

[Dear Colleagues: As you will see, this draft is a work-in-progress, and I send it along with all the usual caveats – this one is raggedy, as well as unfinished – and a little warning. The warning is this: Next week, I am giving my chair lecture, entitled “Doing the Police in Different Voices,” and this paper is a first chapter or installment of that larger project. The bad news is that, if you come to the chair lecture, you will find yourself hearing there some of what I say here. The good news is that you can skip the chair lecture or, of course, this workshop – or, right, both! – without missing a thing. With many thanks for your help and patience, Anne.]

Interrogation Stories

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What is a fact really?

David E. Zulawski & Douglas E. Wicklander¹

The objective of this essay is to propound some new questions about police interrogation practices and the speech acts² that those practices produce. By “new questions,” I mean questions that go beyond the decades-long furor over the constitutional basis for and practical impact of the warnings mandated by *Miranda v. Arizona*³ and even beyond the centuries-long controversy over the proper focus for and value of the “voluntariness” standard for judging the

¹David E. Zulawski & Douglas E. Wicklander, *Practical Aspects of Interview and Interrogation* 73 (2d ed. 2002).

²J.L. Austin’s elegant and influential book, *How To Do Things With Words* (2d ed. 1975) (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.

³384 U.S. 436 (1966). Add cites to commentary, especially to the quarrel between Cassell and Schulhofer..

admissibility of confessions in criminal cases.⁴ According to these familiar debates, interrogations are a practice with the potential to give us access to the “true” answers to the historical questions of who-done-it, how, when, where, and why.⁵ Yet legal scholars pay little, if any, attention to the rhetorical methods through which police interrogations (re)create the facts that they find. In this project, I will argue that the police confessional room is a space where truth is produced by the interrogator’s strategic use of narratives about guilt and innocence. Shapely confessions do not spring full-blown from the minds and mouths of criminal suspects. Rather, they emerge from a collaboration between investigator and criminal, in which the cop usually plays the role of lead author, who spins specific narrative plot-lines 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.”⁶

If this description rings true, let me be clear up front: By arguing that police interrogation tactics consist mainly of storytelling, I do not mean to suggest that the resulting confessions are “fictional” or “false.” To the contrary, narrative is a conventional, familiar, and appropriate methodology for producing the “truth” about or, in Jerome Bruner’s terms, the “meaning” of

⁴For a concise and helpful discussion of the due process voluntariness standard and its origins in a common-law evidence exclusionary rule, see 1 Wayne R. LaFare & Jerold H. Israel, *Criminal Procedure* 439-49 (1984). Professors LaFare and Israel trace the voluntariness standard to a case decided by the Court of King’s Bench in 1783, *Rex v. Warickshall*, 168 Eng. Rep. 263 (1783). Add cites to commentary.

⁵Charles L. Yeschke, *The Art of Investigative Interviewing* 4 (2d ed. 2003).

⁶John E. Hess, *Interviewing and Interrogation for Law Enforcement* 70 (1997).

human action,⁷ including those acts that we deem to be crimes. Most statements given by crime suspects, victims, and witnesses – whether inculpatory or exculpatory – come in the form of stories, and the police are the officials whose job it is, at least in the first instance, to assist in developing the stories – again whether inculpatory or exculpatory – that are fit for use in our criminal justice system. Thus, my agenda is not to argue that the police should cease using interrogation tales. Unless the cops do “enlarge” their suspicions, their “ideas” about who is guilty and who innocent, “into stories,” their interrogation practice would not be a productive one, and like Justice Jackson, I’m inclined to believe that there will be cases whose solution requires police to subject suspects to a reasonable process of custodial examination.⁸ Rather, the essay merely aims to begin exploring some familiar interrogation stories and to suggest that we must parse the plots that fix the facts on the basis of which our criminal justice system convicts some

⁷According to 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).

⁸See *Watts v. Indiana*, 338 U.S. 49, 57-62 (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.”).

suspects and acquits others.

This project was motivated by the strategies promoted by police interrogation experts for use in rape cases. According to (virtually) all of the training manuals, the best way to get a rape suspect to confess is to tell him victim-blaming stories.⁹ By “victim-blaming stories,” I mean narrative accounts that shift the fault for the sexual encounter from the rapist to the rape victim. Upon reading these recommendations, my first thought was something obvious 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 a problem* – is not merely that feminist consciousness may not have penetrated the walls of the police confessional. Rather, the more immediate, if not more interesting, quandary 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,¹⁰ and others are forbidden by the reforms embodied in rape shield laws.¹¹ Presumably, the ultimate objective of these legislative reforms is to redact rape-victim-blaming narratives from the juridical canon and ultimately from the popular stockpile as well. Yet, in the interrogation room, in this intimate space where the heroes and villains of our system rub elbows, we find both sides –

⁹E.g., Fred E. Inbau, John E. Reid, Joseph P. Buckley, & Brian C. Jayne, *Criminal Interrogation and Confessions* 256-57 (4th ed. 2001); Nathan J. Gordon & William L. Fleisher, *Effective Interviewing and Interrogation Techniques* 119-20 (2002); Hess, *supra* note ____, at 69-70; John O. Savino & Brent E. Turvey, *Rape Investigation Handbook* 108 (2005).

