Moral Character: Making Sense of the Experiences of Bar Applicants with Criminal Records

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I. INTRODUCTION

In September 2017, Reginald Dwayne Betts, a graduate of Yale Law School, was admitted to the Connecticut Bar. This achievement for Betts was unsurprising given his career highlights: He graduated from the University of Maryland, won a Harvard University fellowship, wrote two poetry books and a memoir, and has been working on his law doctorate at Yale with an eye toward a legal academic career. But Betts' path also includes three felony convictions related to a carjacking he had committed at a Virginia mall when he was 16 years old, two decades before he became a Connecticut attorney, for which he served eight years in prison.[1]

In February 2019, the Yale Law Journal Forum published an opinion piece by attorney Tarra Simmons,[2] in which she urges reform of the moral character requirements of the Washington State Bar. Simmons speaks from experience: Her formative experiences in the criminal justice system, shaped

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1 Dave Collins, "Felon who Graduated from Yale Allowed to Become Lawyer" (29 September 2017), online: *Boston Globe* <www.boston.com/news/local-news/2017/09/29/felon-who-graduated-from-yale-allowed-to-become-lawyer> [perma.cc/A2Z5-HE52].

2 Tarra Simmons, "Transcending the Stigma of a Criminal Record: A Proposal to Reform State Bar Character and Fitness Evaluations" (25 February 2019), online: *Yale Law Journal* <www.yalelawjournal.org/forum/transcending-the-stigma-of-a-criminal-record?fbclid=IwAR29QhE2wTjBUg3-9R54NFJMxRkrDVGBK4IGBRMZQpgXP-rkSKF3ONhjoaM> [perma.cc/PB4M-LFMG].

by trauma, addiction, and poverty, shaped her feelings of alienation and exclusion in law school and before the Washington State bar.

And, in September 2019, the *American Lawyer* published a story criticizing "the archaic Bar Character and Fitness Exam."[3] The article quoted Prof. Shon Hopwood of Georgetown Law School, an authority on criminal justice and civil rights, whose journey to legal academia and practice started in federal prison, where he spent 12 years for an armed robbery.

Barriers of the sort faced by Betts, Simmons, Hopwood, and others receive little attention in the standard literature on reentry and reintegration. This literature, with good reason, tends to focus on the very basic barriers faced by people with criminal records and a history of incarceration: procuring food, shelter, and minimum-wage employment. Addressing re-entry problems related to the very base of Maslow's hierarchy of needs is understandable and justifiable: as Stephen Raphael explains in *The New Scarlet Letter*, people with criminal histories face formidable odds, and a tough uphill battle, in the effort to secure employment.[4] Raphael and others express concerns about the paucity of evidence-based, efficient vocational programming in prison,[5] the absence of a good continuum after incarceration,[6] and the impact of stigma[7] and disenfranchisement from civic and political life.[8] Underscoring these challenges are vast economic inequalities and the debilitating poverty of formerly incarcerated people. In 2011, Alessandro de Giorgi conducted extensive fieldwork among formerly incarcerated people making their first steps on the outside.[9] Expecting to

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3 The Young Lawyer Editorial Board, "The Archaic Bar Character and Fitness Exam Must Be Reformed" (10 September 2019), online: *American Lawyer*, <www.law.com/americanlawyer/2019/09/10/the-archaic-bar-character-and-fitness-exam-needs-to-be-ref/> [perma.cc/K6D4-LBFP].

4 Steven Raphael, *The New Scarlet Letter?: Negotiating the U.S. Labor Market with a Criminal Conviction* (New York: Upjohn Institute for Employment Research, 2014).

5 Christy A Visher, "Effective Reentry Programs" (2006) 5 Criminology & Public Policy 299.

6 Jeremy Travis, "But They All Come Back: Rethinking Prisoner Reentry" (2001) 5:3 Corrections Management Q 23.

7 Christopher Uggen et al, "The Edge of Stigma: An Experimental Audit of the Effects of Low-Level Criminal Records on Employment" (2014) 52:4 Criminology 627.

8 Christopher Uggen & Jeff Manza, *Locked Out: Felon Disenfranchisement and American Democracy* (New York: Oxford University Press, 2008).

9 Alessandro de Giorgi, "Back to Nothing: Prisoner Reentry and Neoliberal Neglect" (2017) 44:1 Soc Justice 83.

find and document the "significant expansion of the penal state," de Giorgi was surprised to find mostly "chronic poverty and the daily struggle for survival in a neoliberal city… the daily struggles of stigmatized people scrambling to disentangle themselves from the treacherous grips of chronic poverty, sudden homelessness, untreated physical and mental suffering, and the lack of meaningful social services."[10]

While problems of basic survival are understandably acute, and therefore deserving of a central place in socio-legal scholarship, it is also important to learn how criminal histories operate in professional realms in which they are perceived as more unusual and aberrant. Accordingly, this paper seeks to expand the framework of re-entry and desistance to discuss admission barriers to an elite, selective profession — the legal profession. It seeks to understand, and systematize, the experiences of people with criminal records who apply for admission to the Bar; how they make sense of their past and their present; how they experience the moral character determination process; and how their histories and the moral character process shapes their professional paths and aspirations. The project corresponds with bodies of literature about prisoner re-entry, life-course criminology and desistance, sociology of the professions, and socio-psychological writings about remorse, stigma, and redemption of spoiled identities.

Life-course criminologists identify education and employment as important "turning points" away from crime, whether due to control theories involving motivation[11] or due to these frameworks creating distance from criminal peers.[12] Moreover, research has found that experiencing multiple life events facilitates desistance more than experiencing one– also known as experiencing the "respectability package."[13] In that respect,

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10 *Ibid* at 88–89.

11 John H Laub & Robert J Sampson, "Turning Points in the Life Course: Why Change Matters to the Study of Crime" (1993) 31:3 Criminology 301; Walter Forrest & Carter Hay, "Life-Course Transitions, Self-Control and Desistance from Crime" (2011) 11:5 Criminology & Crim Justice 487.

12 Mark Warr, "Life Course Transitions and Desistance from Crime" (1998) 36:2 Criminology 183.

13 Elaine Eggleston Doherty & Jaclyn Cwick, "Unpacking the Complexity of Life Events and Desistance: An Application of Conjunctive Analysis of Case Configurations to Developmental and Life Course Criminology" (2016) 2:1 J Developmental & Life Course Criminology 45.

undertaking professional education that leads to an elite profession can be perceived as a cluster of "turning points" rather than a single event.

Other scholarship about desistance, particularly Shadd Maruna's *Making Good*, highlights the importance of constructing a coherent narrative of transformation for desistance.[14] The capacity to tell such a story is sometimes honed by prison programming and sometimes, for better or worse, by the need to present a story of insight and remorse to a parole board.[15] Some studies have found inverse statistical correlations between feeling remorse, shame, and guilt, and recidivating; however, research design and the difficulty of operationalizing emotions make these studies difficult to generalize from.[16] Moreover, it is important to distinguish between feeling such emotions and expressing them. As Erving Goffman reminds us, situations in which people have to disavow past behavior (and fight against the stigma involving spoiled identity) are performative, in that the way in which we express insight, remorse, and transformation takes into account the audience.[17]

The need to perform and exhibit good moral character as the price of admission is not unique to the bar. As Deborah Rhode explains, the idea of moral character is important to American law, and plays an important role in organizing professional capacity, despite ample psychological evidence that character is shaped through a situational lens, rather than as an independent monolith.[18]

This article examines these deep questions through the lens of the experiences of bar takers themselves. Part I provides a legal analysis of the

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14 Shadd Maruna, *Making Good: How Ex-Convicts Reform and Rebuild Their Lives* (New York: American Psychological Association, 2001).

15 For more on the performative aspect of portraying contrition, remorse, and "insight" on parole, see Hadar Aviram, *Yesterday's Monsters: The Manson Family Cases and the Illusion of Parole* (Oakland: UC Press, 2020); Victor L Shammas, "The Perils of Parole Hearings: California Lifers, Performative Disadvantage, and the Ideology of Insight" (2019) 42:1 PoLAR 142.

16 June Price Tangney, Jeff Stuewig & Logaina Hafez, "Shame, Guilt and Remorse: Implications for Offender Populations" (2011) 22:5 J Forensic Psychiatry & Psychology 706.

