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## ARTICLES

### INTERROGATION STORIES

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*THE Article poses questions about police interrogations that go beyond the furor over *Miranda v. Arizona* and beyond even the controversy over the “voluntariness” standard for judging the admissibility of confessions in criminal cases. According to these debates, police interrogations have the potential to provide true answers to the historical questions of who-done-it, how, when, where, and why. The Article argues that the police confessional is a space where the truth is produced by the interrogator’s strategic use of narratives that exploit popular ways of thinking about the gap between legal liability and moral culpability for criminal misconduct. The project was motivated by the rhetorical strategies promoted by police interrogation experts for use in rape cases. The agenda is positive and normative. As for the positive, my plan is to describe what interrogation stories teach us about the character of police investigations as a device for recovering historical truth. Is the police officer a species of archaeologist, one who digs through layers of accumulated dirt to uncover a hidden crime? Interrogation stories suggest not.*

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*The interrogator is master author or improvisational playwright, one who is comfortable batting around potential plot lines with his leading actors before getting them to sign off on the final script. If author or playwright is the apt analogy, police interrogators do not merely find facts that are buried “out there somewhere,” just waiting for the alert detective to come along and excavate them. Rather, by using narrative scripts, police interrogators actively shape the meaning of facts by helping suspects embed them in a coherent narrative that coincides with our ethical judgments about which acts are blameworthy and which are not. As for the normative, the Article will offer speculations about the value-laden connections between police investigatory practices and the substantive mandates they ostensibly serve. Rape interrogations are a poignant context in which to explore these connections, as we see the police persuading perpetrators to confess by using the very same victim-blaming stories that the rape reform movement has aimed to expunge from substantive prohibitions, courtrooms, popular culture, and, ultimately, from the heads and hearts of human beings.*

INTRODUCTION.....	1601
I. POLICE INTERROGATIONS: A LITTLE BIT OF LAW AND A BOATLOAD OF DISCRETION.....	1610
II. STORYTELLING IN EVERYDAY LIFE: NARRATING THE QUOTIDIAN, THE EXTRAORDINARY, AND THE ILLEGAL.....	1618
A. <i>How Stories Make the Trivial Meaningful and, Maybe,     Criminal</i> .....	1624
B. <i>The Guilty Plea: Crimes Without Narratives</i> .....	1629
III. THE POLICE CONFSSIONAL: SCRIPTING CRIMES .....	1635
IV. THE TRUTH IN THE STORIES .....	1652
CONCLUSION.....	1659

2009]

*Interrogation Stories*

1601

*One cannot bind the investigator with form at every step. The investigator's business is, so to speak, a free art, in its own way, or something like that . . . heh, heh, heh!*

Fyodor Dostoevsky<sup>1</sup>

*What is a fact really?*

David E. Zulawski & Douglas E. Wicklander<sup>2</sup>

#### INTRODUCTION

This Article aims to pose new questions about police interrogations and the speech acts<sup>3</sup> that they produce. By “new,” I mean questions that go beyond the decades-long furor over the warnings mandated by *Miranda v. Arizona*<sup>4</sup> and beyond even the centuries-

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<sup>1</sup> Fyodor Dostoevsky, *Crime and Punishment* 337 (Richard Pevear & Larissa Volokhonsky trans., Vintage Books 1993) (1866).

<sup>2</sup> David E. Zulawski & Douglas E. Wicklander, *Practical Aspects of Interview and Interrogation* 73 (2d ed. 2002).

<sup>3</sup> J.L. Austin's elegant and influential book, *How to Do Things with Words* (1962), isolated categories of utterances in which the saying of words “is, or is a part of, the doing of an action.” Id. at 5. Without yet digging into the voluminous speech-act scholarship that Austin inspired, I reckon that it's safe to say that one who utters to police the words “I confess . . .” has *done*, as well as *said*, something. Indeed, by commencing her utterance with those two words, the subject commits an act just as real as and no less fateful than the crime to which she confesses. It is by virtue of the confessional act—either alone or in combination with other evidence—that the system is able to punish her for the criminal one.

<sup>4</sup> 384 U.S. 436 (1966). As Saul Kassin and his co-authors recently remarked, *Miranda* is “[o]ne of the best known legal opinions in American history,” Saul M. Kassin et al., *Police Interviewing and Interrogation: A Self-Report Survey of Police Practices and Beliefs*, 31 *Law & Hum. Behav.* 381, 383 (2007), and it is one over which scholars have spilled buckets and buckets of ink. For a recent and thoughtful account of the premises underlying the *Miranda* safeguards and how subsequent Supreme Court decisions have allowed police to undermine the effectiveness of those safeguards, see Charles D. Weisselberg, *Mourning Miranda*, 96 *Cal. L. Rev.* 1519 (2008) [hereinafter *Mourning Miranda*]. For a glimpse of more of the voluminous literature on *Miranda*, the following recent articles contain partial bibliographies, most tucked in massive footnotes as required by law review citation practices. See, e.g., Richard A. Leo, *Questioning the Relevance of Miranda in the Twenty-First Century*, 99 *Mich. L. Rev.* 1000, 1001–11 (2001) [hereinafter *Leo, Relevance of Miranda*] (reviewing impact studies on *Miranda*); Erik Luna, *System Failure*, 42 *Am. Crim. L. Rev.* 1201, 1211 n.35 (2005) (review of empirical scholarship on *Miranda*); George C. Thomas III & Richard A. Leo, *The Effects of Miranda v. Arizona: “Embedded” in Our National Culture?*, 29 *Crime & Just.* 203, 266–71 (2002); see also Charles D. Weisselberg, *In the*

long controversy over the “voluntariness” standard for judging the admissibility of confessions in criminal cases.<sup>5</sup> Participants in these familiar debates pick fights over just about everything the Supreme Court ever has said about inquisitorial procedures, but, these days, few observers seriously doubt the fundamental value of confessions in resolving some criminal cases. The commentary proceeds from the premise that properly conducted police interrogations have the potential to give us the true answers to the historical questions of who-done-it, how, when, where, and why.<sup>6</sup> Of course, legal scholars, no less than lawmakers and enforcement agents, must know that shapely confessions rarely, if ever, spring full-blown from the mouths of criminal suspects.<sup>7</sup> Yet the legal literature pays scant at-

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Stationhouse After *Dickerson*, 99 Mich. L. Rev. 1121 (2001) [hereinafter Weisselberg, In the Stationhouse After *Dickerson*]; Charles D. Weisselberg, Saving *Miranda*, 84 Cornell L. Rev. 109 (1998) [hereinafter Weisselberg, Saving *Miranda*].

<sup>5</sup>For a discussion of the due process voluntariness standard and its origins in a common-law evidence exclusionary rule, see 2 Wayne R. LaFare, Jerold H. Israel, Nancy J. King & Orin S. Kerr, *Criminal Procedure* 608–10 (3d ed. 2007). These authors trace the voluntariness standard to a case decided by the Court of King’s Bench in 1783, *R v. Warickshall*, (1783) 168 Eng. Rep. 234 (K.B.).

<sup>6</sup>Why else all the anxiety over the prospect that some inducements to speak may be producing false confessions? Thus, even the leading critics of contemporary interrogation tactics agree that, “[d]one properly, police interrogation can . . . be an unmitigated social benefit. It can allow authorities to capture, prosecute, and convict wrongdoers and deter crime. These are enormously important outcomes.” Richard A. Leo, *Police Interrogation and American Justice* 2 (2008) [hereinafter Leo, *Police Interrogation*]. Of course, interrogators themselves insist that their work contributes mightily to accurate outcomes in criminal cases. See, e.g., Warren D. Holmes, *Criminal Interrogation: A Modern Format for Interrogating Criminal Suspects Based on the Intellectual Approach* 3, 8 (2002); Charles L. Yeschke, *The Art of Investigative Interviewing* xviii–xix (2d ed. 2003).

<sup>7</sup>See, e.g., Leo, *Police Interrogation*, supra note 6, at 119. As interrogation experts explain, “[r]egardless of the type of statement used, the interviewer must continue to maintain control to assure a usable statement from the suspect or witness. To allow a suspect or witness to proceed without direction while making a statement almost assures that it will be unusable.” Zulawski & Wicklander, supra note 2, at 421; see also Holmes, supra note 6, at 117, 121 (“In taking a formal confession, the interrogator should project himself to the scene of the crime, and should ask questions that make the crime unfold before his mind’s eye.”); Fred E. Inbau, John E. Reid, Joseph P. Buckley & Brian C. Jayne, *Criminal Interrogation and Confessions* 377–89 (Jones and Bartlett Publishers 2004) (4th ed. 2001) [hereinafter Inbau 4] (providing guidance for converting an oral confession into a “convincing and effective” written confession that “will serve to arouse immediate interest in the document by the jury as it is read”); Charles E. O’Hara & Gregory L. O’Hara, *Fundamentals of Criminal Investigation* 163, 168 (7th ed. 2003) (explaining that confessions must be both “freely made and correctly accomplished to include reference to each of the elements of the offense.”)

2009]

*Interrogation Stories*

1603

tention to the rhetorical methods through which police interrogations determine the meaning of the facts that they find.<sup>8</sup> In this project, I will argue that the police confessional room is a space where the truth is produced by the interrogator's strategic use of narratives that exploit popular ways of thinking about the gap between legal liability and moral culpability for criminal misconduct. The interrogator's portfolio is stuffed with scripts that are calculated to appeal to the cornered suspect's desire for extenuation,<sup>9</sup> to quench his thirst for some excuse for his crime, even for a flimsy rebuttal that "gets [him] only out of the fire into the frying pan."<sup>10</sup> Confessions emerge from a collaboration between investigator and criminal, in which the interrogator usually plays the role of lead author, who spins specific narrative plot-lines, trying out one mitigating yarn and then another, all told to get the suspect talking and keep him talking until he talks himself right into a prison cell. One interrogation expert explains the process this way: "A confession does not result from an idea presented in one paragraph; it results from an idea that the interrogator enlarges into a story. The interrogator must paint an acceptable picture using words."<sup>11</sup>

If this description of interrogator as co-author rings true, let me be clear up front: I am not using the word "story" pejoratively. That is, by arguing that police interrogation tactics consist mainly of storytelling, I do not here mean to suggest that all—or, even, most or many—of the resulting confessions are "fictional" or

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and that investigators must exercise "good judgment" in deciding what information should be included in and what excluded from the written statement); Robert L. Snow, *Sex Crimes Investigation: Catching and Prosecuting the Perpetrators* 71 (2006) ("Experienced sex crimes detectives realize that even when rape suspects stop lying, few confessions come full-blown by themselves, but usually only follow a series of small admissions" that interrogators must work hard to elicit and develop).

<sup>8</sup> For a very recent and helpful exception, see Leo, *Police Interrogation*, *supra* note 6, at 165–94 (focusing on methods police use in the so-called "postadmission portion" of the interrogation to assist the suspect to "create a persuasive narrative of the suspect's culpability").

<sup>9</sup> For a manual that provides a compendium of tried and true interrogation stories, see Louis C. Senese, *Anatomy of Interrogation Themes: The Reid Technique of Interviewing and Interrogation* (2005) (promising on the back-cover blurb that the book delivers "[m]ore than 1,600 themes and theme dialogues" for 54 different crimes).

<sup>10</sup> J.L. Austin, *A Plea for Excuses*, in *Philosophical Papers* 177 (J.O. Urmson & G.J. Warnock eds., Oxford Univ. Press 3d ed. 1979) (1961). After all, as Austin reminds us, this is how excuses work: "few" of them "get us out of it *completely*." *Id.*

<sup>11</sup> John E. Hess, *Interviewing and Interrogation for Law Enforcement* 70 (1997).

“false.” Confessions may be false, to be sure, but not because they are shaped by and take the shape of stories. To the contrary, narrative is a conventional, familiar, and appropriate methodology for producing the truth about or, more precisely, the meaning of human action,<sup>12</sup> including those acts that we deem to be crimes. Most statements given by crime suspects, victims, and witnesses—whether inculpatory or exculpatory—come in story form, and the police are the officials whose job it is, at least in the first instance, to assist in collecting the stories—again, whether inculpatory or exculpatory—that are fit for use in our criminal justice system. Thus, my agenda here is not to argue that interrogators should be forbidden to rely on narratives when encouraging suspects to confess. Unless the cops do “enlarge” their suspicions, their “ideas” about who is guilty and who is innocent, “into stories,” their interrogation practices would be unintelligible, and, like Justice Jackson, I’m inclined to believe that there will be crimes whose solution requires police to subject suspects to a reasonable process of custodial examination.<sup>13</sup> Rather, my objectives are to familiarize you with common interrogation stories and to recommend that, at least for starters, we must begin parsing the plots that fix the facts on the basis of which our criminal justice system acquits some suspects and convicts others.

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<sup>12</sup> According to psychologist Jerome Bruner, the connection between what people “say” about human acts and those acts’ “meaning” is “self-evident,” and he uses examples of legal utterances to illustrate this crucial connection. For example, he explains:

[T]he meaning placed on most acts by the participants in any everyday encounter depends upon what they say to one another in advance, concurrently, or after they have acted. Or what they are able to presuppose about what the other *would* say, given a particular context. All of this is self-evident, not only at the informal level of dialogue, but at the formal level of privileged dialogue as codified, for example, in the legal system. The law of contracts is entirely about the relationship between performance and what was said. And so too, in a less formal way, is the conduct of marriage, kinship, friendship, and collegueship.

Jerome Bruner, *Acts of Meaning* 18 (1990).

<sup>13</sup> See *Watts v. Indiana*, 338 U.S. 49, 58 (1949) (Jackson, J., concurring in part and dissenting in part) (“[N]o one suggests that any course held promise of solution of these murders other than to take the suspect into custody for questioning. The alternative was to close the books on the crime and forget it, with the suspect at large. This is a grave choice for a society in which two-thirds of the murders already are closed out as insoluble.”). For the perspective of interrogation experts on these tough cases, see, for example, Inbau 4, *supra* note 7, at 231.

This project was motivated by the rhetorical strategies promoted by police interrogation experts for use in rape cases. Along the way, I shall have much to say about those particular techniques, as well as a bit about interrogation tactics more generally. The police have been publishing and studying interrogation strategies for more than half a century,<sup>14</sup> and, according to most of these experts, the best way to get a rapist to confess is to tell him “victim-blaming stories.”<sup>15</sup> “Victim-blaming stories” are narratives whose plots shift the moral fault for the sexual encounter from the rapist to his victim. To explain why this come-on coaxes cats out of bags, the experts explicitly invoke what they call human nature or common sense.<sup>16</sup> As everyone knows, the experts remark, “[n]obody likes to

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<sup>14</sup> In addition to the four editions of the influential interrogation manual authored by Fred Inbau and his co-authors, see Fred E. Inbau & John E. Reid, *Criminal Interrogation and Confessions* (1962) [hereinafter Inbau 1]; Fred E. Inbau & John E. Reid, *Criminal Interrogation and Confessions* (2d ed. 1967) [hereinafter Inbau 2]; Fred E. Inbau, John E. Reid, & Joseph P. Buckley, *Criminal Interrogation and Confessions* (3d ed. 1986) [hereinafter Inbau 3]; Inbau 4, *supra* note 7, and their predecessors, see Fred E. Inbau, *Lie Detection and Criminal Interrogation* (1942); Fred E. Inbau, *Lie Detection and Criminal Interrogation* (2d ed. 1948). There are numerous other texts in circulation. See, e.g., Arthur S. Aubry, Jr. & Rudolph R. Caputo, *Criminal Interrogation* (3d ed. 1980); Nathan J. Gordon & William L. Fleisher, *Effective Interviewing and Interrogation Techniques* (2002); Hess, *supra* note 11; Holmes, *supra* note 6; O’Hara & O’Hara, *supra* note 7; John R. Schaefer & Joe Navarro, *Advanced Interviewing Techniques: Proven Strategies for Law Enforcement, Military, and Security Personnel* (2003); Senese, *supra* note 9; Stan B. Walters, *Principles of Kinesic Interview and Interrogation* (2d ed. 2003); Yeschke, *supra* note 6; Zulawski & Wicklander, *supra* note 2. There also are texts devoted solely to the investigation of sex crimes, which include units on interrogations. See *Rape Investigation Handbook* (John O. Savino & Brent E. Turvey eds., 2005); Snow, *supra* note 7. Early texts include John Adam & J. Collyer Adam, *Criminal Investigation: A Practical Textbook for Magistrates, Police Officers and Lawyers*, Adapted from the System Der Kriminalistik of Dr. Hans Gross (Norman Kendal ed., 3d ed. 1934); Richard O. Arther & Rudolph R. Caputo, *Interrogation for Investigators* (1959); Zechariah Chafee, Jr., Walter H. Pollak & Carl S. Stern, *The Third Degree: Report to the National Commission on Law Observance and Enforcement* (1931); Jacob Fisher, *The Art of Detection* (1948); Maurice J. Fitzgerald, *Handbook of Criminal Investigation* (Paul B. Weston ed., 1951); W.R. Kidd, *Police Interrogation* (1940).

<sup>15</sup> See, e.g., Inbau 4, *supra* note 7, at 254, 256–57, 260, 285; see also Gordon & Fleisher, *supra* note 14, at 119–20; Hess, *supra* note 11, at 69–70; Holmes, *supra* note 6, at 75; Savino & Turvey, *supra* note 14, at 108; Walters, *supra* note 14, at 320–21; Zulawski & Wicklander, *supra* note 2, at 333–34.