¹⁰Add cites.

¹¹Add cites.

the cops and the accused – sitting down together and swapping stories about female culpability for male sexual violence.

From this basic observation, the essay will begin to fill in the ground upon which I aim to build current and future research projects. The agenda encompasses at least three sorts of questions. First, I propose to think critically about the implications of these victim-blaming stories for the movement to reform the law of rape. At first glance, by expressing their preference for these narratives, 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 believe them,¹² but because the stories help them trick rape suspects into incriminating themselves. But, we may wonder in turn, is there empirical evidence for the proposition that victim-blaming makes guilty suspects sing? Then too, even if these yarns do have that salutary effect, might there be alternative techniques that work as well or even better? Although the interrogation manuals regale readers with anecdotes touting the success of victim-blaming,¹³ it would be useful and preferable to have more than police intuitions and war stories supporting the value of these (potentially) misogynist recommendations.

Second, I aim to speculate more generally about the connections between the content of interrogation stories and the meaning of the substantive criminal law, again with special attention to substantive reform movements. When the substantive law changes – particularly when the

¹²See, e.g., Charles L. Yeschke, *The Art of Investigative Interviewing* 105 (2d ed. 2003) (As an interrogator, “you may have to do or say things that you might normally find objectionable. This is tough to do, no doubt, but it is necessary if you are to be of the greatest service to your community.”); add more cites, including Inbau, for proposition that cops insist that they say a lot of stuff they don't believe.

¹³Cite Inbau, Hess, Zulawski & Wicklander.

reform aims to be fairly dramatic, say, by reconfiguring basic elements of familiar crimes – should we not expect to find police tweaking the plot-lines of their interrogation tales, editing them to conform to the demands of the new and improved crime definitions? If we do not observe such revisions, what might this tell us about the connections between police practices and the meaning of the substantive criminal law?

Third, I plan to consider what interrogation stories may have to teach us about the character of police investigations as a device for recovering historical truth. Is the cop an archeologist, one who digs or, better still, sifts through layers of accumulated dirt to uncover a hidden crime? Interrogation stories suggest not. At least in the confessional room, the cop is master narrator or, maybe, playwright,¹⁴ one who bats around plot lines with his leading actors before getting them to sign off on the final script. If playwright is the better analogy, police interrogators do not merely find facts that are buried out there somewhere – this time, deep in the heart and memory of a suspect – just waiting for the alert detective to come along and excavate them. Rather, by using interrogation stories, interrogators actively – and, I will insist, inescapably – shape the meaning of those 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 a particular plot-line, his interrogation story, now his

¹⁴Some interrogation experts use the metaphor of “interview as theater” to describe the process. See John R. Schaefer & Joe Navarro, *Advanced Interviewing Techniques: Proven Strategies for Law Enforcement, Military, and Security Personnel* 5 (2003). 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 6-7; see also Yeschke, *supra* note ____, at 42 (recommending that interviewers rehearse before sessions by engaging in imaginative role-playing).

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, which is a creation of the present interaction between interrogator and suspect, stands in for – indeed, it is – the past. The story, you see, *is* what happened.

I.

Before tracing the twists and turns of rape interrogation stories, let's visit the police confessional and contemplate the laws that encircle it, but do not determine its methodologies or practices. For legal scholars, confessions occur in one of those interesting institutional spaces in our criminal justice system 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. Of course, this island houses more than our police interrogation cells. Indeed, the police do almost all of their detective work here; 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 there are plenty of people working there. However, as far as the case law and the legal literature are concerned, 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 probably is the proper approach, but legal scholars and lawmakers must evaluate the policy critically because, among other things, it yields up the bodies of the human subjects upon whom our criminal law does its awful work. As far as I can tell, we have spent no time inspecting interrogation stories and the ways in which they condition our substantive objectives. My current agenda is to begin filling in this lacuna in our criminal justice literature.

When the police are hoeing their investigative patch – for example, when they are digging up physical clues, weeding out witnesses, plucking up suspects, and picking on perps to spill their beans – they are guided by both the substantive criminal law and by the rules of criminal procedure. However, neither of these sources of law turns out to provide much practical guidance. The substantive law identifies the general lay of the land where police should be plowing, and the law of criminal procedure forbids them to use a few investigatory tools¹⁵ and provides them instructions for using others.¹⁶ Otherwise, the police are the ones who call 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.¹⁷ 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, 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

¹⁵See *Brown v. Mississippi*, 297 U.S. 278 (1936) (forbidding the use of violence to obtain confessions); *Massiah v. United States*, 377 U.S. 201 (1964) (once the formal accusation has been lodged, police may not deliberately elicit statements from the accused about the crime for which he has been charged).