17 Erving Goffman, *Stigma: Notes on the Management of Spoiled Identity* (New York: Touchstone, 2009).

18 Deborah Rhode, "Moral Character as a Professional Credential" (1986) 94 Yale LJ 491; Deborah L Rhode, "Virtue and the Law: The Good Moral Character Requirement in Occupational Licensing, Bar Regulation, and Immigration Proceedings" (2018) 43:3 Law & Soc Inquiry 1027.

California Bar's determination of moral character, relying on the Bar rules. Part II offers an empirical examination of the Bar's policy through the eyes of ten California Bar applicants with criminal records, two ethics lawyers, and a Bar official. Part III draws on the legal and empirical analysis to discuss the significance of shame, remorse, and diversity to the experience of Bar applicants. The conclusion section makes some recommendations for law schools and the Bar for making the process more inclusive.

II. The California Bar and Moral Character Determination

In both the U.S. and Canada, some moral fitness scrutiny is an essential part of the licensing process of lawyers. In the Canadian process, which varies by province, character fitness review is conducted by the bar and also attested to by the lawyer with whom the applicant is articling.[19] In the U.S. process the moral character application is one of three hurdles that successful applicants must clear; the other two are the Multistate Professional Responsibility Examination (MPRE), a three-hour, multiple-choice exam developed by the National Conference of Bar Examiners and administered nationally in the same format, and the passage of the state's Bar examination. The California Bar Examination, recently shortened from three to two days, encompasses the 200-question Multistate Bar Examination (MBE), essays, and a "performance test" (performing a lawyerly duty in a hypothetical case).

Title 4 of the Rules of the California State Bar defines "good moral character" as including, but "not limited to qualities of honesty, fairness, candor, trustworthiness, observance of fiduciary responsibility, respect for and obedience to the law, and respect for the rights of others and the judicial process."[20] The burden of proof of moral character is on the applicant. All bar applicants submit a written moral character application

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19 See generally Alice Woolley, "Can Good Character Be Made Better? Assessing the Federation of Law Societies' Proposed Reform of the Good Character Requirement for Law Society Admission" (2013) 26:2 Can J Admin L & Prac 115. For an example of the provincial process, see "Good Character Requirement" (last visited 20 April 2020), online: *Law Society of Ontario* <lso.ca/becoming-licensed/lawyer-licensing-process/good-character-requirement> [perma.cc/73JD-HTJ8].

20 The State Bar of California, *Rules of the State Bar*, San Francisco: State Bar of California, 2007, Rule 4.40 [State Bar of California, *Rules*].

online and provide their fingerprints for a background check.[21] The bar website advises applicants that "[i]t's important to be honest on the application. The Committee of Bar Examiners considers candor to be a significant factor in determining whether an applicant has the good moral character required for admission to practice law."[22] The obligation to disclose relevant information continues even after submitting an application.[23]

Until Fall 2018, the Bar did not compile statistics for their moral character processing, but its officials estimate that about 50% of applications proceed through without a problem within the 180-day limit established by the Rules.[24] For the remaining 50%, the Moral Character Committee examines the applicant's history and classifies it into one of four categories, according to the severity and recency of the incidents.[25] Category 1 encompasses juvenile misdemeanors, vehicle code infractions, uncomplicated bankruptcy history, and academic probation. Category 2 includes misdemeanors, job terminations, minor college infractions, failures to appear, and dismissed complaints against the applicant in an attorney capacity. Category 3 entails driving under the influence of intoxicants (DUI), military discipline proceedings (or other professional discipline incidents) involving moral turpitude, accusations of fraud, and serious discipline issues incurred in college. The most serious issues are included in Category 4: felony convictions, drug sales, two or more DUIs within five years, and violations of the law school honor code.

The first step for an application triggering further action is a letter to the applicant, asking for clarification or elaboration on the incidents in the report. The letter sometimes also highlights inconsistencies in the application, discrepancies between the applicant's record and the application, and differences between the applicant's original law school application and the moral character application. Within 120 days of receiving the applicant's additional information, the Committee responds in one of five ways: clearing the application, stating that the applicant did not meet the moral character burden, noting that "the application requires

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21 *Ibid*, Rule 4.41.

22 "Moral Character" (last visited 20 April 2020), online: *State Bar of California* <www.calbar.ca.gov/Admissions/Moral-Character> [perma.cc/QM52-SDX6].

23 State Bar of California, *Rules*, *supra* note 20, Rule 4.41.

24 *Ibid*, Rule 4.45.

25 Interview of Mark Torres-Gil (Fall 2018) (on file with author); Mark Torres-Gil, "Moral Character" PowerPoint presentation: (on file with author).

further consideration", inviting the applicant to an "informal conference", or advising the applicant to enter into an Agreement of Abeyance with the Committee (typically in cases in which criminal charges are pending against the candidate, and the matter should therefore be resumed only after their completion).[26]

The "informal conference" is, in essence, an interview with members of the committee (the number of interviewers reported by my interviewees ranged between four and seven). Participation in the interview is voluntary (and, technically, scheduled in response to the applicant's "request"[27]), but virtually all applicants who are invited to it attend. The candidate can be represented by an attorney, but the attorney's role is "limited to observation" and he or she "may not participate" at the hearing.

The hearing is, typically, the conclusive stage of the moral character determination; after the hearing, the applicant receives a letter notifying him or her of the outcome. Following an adverse determination, the applicant may "file a request for hearing on the determination with the State Bar Court,"[28] but few do; it makes much more sense to save the money on representation, since the negative determination is usually in place for two years, and after those years the candidate may reapply with new evidence of his or her insight, contrition, or rehabilitation. A positive determination is in place for 36 months but may be extended at the applicant's request.[29]

Two recent California Supreme Court cases govern the moral character discourse: *In re Gossage* (2000)[30] and *In re Glass* (2014).[31] Eben Gossage became addicted to drugs in the late 1960s, at age 15, and engaged in numerous property offences, including forgeries, to finance his habit.[32] He went in and out of jail for several years, was rejected by drug rehabilitation programs because of his violence, and, at age 23, during a visit to his sister, argued with her and killed her.[33] He was convicted of voluntary manslaughter, received an indeterminate sentence (as was common in the 1970s), and was paroled two and one-half years later.[34] Gossage proceeded

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26 State Bar of California, *Rules*, *supra* note 20, Rule 4.45.
27 *Ibid*, Rule 4.46.
28 *Ibid*, Rule 4.47
29 *Ibid*, Rule 4.51.
30 *In re Gossage*, 99 Cal Rptr 2d 130 (2000) [*Gossage*].
31 *In re Glass*, 58 Cal 4th 500 (2014) [*Glass*].
32 *Gossage*, *supra* note 30 at 133.
33 *Ibid*.
34 *Ibid* at 134.

to commit various offences until the early 1980s, when he did a stint in state prison and, according to him, "hit [rock] bottom" there.[35] Upon his release he turned his life around, working odd jobs, and in the late 1980s attended Golden Gate University Law School, passing the bar on the first try in 1991.[36] Throughout his law school studies, and for several years after his graduation, Gossage committed numerous traffic offences — pertaining mostly to license offences and vehicle registration violations — which were not resolved until the mid-1990s.[37] In his moral character application, Gossage disclosed only four of his 17 convictions, omitting most of the forgeries.[38] On appeal from the State Bar Court, which found Gossage's rehabilitation convincing, the California Supreme Court reversed and found Gossage unfit to practice law.[39] The standard applied placed a "heavy burden" on Gossage to prove internal transformation:

> We therefore agree with the Committee that Gossage can be found morally fit to practice law only if the evidence shows that he is no longer the same person who behaved so poorly in the past, and only if he has since behaved in exemplary fashion over a meaningful period of time. This heavy burden is commensurate with the gravity of his crimes.[40]

In finding that Gossage did not lift this burden, the California Supreme Court relied not only on his long and unreported record of traffic offences, but also on his flawed disclosure. The decision emphasized that "the unusual severity and scope of Gossage's criminal record strengthened - not lessened - his obligation to ensure the accuracy of his Application even if independent research was required" and, lest this seem an unsurmountable task, that "[m]ore rigorous intellectual tasks are often performed by attorneys in the practice of law."[41]

Another case in which lack of candor, manifested in imperfect cooperation with the Bar, was *in re Glass*, which involved hapless journalist Stephen Glass, who in the late 1990s fabricated material more than 40 articles for *The New Republic* and other publications.[42] Glass had invented, out of whole cloth, sources and interviewees for numerous stories,

