of the "moral code" at work here is carceral logic. As the data demonstrate, commissioners perceive remorse not just as accepting personal responsibility, but accepting it at the exclusion of other causes. Remorse means describing a crime's cause as a personal deficit, not as a product of complex interactional processes or problematic social structures. This idea of dispositional flaws as the cause of crime is echoed throughout many other sociological studies of crime and penalty, such as Lynch's in-depth ethnography of parole agents' perception of parolees, wherein the situational realities of parolees' lives were disregarded by agents (2000). Our data suggest that remorseful inmates are expected to adopt an enforcer's lens, understanding the carceral system as a crime prevention

tool. This can only work if the root cause of crime is individual, not structural—a belief in psychological individualism (Haney 1982; Lynch 2000).

Attribution theory offers a related framework for examining perceptions of causal responsibility. Weiner (1980) argued that judgments of controllability determine the extent to which we ascribe responsibility for misdeeds. Our findings speak to a flip side: commissioners were unwilling to consider aspects of the crime beyond an inmate's control and responded with frustration when inmates mentioned situational or external forces that precipitated it. This interpretation, too, aligns with a split self framework: if the "old" inmate was the cause of crime, the inmate's transformation into a new self removes the cause. In contrast, if crime is understood as owing to random, unfair, or socially complex external forces, parole hearings would be rendered futile as crime-fighting tools, fracturing the carceral logic.

By crediting the system with their transformation, inmates reinforce the carceral logic. If commissioners believe inmates see imprisonment not just as a punishment to endure, but as an opportunity to change into a socially palatable member of society, then from commissioners' perspective, inmates' legal consciousness aligns with their own. But an inmate's suggestion that programs are not working or that no suitable programs are available creates a misalignment of legal consciousness, and a failure of the "emotion-state" learnable through programming (Patatore 2016). As Commissioner Bryant said, "the system's set up so that if you want to work, it'll work for you." Inmates for whom it does not work are suspected of "playing by excuses." These attributional processes all paint incarceration in a morally justifiable light. If an inmate transforms, the system worked by making him a new person; if he does not transform, the system worked by successfully keeping a flawed individual behind bars.

Note, too, that even these transformations require a balanced presentation. An inmate must appear to be a new person whose legal consciousness aligns with commissioners', but at the same time, he must not project a sense of entitlement. As DC Gibson said, it is a "horrific mistake" for an inmate to "want to be basically at the same level as the panel." Showing remorse means an inmate must internalize the hierarchies the system prescribes. Remorse entails reflecting the carceral system's values, goals, attribution of blame, and moral logic—such that the inmate's legal consciousness, as perceived by the commissioners, aligns with their own.

## CONCLUSION

While it is impossible to know whether a person truly possesses remorse, second-order legal consciousness functions as an important social process via which parole board members make the best approximation they can. Just as schools and teachers reward students based on their ability to participate in elite culture—mirroring the values of the educational system to reap its symbolic benefits of the educational system (Bourdieu 1977)—lifer inmates are expected to mirror the values embodied by the criminal justice system. It is not simply that inmates are expected to prostrate themselves before parole commissioners, but that they are expected to authentically internalize the values and moral logic of the carceral system. In this way, the integrity of the system is performed and reinforced; building on Headworth (2020), second-order legal consciousness is a crucial part of the social processes that underpin existing relationships of power. As Silbey writes, "The standards that legal institutions announce, even though they fail to realize them completely, are part of how legal institutions create their own power and authority" (2019: 8). Remorse is something the legal institution of parole claims to discern, and it does so via processes that uphold legal hegemony.

It is tempting, perhaps, to conclude that this article counsels in favor of abandoning impressionistic criteria like “remorse” and “insight” altogether. Here, though, we would exercise caution. It is easier to critique the application of a criterion than to suggest a better one, and the two opposites of flexible criteria are either *no* criteria (determinate sentencing) or *inflexible* criteria (rigid decision-making formulae that tend to come with problems of their own). Instead, we hope readers will see our work as a call to put the legal consciousness and law and emotion literatures into further conversation. Looking at remorse through the lens of legal consciousness reveals interactive social processes crucial to the way the emotion is understood by legal actors. And looking at legal consciousness through the lens of emotion offers a clearer, more granular example of how sociolegal scholars might analyze the mechanisms that constitute the production of relational legal consciousness.

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