<sup>16</sup> See, e.g., Inbau 4, *supra* note 7, at 233, 254 (“The principle being expressed here is that it is human nature to project blame away from oneself and to create excuses for behaviors that cause anxiety, loss of self-esteem, or guilt.”).

take the blame for things that have gone wrong,”<sup>17</sup> least of all criminally wrong. Thus, the successful interrogator makes criminals comfortable ratting on themselves by, first, replacing the pungent word “rape”<sup>18</sup> with pabulum such as “trouble,” “problem,” “thing,” “misunderstanding,” or “it,”<sup>19</sup> and, second, offering them “a face-saving excuse” for it.<sup>20</sup> In rape interrogations, the experts instruct, the most effective face-saving rhetoric reassures the suspect that “the victim caused it” by, say, wearing provocative clothing, getting wasted, and/or acting “more than a little friendly.”<sup>21</sup> Then, when “[t]hings [got] going pretty good, . . . all of a sudden she change[d] the rules and [said] stop. Hell, we all know that ‘stop’ often means ‘go,’”<sup>22</sup> and, at that point, no normal guy could help but take some of it for himself.<sup>23</sup>

Upon reading these recommendations, my first thought was something incisive along the lines of, “oh dear, feminism hasn’t made much of a dent on the interrogation room.” Then, I realized that the problem—if there is one—is not merely that feminist consciousness may not have penetrated the walls of police confessional rooms. Rather, the more immediate, if not more interesting, quan-

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<sup>17</sup> Hess, *supra* note 11, at 69.

<sup>18</sup> Here, the investigators would seem to be following Austin’s counsel, for “rape,” no less than “murder,” is a “verb of omen.” See Austin, *supra* note 10, at 190.

<sup>19</sup> The experts admonish interrogators to avoid words such as “kill,” “rape,” or “hit” in order to avoid reminding the suspect “of the specific serious consequences of telling the truth—the penitentiary or even a death sentence” or “recall[ing] to the suspect’s mind a revolting picture of the crime itself—the scream of the victim, the blood spurting from a wound, or the pedestrian’s body being thrown over the hood of an automobile or dragged along the street.” Inbau 4, *supra* note 7, at 354; see also *id.* at 8, 111, 220, 358, 367.

<sup>20</sup> *Id.* at 236; see also Holmes, *supra* note 6, at 69 (“Experienced interrogators . . . will suggest a face-saving out. . . . Most people are image-makers and they will always cast themselves in the best light, criminals are no different.”); Inbau 4, *supra* note 7, at 236 (“Guilty suspects generally require a face-saving excuse to tell the truth.”); Yeschke, *supra* note 6, at 31 (“[Most interviewees] appreciate being allowed to save face through rationalization or projection.”); Zulawski & Wicklander, *supra* note 2, at 188, 194 (recommending that investigators offer witnesses and suspects “face-saving rationalizations” to make them comfortable providing information).

<sup>21</sup> Hess, *supra* note 11, at 70.

<sup>22</sup> *Id.*

<sup>23</sup> See, e.g., Cal. Comm’n on Peace Officer Standards and Training, Interview and Interrogation Techniques Telecourse 24, 26 (1993); Inbau 4, *supra* note 7, at 234 (advising interrogators to assert that the “victim initially came onto the suspect and he acted the way any man would under that circumstance”).



dary is that the substantive criminal law may not be making inroads there either. In recent decades, legislators across the country have moved to eliminate victim-blaming elements from the law of rape and to sharply limit the use of victim-blaming as the forensic tactic-of-choice for lawyers defending accused rapists. Some victim-blaming stories are ostensibly foreclosed by the formal (re)definitions of rape found in contemporary penal codes, and others are forbidden by the reforms embodied in rape shield laws.<sup>24</sup> Presumably, one aim of the legislative reforms was to expunge rape-victim-blaming narratives from the juridical canon so that they would no longer be available in the courtroom to shape the meaning of the sexual intercourse that is being tried as rape. For feminists and allied reformers, of course, the ultimate objective is not merely to remove victim-blaming stories from the courtroom, but to purge them from the popular stockpile as well, so that people no longer invoke these tales when narrating for themselves, as well as for a whole range of significant others, the meaning of their own sexual activity. Yet, in the interrogation room, in this intimate space where the heroes and villains of our system rub elbows, we find both sides—the cops and the criminals—sitting down together and swapping stories about female culpability for male sexual violence.

At first glance, by expressing their preference for narratives that contemporary rape laws reject, expert interrogators seem to be thumbing their noses at the reformers' substantive objectives. Not so fast!, interrogators will retort, insisting that they are telling victim-blaming tales not because they endorse them,<sup>25</sup> but because the

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<sup>24</sup> See Stephen J. Schulhofer, *Unwanted Sex: The Culture of Intimidation and the Failure of Law* 17–46 (1998) (describing feminist criticisms of conventional rape doctrine and statutory reforms designed to focus rape trials on the culpability of the accused rather than that of the victim); see also Anne M. Coughlin, *Sex and Guilt*, 84 Va. L. Rev. 1 (1998) (explaining why the substantive elements of rape were calibrated so as to require rape victims to prove that they should not themselves be blamed for fornication or adultery). For a summary of contemporary rape reforms and their legislative purpose, see Cassia C. Spohn, *The Rape Reform Movement: The Traditional Common Law and Rape Law Reforms*, 39 *Jurimetrics J.* 119 (1999).

<sup>25</sup> See, e.g., Aubry & Caputo, *supra* note 14, at 51 (“[I]n situations which cause him the deepest disgust and revulsion, [the good interrogator] cannot allow himself the luxury of expressing his real feelings and reactions.”); Yeschke, *supra* note 6, at 105 (“[As an interrogator,] you may have to do or say things that you might normally find

stories help them reel in rapists. My intuition, however, is that the stories are more than just jail bait. By using victim-blaming stories to make rapists comfortable confessing, the police risk reinforcing the misogynist conventions and impulses that lead some men to rape in the first instance, that make victims refuse to report rapes to the police, and that make it so difficult for the system to make charges stick for any but the most violent rapes. Perhaps worse still, by continuing to sponsor the old victim-blaming scripts, interrogators suppress the emergence of new narratives—and the experiences they would support—about what would and should count as rape in a culture in which neither women nor men are oppressed by the sexual double standard.

From these basic observations, this Article will begin to fill in the ground for current and future research projects. In this initial foray, my plan is to contemplate what interrogation stories may have to teach us about the character of police investigations as a device for recovering historical truth. Is the cop a species of archaeologist, one who digs or, better still, sifts through layers of accumulated dirt to uncover and reconstruct a hidden crime?<sup>26</sup> Interrogation stories suggest not. At least in the confessional room, the cop is not merely finding but creating, not merely reconstructing but constructing, the solution to the crime.<sup>27</sup> The interrogator is master narrator or, maybe, improvisational playwright,<sup>28</sup> one who is comfortable batting around potential plot lines, as well as pinning down specific bits of dialogue, with his leading actors before getting them to sign off on the final script.<sup>29</sup> If improvisational playwright is the apt analogy—and please notice that some expert in-

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objectionable. This is tough to do, no doubt, but it is necessary if you are to be of the greatest service to your community.”).

<sup>26</sup> Cf. Donald P. Spence, *Narrative Truth and Historical Truth: Meaning and Interpretation in Psychoanalysis* 32 (1982) (criticizing and enriching Freud’s analogy between the work of the psychoanalyst and that of the archaeologist).

<sup>27</sup> See Leo, *Police Interrogation*, *supra* note 6, at 166.

<sup>28</sup> John Setear, my colleague, suggested this useful analogy, and I thank him for it.

<sup>29</sup> See Saul M. Kassin, *A Critical Appraisal of Modern Police Interrogations*, in *Investigative Interviewing: Rights, Research and Regulation* 207, 220 (Tom Williamson ed., 2006) (comparing “the taped confession [to] a Hollywood drama—scripted by the police theory of the case, rehearsed during hours of unrecorded questioning, directed by the questioner and ultimately enacted on paper, tape or camera by the suspect”).

2009]

*Interrogation Stories*

1609

terrogators themselves embrace it<sup>30</sup>—police interrogators do not merely find facts that are buried out there somewhere—this time, deep in the mind and heart of a suspect—just waiting for the alert detective to come along and excavate them. Rather, by using interrogation stories, interrogators actively and inescapably shape the meaning of the facts by helping suspects to embed them in a coherent narrative that coincides with our normative judgments about which acts are blameworthy and which are not. Moreover, once the suspect endorses one of the plots the cops offer, the interrogation story, now an offender's confessional speech act, itself has the potential to *become* the past. Whether represented in evidence in court, memorialized in the files supporting a plea bargain, or embodied in a decision to pursue no charges at all, the interrogation story is likely to be the evidence that most powerfully shapes our present interpretation of a past calamity. In particular, when interrogators succeed in those cases that impressed on Justice Jackson the compelling need for confessions, those crimes whose sole promise of solution rests on the interrogation and nothing but the interrogation, the interrogation story *is* what happened because it provides all and the only meaning we have.<sup>31</sup>

Because we will traverse more than one terrain, I offer this map to help you navigate. Part I will sketch the sources of law governing police interrogations. While law conditions and shapes interrogation strategies, it imposes only minimal constraints, leaving most of the crucial details in the hands of the police. Part II will describe the significant work that narratives play in shaping the meaning of everyday experiences and, especially, in assigning meaning to de-

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<sup>30</sup> Some interrogation experts use the metaphor of “[i]nterview as [t]heater” to describe their work. See Schaefer & Navarro, *supra* note 14, at 5. They encourage interrogation trainees to imagine that they are participating in a “stage production,” for which they must carefully prepare, by casting the actors, selecting the costumes and props, setting and lighting the stage, and, of course, rehearsing the dialogue and dramatic action. *Id.* at 5–7; see also Aubry & Caputo, *supra* note 14, at 107 (“In addition to talking as a playwright writes, the successful interrogator is going to have the playwright’s ear for producing a rhythmic dialogue, an expert sense of timing, and excellent delivery of his own lines.”); Yeschke, *supra* note 6, at 42 (recommending that interviewers rehearse before sessions by engaging in imaginative role-playing).

<sup>31</sup> For a recent crime novel where the mystery is solved by a confession that the interrogator believes jurors likely would accept but that readers may be inclined to doubt, see Karin Fossum, *The Indian Bride* (Charlotte Barslund trans., Harcourt Books 2005) (2001).

viations from our conventional expectations for human behavior. I then go on to apply these insights to the specific problem of confessions to crime. Here, the Article will explore the way in which a narrative transforms the seemingly trivial into the criminal by embedding small factual observations into an intelligible, sinister plot line. This Part will aim to bring home the function and value of confessional narratives by focusing too on cases where confessions are withheld from official listeners, as may occur when an offender pleads guilty to a crime. In Part III, we will enter police interrogation rooms and listen to police telling stories that assist rape suspects to develop raw facts into coherent confessional narratives that will provide the proof necessary to support their own criminal convictions. Part IV will connect the observations developed in Parts II and III by surveying some of the potential psychological effects—and corresponding experiences, both inside and outside the criminal justice system—that rape interrogation stories may promote.

#### I. POLICE INTERROGATIONS: A LITTLE BIT OF LAW AND A BOATLOAD OF DISCRETION

Before exploring rape interrogation master plots, let's pause outside the police confessional and remark how law encircles it, but does not determine its precise methodologies or practices. For legal scholars, confessions occur in one of those interesting institutional spaces that fall right smack in the middle of the substantive criminal law, on the one side, and the law of criminal procedure, on the other. The island houses more than our police interrogation cells. Indeed, the police do almost all of their detective work there. Think of the social, political, discursive, and, of course, physical elbow grease that goes into their investigatory enterprise. The island is *not* a no-man's land—far from it!—for plenty of people work there. As far as the case law and the legal literature are concerned, however, the territory *does* tend to be a *no-law's-land*. As lawyers would put it, the turf is one where policy, not the law, does most of the work. Leaving this place largely to policy may be the proper approach, but legal scholars and lawmakers must evaluate the policy critically because it yields up the human subjects upon whom we authorize our jailers to inflict pain and, even, violence. Yet we have spent no time inspecting interrogation stories and the ways in

2009]

*Interrogation Stories*

1611

which they condition the practical, political, and philosophical objectives of our substantive penal codes. My current agenda aims to begin filling in this lacuna in our criminal justice literature.

When the police are hoeing their investigative patch—for example, when they are spading up physical clues, weeding out witnesses, plucking up suspects, and picking on perps to spill their beans—their efforts are shaped by both the substantive criminal law and by the rules of criminal procedure. Neither of these sources of law, however, turns out to provide much in the way of specific guidance. The substantive law identifies the general lay of the land where police should be plowing, while the law of criminal procedure forbids them to use a few investigatory tools<sup>32</sup> and provides them instructions for using others.<sup>33</sup> Otherwise, the police are the ones calling the investigatory shots.

First, it's intriguing to notice that when legal scholars write about the "*law* of interrogations and confessions," they refer *only* to the rules of criminal procedure, *never* the substantive criminal law.<sup>34</sup> Still, as a practical matter, our working detectives must have the content of the substantive law at least in the backs of their minds. Without the penal code, after all, they would have no job to do,

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<sup>32</sup> See, e.g., *Missouri v. Seibert*, 542 U.S. 600, 617 (2004) (plurality opinion) (disapproving under totality of circumstances an interrogator's use of "question-first-Mirandize-later" technique as "draining the substance out of *Miranda*"); *Massiah v. United States*, 377 U.S. 201, 204–07 (1964) (holding that once the formal accusation has been lodged, the Sixth Amendment forbids police to elicit statements deliberately from the accused about the crime for which he has been charged); *Brown v. Mississippi*, 297 U.S. 278, 285–86 (1936) (forbidding the use of physical violence to obtain confessions).

<sup>33</sup> See, e.g., *Scott v. Harris*, 550 U.S. 372, 383–86 (2007) (defining circumstances in which it is "reasonable" under the Fourth Amendment for police to "seiz[e]" people by using lethal force); *Kyllo v. United States*, 533 U.S. 27, 31–41 (2001) (defining circumstances where police use of technology outside a home to obtain information about the home's interior constitutes a "search" and hence must be supported by a warrant to be judged "reasonable" under the Fourth Amendment); *Miranda v. Arizona*, 384 U.S. 436, 444 (1966) (requiring police to give advice about Fifth Amendment rights before they may subject citizens to "custodial interrogation"); see also *Davis v. United States*, 512 U.S. 452, 456–62 (1994) (allowing interrogator to continue questioning without asking suspect to clarify his remark where suspect undergoing custodial interrogation makes an "equivocal" reference to counsel).

<sup>34</sup> Even commentators who aim to provide a "multifaceted" account of criminal interrogations and confessions focus only on "the American *process* of criminal justice," and not on the substantive judgments that animate the process. See Leo, *Police Interrogation*, *supra* note 6, at 10.

and, without some knowledge of what the code contains, they would have no clue about their most quotidian professional objectives, no notion of whom they are supposed to be policing and what on earth for. At a minimum, moreover, the police must be keeping an eye on the statutory elements of crimes they think they are detecting so that they can spot and grab evidence that prosecutors will need to prove those elements beyond a reasonable doubt if and when cases ever come to trial. Whoever else may be in the audience for substantive criminal prohibitions, therefore, the police must have front row seats. Lay folks may not know much about the law on the books, but, surely, the police are learning and staying on top of it.<sup>35</sup> Unless Franz Kafka really is the guy who pulls cops' strings,<sup>36</sup> the substantive criminal law must be inscribed heavily upon—since it authorizes, shapes, and gives meaning to—police investigatory practices, including those that govern the taking of criminal confessions. Without the substantive criminal law, in short, policing would be unintelligible.

Second, lawyers and lay people have the sense—probably the very strong sense—that police investigators are constrained by the law of criminal procedure. Here, I have in mind the rules governing searches and seizures, and those regulating police interrogations. If these rules—and, especially, the contemporary remedy for their violation—are working in the empirical way imagined by the Su-

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<sup>35</sup> It seems important, even crucial for us, to begin to consider how the police construe the substantive criminal law. What on earth do they make of the language of statutory prohibitions, and how exactly do they make it? My review of commercial interrogation manuals suggests that they rarely advise investigators that, when they are preparing to interrogate a suspect, they should bone up on their jurisdictions' substantive definitions of the crimes for which the suspect may be accused. Perhaps, that advice is so obvious that it can (safely) go without saying. Still, it's curious that the vast majority of these texts make only the most cursory references to the specific elements of crime definitions, and some of those references seem needlessly vague or, worse still, incorrect. To choose the example most pertinent for my purposes, the training manuals focus almost exclusively on "forcible rape," without acknowledging that in recent years many jurisdictions have expanded the definition of "force" so that it encompasses more than pressures in addition to physical violence. See, e.g., Inbau 4, *supra* note 7, at 256–57.

<sup>36</sup> For those who've read *The Trial*, the first sentence of the novel is enough to bring on a case of galloping goose bumps: "Someone must have slandered Josef K., for one morning, without having done anything truly wrong, he was arrested." Franz Kafka, *The Trial* 5 (Breon Mitchell trans., Schocken Books Inc. 1998) (1914). To say the least, things go downhill for Josef K. from there.

preme Court Justices who designed them, they are calibrated to give the police appropriate incentives to respect the constitutional rights of criminal suspects.<sup>37</sup> These days, when constables blunder, say, by searching a house or seizing a person for no good reason, or by failing to Mirandize a suspect undergoing custodial interrogation, they run the risk that a judge will deny them the use of evidence needed to put a criminal away.<sup>38</sup> At a minimum, the police have to know these rules for the exclusionary remedy to serve, at once, as their stick and carrot. Interrogation training manuals may rarely, if ever, refer directly to any specific nuances of substantive crime definitions, but they all admonish the police to stay on top of criminal procedure developments,<sup>39</sup> and we have plenty of anecdotal evidence suggesting that the police do just that and further that they find and take full advantage of procedural wiggle room.<sup>40</sup>

Therefore, both bodies of law—both the substantive criminal law and the law of criminal procedure—hover over, around, and under the investigatory terrain, but neither turns out to provide much guidance to police interrogators. The substantive law does not dictate what the police are supposed to be doing when they are investigating crimes and questioning suspects. Even if the police can rattle off the statutory language by heart, penal codes provide only general, precatory advice to street agents, crucial but implicit

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<sup>37</sup> See, e.g., *California v. Hodari D.*, 499 U.S. 621, 627 (1991) (“Unlawful orders [to stop] will not be deterred . . . by sanctioning through the exclusionary rule those of them that are *not* obeyed.”); *United States v. Leon*, 468 U.S. 897, 919, 922 (1984) (withdrawing the exclusionary remedy from cases where police rely in good faith “on a subsequently invalidated search warrant” on the theory that exclusion “cannot be expected . . . to deter objectively reasonable law enforcement activity”); *Mapp v. Ohio*, 367 U.S. 643, 648 (1961) (extending the Fourth Amendment exclusionary rule to the states as a “deterrent safeguard” to encourage state police to obey the Federal Constitution).