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35 *Ibid* at 135
36 *Ibid* at 136.
37 *Ibid* at 137–38.
38 *Ibid* at 139.
39 *Ibid* at 149.
40 *Ibid* at 144.
41 *Ibid* at 148.
42 *Glass*, *supra* note 31 at 504.

rendering verisimilitude to his creations by fabricating supporting materials and thus eluding the magazine fact checkers.[43] Glass was finally exposed and fired in 1998, while already a law student at Georgetown University's evening program, and in 2000 he graduated and passed the New York Bar examination.[44] In Glass's application to the New York Bar he disclosed only 20 of his fabrications, and also falsely stated that he had assisted *The New Republic* in uncovering his falsehoods.[45] In the early 2000s, Glass wrote a book based on his experiences and also letters of apologies to numerous people he had harmed through his fabrications.[46] He had also undergone more than a decade of therapy.[47]

Glass passed the California bar exam in 2006 and filed his moral character application in 2007. The committee denied his application. The California State Bar Court reversed, finding that Glass "had satisfied his 'heavy burden of proof' and established his rehabilitation."[48] But the California Supreme Court reversed the State Bar Court decision. Undertaking "an independent review of the record, with a focus on Glass's many acts of dishonesty and professional misconduct,"[49] the Court examined "whether he has established a compelling showing of rehabilitation and truly exemplary conduct over an extended period that would suffice to demonstrate his fitness for the practice of law."[50] Answering this question in the negative, the Court highlighted the extensive and systematic pattern of deception, Glass's violations of journalistic ethics, engaging in this dishonest conduct while a law student at Georgetown, and, importantly, the gaps in his disclosures to the New York Bar — even though his disclosures to the California Bar a decade later were complete (albeit characterized by "hypocrisy and evasiveness").[51] Another problem with Glass's record was that "instead of directing his efforts at serving others in the community, much of Glass's energy since the end of his journalistic career seems to have been directed at advancing his own career and financial

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43 *Ibid* at 505
44 *Ibid.*
45 *Ibid* at 511.
46 *Ibid* at 513.
47 *Ibid* at 516.
48 *Ibid* at 518.
49 *Ibid* at 522.
50 *Ibid.*
51 *Ibid* at 523.

and emotional well-being."[52] Denying Glass's right to practice law was part of the Court's "duty to protect the public and maintain the integrity and high standards of the profession."[53]

Gossage and *Glass* are often mentioned, both by Bar officials and by ethics attorneys, as essential readings on moral character — and, indeed, they offer insights as to the importance of honesty and full disclosure, as well as to the principle that the burden on the applicant to show rehabilitation and "exemplary conduct" increases with his or her misdeeds of the past. They also reveal the Bar's emphasis to gauge whether the applicant has truly transformed himself from the inside as well as contributed to the community. Both cases, however, are based on unique and extraordinary facts, and therefore present some difficulty in generalization. How is the committee process experienced by people with criminal records? How do people perceive and comprehend the ways in which they have to perform remorse, rehabilitation, and "exemplary conduct"? These questions call for empirical examination.

III. Making Sense of the Experiences of Bar Takers with Criminal Records

A. Methods

This project seeks to make sense of the experiences of the moral character applicants themselves through in-depth, semi-structured interviews. The project encompasses 13 interviews, sampled through social media appeals to the California community (via Facebook and Twitter and using Facebook pages and hashtags to recruit from local bars and law school alumni associations). Interviewees approached me after friends or colleagues who knew of their personal history informed them of my project. Even though, as explained above, character fitness is part and parcel of admission to the legal profession in all U.S. states and Canadian provinces, I focused the empirical on one jurisdiction in order to rule out distinctions and differences stemming from different procedures. While the 13 interviews were sufficient to achieve content saturation, it is also important to specify that the shame and secrecy surrounding criminal records for bar applicants posed considerable difficulty in locating and approaching interview subjects

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52 *Ibid* at 524.

53 *Ibid* at 526.

in a systematic way. Ten of these are interviews with successful bar applicants who went through the moral character process with criminal backgrounds ranging from expunged juvenile drug convictions to serious violence adult offences that yielded prison terms.[54] The interviewees were diverse in terms of gender (six men, four women), race (five white, two African Americans, three Latino interviewees), and age (ranging from 25 to 60). I also conducted two interviews with ethics attorneys who assist bar applicants with their written moral character application and at the "informal conference" and/or subsequent state bar court proceedings. In addition, I spoke to the Assistant General Counsel at The State Bar, who is also responsible for administering the moral character determinations.

Interviews ranged from one to two hours and were conducted after informed consent was given in accordance with protocols approved by WIRB. No remuneration was given to subjects. Half of the interviews were recorded (the other half were not, at the interviewees' requests), and all of them were transcribed in shorthand during the interview. Most were conducted face to face, though a few (with Southern California lawyers) had to be conducted by phone. Notably, several interviewees kept their personal history discreet from their colleagues, and therefore these interviews took place after work hours or early in the morning, when my interlocutors were alone at the office.

The analysis was conducted inductively, in accordance with modified grounded theory principles.[55] I reviewed the interview transcripts for recurring ideas, concepts or elements, coded the interviews accordingly, and then grouped them into concepts and categories. The themes I identified resonated with several bodies of literature, and primarily with my work on parole hearings.[56] Vignettes from the unrecorded, shorthanded interviews were lightly edited for readability. Pseudonyms are used throughout the piece and unique identifying information has been omitted to protect the subjects.

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54 One example of the limitations of the sampling methods is that, for understandable reasons, I was not approached by people who ultimately did not prevail in their moral character process. I was approached by a few law students who were in the process of applying but were yet unable to provide me with an account of the entire process, and while we had interesting conversations, these were not included in the sample.

55 Barney G Glaser & Anselm L Strauss, *The Discovery of Grounded Theory: Strategies for Qualitative Research* (New York: Routledge, 2017).

56 Aviram, *supra* note 15.

A Note on Positionality: I am a law professor in California and have been a member of the California Bar since 2011. I have provided advice and written recommendations to dozens of students applying for the Bar; I have also testified twice at the State Bar Court in defense of applicants denied entry or reentry to the profession. This background puts me in the unique position of understanding the importance of some gatekeeping into a profession that requires honesty and scrupulous ethics, and at the same time empathizing with people whose background dovetails with much of my criminal justice scholarship.

B. Findings

1. Nothing to Hide Except My Shame: The Written Disclosure Phase

The California Bar website, as well as law professors and ethics lawyers, remind applicants to err on the side of disclosure: "if you are not sure, disclose." The summaries of *Gossage* and *Glass* above highlight the importance of full disclosure in the determination of moral character, and particularly the way omissions can sometimes be perceived at least as seriously as the underlying offence. The Bar official I interviewed explained:

> One of the most important things to us is candor. So if we have an incomplete application, that tells us something important about the applicant. And the thing that is omitted could be a minor thing, but —
> Q: In other words, the coverup is worse than the crime.
> A: (laughs) exactly.

My interviewees who had sealed or expunged juvenile court records had no doubt that they should describe those instances at length and were desperate to explain that they were no longer part of their criminal record. Other than that, my interviewees' approach in filling in the forms reminded me of the dread stoked by high school principals about our "permanent records": an uncertainty about what their paper persona looked like from the bar side and a desire to anticipate and preempt any surprises it might contain.

Gabe, a public defender with an expunged juvenile record, said:

> I didn't honestly know much about the difference between "sealed" and "expunged" or bother to do anything about any of this, though my parents of course did their best to take care of that. But it was crystal clear to me that all of these things needed to be reported.

Raúl said:

> When I started law school, I talked right away with my professors. I remember especially talking to my ethics professor. He made it clear that all this stuff has to be disclosed. What I kept hearing was "err on the side of disclosure."

Raúl's experience is typical in the sense that law school professors, particularly ethics professors, tend to be the institutional gatekeepers for moral character information. Most of my interviewees revealed some, or all, of their criminal background to one or two trusted professors, who advised them on the basis of their experience with similar students over the years. Their memories of these professors are invariably warm, in that the professors supported them and assured them that they would, eventually, be admitted.