¹⁶E.g., *Kyllo v. United States*, 533 U.S. 27 (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 justified as "reasonable" under the Fourth Amendment); *Tennessee v. Garner*, 471 U.S. 1 (1985) (defining circumstances in which it is "reasonable" under the Fourth Amendment for police to "seize" people by shooting them); *Miranda v. Arizona*, 384 U.S. 436 (1966) (before police may subject citizens to "custodial interrogation," they must give advice about Fifth Amendment rights); *Davis v. United States*, 512 U.S. 452 (1994) (where suspect undergoing custodial interrogation makes an "equivocal" reference to counsel, the interrogator is not obliged to stop questioning or ask suspect to clarify his remark).

¹⁷Add cites to folks like Leo and Ofshe etc.

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 are detecting so that they can recognize the evidence prosecutors will need to prove those elements beyond a reasonable doubt if and when cases come to trial. Whoever else may be 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.¹⁸ Unless Franz Kafka really is the guy who pulls cops' strings,¹⁹ the substantive criminal law must be inscribed heavily upon – as it authorizes, shapes, and gives meaning to – police investigatory practices, including those that govern the taking of criminal confessions.

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, of course, I have in mind the rules governing searches and seizures, and the rules guiding police interrogations. If these rules – and, especially, the remedy for their violation – are working in the empirical way imagined by the Supreme Court Justices who designed them, they are calibrated to give the police

¹⁸It 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 research so far suggests that commercial interrogation manuals 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.

¹⁹For those who've read *The Trial*, the first sentence of the novel is enough to bring on a bad case of 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. 1998) (1914). To say the least, things for Josef K. go downhill from there.

appropriate incentives to respect the constitutional rights of criminal suspects.²⁰ 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.²¹ At a minimum, the police have to know these rules for the exclusionary remedy to serve, at once, as their stick and carrot. The 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,²² and we have plenty of anecdotal evidence suggesting that the police do just that.²³

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

²⁰E.g., *Mapp v. Ohio*, 367 U.S. 643 (1961) (extending the Fourth Amendment exclusionary rule to the states as a “deterrent safeguard” to encourage state police to obey the Federal Constitution); *United States v. Leon*, 468 U.S. 897 (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”); *California v. Hodari D.*, 499 U.S. 621 (1991) (“Unlawful orders [to stop] will not be deterred . . . by sanctioning through the exclusionary rule those of them that are *not* obeyed.” (emphasis in original)). Add Elstad?

²¹For recent examples of cases applying the exclusionary rule to sanction cops who blundered, see *Georgia v. Randolph*, 126 S.Ct. 1515 (2006) (it was 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 (2004) (disapproving “question-first-Mirandize-later” interrogation tactic, and suppressing pre- and post-warnings admissions).

²²Inbau and others.

²³Add cites: Siebert would be useful. Add reference to Los Angeles memorandum reminding police officers of the significance of the standing rules, and quote Justice Ginsburg’s concerns, dissenting in *Carter*, about the perverse incentives created by the standing regime.

police are supposed to be doing as a practical matter 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, important but implicit 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 kites, child abusers, dope dealers, drag racers, drive-by shooters, drunk drivers, embezzlers, extortionists, fare beaters, flashers, forgers, gamblers, graffiti artists, grafters, grifters, hackers, identity thieves, illegal aliens, insider traders, jaywalkers, joyriders, kidnapers, litterers, loiterers, mayhem makers, muggers, murderers, nuisances, peeping toms, pickpockets, pimps, poachers, ponzi schemers, pornographers, prostitutes, public drunks, racketeers, rapists, robbers, shoplifters, 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 with which the law entrusts them.²⁴

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. 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

²⁴Identify substantive limits on police committing crimes to catch criminals, as undercover agents are said to be compelled to do.

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*²⁵ explicitly, if vaguely, directs the police to follow the substantive law.²⁶ That is, before the cops may search people and places, or seize people and other stuff, they must conclude not only that things look pretty fishy, but pretty fishy in one of the precise ways condemned by the substantive law.²⁷ 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 they are not authorized to flush out 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.”²⁸

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

²⁵462 U.S. 213 (1983).

²⁶Id. at 243 (The probable cause standard requires “only the probability, and not a prima facie showing, of criminal activity’ . . .”).

²⁷Id. at 243 (factual circumstances in case were “as suggestive of a prearranged drug run, as . . . of an ordinary vacation trip”).

²⁸Yeschke, *supra* note ____, at 53.

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,²⁹ don't twist her arms too hard,³⁰ 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:

²⁹As 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 question if he so desires.”

Id. at 435 (citation omitted); see also Yeschke, *supra* note ___, at 50 (“[S]tate the four warnings without embellishing them. Merely expressing the warnings is sufficient; to do more is self-defeating.”).