<sup>38</sup> For recent examples of cases applying the exclusionary rule to sanction constables who blundered, see *Georgia v. Randolph*, 547 U.S. 103, 122–23 (2006) (finding it unreasonable for police to search marital home where wife gave consent but husband, who was present, explicitly refused it); *Missouri v. Seibert*, 542 U.S. 600, 607 (2004) (disapproving “question-first-Mirandize-later” practices, and suppressing pre- and post-warnings admissions).

<sup>39</sup> See, e.g., Inbau 4, *supra* note 7, at 477–617 (reviewing case law governing interrogation tactics and admissibility of confessions).

<sup>40</sup> See, e.g., Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 Mich. L. Rev. 2466, 2536 (1996); Weisselberg, *In the Stationhouse After Dickerson*, *supra* note 4, at 1126; Weisselberg, *Saving Miranda*, *supra* note 4, at 132–36.

and vague exhortations along the lines of, “Officers, you are sworn to uphold the law, so get out there and bring down arsonists, batterers, bigamists, blackmailers, bookmakers, burglars, car jackers, check kitters, child abusers, dope dealers, drag racers, drive-by shooters, drunk drivers, embezzlers, extortionists, fare beaters, flashers, forgers, gamblers, graffiti artists, grafters, grifters, hackers, hijackers, identity thieves, illegal aliens, insider traders, jaywalkers, joyriders, kidnapers, litterers, loiterers, mayhem-makers, muggers, murderers, nuisances, peeping toms, pickpockets, pimps, pirates, poachers, ponzi schemers, pornographers, prostitutes, public drunks, quacks, racketeers, rapists, robbers, shoplifters, smugglers, spies, stalkers, street peddlers, terrorists, traitors, trespassers, truants, usurers, vandals, vagrants, and so forth and so on.” Insofar as the legal scholarship is concerned, the criminal law itself says nothing, or close to nothing, about the methods police should use to carry out the substantive mission—nabbing these multifarious malefactors—with which the law entrusts them.

By contrast, the law of criminal procedure does govern police investigations directly, but that law also turns out to provide minimal guidance about the methods for maneuvering suspects into snitching on themselves and their confederates.<sup>41</sup> As important for my purposes in this and subsequent projects, the law of criminal procedure is based on largely unstated and unexamined assumptions about the connections between police procedures and substantive crime definitions, about the nature of the role police play in detecting the historical facts of a crime and bringing the guilty to justice, thereby vindicating the functions of the criminal sanction.

Think, for a minute, about the rules for forming probable cause and the way in which the standard in *Illinois v. Gates* explicitly, if vaguely, directs the police to follow the substantive law.<sup>42</sup> That is, before the cops may search and seize people and their stuff, they must conclude not only that things look fishy, but fishy in one of

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<sup>41</sup> As Richard Leo nicely puts it, the “legal guidelines that constrain” interrogators are “mostly vague and highly discretionary.” Leo, *Police Interrogation*, supra note 6, at 120.

<sup>42</sup> *Illinois v. Gates*, 462 U.S. 213, 235 (1983) (the probable cause standard requires “only the probability, and not a prima facie showing, of criminal activity”) (quoting *Spinelli v. United States*, 393 U.S. 410, 419 (1969)).



2009]

*Interrogation Stories*

1615

the ways condemned by the substantive law.<sup>43</sup> This paradigm assumes that the police know and follow the substantive law when they are making judgments about where to search, and what and whom to seize. Of course, the cops must be able to ferret out facts. But not any old facts. Rather, their job is to find facts suggesting that a substantive violation may have occurred or be occurring. As one policing expert reminds trainees,

Before you begin to hunt for evidence, you must know what you're searching for, and that, in turn, depends on the objective of your investigation. If your objective is to prove intent in some criminal, civil, or administrative investigation, you may be looking for documents bearing a certain date or signature. If it is a hit-and-run case, the evidence may be skid marks or broken car parts.<sup>44</sup>

Next, contemplate the connection between criminal interrogations and the substantive law. At least in the legal literature and in popular culture too, the connection is almost nowhere stated explicitly. The connection is so powerful that we've been able to take it almost completely for granted when fashioning our law of interrogations and confessions. Despite all the hand-wringing and word-slinging over *Miranda v. Arizona*, the rules governing custodial interrogations are easy as pie. Give the suspect four little warnings,<sup>45</sup> get her to waive her rights,<sup>46</sup> don't twist her arms too

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<sup>43</sup> Id. at 243 (finding the factual circumstances in the case were "as suggestive of a prearranged drug run, as . . . of an ordinary vacation trip").

<sup>44</sup> Yeschke, *supra* note 6, at 53.

<sup>45</sup> As Chief Justice Rehnquist remarked in *Dickerson v. United States*, 530 U.S. 428 (2000), which invalidated a zany federal statute purporting to overrule *Miranda*, "*Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture." Id. at 443. Rehnquist also offered this simple and legally satisfactory rendition of the "four warnings . . . which have come to be known colloquially as '*Miranda* rights'":

[Police must advise the suspect that he] has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.

Id. at 435 (quoting *Miranda v. Arizona*, 384 U.S. 436, 479 (1966)); see also Yeschke, *supra* note 6, at 50 ("[S]tate the four warnings without embellishing them. Merely expressing the warnings is sufficient; to do more is self-defeating.").

<sup>46</sup> Contrary to *Miranda*'s own rhetoric, see 384 U.S. at 475 (stating that government has a "heavy burden . . . to demonstrate that the defendant knowingly and intelli-

hard,<sup>47</sup> and you are good to go, as we say in my neck of the woods. But good to go *to do what*? The courts and commentators don't need to spell it out, for everyone knows the drill. You are good to go ahead and get the suspect to confess to a crime, and virtually any confession you do get will be admissible in evidence. But notice the obvious, yet unstated, significance of the substantive law. The presence of the penal code is a condition precedent to the conversation. The substantive law—more precisely, its apparent violation, the commission of a crime—authorizes the conversation. Presumably, the substantive law also conditions, guides, channels, and shapes the content and trajectory of the interrogation dialogue. In other words, it also goes without saying that we expect cops to design interrogations to give suspects an opportunity to admit (or deny) things that will help to prove the elements of the crime. For example, in order to obtain a confession warranting a conviction for first-degree murder rather than manslaughter, police interrogators in my state must aim to get the killer to concede that she committed the mortal act purposefully, as opposed to negligently or recklessly, in the sense that she designed it to take another person's life.<sup>48</sup> Likewise, in order to secure a conviction under

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gently waived his privilege against self-incrimination and his right to retained or appointed counsel"), it has turned out to be easy for suspects to waive their rights, see *North Carolina v. Butler*, 441 U.S. 369, 372–76 (1979) (waiver of rights may be implied), and difficult for them to invoke, see *Davis v. United States*, 512 U.S. 452, 461–62 (1994) (invocation of rights must be made in terms that are "unequivocal").

<sup>47</sup> *Dickerson* also explains that *Miranda* did not displace the due process inquiry, but instead imposed on interrogators some extra, formal requirements. Generally speaking, the due process standard "examines 'whether a defendant's will was overborne' by the circumstances surrounding the giving of a confession." *Dickerson*, 530 U.S. at 434 (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973)). If the totality of the circumstances suggests that the confession was made involuntarily, due process demands that the confession be excluded from evidence. In practice, however, the giving of the *Miranda* warnings is treated as having a significant impact on interrogation dynamics, so that, once suspects have received and waived their Fifth Amendment rights, courts give interrogators a lot of leeway on the theory that the warnings educate and fortify suspects for the interrogation ordeal. Thus, the courts reason that the warnings empower suspects by informing them that they can and should pull the plug whenever they start to feel pressured or uncomfortable proceeding. To be sure, the cops can't read the suspect her rights, obtain a clean waiver, and *then* put the gun to her head, but the vast majority of non-violent interrogation techniques are acceptable after and because of the advice of rights.

<sup>48</sup> See Va. Code Ann. § 18.2-32 (2009); see also Roger D. Groot, *Criminal Offenses and Defenses in Virginia* § 10, at 420–22 (4th ed. 1998).

the common law definition of rape that was in force throughout the United States up until the latter part of the last century, police interrogators needed to persuade a rape suspect to admit that he physically forced sexual intercourse on a woman, not his wife, who was physically resisting his advances.<sup>49</sup> Today, by contrast, under reformed rape and sexual assault statutes that criminalize non-consensual sexual touching as well as intercourse procured by violence, interrogators also should be aiming to obtain confessions in which suspects acknowledge, for example, that they heard their partners verbally reject their sexual advances.

These objectives so completely go without saying that the legal literature barely acknowledges them, and the literature also tends to say nothing about how they are to be accomplished—with one crucial exception. In the line of cases and commentary exploring the due process requirement that confessions must be “voluntary” to be admissible in evidence, judges and scholars routinely assert that the voluntariness test is designed to, among other more vague aspirations, screen out “unreliable” confessions. Thus, these texts insist that police interrogators must avoid tactics that will produce a “false” confession: false in the crucial, but narrow, sense that the suspect admits that she committed an act that never occurred at all or that was committed by someone else.<sup>50</sup> And notice this too: the

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<sup>49</sup> See Coughlin, *supra* note 24, at 14–17.

<sup>50</sup> For a standard account of what constitutes a confession that is “false,” see, e.g., Richard A. Leo & Richard J. Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 *J. Crim. L. & Criminology* 429, 449 (1998) (explaining that a confession is false where “suspect confessed to a crime that did not happen; the evidence objectively demonstrates that the defendant could not possibly have committed the crime; the true perpetrator was identified and his guilt established; or the defendant was exonerated by scientific evidence”). Contrary to remarks by Leo and Ofshe, see, e.g., *id.* at 443–44, many contemporary interrogation experts do counsel police to steer clear of tactics likely to elicit confessions that are “false” in this sense. E.g., Holmes, *supra* note 6, at 3–7, 149 (“I’ve worked on enough miscarriage of justice cases to know the danger of abusive interrogation.”); Savino & Turvey, *supra* note 14, at 103–05; (identifying “circumstances that work alone or in concert to help elicit a false confession”); Walters, *supra* note 14, at 287–97; Yeschke, *supra* note 6, at 52 (“It is vital to avoid saying or doing anything that might cause an innocent person to confess.”); Zulawski & Wicklander, *supra* note 2, at 74–92, 103 (describing techniques for spotting and avoiding the taking of false confessions and reminding interrogators that they “have a responsibility to society to work for the truth”). Whether interrogators follow that advice in practice is another matter.

problem and the opportunity for interrogators—as well as for scholars and policymakers—is that the only tactics that courts believe have the power to produce false confessions are physical violence, brutal forms of the third degree, and pellucid promises of leniency in exchange for the admissions.<sup>51</sup> Surely, it is important and sensible to take those dicey (not to mention evil) tools from our interrogators' kits. However, even without—or, maybe, *especially* without<sup>52</sup>—those aids to inculcation, the police are left with plenty of room to maneuver when assisting suspects to make confessions, and those confessions will (and sometimes should) be accepted as true. Therein—within that room—lies my project. What the heck is going on in there?

## II. STORYTELLING IN EVERYDAY LIFE: NARRATING THE QUOTIDIAN, THE EXTRAORDINARY, AND THE ILLEGAL

Before getting to that interesting question, we must remark the role that narratives play in our individual and communal judgments concerning which forms of human conduct should be classified, experienced, and punished as crimes. Since at least the 1970s, psychologists have “investigate[d] the manner in which the narrative scheme operates to produce the particular form and meaning that is human existence.”<sup>53</sup> According to psychologist Jerome Bruner, in

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<sup>51</sup> See LaFave, Israel, King & Kerr, *supra* note 5, at 616–46; see also Inbau 4, *supra* note 7, at 417–18.

<sup>52</sup> Interrogation experts don't lament—indeed, most celebrate—the decline of the third degree. Many cheerfully explain that they secure confessions easily without using any brutality at all. As the authors of one manual put it, “[t]he old adage that you can catch more flies with honey than with vinegar applies most emphatically to the interrogation situation.” Aubry & Caputo, *supra* note 14, at 66–68; see also Yeschke, *supra* note 6, at 40 (“[I]t is the brutal tactics of the past that do the most harm. Such methods cause useless anxiety and distress; they hurt the naïve and sensitive while further alienating the sophisticated and cynical. Tactics of brutality might boost the interviewer's self-image but, in the long run, will not advance his or her professional career.”). Even when it comes to questioning terrorists, domestic interrogation experts condemn the use of brutality, not merely because it is wrong and illegal, but because it is ineffective for those whose goal is to obtain accurate information. See Holmes, *supra* note 6, at 147–49. The FBI appears to agree. See Oversight and Review Div., Office of the Inspector Gen., U.S. Dep't of Justice, *A Review of the FBI's Involvement in and Observations of Detainee Interrogations in Guantanamo Bay, Afghanistan, and Iraq* 47–51 (2008).

<sup>53</sup> Donald E. Polkinghorne, *Narrative Knowing and the Human Sciences* 13, 101–23 (1988); see Dan P. McAdams, *The Stories We Live By: Personal Myths and the Mak-*

2009]

*Interrogation Stories*

1619

our culture storytelling is the primary and, perhaps, essential cognitive process by which people assign meaning to—and hence actually experience—their own actions, actions by others, and events occurring in the worlds around them. As Bruner puts it, “people organize their experience in, knowledge about, and transactions with the social world” by using narratives to mediate between “established or canonical expectations” and “deviations from such expectations.”<sup>54</sup> Bruner develops this account in the course of describing “one crucial feature of cultural psychology,” which feature he calls “‘folk psychology,’ or you may prefer ‘folk social science’ or even, simply, ‘common sense.’”<sup>55</sup> In Bruner’s view, folk psychology is “one of the[] most powerful constitutive instruments” of all cultures, and he defines it as “a set of more or less connected, more or less normative descriptions about how human beings ‘tick,’ what our own and other minds are like, what one can expect situated action to be like . . . and so on.”<sup>56</sup> He explains that the “organizing principle” of folk psychology is “narrative rather than conceptual” and that people are endowed (by culture?) with “a readiness or predisposition to organize experience into a narrative form, into plot structures and the rest.”<sup>57</sup> A crucial step in Bruner’s account of how folk narratives work, as well as why we need them, is to remark the instances where we do not resort overtly to storytelling. As he observes, “[w]hen things ‘are as they should be,’” narratives are not necessary.<sup>58</sup> The community has certain expectations for human conduct in certain contexts—these are our “canonical” expectations—and, when people conform and behave in the ways everyone takes for granted, there simply is nothing whatsoever to

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ing of the Self 11 (1993) (“We each seek to provide our scattered and often confusing experiences with a sense of coherence by arranging the episodes of our lives into stories. . . . We are not telling ourselves lies. Rather, through our personal myths, each of us discovers what is true and what is meaningful in life.”); see also Michael White & David Epstein, *Narrative Means to Therapeutic Ends* 9–10 (1990) (“How do persons organize their stock of lived experience? . . . Those social scientists embracing the text analogy responded by arguing that, in order to make sense of our lives and to express ourselves, experience must be ‘storied’ and it is this storying that determines the meaning ascribed to experience.”).

<sup>54</sup> Bruner, *supra* note 12, at 35.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 35, 45.

<sup>58</sup> *Id.* at 40.

remark, hence no reason to talk at all—let alone to tell stories, about their actions.<sup>59</sup> By contrast, when folks deviate from or flout the norms, bystanders begin buzzing. Our narrative impulse arises most strongly *when*—and *because*—we encounter and need to understand conduct that is extraordinary or nonsensical when measured by the conventional patterns for the context in which it occurs. According to Bruner’s helpful example, when a post-office customer or employee ceases to “behave ‘post-office,’”<sup>60</sup> and instead goes postal, observers immediately start offering narratives to account for and make sense of the deviation. Most important—and this because he insists that “cultural psychology . . . will not be preoccupied with ‘behavior’ but with ‘action’ . . . situated in a cultural setting, and in the mutually interacting intentional states of the participants”—Bruner claims that “[t]he function of the story is to find an intentional state that mitigates or at least makes comprehensible a deviation from a canonical cultural pattern.”<sup>61</sup> We’ll have much more to say about the quest for a *mitigating* “intentional state” when we take our excursion into the interrogation room.

Whatever Bruner’s social science colleagues may have made of his account—particularly his suggestion that people “are predisposed naturally and by circumstance” to rely on narrative when assigning meaning to human conduct that is exceptional or discordant<sup>62</sup>—his main claims are likely to seem non-controversial to criminal lawyers and to law enforcement officers, even obvious in the sense that they call attention to practices so familiar that we take them for granted. Of all conceivable “deviations” from our “canonical” expectations, the human actions (and the resulting

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<sup>59</sup> As J.L. Austin explains, for example, we tend to resort to adverbs only when something peculiar is going on:

The natural economy of language dictates that for the *standard* case covered by any normal verb—not, perhaps, a verb of omen such as ‘murder’, but a verb like ‘eat’ or ‘kick’ or ‘croquet’—no modifying expression is required or even permissible. Only if we do the action named in some *special* way or circumstances, different from those in which such an act is naturally done . . . is a modifying expression called for, or even in order.

Austin, *supra* note 10, at 190.

<sup>60</sup> See Bruner, *supra* note 12, at 48–49. Bruner reports that he borrowed the “post-office” example from a book entitled *Habits, Environments, and Human Behavior* (1978), which was written by the late Roger G. Barker.

<sup>61</sup> Bruner, *supra* note 12, at 19, 49–50.

<sup>62</sup> *Id.* at 97.