> Jolene: I had a really messed-up youth and came to law school as what they call a "nontraditional" student.
> Q: Were you open about your background at school?
> A: Sure. I had nothing to hide. I told my professor everything and he did say it was going to be an uphill battle, I mean, to pass the bar.
> Q: Did that give you pause about staying in law school?
> A: No. He said it was eventually going to be OK. I figured I'd take law school and see what happens.

Even though the prospect of fighting the moral character battle loomed over the interviewees, most of them experienced it as an undercurrent in a sea of stress and anxiety.

> Gina: Between moot court and journal and a bunch of student orgs and just studying and trying to make good grades, plus having a life, this was one more thing I had to do, but I thought it was all going to work out fine and pushed it out of my mind.
> Brian: Law school was intense, and there was also intense personal stuff that was going on during those years. You can't go through all of this and ruminate about the bar all the time.

There was considerable variation among the interviewees in terms of when the reality of having to deal with the moral character coalesced for them. A few of them realized that they might need help as soon as they entered law school; for others, this problem became salient only as the bar exam started to loom large. Martin, an ethics attorney, said:

> People call throughout law school, but most of the calls I get come in around the fall of 3L [the third year of law school – H.A.], which is when people typically submit their paperwork. I wish more people called sooner, because there's a lot of damage control we can do during the law school years.
> Q: Such as?

> A: For example, sometimes it is pretty clear that there's going to be an issue with substance abuse. If the student starts attending LAP [the bar program for substance abuse rehabilitation – H.A.] in law school, that could save some precious time later.

For some interviewees, the requirement to provide extensive disclosure presented problems. Raúl and Gina, in particular, talked about the difficulty to provide full and accurate accounts of their juvenile records.

> Raúl: It's all a blur. Juvie, jail, I honestly couldn't tell you a clear story about where I was at any given moment because my whole juvenile experience is chaos.
> Gina: I was bouncing between juvie and foster homes and group homes for all of my teenage years. And the problem was that, for the law school application, which I kind of finagled last minute, I didn't bother to check all the dates and such. For the moral character I got lucky.
> Q: How did you do it?
> Gina: Fortunately, I kept extensive, detailed journals when I was a teenager, so I went back and consulted those to put the timeline together. But of course, now this timeline didn't match what I had written in the law school application, so I get this letter saying to "explain the omissions."

The assumption that discrepancies between the application and extraneous data, such as the applicant's law school application or rap sheet, are the product of intentional omissions, was deemed by several interviewees unrealistic and hurtful.

> Mike: Some stuff honestly escaped my mind, and now I'm getting a letter from the bar saying that I should explain the omissions. It's like I've been cheating or lying or something.

Rasheed, whose property conviction did not stand in his way for his New York bar membership, nonetheless disclosed it with detail when the time came to apply in California, explaining, "Why not? At that point I had nothing to hide, except my shame." Indeed, the act of writing itself dredged up considerable amounts of shame for many interviewees.

> Bree: It's all like a bad dream. You forget, or maybe forget is inaccurate. You put it out of your mind, you try to live your life and put the time and expense and bad experiences aside, and now you have to relive them all.
> Rasheed: Ironically, it's the very fact that you're somewhere else in your life, applying for these prestigious jobs, putting your life together, that makes it most shameful. Because you've gone a distance from your past, and now you have to relive the past in writing, go back through all that, the mischaracterizations.

This deep sense of shame, stemming from a juxtaposition of the interviewees' statuses in the past and presence, is strongly evocative of Goffman's work on spoiled identities and of Everett Hughes' concept of

master statuses. Shifting one's self identification to that of a prospective lawyer, the interviewees invoke the dissonance and dismay involved with the need to step back into the shoes of criminal defendants and/or prison inmates.

2. "It was, hands down, the worst experience of my life": The Informal Conference

For some of my interviewees, the request for additional information was not the end of the process: they were invited to the "informal conference." Their preparation for this even varied widely. About a third of them hired a lawyer, and those who did were ambivalent, at best, about the services they received:

> Gina: That, honestly, was a waste of money. She sort of told me what to write, but it's nothing I couldn't come up with on my own. So the second time [after a negative determination and a two-year wait] I didn't get a lawyer, I just did it all on my own.
> Bree: The lawyer's help was limited. You know they can sit in the room with you but they can't talk. If anything, it was a boost of support, that there was one person in the room that was on my side, but not a lot more than that.

By contrast, the ethics lawyers themselves feel that their services were essential, and that many unrepresented applicants made mistakes.

> Margaret: I sometimes get people in when it's time for the informal conference, or even when they're thinking of an appeal to the State Bar, and it's too late. You look at their paperwork and you think, if only they had come to talk to me.
> Martin: The most important service we offer people is framing. It's a delicate balance between explaining what happened to you in context and being seen as if you're deflecting blame for what you've done.

These contradictions might reflect the candidates' excessive confidence in their own ability to prepare their paperwork, the lawyers' inflated sense of the value they added to their clients' petitions, or both; in any case, they reflect some anxiety on the part of the candidates to appear in the best possible light to the committee.

The conference itself was uniformly described as an overwhelmingly negative experience. Six of my interviewees volunteered, without prompting from me, that it was "the worst experience of my life." Importantly, three of these interviewees had spent time incarcerated in jail or in a juvenile facility, and they nevertheless experienced this professional interview as a bad experience. Three interviewees were unable to tell me how many people were in the room (Sandy: "I guess I just blocked this off my mind. I can't

even tell you. It's just a general sense of people in suits asking you questions"). The remaining four accounts are of between four and seven people. Mike, who had a background in law enforcement, said:

> Like they teach you in interrogations, to stand on the left side of the person and a little bit behind them, because it makes them feel vulnerable? That's how they played it. The [person who chaired the committee] was on my left a bit behind me. It was disorienting.

Gina said:

> It was horrible. It was shameful. I bawled my eyes out. It was awful to explain these charges to them. It was all taken out of context. I just cried and cried. Honestly I don't know what came out of my mouth.

Bree said:

> I can't even give you the blow by blow because the whole thing was just so... I felt so ashamed. I said what I thought they wanted to hear but it all felt fake and I was angry and upset...

Brian, a notable exception, said:

> After everything I've been through, this was not a big deal. I'm a felon. I'm used to people disrespecting me. I'm used to being treated like nobody. It was just one more of those. I said to myself, I have a task to complete here, to persuade these people to find a positive finding, and that's it, then I'm out of here.

3. "There's no context": Sticking to the Court Record

The bar's definition of moral character includes "respect for and obedience to the law," which is perhaps not surprising as a gateway to the legal profession. When asked about the nexus between moral character and criminal records, Martin, the ethics attorney said, "the bar is doing its best to make sure that there are no psychopaths in the profession." When I suggested that many managing partners of BigLaw firms (a U.S. industry term of art referring to the nation's largest law firms) might exhibit symptoms of psychopathy, my interlocutor laughed, saying: "a criminal record is not a perfect predictor of psychopathy. But what else do we have?"

The assessment of the candidate's record relies, as a primary source, on the official court record and accepts it unquestionably as truth. Discrepancies between the court record and the applicant's disclosure are imputed to the applicant's efforts to cover up unflattering (at best) or incriminating (at worst) information about themselves. Several interviewees were taken aback when discrepancies between their court records and their accounts of the events were interpreted as intentional deception. Typically,

when telling me their criminal histories, they provided a very rich context to their actions, which shed a strikingly different light on them than the official record. Bree told me of a personal relationship that went sour and led to emotion-filled retaliation and expressed frustration that her indictment for a property felony left much of that context out of the conversation. Rasheed mentioned the context for his own property offence, which was an innocently meant prank. Gina's story of her most recent entanglement with the law was especially evocative:

> I was at a clinic working on a [human rights case] and we won. It was such a good day, and we all went to celebrate, and I had a few glasses of wine. Now, my car was parked right there, but obviously it would not be a good idea to drive tipsy, so I went to take [the train]. And then it turns out there's a mechanical problem and there's no trains going anywhere, and how am I going to get home? So maybe I'm a little frustrated, and there's no attendant, and a cop comes along, and starts asking questions, and boom, public intoxication. When all I'm trying to do is not commit a DUI.
>
> Bree: If all you read was the criminal record, you wouldn't know the first thing about what happened. It's such a reductive framework.