³⁰*Dickerson* also explains that *Miranda* did not displace the due process inquiry, but instead imposed on interrogators some extra 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. If the totality of the circumstances suggest 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 the suspect has been advised of and waived his rights, courts give interrogators a lot of leeway by reasoning that, because he heard the warnings, the suspect was in the driver’s seat, could pull the plug at any time he started to feel pressured or uncomfortable participating in the interview. To be sure, the cops can’t read the suspect his right, get him to waive, and *then* put the gun to his head, but almost anything else goes, [add cites].

The presence of the penal code is a condition precedent to the conversation. The substantive law – more precisely, its apparent violation – authorizes, creates the occasion and opportunity for, the conversation, and the substantive law conditions, guides, channels, shapes its content and trajectory. It also goes without saying that we expect interrogators to design their chit-chat to give suspects an opportunity to admit (or deny) things that will help to prove the elements of the crime. It so completely goes without saying that the legal literature neither says it nor says anything about how it is to be accomplished, with one exception. That is, the cases and commentary do insist that police interrogators must avoid tactics that will produce a “false” confession, false in the significant, but narrow, sense that the suspect admits that she committed an act that never occurred at all or that was committed by someone else.³¹ And notice this too: The problem – and the opportunity for this essay – is that the only tactics that are understood to have the power to produce a confession so “unreliable” that we must exclude it for fear it may be “false” are physical violence, brutal forms of the third-degree, and explicit promises of leniency.³² Surely, it is important and sensible for lawmakers to take those dicey, not to mention evil,

³¹For 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) (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., 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., Stan B. Walters, *Principles of Kinesic Interview and Interrogation* 287-97 (2d ed. 2003); Yeschke, *supra* note ___, at 52 (“It is vital to avoid saying or doing anything that might cause an innocent person to confess.”); Zulawski & Wicklander, *supra* note ___, at ___. Whether interrogators follow that advice in practice is another matter.

³²See LaFave & Israel, *supra* note ___, at 441-49.

strategies off our interrogators' tables. However, even without – or, maybe, *especially* without – those particular aids to inculpatory conversations, the police are left with plenty of room to maneuver when assisting suspects to make confessions, and those confessions will (and usually should) be accepted as true. Therein – in that room, in that space – lies my project. What the heck is going on in there?

II.

Before getting to that interesting question, let's briefly contemplate the role that narratives play in our communal judgments concerning which human acts should be classified as crimes. According to Jerome Bruner, in our culture storytelling is the primary and, perhaps, essential psychological process by which people assign meaning to significant actions and events. As he 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."³³ Though he insists that people possess "a readiness or predisposition to organize experience into a narrative form, into plot structures and the rest,"³⁴ a crucial step in Bruner's account is to remark the instances where we do *not* resort to storytelling. As he observes, "[w]hen things 'are as they should be,'" narratives are not necessary.³⁵ The community has certain expectations for human behavior in certain contexts – these are our "canonical" expectations – and, when people conform and behave in the ways everyone takes for granted, there is nothing whatsoever to remark, hence no reason to talk at all, let alone to tell

³³Bruner, *supra* note ____, at 35.

³⁴*Id.* at 45.

³⁵*Id.* at 40.

stories, about their behavior. By contrast, when folks deviate from or flout the norms, bystanders begin buzzing. Our narrative impulse arises *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,’”³⁶ and instead goes postal, bystanders 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.”³⁷ We’ll have much more to say about the quest for a *mitigating* “intentional state” as we continue 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 discordant³⁸ – his main claims are likely to seem non-controversial, even obvious to criminal lawyers. Of all conceivable “deviations” from our “canonical” expectations, the human actions (and the underlying harms) deemed to be crimes are among those we most fear and whose meaning we are compelled to seek

³⁶Id. at 48. Bruner borrowed the “post-office” example from the work of the late Roger G. Barker, another psychologist, citing Barker’s book, *Habitats, Environments, and Human Behavior* (1978).

³⁷Bruner, *supra* note ___, at 19, 49-50 (emphasis in original).

³⁸Id. at 97.

most urgently. Moreover, the 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 “intentional state” – some “mens rea,” in the criminal law’s argot – in the actors who commit them.³⁹ 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 cops and lawyers never receive any formal training in narratology, they understand perfectly the significance and power of narratives, especially first-hand accounts, in “making their cases.” 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 “fictional” or “untrue.” To the contrary, these utterances convey the truth in a narrative or story form. For example, a suspect’s interrogation story often helps to give us access to the true meaning of the act alleged to be a crime, and, of course, it is that meaning which allows us to decide whether the actor deserves to be punished, and if so, how severely. Unless and until they take their proper place in a narrative, the so-called “facts” of the crime will be unworthy of our attention. Here is a statement of fact that is true in the sense that it corresponds to a tiny bit of reality, but that also is, on its own, otherwise meaningless. The

³⁹For just a drop of the buckets of ink spilled on the crucial mental ingredient of crime, see [add cites].

example is taken from a real case,⁴⁰ and, happily, it coincides with one of Bruner's illustrations.⁴¹ 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 time and breath to notice and vocalize,⁴² and forming no part of anyone's memory or account of an ordinary day.