2009]

*Interrogation Stories*

1621

harms) deemed to be crimes are among those we most fear and whose meaning we feel compelled to seek most urgently. Moreover, one essential ingredient through which the law assigns meaning to these deviant actions—innocent, wrong but wholly or partially excusable, or criminal—is the presence or absence of some mitigating or aggravating “intentional state”—some “mens rea,” in the criminal law’s argot—in the actors who commit them.<sup>63</sup> Notice too that police, prosecutors, and defenders are at least as obsessed with “making the case,” as they are with “finding the truth.” To be more charitable and more precise, these official actors know that the truth can come out in court only if they can make the case for it. Perhaps most important of all, though most police and lawyers never receive any formal training in what literary theorists call “narratology,”<sup>64</sup> they understand perfectly the significance and power of narratives, especially first-hand accounts, in “making their cases.”<sup>65</sup> Why else do they compete for the first shot at getting suspects’ stories, as well as for early opportunities to interview and debrief eyewitnesses?

Again, by calling confessions and witness statements “narratives” or “stories,” I am not suggesting that they are “false,” “fictional,” or “untrue.” Moreover, for purposes of this project, I have no interest in and no need to take on all the “forbidding complexities that overhang any conscientious effort to *define* the notions of truth and falsity.”<sup>66</sup> Thus, I’ll assume that you too buy into the “un-

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<sup>63</sup> For just a drop of the gallons of ink spilled on the crucial mental ingredient of crime, see 1 Wayne R. LaFare, *Substantive Criminal Law* 331–420 (2d ed. 2003).

<sup>64</sup> For a comprehensive introduction to narratology, see Mieke Bal, *Narratology: Introduction to the Theory of Narrative* (Christine van Boheemen trans., 2d ed. 1997). As Bal explains, “[n]arratology is the theory of narratives, narrative texts, images, spectacles, events; cultural artifacts that ‘tell a story.’” Id. at 3. For an elegant and persuasive essay on whether (and a few places where) lawyers might benefit from knowing some narratology, see Peter Brooks, *Narrative Transactions: Does Law Need a Narratology?*, 18 *Yale J.L. & Human.* 1 (2006).

<sup>65</sup> As Robert Weisberg explains, the standards of “conventional lawyering” require practitioners to tell “sophisticated” and “compelling” narratives to win their cases, so it is likely that lawyers “have implicitly learned the art of storytelling the way they once learned the rhetorical tropes.” Robert Weisberg, *Proclaiming Trials as Narratives: Premises and Pretenses*, in *Law’s Stories: Narrative and Rhetoric in the Law* 61, 64 (Peter Brooks & Paul Gewirtz eds., 1996). The standards of “conventional policing” require cops to craft effective narratives too, and officers must soak up this skill in their training, whether it be on the job or in the classroom.

<sup>66</sup> Harry G. Frankfurt, *On Truth* 9–10 (2006).

pretentious and philosophically innocent” distinction between telling the truth and telling a lie about facts with which the speaker is “authoritatively familiar.”<sup>67</sup> Instead, my aim is to draw a common-sense, but sometimes neglected, distinction between truth and meaning, and to endorse the suggestion that the legal system invariably gains access to the meaning of facts through explanations that come in a narrative form. There is no doubt that lawyers and law enforcement officials are deeply committed to the distinction between witnesses who tell the truth and those who lie, to the difference between facts and falsehoods. At the same time, legal agents want to know both *more* and *less than* “just the facts.”<sup>68</sup> What they want is *the story* that makes *some of the facts* comprehensible. As Donald Spence explains, “narrative truth”—what I suppose Bruner would call “narrative meaning”—is the conviction “that *one* solution to a mystery must be true.”<sup>69</sup> That crucial form of meaning “depends on continuity and closure and the extent to which the fit of the pieces”—in the law’s perceptive nomenclature,

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<sup>67</sup> Id. at 10.

<sup>68</sup> One interrogation expert offers this pragmatic criticism of Joe Friday’s “just the facts” interrogation style:

The fictional Sergeant Joe Friday of *Dragnet* has probably had a more detrimental impact on police interviewing than any other single person or event. Though greatly admired as an individual, Friday’s technique of insisting on ‘just the facts,’ despite its entertainment value, was poor interviewing. Unfortunately, many officers, rookies and veterans alike, imitate this style, not because it is effective, but because it is easy. By refusing to acknowledge a person’s feelings and emotions, and instead just discussing the facts, the investigator removes much of the stress from interviewing. However, failure to deal with these feelings can also prevent the interviewer from obtaining those precious facts. Fear, anger, grief, and many other emotions serve as barriers to communication. If you deal with and remove these barriers, the facts will come. If they are ignored, the facts may remain unknown.

Hess, *supra* note 11, at 3–4.

The authors of the leading manual on interrogations agree that “[i]nvestigators who are interested in obtaining ‘just the facts’ generally make poor interviewers.” Inbau 4, *supra* note 7, at 67. “Good interviewers,” it seems, are people persons: they “have a genuine curiosity and concern about people, guilty or innocent, and sincerely enjoy talking to others.” Id. At the same time, other experts counsel that, for some suspects, the most effective interrogation posture is to emphasize the “hard, cold facts. As Jack Webb says, ‘The facts please, just the facts.’” See Aubry & Caputo, *supra* note 14, at 118. Of course, these experts also recommend that interrogators sometimes should bluff about their knowledge of the facts, pretend to possess witnesses and physical evidence that do not exist, and so forth. Id. at 207–10.

<sup>69</sup> Spence, *supra* note 26, at 31.



2009]

*Interrogation Stories*

1623

the fact *pattern*—“takes on an aesthetic finality.”<sup>70</sup> The facts of the crime achieve that significant and interesting status only when an official narrator embeds in a coherent story some, but far from all, of the stuff—the welter of actors, actions, events, objects, outcomes, and material and mental circumstances—that occupies the foreground, background, and periphery of the conduct ultimately judged (in large part, by reason of the story) to be criminal. Facts become worthy of our attention—in law’s terms, facts become relevant facts, or, more concisely if provocatively, facts become facts—only upon taking their proper place in such a narrative. Borrowing from Arthur Danto’s vivid illustration, if I were to ask you to tell me all about your jury trial, I would be dismayed—even impatient and irritated, unless you happen to be R.M. Renfield, who was Dracula’s minion and stark raving mad to boot<sup>71</sup>—if your account traced for me all the orbits of a fly that was circling around the courtroom. In the real trial, the fly was there, but, in your story about the trial, the fly had better not be there, unless you plan to recount “something odd and interesting . . . *about* that fly.”<sup>72</sup>

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<sup>70</sup> Id.

<sup>71</sup> You’ll recall that Renfield was “unlike the normal lunatic”: “His redeeming quality [was] a love of animals.” Early in his treatment at Dr. Seward’s asylum, Renfield’s “hobby [was] catching flies,” and he collected so many that Seward was forced to insist that he give some of them up. Renfield complied by feeding his little pets to spiders and, of course, eating them himself. In Seward’s estimation, Renfield had “evidently some deep problem in his mind,” not only because he gobbled up flies, but because he apparently kept a ledger of his snacks. He had “a little notebook in which he [was] always jotting down something. Whole pages of it are filled with masses of figures, generally single numbers added up in batches, and then the totals added in batches again, as though he were ‘focusing’ some account, as the auditors put it.” Bram Stoker, *Dracula* 75, 85–86 (Barnes & Noble 2006) (1897).

<sup>72</sup> The following, taken from Arthur Danto, is one of my favorite examples of the way in which the narrative form forces narrators to separate the facts that matter from the facts that don’t, to select the facts that will be recorded and remembered as facts, and to discard, indeed, render invisible, all the rest:

Suppose I wish to know what happened at a court trial. I may ask my informant to leave nothing out, to tell me all. But I should be dismayed if, in addition to telling me of the speeches of the attorneys, the emotional attitudes of the litigants, the behaviour of the judge, he were to tell me how many flies there were in the courtroom, and show me a complicated map of the precise orbits in which they flew, a vast tangle of epicycles. Or mention all the coughs and sneezes. The story would get submerged in all these details. I *can* imagine him saying: ‘At this point a fly lighted on the rail of the witness-box.’ For I would expect something odd and interesting to follow: the witness screams, displaying a weird phobia. Or a brilliant attorney takes this as an occasion for a splendid forensic display

*A. How Stories Make the Trivial Meaningful and, Maybe, Criminal*

Before continuing, let's contemplate a statement of fact that is true in the sense that it corresponds to a spot of reality, but that also is, on its own, otherwise meaningless. The example is taken from a real case,<sup>73</sup> and, happily, it coincides with one of Bruner's illustrations.<sup>74</sup> Consider this simple statement, "the afghan is on the heater." Assume too that the statement is true—for, as you will see, it is true—in the sense that it accurately reports a state of affairs existing in the real world. The afghan *is* on the heater. So far so good, but so what? Standing on their own, both the statement and its corresponding reality are insignificant, trivial, even meaningless, usually not worth taking the brain cells, breath, and time to notice and vocalize,<sup>75</sup> and forming no part of anyone's memory or account of an ordinary day. (Come to think of it, ordinary days may be difficult to recount vividly or to remember at all because they do not provide the occasion or the stuff for telling stories.)

Now, go ahead and embed the statement in a police report, which, by definition, is a document that records an event that is not a part of most folks' ordinary days. The particular report that I have in mind describes a bedroom in which a toddler perished in a fire. The coroner does the autopsy and announces that the child's "[d]eath was caused by toxic fumes released from the burning of an

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(‘As this fly, ladies and gentlemen . . .’). Or in trying to brush him away, a bottle of ink gets spilled over a critical bit of evidence. Whatever the case, I shall want to know: what *about* that fly? But if there is no ‘what about’, if this is only ‘part of what happened during the trial’, then it does not belong in the account of the trial at all. When I say, then: ‘tell me the whole story, and leave nothing out’ I must be (and am) understood to mean: leave out nothing significant: whatever belongs in the story I want to be told of it.

Arthur C. Danto, *Narration and Knowledge* 131 (1985).

<sup>73</sup> See *State v. Ritt*, 599 N.W.2d 802 (Minn. 1999). I owe this helpful example to Jonathan Goodman, for I found the *Ritt* case by reading his article, *Getting to the Truth: Analysis and Argument in Support of the Reid Technique of Interview and Interrogation*, 21 Me. B.J. 20 (2006).

<sup>74</sup> See Bruner, *supra* note 12, at 25 (borrowing an utterance with which J.L. Austin liked to play, to wit, “the cat is on the mat”).

<sup>75</sup> The statement could have (a wee bit) more salience than I—for purposes of my illustration—am allowing. Upon noticing an afghan on a heater and depending on the design of the heater and (especially) on whether the heater were turned off, on, and how high, for example, some folks would find the possibility of fire crossing their minds. In such a case, such observers might exclaim, “the afghan is on the *heater!*!”

2009]

*Interrogation Stories*

1625

acrylic afghan.”<sup>76</sup> These terse observations transform what could have been an off-hand statement about a trivial fact—“the afghan is on the heater”—into the central mystery that must be resolved in order to understand the meaning of the little girl’s death. Detectives scramble to discover whether the afghan were merely an afghan, albeit one in the wrong place at the wrong time, or whether it were a weapon someone used to murder a child. To resolve the mystery, we need a story that explains whether and, if so, how the afghan came to be the instrument of death, and that identifies the intentions of the agent who wielded it. How precisely—and when—did the afghan come to rest on the heater? Who put it there, and/or who knew it was there and left it there? Most crucial of all, what on earth was that person thinking when she put it there and/or left it there? Although there are a number of potential solutions to this mystery, that number is far from infinite. Each solution will come in the form of a narrative, the legal system will aim to settle on one and only one of them, and that one story will determine how family and friends, as well as penal agents and institutions, experience and respond to the child’s death. The story will have a coherent plot that unfolds in time and human agents who are endowed with and act upon knowledge, beliefs, and intentions. To be persuasive, the story must build the material idiosyncrasies of the household into a sequence that makes the calamity comprehensible according to our normative expectations for how and why people behave the way they do, for how and why they misbehave, and for what counts as criminal misbehavior. Perhaps the child woke up in the middle of the night, threw the afghan out of her crib onto the heater when no one was there to notice and retrieve it, and the fire that caused her death was a tragic accident, for which we mourn but assign no criminal blame. Perhaps the afghan got wet, and, never thinking of the risk of fire, someone lovingly draped it over the heater so that it would be dry and warm before bedtime. Perhaps the actor was aware of the risk of fire, intended to remove the blanket as soon as it was dry, but got caught up in the daily routine and forgot all about it. Perhaps the actor was too busy to make the room tidy, to remove the afghan from the heater, fold it, and place it back in the crib where it belonged. Perhaps the

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<sup>76</sup> See *Ritt*, 599 N.W.2d at 804.

actor was too lazy to make these homely gestures. Perhaps the actor placed the afghan on the heater for the purpose of starting a fire to destroy the girl's life. Depending on the testimony from witnesses in the case and the clues supplied by the physical evidence, a factfinder will have to weigh some or all of these conflicting narratives, together and one against another, before selecting the story that pins down the meaning of the child's death, the narrative that will authorize state officials to pronounce the death to be an accident or some degree of homicide.

In the case from which I draw this example, *State v. Ritt*,<sup>77</sup> the child who died in the fire was a difficult one, born with a debilitating virus and requiring constant assistance from a team of caregivers. A jury decided that the child died because her mother murdered her. The opinion by the Supreme Court of Minnesota affirming the mother's conviction presents the disjunctive causal accounts of the fire put forward by the prosecution and by the defense, and you should keep these accounts in mind for we will return to their construction in a few minutes. "The state's theory of the case was that [the mother] draped the afghan over the heater and [an adjacent] daybed, poured nail polish remover over it and ignited it."<sup>78</sup> By contrast, the defense aimed to show "that the fire was caused by a lit cigarette," which could have been dropped by any one of a number of smokers who spent time in the house and "which had burned into the mattress of the daybed."<sup>79</sup> These alternative narratives were all well and good, but no witness and no evidence recovered from the scene came even close to supporting one over the other conclusively. Indeed, the case was of the sort that impressed on Justice Jackson the need for police interrogations, for it would not have been closed without one. The Supreme Court of Minnesota places in the foreground of its opinion two stories from the child's mother, which offer conflicting versions concerning what she may have known, believed, intended, hoped, and feared before, during, and after the fire. In her preliminary interview with the fire marshal, the mother explained that the child "had recently begun to throw things out of her crib," and that the

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<sup>77</sup> Id.

<sup>78</sup> Id. at 807.

<sup>79</sup> Id.

2009]

*Interrogation Stories*

1627

afghan “had landed on the heater in the past and had browned but not burned.”<sup>80</sup> By this account, the best (and worst) the mother did or could do was to assist the police in drawing inferences after the catastrophe had occurred. Alas, she helps them speculate, on this night the blanket must have ignited and started to burn after the child chucked it from her crib. In this story about the origins of the fatal fire, the mother was not the agent who killed her baby either accidentally or on purpose—or, maybe, accidentally on purpose—because she was fast asleep in her own bed at the crucial time, and she therefore deserves our compassion, not our condemnation.<sup>81</sup>

A few days later, the mother went down to the police station, spoke with a detective, and revised her account significantly. At first, she stuck to her guns and repeated the tale she told the fire inspector, but, as the session continued, her narrative began to follow a far more sinister trajectory. In the new narrative produced under interrogation, the mother made revelations she had omitted before. According to this version, the mother arose and went to check on the child long before the smoke alarm sounded. She noticed that her daughter seemed “warm,” so she removed the afghan and tossed it towards the daybed. She did not see the afghan fall on the heater, but she was sure that part of it did land there, and she left it lying there when she returned to her own bed.<sup>82</sup> As for her mental attitude, the story is obscure and more than a little vexing, as she drew a distinction between her intentions, on the one hand, and her hopes, on the other, both of which were mediated by her uncertainty and ignorance. She “denied placing the afghan on the heater ‘on purpose,’” and she insisted that “she did not intend for [her child] to die.”<sup>83</sup> In the very next breath, however, she acknowledged that she “might have [placed the blanket there] ‘on hope,’

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<sup>80</sup> Id. at 806.

<sup>81</sup> Of course, even under the scenario I outline above, our versatile law of homicide might support manslaughter charges against the mother based on her failure to satisfy her duty to protect her child from serious harm. The theory would be that she knew that the child was prone to throwing things, including the afghan, onto the heater; that she was aware of some risk of fire since she also knew that the afghan had “browned” on the past occasion she described; and that, as parent, she had the duty to rearrange things in the child’s bedroom to reduce, if not eliminate altogether, that risk.

<sup>82</sup> *Ritt*, 599 N.W.2d at 807; Trial Tr. at 1299, 1357, *State v. Ritt*, 599 N.W.2d 802 (Minn. 1999) (No. K1-97-1014) (on file with the Virginia Law Review Association).

<sup>83</sup> *Ritt*, 599 N.W.2d at 807.

and that sometimes she wished that God would decide to take” her child to put her out of her misery.<sup>84</sup> She also disclosed that, when she was standing beside her daughter’s crib before the blaze, the “thought did cross [her] mind that it could happen . . . . That the space heater could start on fire.”<sup>85</sup> At several points, she acknowledged that she had committed a crime, which she sought to minimize by naming it “only” an omission. As she queried during the taking of her formal statement, “My only crime was that I didn’t take it off the space heater, and that’s the crime, isn’t it?”<sup>86</sup> Throughout the interrogation, she also remarked that she never believed that the blanket would ignite because, as far as she then knew, fires are started only by open flames, which space heaters don’t produce.<sup>87</sup>

When it came time for the jurors to deliberate over the meaning of the child’s death, they had a range of additional evidence jostling for their attention: testimony from rescuers concerning their efforts during and after the fire, together with their assessments of the parents’ demeanor; the results of “test burns” by experts trying to duplicate the fire; statements from the child’s sister, who escaped the blaze unharmed, that supported conflicting opinions concerning whether the mother also could have rescued the child; testimony from professional caregivers concerning the child’s strength and motor skills; testimony from family and friends about conversations in which the mother spoke of placing the child for adoption and about others in which she referred to the risk of fire from space heaters; testimony from the child’s father and others concerning the mother’s devotion to her daughter; and so on. Yet, in the court’s reconstruction, the jury found the solution to the mystery in the mother’s confession about her conduct on the night of the fire, in her admissions about her conflicted mental state, and in her unseemly and doomed effort to distinguish “between what she wanted to happen and what she hoped might happen.”<sup>88</sup> The opinion offers a quick but striking sketch of the jury deliberations. A few hours after getting the case, we are told, the jury “requested

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<sup>84</sup> *Id.*

<sup>85</sup> Trial Tr., *supra* note 82, at 1288–89, 1299.