The stories my interviewees told of their crimes are reflective of experiences that litigants in general,[57] and criminal defendants in particular,[58] face when the complex genesis of their legal problem is reduced to what the legal system deems relevant. My interviewees' legal education imbued their experience as criminal defendants with a sour aftertaste, as they felt the reductionist character of the legal system. This contributed to their sense of shame and their feelings that aspects of their conduct that could be understandable, if not excusable, were left out of the official narrative of the crime, and that the richness and uniqueness of their circumstances was blurred to make them faceless, unidentifiable members of the criminal offender population.

4. "I'm Sorry, but I Was Wronged, Too": The Complicated Experience of Remorse

Recall De Giorgi's formerly incarcerated interlocutors, struggling with basic survival problems: a roof over their heads, something to eat, a job — any job. One of de Giorgi's important insights was that, despite the very real

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57 Austin Sarat & William LF Felstiner, "Law and Strategy in the Divorce Lawyer's Office" (1986) 20:1 Law & Soc'y Rev 93.

58 Sally Merry, *Getting Justice and Getting Even: Legal Consciousness Among Working-Class Americans* (Chicago: University of Chicago Press, 1990).

problems faced by reentering prisoners, "the main services offered to [them] are aimed at restructuring their personalities along the coordinates of an idealized neoliberal subject: a self-reliant entrepreneur of the self, constantly at work to accumulate human capital and eager to compete with his/her peers in the lowest regions of a deregulated labor market."[59] This narrow focus on accountability is echoed by de Giorgi's interlocutors, who "appear to have internalized the neoliberal narrative of personal responsibility that is constantly inculcated in prisons, rehabilitation centers, and reentry programs. They wholeheartedly embrace the dominant rhetoric of free choice, as well as hegemonic definitions of social deservingness and undeservingness."[60]

As amply demonstrated in *Gossage* and *Glass*, expressing remorse and convincing the committee of having transformed one's life are essential. The importance of not only feeling remorse, but performing it convincingly, so that it is readable to the committee, cannot be understated. I saw parallels between this experience and my research on self-presentation of lifers before parole boards.[61] The expectation of the committee seems to be a complete, unqualified expression of remorse, and it has to be read as genuine.

In *I Was Wrong*[62] and *Justice Through Apologies*,[63] Nick Smith examines the components of what is generally perceived as a complete apology, listing no less than 13 factors. Some of these address the content of the apology (such as corroborated factual record, acceptance of blame, identification of the harms done and the moral principles behind them, willingness to redress), but some of them address the context and performance of the apology, which lend it verisimilitude.

Smith's list of factors might appear a tall order, but it speaks to the public conversation about whether apologies are "complete" and the tendency to reject "non-apology-apologies" a-la "I'm sorry they were hurt." Importantly, Smith's list addresses not only what is said, but also how it is said. In *Justice Through Apologies*, Smith convincingly argues against the practice of court-ordered apologies, which, as he explains, are inherently incomplete and unconvincing by virtue of the context in which they are

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59 de Giorgi, *supra* note 9 at 94.

60 *Ibid* at 107.

61 Aviram, *supra* note 15.

62 Nick Smith, *I Was Wrong: The Meaning of Apologies* (Cambridge: Cambridge University Press, 2008)

63 Nick Smith, *Justice Through Apologies: Remorse, Reform, and Punishment* (Cambridge: Cambridge University Press, 2014).

offered. Elsewhere,[64] I expand Smith's point to encompass the expectation that remorse be performed at parole hearings, and the moral character "informal conference" is no different. Because of this context, in which people are expected to deliver a convincing performance of remorse, I asked the bar official I interviewed how he could tell whether someone was genuine in expressing remorse. My pleasant interlocutor became angry and replied: "What do you think, that I just fell off the boat? I was a federal prosecutor for 28 years. I can tell when I'm being lied to."

My interviewees who, regardless of their diverse socio-economic background were, as a group, educated, eloquent, and sophisticated, took issue with the simplistic way in which the bar solicited their expressions of remorse. By contrast to de Giorgi's subjects, my subjects did not embrace the dominant rhetoric of an unqualified remorse, even as they were keenly aware of the need to project it.

> Bree: It's not that I'm not sorry. I'm sorry. But I was wronged, too. You should have seen that courtroom. I walked with a really strong sense that an injustice had been done. And there was no room, no space, in that interview, to discuss this. This doesn't negate my remorse, you know what I mean? I can feel sorry for what I did and at the same time tell you that I was wronged too.

The duality that Bree identifies is between her own complex understanding of the factors that led to her crime of conviction and the oversimplified, unambiguous narrative expected by the court. This theme was echoed more explicitly by Jolene and by Gina, both of whom offer their sense that the courtroom hearing is performative:

> Jolene: What I did all those years ago and what was done to me is all part of a very complicated experience as a young person. And it's all linked to being a runaway and being involved with drugs. So I knew the expectation was, talk about your part and leave out all the rest, because that makes it seem like you're not really sorry.
> Gina: It was very clear to me that I had to grovel. There were no two ways about it. There was no one in the room that I felt could take in a complicated narrative of what happened. It was obvious that I was in a theater production and I just had to follow the script.

Gina, in particular, evokes Goffman's notion of a constant performance, a "presentation of self,"[65] in a setting in which it was very clear to her that the performance was inauthentic to the narrative. She also suggests that her

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64 Aviram, *supra* note 15.

65 Goffman, *supra* note 17.

complicated history was something the people in the room were unable to "take in."

Even more bitterness resulted from situations in which my interviewees provided a "record of rehabilitation" that was read as inauthentic. Mike included in his file evidence of his many volunteer and pro-bono activities. He was dismayed when the committee challenged his motivation in participating in these activities:

> [The committee member] said, this is all puffery, you're doing all this stuff to glorify yourself and get good connections. A lot of this is politically expedient. That was upsetting to hear. Being on these boards is a lot of work.

Overall, the sense I got was not that my interviewees were not remorseful, but that their remorse was entwined with the complex nature of criminal justice in America, in which apportioning blame is not as easy as it seems, and in which the criminal justice system can only "read" unqualified remorse. One interesting subsection of this experience was the issue of substance abuse, to which we now turn.

5. Substance Abuse: Overdiagnosis or Denial?

The classification used by the bar to sort moral character cases classifies substance abuse issues as serious: a single DUI lands an applicant in Category 3, whereas two DUI offences land them in Category 4. The bar official I interviewed explained:

> We have a serious problem with substance abuse in the legal profession. So our job in dealing with these cases is to try and figure out whether the person really has a substance abuse problem or they were just unlucky. The two obvious things we're looking at are, do we have a pattern here? Or is this just one incident? And how recent is it?

Three of my interviewees — Brian, Mike, and Gina — participated in recovery programs in the legal community. Notably, all three of them denied having a substance abuse problem. Brian participated in The Other Bar,[66] a 12-step organization for the legal community, which is not officially affiliated with the California Bar, and explained:

> To be honest, I don't think I have a substance abuse problem. But I did find the program useful. It's not very common to find a place where men talk about their

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66 "Success Begins Here': Help for Alcoholism, Drug Abuse and Related Personal Problems" (last visited 4 July 2020), online: *The Other Bar* <otherbar.org/> [perma.cc/3ETC-CWWJ].

> feelings openly, and because we share a profession, a lot of the dilemmas and the things people were talking about were stuff that I, too, deal with in my life.

Mike and Gina participated in the Lawyer Assistance Program (LAP), which is affiliated with the California Bar.[67] In both cases, they joined the program because at their first informal conference, in which they were denied admission to the bar, they were required to do so. LAP defines its mission statement as helping "lawyers, State Bar applicants, and law students who are grappling with stress, anxiety, depression, substance abuse or concerns about their career." The program is billed as a voluntary, confidential resource, but it offers "monitoring" services for a fee:

> The Monitored Lawyer Assistance Program is for attorneys who want to satisfy a specific monitoring or verification requirement imposed by an employer, the Office of the Chief Trial Counsel, State Bar Court, Committee of Bar Examiners or another entity.
>
> The program offers long-term structure and the support of a professional case manager. Attorneys may refer themselves to this program or may be referred as the result of an investigation or disciplinary proceeding. It is also available to attorneys seeking help independently who want the additional structure and support that this part of the program provides. There is a fee for group participation and lab testing, if required.[68]

LAP is a more structured substance-abuse program than The Other Bar, in the sense that it provides periodic drug testing, professional supervision, and even an assessment. The bar official I interviewed explained that LAP provides the Committee with a letter regarding the applicant's progress in their rehabilitation journey. The letter uses terms of art to describe rehabilitation, which the committee "decodes" in order to decide whether additional time at the program is necessary.