Now, go ahead and embed the statement in a police report, which, by definition, is a document that records an event that would not be part of your ordinary day or mine. The particular report I have in mind describes a bedroom in which a toddler died in her crib after a fire broke out in her room. The coroner does the autopsy and announces that the child's "[d]eath was caused by toxic fumes released from the burning of an acrylic afghan."⁴³ With these terse speech acts, police and physician 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

⁴⁰See *State v. Ritt*, 599 N.W.2d 802 (1999). I owe this helpful example to Jonathan Goodman, for I found the *Ritt* case by reading his article – for which I also thank him – *Getting to the Truth: Analysis and Argument in Support of the Reid Technique of Interview and Interrogation*, 21 Me. B.J. 20 (2006).

⁴¹See Bruner, *supra* note ____, at 25 (borrowing an utterance with which Noam Chomsky liked to play, to wit, "the cat is on the mat").

⁴²I'm compelled to concede that the statement could have (a wee bit) more salience than I – for purposes of my illustration – am allowing. Upon noticing an afghan on a space heater and depending on the configuration of the heater and (especially) on whether the heater was 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*?!"

⁴³See *State v. Ritt*, 599 N.W.2d at 804.

understand the meaning of the child's death. Detectives, doctors, family members, and bystanders scramble to discover whether the afghan was merely an afghan, albeit one in the wrong place at the wrong time, or whether it was a weapon someone used to kill 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 intentional state of the agent who wielded it. How precisely – and when – did the afghan get placed 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? There is a range of potential answers to these questions, each of which will take the form of a narrative, one with a sequence, a plot, and human agents, who are endowed with and act upon knowledge, beliefs, and intentions. 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 – a parent, a sibling, a caretaker – placed it on the heater so that it would be nice and dry before bedtime. Perhaps the actor was aware of the risk of fire, intended to remove the blanket as soon as it was warm and dry, but got caught up in the daily routine and forgot all about it. Perhaps the actor was too lazy to be bothered to make the room tidy, to pick up the afghan, and place it back in the crib where it belonged. Perhaps the actor put the afghan on the heater for the purpose of starting a fire to destroy the life of a difficult, redundant, or unwanted child, or for some other sinister objective. The community will have to weigh these conflicting narratives, together and one against another, to arrive at the true meaning of the child's death, to pronounce it an accident or some degree of homicide.

In the case from which I draw this example, *State v. Ritt*,⁴⁴ the child who perished in the fire was a difficult one, born with a debilitating virus and requiring constant assistance from a raft of caregivers, and her mother murdered her. As you would expect, the opinion by the Supreme Court of Minnesota presents the disjunctive causal accounts of the fire put forward by the prosecution and by the defense. “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.”⁴⁵ By contrast, the defense aimed to make the case “that the fire was caused by a lit cigarette,” which could have been left by any one of a number of smokers who spent time in the house, and “which had burned into the mattress of the daybed.”⁴⁶ The opinion also recounts two additional stories narrated by 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 first conversations with the fire marshal, the mother explained that the child “had recently begun to throw things [including the afghan] out of her crib,” and the afghan “had landed on the heater in the past and had browned but not burned.”⁴⁷ By this account, the best (and worst) the mother could do or did was to assist the police in drawing inferences after the fact. Alas, she helps them speculate, on this particular night the afghan must have gone beyond “browned” to burning after the child chucked it from her crib onto the heater. The mother was not the agent who killed her baby either accidentally or on purpose – or, maybe, accidentally on purpose – because she was

⁴⁴Id.

⁴⁵Id. at 807.

⁴⁶ Id. at 807.

⁴⁷Id. at 806.

fast asleep in her own bed at the crucial time, and she therefore deserves our empathy, not our condemnation.⁴⁸

A few days later, the mother was interviewed by a detective, and she then revised her account significantly. At first, she stuck to the story she told the fire inspector, but, as the session continued, her narrative began to follow a different, far more malign, trajectory. According to the new narrative produced under interrogation, the mother entered the child's room prior to the fire. While there, she "took the afghan off" the child 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.⁴⁹ As for her mental attitude concerning the fire she started, the story is a little vexing, as she tried to draw a distinction between her intentions and her hopes, which themselves 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 [the child] to die."⁵⁰ In the very next breath, however, she acknowledged that she "might have [placed the blanket on the space heater] 'on hope,' and that sometimes she wished that God would decide to take" her child.⁵¹ Towards the end of the

⁴⁸Of 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 case 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 the parent, she had the duty to rearrange things in the child's bedroom to reduce, if not eliminate altogether, that risk.