<sup>86</sup> *Id.* at 1374–75, 1381.

<sup>87</sup> *Id.* at 1293.

<sup>88</sup> *Ritt*, 599 N.W.2d at 807.

2009]

*Interrogation Stories*

1629

to view the videotapes of [the mother's] interview and formal statement."<sup>89</sup> Without objection from either side, the trial judge granted the request and "permitted [the jurors] to review both videotapes . . . and to stop the videotapes when they wished to discuss them among themselves."<sup>90</sup> The very next thing we learn is that the jury returned its verdict two days later, convicting the mother of premeditated murder and arson, and acquitting her of manslaughter.<sup>91</sup> From this concise description, which tightly connects the jury's reviewing of the confession to its guilty verdict, readers are meant to—and do—infer that the mother's interrogation story made the case for first-degree murder. The other evidence receded into the background, as the jurors sat in a room for two days, playing, pausing, and parsing the videotaped admissions, until all were convinced that the mother was a murderer. This killing was murder, rather than manslaughter or misadventure, because of what the defendant herself had to say about how and why the afghan came to be on the heater: she put it there and she left it there because she hoped that her daughter would die. The mother learned—too late to save her own skin, a just outcome if she indeed took the life of her little girl—the lesson that Bruner insists that people in our culture quickly absorb: "[W]hat [we] have done or plan to do will be interpreted not only by the act itself but by how [we] tell about it. *Logos* and *praxis* are culturally inseparable."<sup>92</sup>

*B. The Guilty Plea: Crimes Without Narratives*

Now, contemplate the power of the confession that is withheld, and ponder too the distinction between a confession and a guilty plea. These speech acts are related, sometimes interrelated, for each makes the speaker eligible for criminal punishment, and one (the confession) frequently gives way to and supports the other (the plea). However, they are not-quite-kissing cousins, for their function and value are distinct. As the Supreme Court has ex-

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<sup>89</sup> Id. at 808.

<sup>90</sup> Id.

<sup>91</sup> The jury also convicted Ms. Ritt of second-degree murder on a depraved indifference theory. See *id.*

<sup>92</sup> Bruner, *supra* note 12, at 81.

plained, “[a] plea of guilty is more than a confession which admits that the accused did various acts; it is itself a conviction.”<sup>93</sup> By contrast, by admitting her misconduct in a confession, the offender does not thereby convict herself, but (merely!) offers evidence to support her conviction. To get from confession to conviction, the system must take an additional formal step or two, such as staging a guilty plea hearing or a trial that concludes in a guilty verdict. From this perspective, confessions seem to do less work in our system than guilty pleas do. Still, confessions may do more work than guilty pleas do in terms of making the crime comprehensible, precisely because confessions typically come in story form. When confessing, the suspect narrates how, where, and when the crime happened, and she even may explain why she committed it. Thus, confessions hold out the promise of giving access to the whole story, at least from the confessor’s point of view,<sup>94</sup> which is something that guilty pleas don’t even pretend to do. Guilty pleas tend to follow closely on the heels of confessions,<sup>95</sup> and, when they do, it’s safe to assume that the deal will be far less favorable than pleas negotiated in cases where the suspect kept her own counsel until she had a defense lawyer do the bargaining for her. Why else do you suppose that defense lawyers never, ever encourage clients to confess, though they often do counsel them to plead guilty? Moreover, unlike the formal guilty plea colloquy, confessions are likely to seem unscripted—an impression that we will evaluate critically below—at least not by those wily defense lawyers. Guilty pleas may spare the lawyers time and trouble, but they deny to victims and the community the more nuanced and satisfying story that we might imagine would emerge if only the defendant chose to confess in the stationhouse or on the stand.

This time, let’s use a literary example, one taken from J.M. Coetzee’s magnificent novel, *Disgrace*.<sup>96</sup> The protagonist of the novel, David Lurie, is a university professor who is charged with sexually harassing a student enrolled in one of his poetry courses. Lurie and the woman share a couple of meals, and they have sex three times. Things get sticky. The woman stops coming to class, fails to appear

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<sup>93</sup> *Boykin v. Alabama*, 395 U.S. 238, 242 (1969) (citation omitted).

<sup>94</sup> See Peter Brooks, *Troubling Confessions* 9 (2000).

<sup>95</sup> See Leo, *supra* note 6, at 30–31.

<sup>96</sup> J.M. Coetzee, *Disgrace* (1999).



2009]

*Interrogation Stories*

1631

for an exam, and ultimately drops the course. The Vice-Rector of Student Affairs notifies Lurie that the student has lodged a sexual harassment claim against him, and he also is charged with falsifying university records by marking the student as present in class when she was absent and by giving her a grade (though only a measly seventy) for the exam she never took.<sup>97</sup>

Lurie is summoned to appear before a “committee of inquiry,” whose members include a Professor of Religious Studies, the Dean of Engineering, a Professor from the Business School, a Professor of Social Sciences (who happens to be a feminist), and “a student observer from the Coalition Against Discrimination.”<sup>98</sup> The committee is formally charged with getting to the bottom of the scandal, and at least some of its members “see [them]selves as trying to work out a compromise that will allow [Lurie] to keep [his] job.”<sup>99</sup> At the outset of the hearing, the committee chairman briefly refers to the charges, but, before he can get another word out, Lurie short-circuits the process by declaring, “I am sure the members of this committee have better things to do with their time than rehash a story over which there will be no dispute. I plead guilty to both charges. Pass sentence, and let us get on with our lives.”<sup>100</sup>

The committee members get antsy. Clearly frustrated, even becoming grouchy, they try to get Lurie to say more, reminding him that their “role is to hear both sides of the case and make a recommendation.”<sup>101</sup> He declines their invitation to give his side of the story, and the members press him harder, insisting that both they and Lurie must be “crystal clear in [their] minds” about “what it is specifically that Professor Lurie acknowledges and therefore what it is that he is being censured for,” assuming he is censured.<sup>102</sup> Lurie again refuses, this time saying:

What goes on in my mind is my business, not yours . . . Frankly, what you want from me is not a response but a confession. Well, I make no confession. I put forward a plea, as is my right. Guilty

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<sup>97</sup> Lurie himself characterizes the seventy as “a vacillator’s mark, neither good nor bad.” *Id.* at 26.

<sup>98</sup> *Id.* at 40, 47–48.

<sup>99</sup> *Id.* at 54.

<sup>100</sup> *Id.* at 48.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 50–51.

as charged. That is my plea. That is as far as I am prepared to go.<sup>103</sup>

The hearing continues in this vein, with the committee members alternatively badgering and cajoling Lurie to speak, to explain his plea by revealing what the affair signified to him. He briefly toys with the notion of confessing, even going so far as to make what lawyers call a “proffer,” to sketch what his confession would be were he to agree to make one:<sup>104</sup> “Suffice it to say that Eros entered. After that I was not the same. . . . I was no longer a fifty-year-old divorcé at a loose end. I became a servant of Eros.”<sup>105</sup> A committee member asks whether Lurie invokes the power of Eros as “a defence . . . ? Ungovernable impulse?”<sup>106</sup> At this (friendly?) interpretation of his hypothetical confession, Lurie refuses to bite, even making matters worse for himself by rebuffing this potential, albeit partial, excuse, and affirming that his impulse “was far from ungovernable. I have denied similar impulses many times in the past, I am ashamed to say.”<sup>107</sup> Impatient, the Professor of Social Sciences soon intervenes to “say it is futile to go on debating with Professor Lurie. We must take his plea at face value and recommend accordingly.”<sup>108</sup> To say the least, “the atmosphere in the room is not good: sour it seems to” Lurie.<sup>109</sup>

For readers of the novel, the hearing is, if anything, even more excruciating than for the committee members. Lurie’s offhand and sarcastic suggestion that “there will be no dispute” over the story couldn’t be farther from the truth. No one—not the committee members, not Lurie, not his accuser, not the reader—has the whole story. There is no settled story, but multiple potential stories, or, to make the same point in a slightly different way, all we have is a big fat dispute over the meaning of this uncommon affair. The committee members have access to some knowledge that Lurie and the readers lack, for they have read statements by and heard testimony from the accuser. The events in the novel are narrated from Lurie’s

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<sup>103</sup> *Id.* at 51.

<sup>104</sup> See, e.g., *Black’s Law Dictionary* 1246 (Bryan A. Gardner ed., 8th ed. 2004).

<sup>105</sup> Coetzee, *supra* note 96, at 52.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 53.

<sup>109</sup> *Id.* at 50.

2009]

*Interrogation Stories*

1633

point of view, not hers, and, since he is not permitted to sit in on her session with the committee, neither are we. Moreover, he stubbornly refuses to read her complaint—he believes that it is inauthentic, authored not by her, but by her parents, cousin, and/or boyfriend, who he thinks pressured her into making it<sup>110</sup>—so we have no chance to read it either, even though we are dying to get our hands on it. At the same time, however, readers have crucial information that the committee lacks, which is a description of the intercourse from Lurie’s perspective. After all, we stood at his shoulder and watched the affair get off the ground, stagger, and collapse. Armed with these insights, you’d think that we’d be in a fair position to resolve the mystery that the committee is unable to penetrate, to tease out the true meaning of the sex between the professor and his student. No such luck. The novel is good, even great, because of what Bruner would call its “subjunctive” quality. Again, to borrow Bruner’s words, “[t]o make a [fictional] *story* good, it would seem, you must make it somewhat uncertain, somehow open to variant readings, rather subject to the vagaries of intentional states, undetermined.”<sup>111</sup> Law lacks the luxury of telling stories that are “good” in this sense. As J.L. Austin reminds us, “in legal cases,” unlike other forms of discourse that also rely on narrative, “there is the overriding requirement that a decision be reached, and a relatively black or white decision—guilty or not guilty—for the plaintiff or for the defendant.”<sup>112</sup> Law would not be law without a winner, a loser, and a “Last Word.”

Most readers of *Disgrace* will be inclined to swallow hard before saying the Last Word. Though we are sure (aren’t we?) that we’ve witnessed a university professor purposefully harass his young student, the novel’s account of the affair—and especially Lurie’s vacillating thoughts about his relations with the student—give rise to a multitude of meanings. The second time they have sex, the intercourse seems to be rape—not mere harassment, whatever that may

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<sup>110</sup> Interrogation experts share Lurie’s intuition that, at least in some cases, women lodge false rape claims because “someone else” has talked them into it, and they recommend that interrogators offer that narrative to women suspected of doing so to persuade them to confess that the accusation is fabricated. See Senese, *supra* note 9, at 209–10.

<sup>111</sup> See Bruner, *supra* note 12, at 53–54.

<sup>112</sup> See Austin, *supra* note 10, at 187–88.

be—for he comes uninvited to her flat, thrusts himself upon her, and mutters “[w]ords heavy as clubs” into her ear. She struggles with him, saying, “No, not now!’ . . . But nothing will stop him.”<sup>113</sup> This time, when “it is over,” he tells himself that it was “[n]ot rape, not quite that, but undesired nevertheless, undesired to the core.”<sup>114</sup> At other times, the sex resembles statutory rape. The student is petite, in Lurie’s eyes even childlike, “[h]er hips . . . as slim as a twelve-year-old’s.”<sup>115</sup> To be sure, after the affair ends, Lurie reassures his ex-wife that the student is “[t]wenty. Of age. Old enough to know her own mind.”<sup>116</sup> But we previously had listened to him thinking: She’s “[a] child! . . . No more than a child! What am I doing? Yet his heart lurche[d] with desire.”<sup>117</sup> Alas, there are still more possibilities. Incest haunts the margins of the affair, for Lurie beds the student in his daughter’s room, wheedles her in the voice of a parent, almost calls himself her “Daddy,” and wonders whether she is offering to be his mistress or his daughter.<sup>118</sup> Then too, he may have equated having sex with her to buying sex from a prostitute, which had been his prior and “entirely satisfactory” solution to “the problem of sex,”<sup>119</sup> as he finds himself musing that it may be she who is “exploit[ing] him,” that she is giving him sex so that she can cut his poetry classes and exams in order to concentrate on her drama courses and acting.<sup>120</sup>

The guilty plea empowers and emboldens the committee to fire Lurie—and they sure do, pardon the expression, fire his ass—but the plea does not by itself satisfy them, not to mention the wider audience of readers, that justice has been fully served. To discharge that delicate task, the community must have access to that which Lurie specifically refuses us. Before passing judgment, we want a confession, a narrative from his own mouth, describing what his acts meant to him. At this point in my own quest for the meaning of Lurie’s misconduct, I confess that I find myself dying to burst into the hearing room and say, “Look, pal, when you hopped into

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<sup>113</sup> Coetzee, *supra* note 96, at 24–25.

<sup>114</sup> *Id.* at 25.

<sup>115</sup> *Id.* at 19.

<sup>116</sup> *Id.* at 45.

<sup>117</sup> *Id.* at 20.

<sup>118</sup> *Id.* at 26–27.

<sup>119</sup> *Id.* at 1.

<sup>120</sup> *Id.* at 28.

bed with your student, you *made* it our business to figure out what was going on in your mind!” Then, I would whistle up the nearest police interrogator. The committee’s interrogation methods are worse than useless, and I’m in no position to try to work Lurie over. Where the heck are those cops when you need them?

### III. THE POLICE CONFESSIONAL: SCRIPTING CRIMES

With these examples under our belts, we are at last ready to enter the police confessional room and listen to some of the rape narratives recounted by the speakers there. How do interrogators and suspects use narratives to fix the meaning of sexual encounters that are alleged to be rape? What problems—and much more optimistically—what opportunities do these narratives create for police, suspects, prosecutors, and defenders, as well as substantive law reformers? And what about victims and potential victims, as well as all the other folks who are and would be law-abiding? Surely, we should contemplate their problems and opportunities too.

Let’s start with a caveat about my sources for these stories. I first noticed them when I followed the lead of the Supreme Court in *Miranda* and began reading police interrogation manuals. As Chief Justice Warren lamented in his opinion for the Court in *Miranda*, it was hard to get a handle on what was going on in police interrogations because the cops discouraged, even forbade, third-party observers from attending them.<sup>121</sup> In order to develop its empirical case, the Court turned to the “most recent and representative” interrogation training manuals then in “use among law enforcement agencies and among students of police science,”<sup>122</sup> and it assumed that working detectives were adopting the experts’ techniques. For purposes of this essay, I am taking that methodological leaf from *Miranda* and sticking largely within the confines of the training

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<sup>121</sup> In *Miranda*, the Court remarked:

Interrogation still takes place in privacy. Privacy results in secrecy and this in turn results in a gap in our knowledge as to what in fact goes on in the interrogation rooms. A valuable source of information about present police practices, however, may be found in various police manuals and texts which document procedures employed with success in the past, and which recommend various other effective tactics.

384 U.S. 436, 448 (1966).

<sup>122</sup> *Id.* at 448 n.8, 449 n.9.

manuals. In the decades since *Miranda* was decided, police experts continue to recommend that interrogations be held in private and one-on-one.<sup>123</sup> (The first thing the cops would have told the scholars who sat on David Lurie's "committee of inquiry" is that perps won't confide in committees.) Yet the commentators have been inclined to agree that, notwithstanding its shaky empirics, the Court probably did get the basic facts right.<sup>124</sup> Of course, prescriptive texts are well worth studying in their own right—if they were not, most law professors would be out of a job—and there is a growing body of empirical research,<sup>125</sup> as well as abundant anecdotal material contained in trial transcripts, appellate reports, and the popular media, suggesting that the police actively incorporate the experts' prescriptions into their own interrogation practices.<sup>126</sup> Then too, these texts themselves are a repository of the experts' interrogation experiences, as all of the authors base their "how-to's," their specific lists of interrogation dos and don'ts, on what they learned "through the school of hard knocks."<sup>127</sup>

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<sup>123</sup> See, e.g., Inbau 4, *supra* note 7, at 51–64.

<sup>124</sup> As Chuck Weisselberg recently remarked, "[o]ne can criticize the Court for relying upon an amicus brief and manuals for such an essential part of the decision, but I believe that the Justices got the facts right with respect to basic interrogation techniques. . . . [T]hese same tactics prevail today." Weisselberg, *Mourning Miranda*, *supra* note 4, at 1526–27.

<sup>125</sup> One of the most significant studies was performed by Richard Leo in California in the early 1990s. See Richard A. Leo, *Inside the Interrogation Room*, 86 *J. Crim. L. & Criminology* 266 (1996) (describing results obtained from personal observation of 122 live interrogation sessions and viewing of 60 videotaped ones). For a recent summary of the empirical literature, see Weisselberg, *Mourning Miranda*, *supra* note 4, at 1535–37.

<sup>126</sup> See *Trial Tr.*, *supra* note 82, at 1197–390 (interrogation DVDs also on file with the Virginia Law Review Association); *State v. Thomas*, 673 N.W.2d 897, 902–05 (Neb. 2004). As for popular media, just tune into almost any episode of any of the *Law & Order* series, and you're good to go.