> Mike: I found it a good program, even though I don't think I actually have a substance abuse problem. But it was good to have the structure, because at the first hearing they were telling me I was clearly not aware of the problem, that I needed to accept the problem to take care of it, so it was good to have something I could bring to them that would say, "moderately rehabilitated" or "completely rehabilitated" and have them accept it.

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67 "Lawyer Assistance Program" (last visited 4 July 2020), online: *The State Bar of California* <www.calbar.ca.gov/Attorneys/Attorney-Regulation/Lawyer-Assistance-Program> [perma.cc/B964-RHYT].

68 "Lawyer Assistance Program Services" (last visited 4 July 2020), online: *The State Bar of California*, <hwww.calbar.ca.gov/Attorneys/Attorney-Regulation/Lawyer-Assistance-Program/LAP-Services> [perma.cc/5K5R-KXGD].

> Gina: Look, I can have a glass of wine. Or several. And stop at will. I'm not an alcoholic, obviously. But after the first hearing, it was obvious that the way out of this situation was the LAP program. So I participated, and the leader of the program became a mentor for me. He wrote me a really nice letter for my second hearing.

For both Mike and Gina, "lumping" them into the substance-abuse-problem population was a reduction and generalization of the role alcohol played in their lives. They describe a sense of being "roped" into an artificial, performative situation, which is the only way to provide the credentials that the system is able to recognize.

I asked Martin whether he thought the proliferation of substance abuse diagnoses stemmed from overcautiousness on the part of the bar, or denial on the part of the applicants. He opined:

> It's probably both. You know, I used to be an addict. I know very well what it's like to be in denial of your own problems. And at the same time, if the bar overdiagnoses, I can see why they do it. We have a really serious issue of lawyers who are irresponsible, falling behind, disappointing their clients, even deceiving or cheating their clients, and it's often linked with substance abuse. Don't forget that there's also some comorbidity with issues of mental health, which are also rife in the legal profession, and because there is so much shame in the profession about having a mental health challenge, people simply self-medicate.

Overcautiousness about sobriety is not unique to the California Bar. Tarra Simmons, a formerly incarcerated lawyer, appealed the Washington State Review Board's decision not to approve her moral character application, and found some logic in the Board and the Court's rigidity after the fact:

> I appealed to the Washington Supreme Court. . . It must have surprised both the court and the public that the brilliant attorney arguing on my behalf had himself been convicted of armed bank robberies just a few years prior. The court reversed the Board's rejection. It embraced evidence-based practices for evaluating how long a person must show rehabilitation from substance use disorder and refrain from crime before they pose no substantial risk of recidivism. Although the court declined to adopt a bright-line rule for admission to practice law, it cited to research showing that five years of sobriety and exemplary conduct should be given great weight in determining whether a person has transformed her life. The court refused to adopt our suggested presumption that five years of law-abiding conduct establish the character and fitness necessary to practice law, giving flexibility for people with less time of documented desistance or sobriety. In retrospect, I agree with the court and view this flexibility as important. Through my personal experience mentoring and supporting others in substance use recovery, I understand that a relapse can prompt one towards recovery and result in profound change. A rigid rule could have mistakenly left out those who are equally

> committed to overcoming their history of abuse and equally qualified to be members of the legal profession.[69]

Because of the confidentiality involved, it is impossible to obtain data about the demographics and backgrounds of LAP participants. But the problem of obtaining data runs far deeper and involves important dimensions such as race and class, to which we turn next.

6. Invisible Diversity: The Intersection of Criminal Histories with Race and Class

Because the bar did not, until recently, keep statistics on its moral character process, it is impossible to tell the extent to which being identified as a moral character "problem" correlated with race or class.[70] But my interviewees were painfully aware of the intersections between their demographics and their path to the legal profession. Notably, interviewees of color connected the moral character process with other aspects of their marginalization, both throughout the process and after it. Rasheed explained:

> I've been sitting in meetings with colleagues and am painfully aware of how I am doubly "other": because of my race and because of this thing that people can't see. And neither of these are things you comment on in polite conversation or make overt.

White interviewees were also deeply aware of race, but rather as an exception. Interviewees for whom the criminal justice encounter was an aberration in their lives felt like visitors who saw what the system was like for disenfranchised individuals. Bree said:

> Look, [the trial] was a bad experience, but I'm keenly aware of the fact that I was overall lucky. There was this guy there, and his hearings got delayed, too, and I gotta say — I was so lucky that my [family] is [influential]. It could have been a lot worse.

Bree's comment reflects a keen awareness of the privilege she was able to monetize into a lenient outcome in the criminal justice system. I asked Bree

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69 Simmons, *supra* note 2.

70 This problem is, remarkably, not limited to California. In her personal essay about her own Bar admission barrier in Washington State, Tarra Simmons reports that "The WSBA does not keep demographic data on the applicants who are admitted or denied, and the confidential nature of the process does not allow for them to have access to prior Board decisions." See Simmons, *supra* note 2.

whether the experience honed her compassion and care toward those hurt by the system, and she replied:

> Sure! This is why, why I wanted to practice law, to correct these problems and help people. Except I ended up not doing it because I gotta say, after everything I've been through, I can't deal with criminal law. Just can't deal with it. Too traumatized.

Gina spoke of her sense of being "otherized" in invisible ways:

> I've had this long history, and people think, just because I wear this white face, and I walk around, I've made it.
> Q: That's an interesting metaphor, 'wearing a white face.'
> A: Well, that's exactly what it feels like. Like the white face is a mask. And of course it's different for someone who walks around looking like a person of color. But I have had these experiences, and I feel kinship with people who felt them, even though this white face is shielding me from overt reactions. But this process made me realize even more strongly how people are treated in this country.
> Q: Did this shape your decision to go into public interest lawyering?
> A: No, that happened earlier. I've always wanted to do this.

Gina's remarkable use of the term "wearing a white face" suggests that the identities of white applicants might be more redeemable than those of applicants of color. Their ability, to use Goffman's dramaturgical approach, to use their "mask" of a white face to perform an identity that does not appear spoiled to outside viewers, is not available to applicants of color, like Rasheed, for whom the hidden spoiled identity as a person with a criminal record is echoed by the overt spoiled identity of a person of color within a predominantly white profession.

Nonetheless, it is important to say that all my interviewees — white people and people of color alike — struck me as having been sensitive to issues of discrimination before their legal career, but many of them said that their own experiences in the criminal justice system made them keenly aware of oppression and inequality. Two white interviewees mentioned meeting other defendants in court who fared much worse than they did. Gabe explained:

> If anything, my background made me even more aware of what bullshit the war on drugs is, and more committed to helping people that are caught in it.

These sensitivities to race and class were just some of the effects of the moral character experience on my interviewee's legal career after their paths to admission were cleared.

7. Effect on Legal Career

All the interviewees, without exception, reported a sense of joy and relief in finally being admitted to the bar.

> Gabe: I was waiting to hear… my friends got their letters back, and I was wondering what was keeping mine. So when I heard, it was like — my life can begin again. I'm done with all that and now I can move on.
> Bree: Just immense relief. I cried when I got the letter.
> Gina: So many people rallied around me for the second hearing. I called in all the favors, all my friends rose to the occasion. So when I heard back — tears of joy, and I right away planned a giant party for all my friends. It was such a wonderful celebration.

But the embarrassing and shameful aspect of the experience remained etched in their memories and affected the way they conducted themselves in their professional lives. Three of my interviewees spoke to me early in the morning, before their colleagues came in; the rest spoke to me in the evenings, at home or in cafés. Mike explained his discretion policy:

> My direct supervisor at work knows, and he also went to bat for me with the committee, writing letters and all that. But the other people who work here don't really. Which is fine, not everyone needs to know everything.

Bree, too, erred on the side of non-disclosure to her colleagues:

> I've certainly become more reserved. The other associates at the firm are going out to drinks and inviting me, and I'm more hesitant about this than I'd been in other workplaces. Nobody here knows about me.

Other interviewees had a different approach, relying on their experiences as a way to build bridges with their clients. Gabe, who works as a public defender, explained:

> Oh, I openly share this with clients. It's sometimes hard for clients to find common ground with a defense attorney, and they understandably think you don't know what they're going through. I'm after all a white guy, wearing this suit, my tattoos are covered, so telling them, yes, I know what it's like to be in jail for the night, I know what it's like to go through this and fight the war on drugs, it's important. It humanizes them. It reminds them that I see that they are human.