⁴⁹State v. Ritt, 599 N.W.2d at 807.

⁵⁰Id.

⁵¹Id. at 807.

interrogation, she also advised the detective that she “could not understand how a space heater could cause a fire.”⁵²

When it came time for the jurors to determine the meaning of the child’s death, they had a range of additional evidence to weigh along with the mother’s statements: the results of “test burns” conducted by experts trying to duplicate the fatal fire, testimony from the child’s sister who escaped from the home unharmed and which supported conflicting opinions concerning whether or not the mother could have rescued the child, testimony from family friends about conversations with the mother in which she spoke of placing the child for adoption and discussed space heaters and the risk of fire. Yet, as the court reconstructs things, the jury found the key to the mystery in the mother’s statements about her mental state, in her unseemly and doomed effort to distinguish “between what she wanted to happen and what she hoped might happen.”⁵³ The opinion offers a quick but striking sketch of the jury deliberations. A few hours after getting the case, the jury “requested to view the videotapes of [the mother’s] interview and formal statement.”⁵⁴ Without objection from either side, the trial judge granted the request and “permitted [the jurors] to review both videotapes out of the presence of the court and counsel and to stop the videotapes when they wished to discuss them among themselves.”⁵⁵ The very next thing we are told is that the jury came back with its verdict two days later, convicting the mother

⁵²Id.

⁵³Id.

⁵⁴Id. at 808.

⁵⁵Id.

of premeditated murder and arson, and acquitting her of manslaughter.⁵⁶ From this concise description, which tightly connects the videotapes to the verdict, readers are meant to and do infer that the mother's interrogation story played a powerful role in the case for murder. To be sure, there was other evidence corroborating the verdict, but we are left with an image of jurors sitting in a room for two days, playing, pausing, parsing, replaying, pausing, parsing the videotaped statements, until all were convinced that the mother was a murderer. This killing was a murder, rather than manslaughter or an accident, because of what the defendant herself had to say about why the afghan was on the heater: It was there because she hoped her daughter would die. The mother learned – too late to salvage her own skin, not to mention 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.”⁵⁷

Think now of the power of the confession that is withheld, as well as 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 explained, “a plea of guilty is more than an admission of conduct; it *is* a conviction.”⁵⁸ By contrast, by admitting her misconduct in a confession, a suspect does not thereby convict herself. To get from confession to

⁵⁶Mention too that the mother was convicted for second-degree murder on a depraved indifference theory.

⁵⁷Bruner, *supra* note ___, at 81.

⁵⁸See *Boykin v. Alabama*, 395 U.S. 238, ___ (1969) (emphasis added).

conviction, the system must take an additional formal step or two, such as a guilty plea 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 have the capacity to do more work than guilty pleas, precisely because confessions typically come in story form. When confessing, the suspect narrates how, where, and when the crime went down, and she also explains why she committed it. Thus, confessions have the potential to give us access to the whole story, at least from the confessor's point of view, which is something that guilty pleas don't even pretend to do. Why else do you suppose that defense lawyers never, ever encourage clients to confess, though they often do counsel them to plead guilty? Guilty pleas tend to follow closely on the heels of confessions, and, when they do, they are likely to be far less favorable than pleas negotiated in cases where the suspect kept his own counsel. Notice too that, for crime victims and their families, the guilty plea does not seem to carry the same conviction as the full-blown confession, not to mention any of its implications of remorse. Press accounts often report that crime victims and their kin are disconcerted, if not furiously disappointed, when the defendant elects to plead guilty rather than go to trial. The guilty plea may spare the lawyers time and trouble, but it denies to victims the more nuanced and satisfying story that (they imagine) would emerge if the defendant were forced to have her day in court.

This time, let's use a literary example, one taken from J.M. Coetzee's magnificent novel, *Disgrace*.⁵⁹ 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

⁵⁹J.M. Coetzee, *Disgrace* (1999).

coming to class, fails to appear 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.

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 is a feminist, and “a student observer from the Coalition Against Discrimination.”⁶⁰ 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.”⁶¹ At the outset of the hearing, the committee Chairman briefly refers to the charges, but, before he can get another word out, Lurie immediately 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.”⁶²

At this, the committee members start murmuring among themselves. 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.”⁶³ He declines their invitation to give his

⁶⁰Id. at 40, 47-48.

⁶¹Id. at 54.

⁶²Id. at 48.

⁶³Id.

side of the story, and his colleagues 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.⁶⁴ 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 as charged. That is my plea. That is as far as I am prepared to go.””⁶⁵

The hearing continues in this vein, with the committee members alternatively badgering and cajoling Lurie to speak. He briefly toys with the notion of confessing, even going so far as to outline what his confession would be were he to make one: ““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.””⁶⁶ One committee member asks whether Lurie invokes the power of Eros as “ a defence . . .? Ungovernable impulse?” At this (friendly?) interpretation of his hypothetical confession, Lurie refuses to bite, even making matters worse for himself by affirming that his impulse “was far from ungovernable. I have denied similar impulses many times in the past, I am ashamed to say.”⁶⁷ 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

⁶⁴Id. at 50-51.