<sup>127</sup> See, e.g., C. H. Van Meter, *Principles of Police Interrogation* vii (1973); see also Aubry & Caputo, *supra* note 14, at 113–14, 195 (assuring readers that specific recommendations "have been used by the writers on many occasions, and in many different types of interrogation situations, some successful at times, others unsuccessful at times, however all have been used with success at one time or another"); Hess, *supra* note 11, at 7 (promising that text will share "techniques and ideas that others have used successfully through the years" in order to "prevent the reader from having to learn them all the hard way, through trial and error"); Holmes, *supra* note 6, at ix ("The contents of this book are empirically-based, and I believe this is an honest reflection of my life experience as a polygraph examiner."); Inbau 4, *supra* note 7

Like Chief Justice Warren in *Miranda*, leading interrogation scholars, such as Richard Leo and Chuck Weisselberg, treat the interrogation manuals as a reliable source for actual interrogation practices. As Weisselberg observes, “[b]ecause most police officers are not lawyers and do not read judicial decisions, training is the link between the Supreme Court’s pronouncements and the way in which interrogations are conducted every day in police stations.”<sup>128</sup> Though they might seem dated, the training manuals cited in *Miranda* itself are the place to start, since scholars must study them to determine what on earth the cops were doing to give those Supreme Court Justices such fits. After wolfing down these early texts, hungry criminal procedure instructors then gobbled up the post-*Miranda* editions in order to sample *Miranda*’s impact on interrogation practices. By now, as I mentioned above, all criminal procedure scholars know that the news is that post-*Miranda* there was no news. As far as the interrogation experts and (especially) their critics are concerned, the *Miranda* earthquake caused no more than a temporary tremor in police interrogation rooms, from which the police could and did quickly and completely recover. Sure, *Miranda* mandates a little more red tape—cops must read suspects the handy advice-of-rights cards and then help them initial those pesky waiver-of-rights forms<sup>129</sup>—but otherwise it’s business as

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(promising on the jacket blurb that the text “presents techniques that are based on actual criminal cases and have been used successfully by thousands of” interrogators).

<sup>128</sup> See Weisselberg, *Mourning Miranda*, supra note 4, at 1521 (citing Leo, *Police Interrogation*, supra note 6, at 109).

<sup>129</sup> For examples of the advice cards and waiver forms, see O’Hara & O’Hara, supra note 7, at 131, 133; see also Inbau 4, supra note 7, at 489–504; Yeschke, supra note 6, at 49–52. According to David Simon, far from being obstacles to confessions, the waiver forms—when used by a skillful interrogator—diffuse the impact of the warnings and assist the police in obtaining the suspect’s cooperation. See David Simon, *Homicide: A Year on the Killing Streets* 202 (1991); see also Leo, *Relevance of Miranda*, supra note 4, at 1012–15 (2001) (citing Simon and the work of other commentators who have described ways in which police have adapted to *Miranda* and even turned the warnings into a technique that encourages waivers and confessions). Interrogation experts agree. As some put it, “*Miranda* warnings, when presented properly, enhance the interview environment and increase the probability of a successful interview outcome.” Schafer & Navarro, supra note 14, at 55; see also Hess, supra note 11, at 36 (offering examples of “how some investigators, without in any way violating either the letter or the spirit of the law, have converted [the *Miranda*] hurdle into a tool”).

usual in the police confessional.<sup>130</sup> Give the suspect four little warnings, get her to waive her rights, don't twist her arms too hard, and you are good to go and do exactly what we instructed you to do in our first edition!<sup>131</sup>

Let's set *Miranda* aside for the nonce—by now, that well is nearly bone dry—and begin measuring the worth of police interrogations not against the values embodied in the privilege against self-incrimination, but against the substantive mandates that give meaning as well as authority to criminal investigations. Substantive criminal law scholars don't seem inclined to read or write about interrogation manuals, presumably because they assume that interrogations and confessions belong exclusively to the domain of procedure. But if they did read them—in particular, if they took the time to compare and contrast the texts published over the last half-century or so—they too would discover that, insofar as rape interrogations are concerned, the news is that there is no news. None. That is, the stories interrogators tell rape suspects once they've satisfied the *Miranda* forms—the specific plots through which the police aim to confer substantive meaning on sexual intercourse that is alleged to be criminal—have changed not one whit. From what the manuals advise, the police are and should continue telling accused rapists the same old victim-blaming stories.

This narrative inertia might not be surprising in the case of crimes—think, for example, of burglary, robbery, and the various degrees of homicide—whose elements have not changed much, if at all, for generations. We might have other grounds for criticizing tales police tell to develop confessions of those crimes, but it seems sensible to trust that, by now, interrogators possess a stable set of story lines that cajole suspects into talking in the first place and

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<sup>130</sup> The Supreme Court itself has confirmed this interpretation of *Miranda*. See *Moran v. Burbine*, 475 U.S. 412, 426–27 (1986) (asserting that *Miranda* held that “[p]olice questioning, often an essential part of the investigatory process, could continue in its traditional form, . . . only if the suspect clearly understood” the content of the *Miranda* warnings”).

<sup>131</sup> The authors of the manual ostensibly most criticized in *Miranda* were optimistic that their interrogation recommendations would survive almost unscathed. As Fred Inbau and John Reid put it in the edition published the year after *Miranda* came down, “As we interpret [*Miranda*], all but a very few of the interrogation tactics and techniques presented in our earlier publication are still valid if used after the recently prescribed warnings have been given to the suspect . . . , and after he has waived his” rights. Inbau 2, *supra* note 14, at 1.



then into endorsing narratives that assist in proving those crimes' familiar elements. When it comes to rape, however, we might expect to see some innovations in the interrogation scripts that experts recommend. During recent decades, the law of rape has been volatile; indeed, according to some commentators, the formal prohibition has been the subject of a historical transformation. By the early 1970s, as the American Bar Association recorded, states began "responding to a groundswell of pressure to revise their [rape] laws."<sup>132</sup> To put it mildly, the reforms were overdetermined, but one objective emphasized by virtually all reformers was the need to purge from the "whole criminal law system" investigatory practices, doctrinal elements, and evidentiary requirements that humiliated and condemned the rape victim "as deserving what she got."<sup>133</sup> In other words, the reforms ostensibly were designed to overthrow the traditional, but now outmoded, canonical narrative about rape in which women were blamed for having nonmarital sex unless they fought, tooth and nail, to escape the encounter.<sup>134</sup>

The upshot? Today, the United States no longer endorses one rape prohibition, that one laid down in the eighteenth century by William Blackstone's mighty *Commentaries*,<sup>135</sup> which applied most comfortably, if not only, in cases where a man used serious physical violence to overcome a woman's earnest physical resistance to having sex with him.<sup>136</sup> In its place, state legislators have promulgated many different definitions of rape, which local police, in turn, must enforce on the ground. In most states, the crime that once was a monolithic felony—rape—has been subdivided into several greater and lesser offenses. In some states, legislators have renamed the offense "sexual assault" in order to signal their determination to

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<sup>132</sup> Report of the Law School Division, 100 Ann. Rep. A.B.A. 511, 512 (1975).

<sup>133</sup> See *id.* (quoting Babcock, Freedman, Morton & Ross, *Sex Discrimination and the Law: Causes and Remedies* 819 (1975)).

<sup>134</sup> See Coughlin, *supra* note 24, at 20–40.

<sup>135</sup> 4 William Blackstone, *Commentaries* \*210 (defining rape as "the carnal knowledge of a woman forcibly and against her will").

<sup>136</sup> For a vivid glimpse of how the common-law prohibition was applied in practice, see *Mills v. United States*, 164 U.S. 644, 648 (1897) ("[A]lthough the crime is completed when the connection takes place without the consent of the female, yet in the ordinary case where the woman is awake, of mature years, of sound mind and not in fear, a failure to *oppose* the carnal act is consent; and though she object verbally, if she make no outcry and no resistance, she by her conduct consents, and the act is not rape in the man.").

break with the common-law definition of rape and to “emphasize[] the affinity between sexual assault and other forms of assault and battery,” which criminalize “[a]ny ‘unauthorized touching of another.’”<sup>137</sup> A few jurisdictions have been content with fairly modest reforms, such as relaxing the “resistance” requirement from “earnest” or “utmost” to “reasonable under the circumstances,” while others have plunged ahead and purged victim resistance from the formal law altogether.<sup>138</sup> In a number of jurisdictions, lawmakers have redefined the “force” element so that it encompasses forms of coercion other than physical violence, and some penal codes now prohibit—either as a degree of rape or as a lesser offense—“non-consensual” intercourse simpliciter.<sup>139</sup> At the same time, the states have enacted “rape shield” provisions, all of which protect the rape victim from being cross-examined about her sexual history and reputation, and some states have decided to prohibit defense counsel from referring to the victim’s apparel at the time of the rape as evidence that she was consenting to the intercourse.<sup>140</sup> At a minimum, therefore, you’d expect to find the training manuals—which are pitched to a national audience and, therefore, necessarily paint crimes with a broad brush—admonishing detectives to study the elements of their local rape statutes, to keep abreast of legislative and case law developments on their home-fronts, and to update their interrogation scripts so that they have a shot at eliciting admissions tending to prove contemporary, not common-law, ingredients of the crime. But they don’t. To the contrary, the current manuals refer to “forcible rape,”<sup>141</sup> without anywhere acknowledging that in many states “force” no longer means physical violence and only physical violence. Likewise, the experts continue to peddle to police, at least some of whom should be trying to get the goods on date rapists, precisely the same old victim-blaming scripts that the earliest manuals sold to cops trying to trip up perpetrators of the common-law crime.

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<sup>137</sup> See, e.g., *In re M.T.S.*, 609 A.2d 1266, 1276 (N.J. 1992).

<sup>138</sup> See Richard Klein, *An Analysis of Thirty-Five Years of Rape Reform: A Frustrating Search for Fundamental Fairness*, 41 *Akron L. Rev.* 981, 987–90 (2008).

<sup>139</sup> See Donald Dripps, *After Rape Law: Will the Turn to Consent Normalize the Prosecution of Sexual Assault?*, 41 *Akron L. Rev.* 957, 958 (2008).

<sup>140</sup> See Klein, *supra* note 138, at 990–97, 1028–30.

<sup>141</sup> See, e.g., *Inbau* 4, *supra* note 7, at 256–57.

The acknowledged leader among interrogation manuals both before and after *Miranda*, the tome some reverently call “The Interrogator’s Bible,”<sup>142</sup> is *Criminal Interrogation and Confessions*, a text initially co-authored by the late Fred Inbau and the late John Reid, and now regularly updated by their once-junior colleagues, Joseph Buckley and Brian Jayne.<sup>143</sup> Although (or, come to think of it, because?) Earl Warren and his colleagues singled out this text for special criticism in *Miranda*,<sup>144</sup> the Inbau book is “the definitive police training manual in the United States, if not the western world,” with “[t]housands of American police . . . trained by the Inbau and Reid materials each year.”<sup>145</sup> By now, some of the Supreme Court

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<sup>142</sup> See, e.g., Goodman, *supra* note 73, at 20 (“*Criminal Interrogations and Confessions*, now in its fourth edition, ‘has been regarded as the undisputed bible of police interrogation since its initial publication in 1962.’”). Textbooks on criminal investigation refer to “Professor Fred E. Inbau [as] the authority on interrogation,” see, e.g., O’Hara & O’Hara, *supra* note 7, at 147, and the authors of competing interrogation manuals usually give credit to the Inbau team for helping them learn their craft. See, e.g., Hess, *supra* note 11, at v (“Joseph Buckley and other members of John E. Reid and Associates, through their training programs throughout the country, have done much to advance the level of interviewing and interrogation in both the public and private sector.”); Yeschke, *supra* note 6, at xix (“We owe a debt to leaders like the late John E. Reid who, through personal example, showed us how to uncover the truth without using coercion. Those who have been exposed to his knowledge are better for it. On the job with both the CIA and the FBI, I have adapted Reid’s technique to real-world situations to form my own process, which I believe advances what Reid taught me.”); Zulawski & Wicklander, *supra* note 2, at xiii–xiv (noting that both authors earned degrees from the Reid College of Detection of Deception, and both later worked for John E. Reid & Associates before forming their own firm); see also Van Meter, *supra* note 127, at 78 (recommending that fledgling interrogators continue their study by reading the Inbau book then in circulation).

<sup>143</sup> As I note above, the first edition of the Inbau book was published in 1962, and, by now, the text has gone to four editions, with the latest published in 2004, see *supra* note 14.

<sup>144</sup> See *Miranda v. Arizona*, 384 U.S. 436, 449–50, 452, 454–55 (1966).

<sup>145</sup> Richard A. Leo, *The Third Degree and the Origins of Psychological Interrogation in the United States*, in *Interrogations, Confessions, and Entrapment* 63–64 (G. Daniel Lassiter ed., 2004); see also Leo, *Police Interrogation*, *supra* note 6, at 108–12. As Chuck Weisselberg reports:

The largest national provider of training in interrogation techniques is Chicago-based John E. Reid & Associates. The company offers a menu of programs, including a basic course on “‘The Reid Technique of Interviewing and Interrogation,’” which is taught across the country. . . . Reid & Associates claim that “[m]ore than 300,000 professionals in the law enforcement and security fields have attended this three day program since it was first offered in 1974.” According to Reid & Associates, the course is approved by state authorities for officer training in a significant number of states.

Justices also have come on board, as we find the Court here and there citing the Inbau text with approval.<sup>146</sup> When you open the cover and peek inside, what you find are detailed instructions for how to host a story-hour (or, more likely, hours) for your criminal suspect.<sup>147</sup> The book is crammed with cunning cons and props to prime the confessional pump, as well as practical advice for the beginner, including interrogation room decor,<sup>148</sup> suspect-friendly snacks,<sup>149</sup> and sartorial and hygiene tips for the successful host.<sup>150</sup> But the guts of the advice is for cops to ply the suspect with alternative stories about the crime that she perpetrated until she endorses one of them as her true confession, the details of which can then be fleshed out, tweaked where necessary, pinned down, and turned over to a prosecutor as the basis for a plea bargain or for use as evidence in court. These interrogation protocols are known throughout the law enforcement world as the “Reid Technique.”

Here’s the drill. Once you’ve identified a suspect “whose guilt . . . seems definite or reasonably certain,”<sup>151</sup> you invite her to

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Weisselberg, *Mourning Miranda*, supra note 4, at 1530.

<sup>146</sup> See, e.g., *Missouri v. Seibert*, 542 U.S. 600, 610 n.2 (2004) (plurality opinion).

<sup>147</sup> See Inbau 1, supra note 14, at 1–88.

<sup>148</sup> See Inbau 4, supra note 7, at 57–64; see also Aubry & Caputo, supra note 14, at 183–93; Hess, supra note 11, at 84–85; Savino & Turvey, supra note 14, at 107; Schafer & Navarro, supra note 14, at 34–35. For an example of the lengths to which some interrogators will go in getting their interrogation decor just right, see *United States v. LeBrun*, 363 F.3d 715, 718 (8th Cir. 2004) (agents enlarged photos depicting scenes from suspect’s life and pasted them on wall of interrogation room).

<sup>149</sup> See Inbau 4, supra note 7, at 74 (coffee and a sandwich); see also Savino & Turvey, supra note 14, at 107 (advising investigators to “provide and document food and drinks supplied for the suspect”). Perhaps as important, the experts identify refreshments to avoid. See Inbau 4, supra note 7, at 61 (serving a bottled beverage is inadvisable, for, after imbibing, a violent suspect may be tempted to bludgeon you with the empty).

<sup>150</sup> See Inbau 4, supra note 7, at 70, 81 (recommending that interrogators wear civilian clothing and that they use “mouthwash or breath cleanser” if their colleagues find their breath is foul); see also Aubry & Caputo, supra note 14, at 64–65, 187 (recommending that interrogators avoid “slovenly appearance” and that they wear “a business suit” rather than police uniforms); Schafer & Navarro, supra note 14, at 49.

<sup>151</sup> Inbau 4, supra note 7, at 209. As a recent news story explains, police investigators in the United States have been trained to draw a sharp distinction between the kind of questioning that takes place during an “interview,” which is designed to obtain preliminary clues and identify credible witnesses, and that which occurs in an “interrogation,” which is designed to elicit a confession to the crime. If it occurs, the interview precedes the interrogation, and it is one of the techniques used to separate those who are suspects—and destined to be subjected to an interrogation—from those who are

2009]

*Interrogation Stories*

1643

come on in, you sit her down, and you tell her that there's no doubt that she's your perp.<sup>152</sup> You don't know for sure why she did it, you are fuzzy on a few details, you'd like to clean up these flyspecks, and so you offer to hear her side of the story before you toddle over to see the prosecuting attorney. Before the offender can get a word in edgewise,<sup>153</sup> you remark that her misconduct is open to more than one interpretation, and you offer a couple of alternative narratives that make sense of her modes and motives. Each plot is incriminating—this is an interrogation, not a tea party, for crying out loud—but one is much more repulsive than the other. Thus, one story will portray the suspect as a thoroughly reprehensible creep—for example, she dreamed and schemed, planned and plotted, diced and sliced, before flouting the law's commands—while another will cast her in the role of reluctant or hapless offender—for example, she stumbled into trouble because she was in desperate straits for which some other jerk or the fates are to blame.<sup>154</sup> Then, you suggest, she has the power to choose: which of these sto-

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not. Thus, the answer to this initial question—"Is the person I'm interviewing being honest, or spinning fairy tales?"—is "tricky" and "crucial," for the interrogator and above all "for the fate of the person being questioned." Benedict Carey, *Judging Honesty by Words, Not Fidgets*, NY Times, May 12, 2009, at D1. The persons who acquit themselves poorly in an interview "may become potential suspects and spend hours on the business end of a confrontational, life-changing interrogation—whether or not they are guilty." *Id.* Forensic psychologists are now working to develop new techniques to help interrogators separate the honest from the dishonest interviewee. According to this research, police officers should focus far less on the subject's body language than they have been taught to do and should evaluate instead the content of what the subject has to say. See *id.*

<sup>152</sup> Inbau 4, *supra* note 7, at 209, 213, 220.

<sup>153</sup> As David Zulawski and Douglas Wicklander explain, the interrogator must "do almost all the talking until the suspect gives an initial acknowledgment of guilt." Zulawski & Wicklander, *supra* note 2, at 305.