Martin, who represents bar applicants and lawyers in ethics matters, shared:

> My [history of addiction] is something that I always share with applicants. It's an important ice breaker, and also a good reminder that you can go through this and move on to a successful legal career.

And for many of them, the concern about being found out never completely vanished. Rasheed described this sense of constant vigilance:

> It's something that can never truly recede to the back of my mind. Yes, I still Google myself to make sure that whatever's there stays off of Page 1. I do this periodically. I have a great job and I'm happy, but I'm never going to not Google myself to make sure.

He remembered an instance in which his personal history stood in the way of getting a job:

> I had an interview at [workplace] scheduled, and everyone was so very nice and sending me emails in anticipation of this [interview], and then, a few days before the interview, I Googled myself and found that mention of the incident I was involved with jumped to Page 1.
> Q: Which you ascribed to…
> A: Which I ascribed to people looking me up. And a couple of days later, I got an email from them saying that they've decided to go a different direction with their hires, and that was that. I knew what it was about.
> Q: Did they ever tell you it was because of your record?
> A: They didn't have to.

Rasheed also reflected on how his criminal history impacted his personal life:

> Another interesting situation is how this has affected dating. But you know, in a funny way this actually does an excellent job of weeding people for me. Whoever might have a problem with my history, or with dating someone with a criminal record, is not someone I want to date anyway.

This diversity of opinion about the interviewees' later careers reveals different personal styles and ways to express and foster resilience. But regardless of how open interviewees were with the people in their professional lives about what they went through, their backgrounds, and the way these backgrounds played out in the moral character process, could not be forgotten. These lasting effects on the interviewees' psyches are striking given the insights from life course criminology about desistance: certain events in the life course — particularly those that imbue a person with considerable stigma — can leave a strong and lingering imprint on the person's life even as the person makes the choice to desist in the future.

IV. DISCUSSION: SHAME, REMORSE, AND EXCLUSION

The most dominant emotion that arose in the interviews was shame, in a way that complicates the existing literature on re-entry. Perhaps by contrast to the simplistic assumption that anyone whose needs are located higher than bare survival in Maslow's hierarchy is privileged, and thus has problems that merit less attention, my interviewees' experiences reflected a unique

type of suffering: the shame associated with the sudden, and compelled, bridging of the gap between who they were and who they had become. The shame was exacerbated by the discrepancy between my interviewees' past experiences and the stereotypes and expectations associated with people of their new professional milieu. Echoing Goffman's concept of performativity, the interviewees, most of whom had managed to morph their self-identity to conform to their new status as candidates for the legal profession, were reduced by the process into their former shoes as convicts and/or prisoners.

Making sense of these sentiments illuminates previously neglected themes in the re-entry literature, namely the costs of upward mobilization from a checkered past. A process that requires disclosure and discussion of people's histories, even if done in a respectful and courteous way, can and does bring up difficult experiences. Ironically, the social distance traveled from these experiences to seeking admission to an elite profession makes the former status less normal, more aberrant, and more emotionally difficult to face and disclose. The stringent requirements on accuracy in disclosure should be interpreted in light of these emotional difficulties and should take into account not only the practical difficulties of remembering and accurately recreating an unsettled life, but also the anguish involved in completing the paperwork. Omissions and inaccuracies should not be ignored, but they should be approached with nuance and sensitivity.

But there are also ways in which the process itself can be made more salutary. Allowing attendees to bring support people to the hearings and allowing those to speak on the applicants' behalf could help transform a difficult situation into a more healing one. Opening the process to law school professors and fellow students would do the same and contribute to the reduction of stigma.

One of the striking findings was the contrast between the Bar officials' simplistic perception of remorse and the applicants' more complex perception of their personal histories and moral process. The officials' certainty that they could glean the essence of the story from the court record and to assess remorse reflected a considerable amount of unwarranted hubris. My interlocutor's certainty that he can detect true remorse is far from endemic to bar proceedings: police officers, judges, parole commissioners and parole agents all tend to highly estimate their ability to detect sincerity. Experimental research, however, does not bear this out. In one experiment, Saul Kassin et al. surveyed 574 investigators from 16 police

departments in five American states and 57 customs officials from two Canadian provinces.[71] The subjects were asked to rate their own deception detection skills and estimated a 77% level of accuracy. This high level of confidence far surpasses experimental findings. Elsewhere, Meissner and Kassin reviewed literature on police officers' accuracy in detection and found it to be no different than that of laypeople.[72] In a third study, Kassin et al. played ten taped confessions of inmates to college students and police investigators, half of which were true and half false. The students were generally more accurate than police, and accuracy rates were higher among those presented with audiotaped than videotaped confessions. In addition, investigators were significantly more confident in their judgments and also prone to judge confessors guilty. To determine if police accuracy would increase if this guilty response bias were neutralized, participants in a second experiment were specifically informed that half the confessions were true and half were false. This manipulation eliminated the investigator response bias, but it did not increase accuracy or lower confidence.[73] Even psychologist Paul Ekman, who believes that facial microexpressions can reveal insincerity,[74] finds that lie detection rates among untrained professionals — lawyers, trained law enforcement professionals, psychotherapists, trial attorneys, and judges — tend to be no better than chance.[75]

These difficulties are especially salient in the context of assessing the sincerity of remorse. In his book *Showing Remorse*,[76] Richard Weisman

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71 Saul M Kassin et al, "Police Interviewing and Interrogation: A Self-Report Survey of Police Practices and Beliefs" (2007) 31:4 L & Human Behavior 381.

72 Christian A Meissner & Saul M Kassin, "'He's guilty!': Investigator Bias in Judgments of Truth and Deception" (2002) 26:5 L & Human Behavior 469.

73 Saul M Kassin, Christian A Meissner & RJ Norwick, "'I'd Know a False Confession if I Saw One': A Comparative Study of College Students and Police Investigators" (2005) 29:2 L & Human Behavior 211.

74 Paul Ekman, *Telling Lies: Clues to Deceit in the Marketplace, Politics, and Marriage* (New York: WW Norton and Company, 2009) at 341–43.

75 Others have even less faith than Ekman: In a law review article about juror lie detection, Renée Hutchins offers evidence that deducing guilt from demeanor is endorsed, as a matter of routine, in jury instructions, but no guidance is offered as to how juries should make such deductions. As Hutchins explains, expressions denoting shifts in the automatic nervous system can reflect stress, shame, alarm, or other form of heightened emotion that is not necessarily deception. Renée McDonald Hutchins, "You Can't Handle the Truth! Trial Juries and Credibility" (2014) 44 Seton Hall L Rev 505.

76 Richard Weisman, *Showing Remorse: Law and the Social Control of Emotion* (New York: Routledge, 2014).

discusses two kinds of people whose remorse would not be recognized by the legal system despite their sincerity: the innocent defendant and the defendant who believes that his or her actions were right. Neither of these people can genuinely express remorse in a satisfying way, because the building blocks of the apology will be perceived as lacking. Notably, in the context of the moral character hearing, as well as in the context of a criminal trial or a parole hearing, convicted defendants are regarded as factually as well as legally guilty. Nonetheless, some of them profess their innocence. Formally, sentencing judges and parole commissioners are not supposed to hold the lack of expressed remorse against people who contest their guilt; practically, however, the extent to which the person is seen as stubbornly avoiding accountability and exhibiting lack of insight, as opposed to courageously fighting to prove their innocence, largely depends on whether the person is perceived as guilty or as innocent.

Although the assessment of remorse as genuine is regarded as an important task in the criminal justice system, as Susan Bandes argues,[77] there is currently no credible empirical evidence that remorse can be accurately evaluated in a courtroom (or, for that matter, anywhere else where virtual strangers' credibility is assessed). Without any empirical validity, factfinders rely on their sense of a convincing remorse performance. This adds a thick layer of artifice and superficiality to a process that purportedly demands serious self-reflection. A strongly recurring theme in the interviews was the interviewees' sense that their expressions of remorse, participation in rehabilitative programming (particularly substance abuse programs) and preparations for subsequent hearings were all part of a performance — not so much a disingenuous one as an artificial one. Again, echoing Goffman, the interviewees were forced to reduce their complex experiences and reflections to a flat narrative that could be comprehended by the committee, causing distress and dissonance in these intelligent, articulate people, who found themselves playing a mediocre part in a cliché play.