⁶⁵Id. at 51.

⁶⁶Id. at 52.

⁶⁷Id.

face value and recommend accordingly.’’⁶⁸ To say the least, “the atmosphere in the room is not good: sour it seems to” Lurie.⁶⁹

For readers of the novel, the hearing is, if anything, even more excruciating than for the committee members. Lurie’s off-hand 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 the student, 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 has access to some knowledge that Lurie and the readers lack, for they have read and heard statements from the accuser. The events in the novel are narrated from Lurie’s 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, not her utterance at all, but that of her parents and boyfriend, whom he thinks coerced her into making it – 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 watched the affair start, unfold, and fall apart. Armed with these details, you’d think that readers would be in a fair position to resolve the mystery that the committee is unable to penetrate, to identify the true meaning of the sex between this professor and this 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

⁶⁸Id. at 53.

⁶⁹Id. at 50.

[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.”⁷⁰

The story of this affair is all of that. Though we are sure (aren't we?) that we've witnessed a straightforward case of sexual harassment, 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. On one occasion, the sex seems to be not mere harassment, but rape, for the woman struggles, saying, ““No, not now!’ . . . But nothing will stop” Lurie. When “*it* is over,” he tells himself that *it* was “[n]ot rape, not quite that, but undesired nevertheless, undesired to the core.”⁷¹ At other times, the sex takes on the character of statutory rape. The student is petite, in Lurie's eyes even childlike, “[h]er hips . . . as slim as a twelve-year-old's.”⁷² 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.”⁷³ But we previously had listened to him thinking: She's “[*a*] *child!* . . . *No more than a child! What am I doing?* Yet his heart lurched with desire.”⁷⁴ Alas, there are still more possibilities. Lurie may have had incest in mind, for he has sex with the student in his daughter's bed, wheedles her in the voice of a parent, almost calls himself her “Daddy,” wonders whether she is offering to be his mistress or his daughter.⁷⁵ Then too, he may have viewed having

⁷⁰See Bruner, *supra* note ____, at 53-54 (emphasis in original).

⁷¹Coetzee, *supra* note ____, at 25 (emphasis added).

⁷²*Id.* at 19.

⁷³*Id.* at 45.

⁷⁴*Id.* at 20 (emphasis in original).

⁷⁵*Id.* at 26-27.

sex with her as equivalent to buying sex from a prostitute, which had been his prior and “entirely satisfactory” solution to “the problem of sex,”⁷⁶ as he finds himself wondering whether it is not she who is “exploit[ing] him,” giving him sex so she can skip out on her poetry classes and exams in order to concentrate on drama courses and acting.⁷⁷

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 and difficult, nay, impossible, 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, buddy, by committing this sexual offense, 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 are those cops when you need them?

III.

With these examples under our belts, we (at last) are ready to turn to rape interrogation stories. What are these victim-blaming stories, how do they function, what problems – and much more optimistically – what opportunities do they create for, among others, substantive law reformers? I first glimpsed these stories when I followed the lead of the Supreme Court in

⁷⁶Id. at 1.

⁷⁷ Id. at 28.

Miranda and began reading police interrogation manuals. As Chief Justice Warren remarked in *Miranda*, outsiders have limited access to the interrogation room because police discourage, even forbid, the presence of third-party observers there. Therefore, the Court turned to the formal interrogation training manuals as one source, albeit crude and incomplete, for developing its empirical account of what transpires in that place.⁷⁸ (For purposes of future research, I am aiming for more direct access to police interrogations, but this initial essay remains within the confines of the “how-to” manuals.) The acknowledged leader in the field – the tome some reverently call “The Interrogator’s Bible”⁷⁹ – is *Criminal Interrogation and Confessions*, which initially was co-

⁷⁸In *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. at 448-49. To this day, interrogation experts insist that the interrogation should be a private meeting between suspect and interrogator. In some circumstances, they acknowledge that more than one officer may attend the session, but most manuals advise that one-on-one sessions are by far the most productive. See Schaefer & Navarro, *supra* note ___, at 3; Yeschke, *supra* note ___, at 141-42; Hess, *supra* note ___, at 11 [add others].