<sup>154</sup> Inbau 4, *supra* note 7, at 232–35; see also, e.g., Hess, *supra* note 11, at 76–77; Yeschke, *supra* note 6, at 202–03 (suggesting that officers questioning a child suspected of falsely accusing a stepfather of molestation should advise the child that she made the charge, not because she was a nasty kid, but because she loved her mom and wanted to put him away where he couldn't hurt her anymore); Zulawski & Wicklander, *supra* note 2, at 306 ("The process of rationalization . . . makes the suspect a victim of circumstances instead of the initiator of the incident."); see also *id.* at 10, 305–42. The appellate cases confirm that officers use this technique frequently and successfully. See *State v. Thomas*, 673 N.W.2d 897, 903–06 (Neb. 2004) (quoting interrogation transcript in which officers "stressed that if the death was an accident, [the suspect] needed to tell his side of the story or people would think he was a 'frickin' animal' and 'hardened core criminal'").

ries does she want her nearest and dearest, not to mention a judge and jury, to use when giving meaning to it, to this unfortunate thing that happened?<sup>155</sup>

For example, consider the alternative plots that an Inbau-trained interrogator offered to a man to make sense of his shooting of a store clerk. When reading the monologue, one almost imagines that the interrogator has been studying the works of Jerome Bruner, as the officer draws the accused shooter's attention to the way in which one sequence of events can be embedded in several narrative explanations, the selection of one of which will determine the meaning of those events:

Joe, was hurting this guy part of your original plan, or did it just happen on the spur of the moment? If you went in there with the full intention of pulling that trigger, it tells me that you have no regard for human life and that you are capable of doing anything. If that's the case we might as well end this right now because I know people like that are not capable of telling the truth. But, Joe, I think that the gun just went off. I think all you wanted was a few bucks; you didn't want to hurt him, Joe. But because this is out of character for you, you panicked and the darn thing went off. Gosh, if that's what happened you've got to let me know, because I'm no mind reader. The guy who plans something like this for months in advance and walks into a store knowing full well that he's going to shoot and kill any possible witness looks the same to me as the fellow who acts out of desperation and, on the spur of the moment, finds himself with a gun in his hand and in the heat of the moment panics and ends up doing something he really regrets. Joe, this wasn't part of the plan, was it? It just went off, didn't it, Joe?<sup>156</sup>

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<sup>155</sup> See Inbau 4, *supra* note 7, at 352–65 (describing “principles” and “procedures” for presenting the suspect a choice among alternative “explanations for possible commission of the crime”); see also, e.g., Gordon & Fleisher, *supra* note 14, at 119–20 (“The interrogator must offer possible scenarios to explain why the crime may have been committed. He should go from possibility to possibility, until the suspect appears to show an interest in a scenario, and then expand upon that possible explanation.”); Yeschke, *supra* note 6, at 32, 53, 151, 157 (directing interrogators to support the suspect's efforts to come up with an account that “rationalize[s]” the offense and helps him save face); Zulawski & Wicklander, *supra* note 2, at 2–3, 325, 327.

<sup>156</sup> Inbau 4, *supra* note 7, at 360–61.

As support for this strategy—for offering the suspect narratives that supply divergent moral explanations for the same human action, such as squeezing the trigger of a gun, picking up money, or having sex—the experts explicitly invoke folk psychology.<sup>157</sup> According to the experts, interrogators need not have formal training in psychiatry or psychology, but they must be “student[s] of human beings, human emotions, and human activity” and be able to identify mental disorders in terms that the layman knows and understands, terms such as “‘nut,’ ‘screwball,’ or ‘crackpot.’”<sup>158</sup> Though (in the cops’ view) the suspect is guilty, he is not “nuts,” and, therefore, it will be excruciating for him to admit that he did it. Astute interrogators long have known that “[i]t is merciless, or rather psychologically wrong, to expect anyone boldly and directly to confess his crime. . . . We must smooth the way, render the task easy.”<sup>159</sup> The most effective way to “ease the ordeal” of confessing illustrates perfectly Jerome Bruner’s account of the way in which people in our culture ineluctably seek out mitigating narratives to provide meaning to discordant events. The interrogators offer the suspect the option of making a statement that removes some moral responsibility—not legal responsibility, mind you—for the misconduct. Upon hearing the mitigating account, and especially when comparing it to the other available (and more incriminating) interpretations the interrogator also helpfully mentions, the suspect will feel less guilty, less embarrassed, perhaps even relieved to get it—or some of it—off her chest.<sup>160</sup> In this regard, notice how the foregoing script is well calibrated to serve this objective. Neither plot provides the suspect any legal excuse or mitigation—either way, the robber who killed a store clerk would be guilty of first-degree murder, based on a premeditation and deliberation theory or on a felony-murder theory—but the notion is that he’ll be much more comfortable confessing when handed the opportunity to choose a

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<sup>157</sup> E.g., Gordon & Fleisher, *supra* note 14, at 119–31.

<sup>158</sup> See Aubry & Caputo, *supra* note 14, at 277–78.

<sup>159</sup> Inbau 4, *supra* note 7, at 354 (quoting Hans Gross, *Criminal Investigation* 120 (1907)).

<sup>160</sup> See Zulawski & Wicklander, *supra* note 2, at 322–23 (remarking that suspects who hear the “rationalization in story form” are likely to be “comfortable with the idea that confessing is the right thing to do”).

mitigating, face-saving, indeed, “understandable,” explanation for the shooting over a story in which he appears as a calculating, hardened killer.

After giving the suspect her narrative alternatives—you did it this way or that way, which will it be?—the interrogator waits for the buy sign, the same body language that alerts a shrewd waitress that her over-stuffed customer who after hearing his options—you can have devil’s food or angel food, which will it be?—has come to realize that he really does have room for dessert.<sup>161</sup> This juncture is critical. Remember, at this point in the process, the detectives are convinced that their suspect is guilty, but the offender has not yet acknowledged committing the *actus reus*, let alone disclosed his mental state when performing it. If all goes according to plan, the suspect now will buy one of the alternatives and admit, at the very least, that he was in proximity to the victim. From there the interrogator works to refine the story, drawing out more details, perhaps persuading the suspect to revise assertions contradicted by the physical evidence and even helping him acknowledge that his initial admissions are not credible because they conflict with the narrative trajectory. Even if suspects fall short of making full confessions, you see, the police are expert—as we do and should expect them to be—at finding ways to use narrative to plug the gaps in inculpatory statements.

As consumers of criminal procedure literature, whether scholarly or popular, probably would predict, the master plot promoted by the Reid Technique for use in rape interrogations involves direct condemnation of the rape victim.<sup>162</sup> Victim-blaming is effective when questioning a variety of offenders, but it is said to be *the* method-most-likely-to-succeed in rape interrogations,<sup>163</sup> and many general examples of successful victim-blaming stories are taken from interrogations of rape suspects. Here, we encounter precisely the same representations of guilty rape victims that feminist and other reformers have been determined to overthrow and that I had thought that the substantive law was moving, perhaps like molasses

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<sup>161</sup> Inbau 4, *supra* note 7, at 352.

<sup>162</sup> See Hess, *supra* note 11, at 70.

<sup>163</sup> See, e.g., Inbau 4, *supra* note 7, at 254–57 (explaining that wrongdoers have a “natural inclination” to blame their victims and offering “outstanding examples” of victim-blaming in interrogations of sex offenders ranging from pedophiles to rapists).



2009]

*Interrogation Stories*

1647

in winter, but still moving, to eliminate from the criminal justice system. As I mentioned above, the victim-blaming stories contained in the fourth edition of the Inbau book, which was published in 2004, are nearly identical—word for word for word—to those set forth in the first edition, which was published in 1962, and the few emendations suggest that victim-blaming is booming. The statutory law has changed fairly dramatically, ostensibly in response to a change in social consciousness about what sex counts as rape and how to allocate responsibility for it, so why are our police telling the same old stories?

For example, the experts urge interrogators to advise the rape suspect that the “victim was to blame for dressing or behaving in such a way as to have unduly excited a man’s passions.”<sup>164</sup> To guard against the risk that novice interrogators might find themselves groping for words to castigate their victims for wearing scandalous garb, the experts supply some patter. Each edition of the Inbau text counsels interrogators to use this script:

Joe, no woman should be on the street alone at night looking as sexy as she did. Even here today, she’s got on a low-cut dress that makes visible damn near all of her breasts. That’s wrong! It’s too much of a temptation for any normal man. If she hadn’t gone around dressed like that you wouldn’t be in this room now.<sup>165</sup>

Likewise, cops are advised that they should criticize the victim “for behaving in such a way as to arouse the subject sexually to a point where he just had to have an outlet for his feelings.”<sup>166</sup> Once again, the experts offer interrogators a brief monologue to use to reassure rapists that women who “let” men kiss and caress them are to blame if they get raped:

Joe, this girl was having a lot of fun for herself by letting you kiss her and feel her breasts. For her, that would have been sufficient. But men aren’t built the same way. There’s a limit to the

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<sup>164</sup> Inbau 4, supra note 7, at 256–57; see Inbau 3, supra note 14, at 108; Inbau 2, supra note 14, at 49; Inbau 1, supra note 14, at 45; see also Senese, supra note 9, at 204–06.

<sup>165</sup> Inbau 4, supra note 7, at 257; see Inbau 3, supra note 14, at 108; Inbau 2, supra note 14, at 49–50; Inbau 1, supra note 14, at 45–46; see also Hess, supra note 11, at 70 (“I saw how she looked, and it looked like she was on the make to me.”).

<sup>166</sup> Inbau 2, supra note 14, at 50; see Inbau 3, supra note 14, at 109.

teasing and excitement they can take; then something's got to give. A female ought to realize this, and if she's not willing to go all the way, she ought to stop way short of what this gal allowed you to do.<sup>167</sup>

Finally, “[w]here circumstances permit,” interrogators are encouraged to develop scripts that condemn the victim for “act[ing] like she might have been a prostitute” and leading the suspect to “assume[] she was a willing partner.”<sup>168</sup> Once again, the authors of the Reid Technique provide a set speech that invites suspects to declare that their victims appeared to be prostitutes out to make an extra buck:

In fact, the investigator may even say that the police knew [the victim] had engaged in acts of prostitution on other occasions; the question may then be asked, “Did she try to get some money out of you—perhaps more than you actually had, but once you were that close to her you couldn't help but complete what she started?”<sup>169</sup>

By thus “condemn[ing]” and “degrading” the victim, the officer “will make it easier for the suspect to admit the act of intercourse or at least his presence in the company of the victim.”<sup>170</sup>

Between the third and fourth editions of the Inbau book, the authors did replace one rape interrogation story with another, and, if anything, the revised version suggests that victim-blaming is as firmly entrenched in the contemporary interrogation room as it was in the early 1960s. According to the text, another useful technique for giving a suspect mental “relief and comfort” is to confide

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<sup>167</sup> Inbau 4, *supra* note 7, at 257; see Inbau 3, *supra* note 14, at 109; Inbau 2, *supra* note 14, at 50; Inbau 1, *supra* note 14, at 46; see also Hess, *supra* note 11, at 70 (“Things get going pretty good, and all of a sudden she changes the rules and tells you to stop. Hell, we all know that ‘stop’ often means ‘go,’ and I’m guessing that’s what you thought.”); Zulawski & Wicklander, *supra* note 2, at 334 (“Did she come on to you or did you start this whole thing?”).

<sup>168</sup> Inbau 4, *supra* note 7, at 257; see Inbau 3, *supra* note 14, at 109; Inbau 2, *supra* note 14, at 50; Inbau 1, *supra* note 14, at 46; see also Senese, *supra* note 9, at 207 (“Blame the suspect’s perception of the victim’s reputation as being promiscuous.”).

<sup>169</sup> Inbau 4, *supra* note 7, at 257; see Inbau 3, *supra* note 14, at 109; Inbau 2, *supra* note 14, at 50; Inbau 1, *supra* note 14, at 46.

<sup>170</sup> Inbau 4, *supra* note 7, at 257; Inbau 3, *supra* note 14, at 109; Inbau 2, *supra* note 14, at 50; Inbau 1, *supra* note 14, at 46.

2009]

*Interrogation Stories*

1649

that the investigator has a friend or relative who committed the same misconduct for which the suspect stands accused.<sup>171</sup> Indeed, the investigator might even go so far as to “acknowledge that he has been tempted to indulge in the same behavior.”<sup>172</sup> The detective who interrogated Kelly Ritt, the woman suspected of setting her daughter’s room on fire, followed this strategy, as he confided that he too had a disabled child whose care was very demanding, that often he wished he “could throw” his son out the window, that sometimes he wanted to see the child die rather than suffer, and that his own wife “could have intentionally done this” too.<sup>173</sup> For a general example of how to work this angle, each edition of the Inbau manual quotes the following speech, which was made by an investigator in a “case involving a suspect who killed his wife.” Notice that this script also incorporates victim-blaming rhetoric:

Joe, as recently as just last week, my wife made me so angry with her nagging that I felt I couldn’t stand it anymore, but just as she was at her worst, there was a ringing of the doorbell by friends from out of town. Was I glad they came! Otherwise, I don’t know what I would have done. You were not so lucky as I was on that occasion. Was it something like that, Joe? Or did you find out she was running around with some other man? It must have been something of this sort that touched you off, or maybe it was a combination of several things like that. You’ve never been in trouble before, so it must have been something like what I’ve just mentioned—something that hit you on the spur of the moment and you couldn’t stop yourself. Anyway, she’s gone, so we must depend upon you to find out the reason for what happened. You’re the only one who can tell us.<sup>174</sup>

When instructing interrogators how to use this “there but for the grace of God go I” theme in rape cases, the authors (finally!) swap stories from one edition to the next. In its third edition, the Inbau

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<sup>171</sup> Inbau 4, supra note 7, at 242–43.

<sup>172</sup> Inbau 4, supra note 7, at 243; see also Yeschke, supra note 6, at 40 (“I suggest . . . giving the impression that if you were in a similar circumstance, you might have done something similar to what the interviewee did, even though you know that you would never engage in that particular behavior.”).

<sup>173</sup> Trial Tr., supra note 82, at 1231–32, 1263, 1268, 1281, 1378.

<sup>174</sup> Inbau 4, supra note 7, at 244–45; see also Inbau 3, supra note 14, at 100.

book encourages interrogators to use the following war story for this purpose, which was taken from “[o]ne of many actual cases encountered by the authors of this text”:

[The case involved] a young man, about 17 years of age, who was suspected of rape. The suspect was told that because of the circumstances of the case, he could hardly avoid doing what he did and that, moreover, the interrogator himself, as a young man in high school, “roughed it up” with a girl in an attempt to have intercourse with her. Soon thereafter, the suspect confessed. His father . . . arrived at the police station protesting his son’s arrest. He was told his son had committed a rape and had admitted to it. The father vehemently protested that his son could not have done such a thing. When the interrogator learned of the protest, he advised the arresting officers to have the father meet his son face to face and learn the truth directly from the confessor himself. When the two met, the father said “Son, did you do this?” The son replied: “Yes, Dad; I just couldn’t help what I did. Even Mr. \_\_\_\_\_ [naming the interrogator] did something like this when he was in high school.” Fortunately, the suspect pleaded guilty and, in view of extenuating circumstances, was granted probation, which spared the interrogator the experience of testifying [to] what he had told the suspect. (To be sure, the interrogator would have admitted the fact at trial and . . . such a statement, although false, would have been ruled legally permissible.)<sup>175</sup>

In the fourth edition, the instructors substitute the following story for interrogators to use at this juncture, which one of them “used . . . to successfully elicit a confession.”<sup>176</sup> Keep in mind that the objective is to reassure the suspect that his conduct was not so bad—rather, it was understandable, even normal—because the investigator’s own friends and relatives have done it too:

Jim, I think what happened here is that this gal came onto you in the bar and was flirting with you, leaving the clear impression that she was interested in a sexual relationship. But when it came down to it, she changed her mind at the last second. I’ve got a sis-

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<sup>175</sup> Inbau 3, *supra* note 14, at 98–99 (brackets in original).

<sup>176</sup> Inbau 4, *supra* note 7, at 243.

2009]

*Interrogation Stories*

1651

ter who used to get all dressed up and go to these singles bars. She'd pick a guy out and talk real intimately with him while he was buying her drinks. At the end of the evening the guy, of course, would try to get her alone in his car or apartment. She usually ended up driving herself home, which, obviously, made the guy pretty upset. I think in your situation this gal allowed the relationship to get much closer than what my sister did and, we both know, guys reach a certain point of no return.<sup>177</sup>

Surely, it was sensible for the authors to decide to scrub their first (ostensibly false) rape war story. Not all rapists fed that line will make the fortunate decision to plead guilty and thereby “spare[] the interrogator” the consequences of testifying to “what he had told the suspect.”<sup>178</sup> More to the point and more troubling are the so-called “extenuating circumstances” that, in the view of some prosecutor or judge, supported a sentence of probation. Who knows? These may well have been (created by) the interrogator's own (false) confession. Then too, an interrogator-in-training might be well-advised to consult the governing statute of limitations, not to mention a defense attorney, before running around telling his suspects about his own (potential) crimes. Therefore, quite apart from any concerns we might have about the substantive effects of interrogation tales that put the blame on girls who get themselves “roughed up,” there are plenty of reasons to redact this vivid monologue. Yet the new version is a poignant, really painful, variation on the some-of-my-best-friends-and-relatives-are-culpable theme. In the updated version, it is not the rapist or the men able to imagine themselves walking in a rapist's shoes who are potentially culpable. Rather, it is the woman—any woman and all women, right up to the experts' own sisters—who are morally at fault for engaging in conduct that “upsets” men into raping them. In the twenty-first century, as far as the cops and perps are concerned, “there but for the grace of God go my sisters.”

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<sup>177</sup> Id. at 243.

<sup>178</sup> Inbau 3, *supra* note 14, at 98.