Even worse, the inability to accurately detect genuine remorse can yield further injustices by creating racial and cultural inequality: the evidence suggests that that race and other impermissible factors can confound the ability to evaluate remorse. In *The Cultural Defense*, Alison Renteln reminds us that not everyone displays remorse in the same way. Among her examples is the criminal trial of a young Hmong man, in which on appeal the defense

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77 Susan A Bandes, "Remorse and Criminal Justice" (2016) 8:1 Emotion Rev 14.

argued that the jury drew the wrong conclusions from the defendant's defiant and unemotional demeanor. Factors such as these could play to the disadvantage of applicants of color at moral character hearings.[78]

Indeed, this is just one of several issues that raise alarm about the demographic effects of professional exclusion from the Bar. The comments by interviewees of color about their double deviance, and by white interviewees about their hidden deviance, underscored the deep and scarring impact of an elitist profession on people with unique, non-elitist personal experiences. The California bar is disproportionately male and white. In the few occasions in which bar membership with criminal records are discussed, it is not in the context of diversity, but rather in the context of a public concern about "crooks" in the legal profession. Accordingly, the bar orients its policies, including the recent requirement that current members undergo periodic fingerprinting, toward the exposure and weeding out of "crooks." Criminal experiences are seen as a liability and a warning sign about the members' character.

My interviewees' interpretations were diametrically opposed to those of the bar. All of them, without exception, mentioned their experiences in the criminal justice system as catalysts for their decision to become lawyers, and most specifically to help disenfranchised population. Public interest lawyers who spoke to me cited their own criminal experience as an important empathy booster with their clients. Even some of the ethics attorneys cited their personal experiences with substance abuse as a bridge between them and clients with similar histories. By contrast, commercial lawyers, especially in big firms, remained circumspect about their history. Two lawyers spoke to me in the early morning hours, when they were alone in the office, and others spoke from home, citing concern about letting their colleagues know about their history. My conclusion from this was that the interviewees' background was a rich resource that provided them with a unique and important insider perspective on the system, which remained unvalued and tagged as uniformly negative baggage.

This limited perception of the interviewees' background matters because criminal histories are, in themselves, an important form of diversity that remains invisible in the world of limited, prescribed categories of diversity consisting of race, gender and sometimes sexual orientation. The truths revealed about workplace diversity by the existing categories are

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78 Alison D Renteln, *The Cultural Defense* (New York: Oxford University Press, 2004).

important, but they obscure other truths, involving other categories of valuable viewpoints from less overt personal histories and characteristics. Rather than seeing my interviewees as valuable resources for the legal profession, they are viewed as liabilities, people to scrutinize and screen, to the profession's detriment.

Also, importantly, having a criminal record intersects in meaningful ways with other personal characteristics, such as race and class. Demographic research robustly shows how poor people and people of color are over-represented in the criminal justice system, though the interplay of race and class can be difficult to untangle. We know that these same populations tend to be underrepresented in the Law student population; what we don't know is how many people of color, who might have otherwise been interested in pursuing legal careers, refrain from applying because of concerns that their criminal record will be an obstacle in admission to the school or, later, to the bar. Because, until recently, the bar did not collect statistics on its own moral character process, we also do not know whether the applicants that the bar selects for further moral character proceedings (expanded written answers, informal conference) tend to be disproportionately poor people of color. This raises concerns about the contribution of the moral character process to the elitist composition of the bar, either as a weeding implement or as a deterrent, whose scope can only be determined with the data. The fact that data has not been collected until recently is in itself suggestive that the bar did not prioritize transparency about its member selection process.

V. Conclusion and Recommendations

My interviewees' comments about remorse suggest that the bar's goal to "weed out psychopaths," as suggested by one of my interviewees, is pursued with a healthy dose of hubris. This is, of course, not unique to the legal profession. Strewn throughout the criminal process are situations in which professionals — jurors, judges, police officers, parole commissioners — purport to be able to determine the sincerity of remorse. Scholarship about remorse shows that professionals tend to significantly overestimate their ability to discern sincerity in remorse. As Susan Bandes argues,[79] there is no dependable way to detect remorse, and even to the extent that it correlates

[79] Bandes, *supra* note 77.

with rehabilitation or desistance — which is in itself contested — its sincerity is unknowable.

As a consequence, my first suggestion is for more modesty in the bar's approach. In the absence of reliable information about internal transformation, the bar should adopt a guideline that "rehabilitation is as rehabilitation does." Gainfully employed people, students in good standing, and the like, are people who desist from crime.

In this context, it is remarkable that the bar does not consider law school itself an experience demonstrative of desistance. Life course criminology literature, as well as the desistance literature, highlight education as an important station on the path to desistance. The rigor and stress involved in legal education imply that those who undertake law school are making a considerable effort that guides and colors their lives and can be, if not all-consuming, nearly so. This is especially remarkable given the fact that the bar views very seriously any violations of the law school honor code, classifying them as "category 4" incidents.

Tarra Simmons' experience appealing her denial offers a glimpse into the difficulty of making such arguments as an individual. The considerable amount of shame involved in applying to the Bar with a criminal record means that people usually pursue these legal paths on their own and cannot therefore benefit from the collective experience of others in the same category. This lamentable situation might change, however, with two laudable developments. Underground Scholars, an organization for justice-involved university students at Berkeley and UCLA, sees its mission as "creat[ing] a pathway for formerly incarcerated and system impacted individuals into higher education" and "building a prison-to-university pipeline through recruitment, retention, and advocacy."[80] While Underground Scholars focuses mostly on recruitment and retention in undergraduate programs, their important work could mean more access to law school by college graduates with criminal records. A more direct contribution to the ability to advocate as a group is the recent effort by Dieter Tejada, a Vanderbilt Law School graduate who passed the bar in Connecticut but failed the moral character qualification, to form the National Justice Impact Movement, a voluntary bar association bar for

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[80] Berkeley Underground Scholars, "Our Mission" (last visited 4 July 2020), online: *UC Berkeley* <undergroundscholars.berkeley.edu/about> [perma.cc/4AL3-JK69].

formerly incarcerated lawyers.[81] Such an organization, particularly if adopted by other states, could have a valuable contribution to reducing negative stigmas, providing positive role models, and infusing the legal community with insider perspectives, compassion, and a deeper comprehension of the criminal justice experience.

Finally, law schools themselves share a responsibility to support students with criminal records and help them succeed. Law school applications should be explicit and clear about the fact that their content is read by the bar committee in tandem with the moral character application, and that accuracy in the narrative is therefore imperative even at this early stage. Law schools should provide online information about criminal records and the moral character process on their website. Admissions personnel should be able to offer counsel to prospective applicants with professionalism and compassion about the content of the applications, to make sure that the threshold to entry is not a deterrent or hindrance, but rather a challenge to undertake with full information and resources.

Politically speaking, California law schools have invested plenty of advocacy and activism energy on a struggle to raise the minimum score for California bar passage, which is the lowest nationwide.[82] I think it would be morally advisable to divert at least some of this energy to the issue of moral character. To the extent that legal education is a major player in shaping the legal profession of the future, law schools should expand their definition of "diversity" beyond well-trodden paths and advocate for their graduates with criminal records, whose intimate acquaintance with the criminal process can shape the legal profession in the direction of empathy, trust, and empowerment.

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81 Kelan Lyons, "From Prison to Practice: Connecticut Man Hopes to Start Bar Association for Formerly Incarcerated Lawyers" (2 August 2019), online: *The CT Mirror*, <ctmirror.org/2019/08/02/from-prison-to-practice-connecticut-man-hopes-to-start-bar-association-for-formerly-incarcerated-lawyers/?fbclid=IwAR0xTWBe8X1aGwBdSNv4FzCy6icrnD-5K-zg7R4LopWuL5qfqR8qiRKG0OE> [perma.cc/J62S-592X].

82 Staci Zaretsky, "Law School Deans Say Absurd Cut Score to Blame For California's Horrendous Bar Exam Pass Rate" (6 December 2018), online: *Above the Law* <abovethelaw.com/2018/12/law-school-deans-say-absurd-cut-score-to-blame-for-californias-horrendous-bar-exam-pass-rate/> [perma.cc/GXX6-H7DF].