## IV. THE TRUTH IN THE STORIES

*The value of every story depends on its being true. A story is a picture either of an individual or of human nature in general: if it be false, it is a picture of nothing.*

Samuel Johnson<sup>179</sup>

But these are just stories, the cops will say. We don't believe them, and you don't believe them. Come on, don't be naïve! Everyone on the planet—whether they are consumer of criminal procedure cases or television cop shows—knows that interrogators get to lie to suspects about (almost) everything under the sun. Victim-blaming stories are just another of our many licit packs of lies. Besides, we blame victims right and left—when we are interrogating perpetrators of arson, child abuse, embezzlement, homicide, robbery, you name it<sup>180</sup>—and there is nothing special about using these narratives to turn the tables on rapists. The bad guys (including especially sex offenders<sup>181</sup>) do buy into these stories for, as our experts advise, we follow scripts that coincide with suspects' own rationalizations and distorted ways of thinking about what excuses criminal misconduct and what does not. These stories are a tad excruciating for victims and their families to hear, but, by telling them, we apprehend and incapacitate rapists. Far from being misogynist, the stories aid victims directly by engaging on their behalf the retributive power of criminal punishment. At the end of the day, moreover, it is the conviction that counts when it comes to educating offenders and non-offenders alike, not the tale that gets the confession that gets the conviction. When all is said and done, therefore, these false and unseemly behind-the-scenes stories must be counted as serving the substantive values supporting the criminal sanction generally and the reformed rape prohibitions specifically.

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<sup>179</sup> James Boswell, *Life of Johnson* 685 (R.W. Chapman ed., Oxford Univ. Press 1976) (1799).

<sup>180</sup> See Senese, *supra* note 9, at 97, 133, 178–79 (advising interrogators to use victim-blaming narratives for crimes ranging from “computer misconduct” to “kidnapping” to “taking game during a closed season”). As another interrogation expert puts it, “[b]lame everybody except the suspect.” Hess, *supra* note 11, at 69.

<sup>181</sup> See *supra* note 15.

Other legal commentators have begun to study the precise interrogation practices that are enabled by the *Miranda* regime, and a few have noticed that interrogators depend heavily on the stock stories recommended by the authors of the Reid Technique. For example, in his perceptive and comprehensive book *Police Interrogation and American Justice*, Richard Leo recently remarked that “[t]he suspect’s postadmission narrative or confession . . . is not something that is simply taken or elicited. Rather, it is actively shaped and manipulated—with the suspect’s participation to be sure, but at the interrogator’s direction.”<sup>182</sup> To the extent that these authors press normative objections—and, to say the least, many sharply criticize the Reid Technique—they focus almost exclusively on the phenomenon of false confessions, that is, they aim to illuminate how police use narratives, in combination with other interrogation techniques, to persuade innocent suspects to confess to crimes they did not commit.<sup>183</sup> Confessions that are false in this sense pose an urgent problem for our criminal justice system. If some sorts of interrogation stories produce confessions that are literally false, they should be stripped from the interrogator’s arsenal. But confessions that falsely inculcate the innocent are not the only hazards that interrogation stories may create. As I argue here, these stories have the power to undermine the substantive objectives of the criminal law and even to assist a potentially guilty person to get off the hook. Perhaps more fundamentally, by continuing to recount the tired old victim-blaming tales that our law of rape now formally rejects, the police are suppressing the emergence of alternative stories, alternative ways of narrating the wrong and the harm of rape, together with the alternative meaning and experiences that those narratives ultimately would foster and support.

Indeed, if we follow the insights reported by Bruner and other narrative psychologists, victim-blaming narratives must have potent psychological effects on the men and women who hear them in the interrogation room and in the many other locations where they

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<sup>182</sup> Leo, *Police Interrogation*, supra note 6, at 166; see id. at 165–94 (summarizing aspects of Reid Technique and the commentary criticizing it).

<sup>183</sup> See, e.g., Saul M. Kassin & Gisli H. Gudjonsson, *The Psychology of Confessions: A Review of the Literature and Issues*, 5 *Psychological Science in the Public Interest* 33, 48–56 (2004).

circulate. By conceding that rapists believe these stories—and, remember, the strategy rests entirely on the proposition that victim-blaming soothes suspects into singing by offering them a reasonable and morally acceptable “face saver” for their crimes—I fear that the police are giving not merely an inch but a mile. Think merely of the psychological effects that victim-blaming may have on various categories of suspects who hear them and who, the police tell us, endorse them. First, consider the rapist who is interrogated, but who is never charged with rape or any lesser-included offense. This offender may conclude not that he is getting away with it, but that he is innocent of it and further that he is innocent for the precise reasons that his interrogator identified in the victim-blaming script. If so, the man is likely to depart the interrogation room feeling vindicated, even pleased as punch about his old victim-blaming views, assuming that he held them before going to the stationhouse. After all, the cop’s objective was to give the man mental relief and comfort by telling him a story that shifts the fault from him to his victim, and the experts insist that the technique is effective because it has precisely that psychological effect. Thus, this actor might be left with the impression: Hey, the cops agree that these seductive gals are asking for it! Gosh darn it, even the cops’ sisters are asking for it when they get dressed up and go to bars!

Second, what of the rapist whose interrogation includes a round of victim-blaming and who ultimately is convicted of rape? Will this guy understand that the cops gulled him into confessing, that they were bluffing when they blamed the victim, and, therefore, that his penalty was deserved, morally as well as legally? Or will he continue to believe that the victim was to blame, to think that he and his interrogator were on the same page about her culpability? Where he got unlucky was in court, where a judge singled him out unfairly for punishment for doing exactly what cops, their family and friends—and, heck, judges too, assuming that they are no different from other normal men and women<sup>184</sup>—do all the time. Again, it seems sensible to assume that rapists tell themselves mi-

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<sup>184</sup> As Judge Richard Posner reassured us more than a decade ago, “people with irregular sex lives are pretty much (not entirely, of course) screened out of the judiciary—especially the federal judiciary, with its elaborate preappointment investigations by the FBI and other bodies.” Richard A. Posner, *Sex and Reason* 1 (1992).



2009]

*Interrogation Stories*

1655

sogynist tales long before they enter the interrogation room, and they are likely to cling to them after they depart no matter what they hear there. Still, the victim-blaming scripts surely have some tendency to reinforce sexist ways of thinking about women's responsibility for falling prey to violent men; at the very least, they fail to situate the sexual intercourse alleged to be rape within an alternative plot that fairly allocates responsibility between the participants. If so, we should be concerned to study their effect, especially on offenders who are likely to be recidivist.

The Inbau book provides one disturbing anecdote that illustrates the potential for these stories to leave lasting psychological impressions, including on perpetrators who ultimately are convicted. According to the Reid Technique, it is helpful for interrogators to advise an offender who has committed prior similar offenses that his present crime is no different from his past misdeeds, when in fact the present harm is more grievous. The authors offer a vignette, together with supporting dialogue, in which one of them persuaded a serial-rapist-turned-murderer to confess by reassuring him that his latest victim's death was just "a tough break," that is, it was "tough" for the murderer, not for the woman he strangled to death.<sup>185</sup> In the authors' estimation, this representation

was true to a considerable extent because, from all indications, he apparently only had wanted to subdue his victim's resistance rather than to kill her. (He had choked the victim in a fit of passion, which was his usual practice with others, but in this particular instance the girl failed to recover consciousness soon enough. As a result, he had assumed she was dead and had disposed of her body by throwing it from his car. Her life might have been spared if he had only given her sufficient time to recover from the effects of his earlier violence.)<sup>186</sup>

Once again, we must recall that the interrogator's objective in using this script is to console the suspect, to make him comfortable confessing. The theory is that the suspect will be more willing

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<sup>185</sup> Each edition of the Inbau text contains this advice, accompanied by the same vignette. See Inbau 4, *supra* note 7, at 245; Inbau 3, *supra* note 14, at 100; Inbau 2, *supra* note 14, at 42; Inbau 1, *supra* note 14, at 38.

<sup>186</sup> Inbau 4, *supra* note 7, at 245; see Inbau 3, *supra* note 14, at 100; Inbau 2, *supra* note 14, at 42; Inbau 1, *supra* note 14, at 38.

(maybe, even eager) to talk if he is reassured that his “irregular” behavior falls within “normal” parameters of deviance. When judged in the light of that objective, the strategy was highly successful in this case because the offender did confess. And, as the Inbau interrogators cheerfully report, “a few days before [his] execution, the rapist-killer stated that at the time of his interrogation, just prior to his confession, he had been comforted by the interrogator’s remarks” that his present offense was “‘no worse’ [than] his previous ones.”<sup>187</sup> When judged in the light of the political and ethical functions underlying the substantive criminal law, however, we might be far less sanguine about this technique at least if this man’s life had been spared. Who knows? The advice might have made him feel comfortable enough to contemplate and even continue raping, though perhaps a smidgeon less violently.

Third, consider whether, under contemporary rape statutes, police-sponsored victim-blaming stories may assist rapists to develop legal defenses to, as opposed to merely moral excuses for, criminal liability. Like other interrogation manuals, the Inbau text admonishes interrogators-in-training to avoid using narratives that may provide the suspect with a legal defense to the crime, and the experts imply, if not insist, that victim-blaming in rape cases does not have that effect.<sup>188</sup> This claim might be plausible when it comes to constructing the elements of the common-law crime. Remember that in the middle of the last century, when the first edition of the Inbau book appeared, cops everywhere were enforcing the common-law crime, and they were trying to prove the identity of the perpetrator without any help from DNA technology. Almost certainly, the suspect would protest that no intercourse occurred or that, if it did occur, he most certainly was not a participant in it. By definition, the intercourse must have followed hard upon a violent struggle, leaving the victim bruised, beaten, and bloody; if not, it would not qualify for prosecution as rape under the common law.<sup>189</sup> Persuading this rapist to confess by reassuring him that his victim was to blame would establish the not inconsequential fact that he did have sex with her. At the same time, the violent character of

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<sup>187</sup> Inbau 4, *supra* note 7, at 245; see Inbau 3, *supra* note 14, at 100; Inbau 2, *supra* note 14, at 42; Inbau 1, *supra* note 14, at 38.

<sup>188</sup> See Inbau 4, *supra* note 7, at 253.

<sup>189</sup> See *supra* text accompanying note 135.

2009]

*Interrogation Stories*

1657

the sex would by itself tend to thwart his claim for legal or moral extenuation. Indeed, one hopes that by today victim-blaming stories will enhance the moral culpability of any violent rapist who adopts them, as well as fall on deaf ears if offered to jurors by defense lawyers. We inspect the physical wounds left behind by the sex act, we hear the confession, and we howl at the perpetrator, “You thought she was asking for *that*?” As Austin puts it so nicely, some excuses simply are “‘unacceptable’: . . . there will be cases of such a kind or of such gravity that ‘we will not accept’”<sup>190</sup> the excuse. If you are an offender who tries on such an excuse, “you will be subscribing to such dreadful standards that your last state will be worse than your first.”<sup>191</sup>

Now, contrast the construction of common-law cases with the most difficult rape cases today, where the defendant is charged with sex that is non-consensual but not violent. In such cases, the suspect is likely to be more willing to concede—if there is DNA evidence, he *must* concede—that he and the victim did have sexual intercourse. He contests not the occurrence but the *meaning* of the sex. And, in these cases, the meaning of the intercourse *is* up for grabs, right? This is precisely what we mean, don’t we, when we refer to the “she said, he said” conundrum? Both partners agree that they had sex, and both agree that it was not violent. There, agreement runs out. She claims the intercourse was non-consensual and criminal, while he claims it was consensual and lawful. This time, the victim-blaming story surely has the potential to help the suspect craft a believable and legally exculpatory narrative of the events. And that narrative will, in turn, guide the suspect, the criminal justice system, and, ultimately, the community in fixing the meaning of the intercourse that all agree occurred. It takes but one (short?) step from the interrogation story—by her clothing, conduct, and demeanor, she was asking for it—to a legal defense—by some or all of those same tokens, she was consenting to it, or I reasonably believed that she was consenting. Here we glimpse the other side of the false confession coin. In such cases, the problem is not that the police are falsely inculcating an innocent person, but that they are assisting a person who is potentially guilty to get off

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<sup>190</sup> Austin, *supra* note 10, at 194.

<sup>191</sup> *Id.* at 195.

the hook. For all we know, going into the confession, the suspect, like David Lurie in *Disgrace*, might have possessed a whole range of mental states about the sexual encounter. For example, he may have known or believed that the victim was not consenting, and he may have enjoyed having sex that way; he may have been aware of the risk that she was not consenting, but decided to plow ahead anyway; he may have been too intoxicated to notice or to care about her views. But the police privilege one narrative and one narrative only—the victim-blaming tale—and thereby suppress all other potential alternative narratives. Worse still, by employing the victim-blaming script, the interrogators single out one psychological state and wrap it up in an exculpatory narrative, that just happens to be adjacent, if not identical, to a defense to criminal liability. With cops like these, who needs defense lawyers?<sup>192</sup>

The deeper problem is that many, if not most, interrogation stories work because lots of folks, law-abiders and law-breakers alike, believe them. In that sense, they are—as the Inbau authors said of the story endorsed by the rapist-turned-murder—“true to a considerable extent.”<sup>193</sup> Most poignantly of all, as Alan Wertheimer remarks in his recent book on rape,<sup>194</sup> rape victims themselves tend to buy into and internalize the victim-blaming scripts. Drawing upon studies by social scientists, Wertheimer argues that the unique experiential injury of rape—unique in the sense that other crime victims tend to be spared this pain—is that the “victims see themselves as having made a choice. . . . Victims of rape report that they come to experience a sense of guilt, shame, and self-loathing, feelings that reflect a disposition to second-guess one’s decision to succumb.”<sup>195</sup> To the extent that victim-blaming stories are creating and reinforcing that sense of injury, we should move to eliminate them, not only from the law as it appears on the statute books and from the criminal trial, but from other spaces in the system as well, including our police interrogation rooms.

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<sup>192</sup> When reading the recommendations put forward by the Inbau book, one is reminded of the scene in the film *Anatomy of a Murder* (Carlyle Productions 1959), directed by Otto Preminger, in which Jimmy Stewart plays a defense lawyer assisting a client, played by Ben Gazzara, to come up with a story that will persuade a jury to acquit him for killing a man he claimed raped his wife.

<sup>193</sup> See *supra* text accompanying note 186.

<sup>194</sup> Alan Wertheimer, *Consent to Sexual Relations* (2003).

<sup>195</sup> *Id.* at 105.

2009]

*Interrogation Stories*

1659

## CONCLUSION

*Before the tribunal Adèle confessed all her crimes; but, to lessen her guilt, she combined with her confessions the story of her tribulations. The jurors groaned, but they had to sentence her to life imprisonment . . . .*

François Eugène Vidocq<sup>196</sup>

The agenda for future research encompasses a number of questions, including one I'm sure that readers have for me: what stories should police interrogators use when helping to persuade guilty rapists to confess? Conventional police wisdom teaches that the path to confession is eased by encouraging the confessing subject to invoke some extenuating circumstances, to narrate the awful tribulations that culminated in the crime that she is being asked to admit and for which she must be punished. If that received wisdom withstands scrutiny—and I hope that social scientists have included it on their list of police conventions to be scrutinized—we must consider precisely how the mitigating narratives should be developed and deployed in the course of a police interrogation. Contemporary investigation protocols hold that it is the interrogator—not the suspect—who readily will and, therefore, must articulate a narrative that extenuates the crime, but without quite exonerating the criminal for it. If that received wisdom—that police interrogators should talk more and listen less—also withstands scrutiny,<sup>197</sup> legal scholars and policymakers are obliged to assist the police in determining which mitigating conditions should be raised in interrogations and which should not. As I argue here, the list of mitigating conditions should not be infinite—the police should not encourage suspects to try out any and every old excuse under the sun—but should be shaped and limited by the substantive objectives to be served by punishing the individual wrongdoer.

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<sup>196</sup> Vidocq, *The Personal Memoirs of the First Great Detective* 433 (Edwin Giles Rich ed. and trans., 1935).

<sup>197</sup> Social scientists have begun to study and question other conventional wisdom applied in the context of police investigations, including the crucial assertion that police can rely on witnesses' body language, as opposed to what witnesses say, to separate those who are liars from those who are honest. See Carey, *supra* note 151 (citing studies).

Victim-blaming is incompatible with the contemporary goals of rape law, and the police should stop feeding those stock stories to accused rapists. Over the years, police interrogators have developed many alternative psychological strategies, and, if they are challenged to make adjustments, they are likely to be deft. After all, we now know that the comforting Jeff is perfectly capable of cajoling suspects into confessing without any assistance from the threatening Mutt. Interrogators might be able to obtain confessions by using consoling narratives that bond the subject with the interrogator and that attribute the crime to ordinary human frailty or folly, but without shifting fault to the victim. For example, when shorn of their victim-blaming overtones, the “there but for the grace of God go I” narrative seems likely to offer the suspect a respectable place to make a stand, a vantage point from which to begin making admissions but without feeling or being demonized, consigned forever to reside among those deemed irredeemable.

In the end, that is, why not challenge the police to take seriously their role as “folk psychologist?” As I recount above, the role is one that their interrogation experts explicitly endorse. We also should remember that, once upon a time, one of the goals of criminal justice was to rehabilitate offenders. To say the least, the reputation of rehabilitation has been tarnished in recent decades, but that is because the system has all but ceased even pretending to try to rehabilitate anyone. Of course, the role of the police in our system is not to rehabilitate criminals, but to apprehend them, and, thus, it may seem naïve, even ludicrous, to suggest for them some therapeutic role. As the interrogation manuals so eloquently testify, however, the police play a significant role in creating the meaning of the acts that they investigate. To make the same point in a more homely way, they do a heck of a lot of talking with the people they interrogate. Therefore, to the extent possible, why not use those lengthy conversations as an opportunity to plant some ideas that might aid the guilty subject’s rehabilitation? Where rapists are concerned, it seems likely that rehabilitation might commence with the stirring of some capacity to feel empathy with victims. If that is so, then the police should avoid telling tales that disparage and disgrace victims at this crucial juncture in the rapist’s contact with the criminal justice system. Even as we try to begin rehabilitating a culture that for so long relied on victim-blaming

2009]

*Interrogation Stories*

1661

narratives to allocate responsibility for heterosexual intercourse, we might also begin to assist the men, as well as the women, whose daily lived experiences have been shaped and sometimes blasted by these stories.