⁷⁹See, e.g., Goodman, *supra* note ___, 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.’”) A leading textbook on Criminal Investigations refers to “Professor Fred E. Inbau [as] the authority on interrogation.” Charles E. O’Hara & Gregory L. O’Hara, *Fundamentals of Criminal Investigation* 147 (7th ed. 2003). Likewise, the authors of competing interrogation manuals often give credit to the Inbau team for helping them learn their craft. See, e.g., Hess, *supra* note ___, 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 ___, 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 coercion. Those who have been exposed to his knowledge are better for it. On the job with both the CIA and the FBI,

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.⁸⁰ First published in 1962, the Inbau book is the interrogation manual most heavily criticized, but ultimately and ironically also tacitly endorsed, by *Miranda* itself.⁸¹ Many students and teachers of criminal procedure still study the first edition of the Inbau book in an effort to understand what on earth was going on in the interrogation room – that is, what apart from violence and the brutal third degree – to give those Supreme Court Justices such fits. When you open the cover and take a peek inside, what you find are detailed instructions for how to host a story-hour (or, more likely, hours and hours) for criminal suspects.⁸² To be sure, the Inbau book is full of cunning cons, bluffs, ruses, and props to prime the confessional pump, but the manual’s main advice is for the interrogator to tell the suspect stories and to keep on telling him stories until he endorses one of the stories as his true confession.

[After a series of helpful suggestions, including how to decorate the interrogation room – a simple, minimal look is best, but be sure to have soft drinks and snacks on hand – some sartorial

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 ____, at xiii-xiv (both authors earned degrees from the Reid College of Detection of Deception, and both later were worked for John E. Reid & Associates before forming their own interview-interrogation firm).

⁸⁰See Fred E. Inbau & John E. Reid, *Criminal Interrogation and Confessions* (1962) (Inbau 1); Fred E. Inbau & John E. Reid, *Criminal Interrogation and Confessions* (2d ed. 1967) (Inbau 2); Fred E. Inbau, John E. Reid, & Joseph P. Buckley, *Criminal Interrogation and Confessions* (3d ed. 1986) (Inbau 3); Fred E. Inbau, John E. Reid, Joseph P. Buckley, & Brian C. Jayne (4th ed. 2004).

⁸¹Cite *Miranda* (pages quoting Inbau); cite Siebert (praising Inbau for rejecting question first, warn later tactic).

⁸²See Inbau 1, *supra* note ____, at 1-88.

tips – if possible, lose the gun and badge, and oh, yeah, please do use mouthwash especially if you ate Italian for lunch – and a reminder to arrange for a tete-a-tete with your suspect – the book offers a collaborative story-writing guide.] More precisely, fledgling interrogators are instructed to come up with two (or more) alternative narrative accounts describing how the crime went down and (especially) the suspect’s motives for committing it.⁸³ Each story is incriminating, but some will characterize the suspect as a thoroughly reprehensible creep – e.g, he dreamed and schemed, planned and plotted, diced and sliced, before flouting the law’s commands – while others will cast him in the role of reluctant or hapless offender – e.g., he stumbled into trouble because he was in desperate straits for which some other jerk or the fates are to blame.⁸⁴ The notion is that the latter tale relieves the suspect of some moral responsibility – *not* legal responsibility, mind you – and that, upon hearing it, the suspect will feel less guilty, hence less embarrassed, perhaps even comfortable, confiding his violation to the cops.⁸⁵ According to the

⁸³See [see also, e.g., Gordon & Fleisher, *supra* note ___, 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 ___, at 32, 53, 151, 157 (support the suspect’s efforts to come up with an account that “rationalizes” the offense and helps him save face); Zulawski & Wicklander, *supra* note ___, at 2-3,, 325, 327.

⁸⁴Inbau, *supra* note ___, at ___; See, e.g., Hess, *supra* note ___, at 76-77; Yeschke, *supra* note ___, at 202 (You falsely accused your step-dad of molesting you, not because you are a nasty kid, but because you love your mom and want to put him away where he can’t hurt her anymore.); Zulawski & Wicklander, *supra* note ___, 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).

⁸⁵See Zulawski & Wicklander, *supra* note ___, at 322-23 (after hearing the “rationalization in story form,” many “suspects are comfortable with the idea that confessing is the right thing to do”).

Inbau book and other interrogation kits,⁸⁶ therefore, the best interrogator is an accomplished storyteller, and interrogation stories are the closest thing to foolproof for getting suspects singing and ultimately signing on to – indeed, actually formally signing – one story or another about their involvement in crimes.

Of course, after wolfing down the first edition of the Inbau book for a taste of pre-*Miranda* interrogations, the hungry Criminal Procedure instructor immediately gobbles up the newest version of that text in order to sample *Miranda's* impact on expert advice about interrogation techniques. The impact is exactly what you would expect. Boiled down, the post-*Miranda* advice is this: Give the suspect four little warnings and 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! As far as these expert interrogators are concerned, the *Miranda* earthquake caused no more than a temporary tremor in police interrogation rooms. Sure, *Miranda* mandates a little more red tape – the handy advice-of-rights cards, for starters, as well as those pesky waiver-of-rights forms⁸⁷ – but otherwise it's business as usual in the police confessional.⁸⁸

⁸⁶E.g., Nathan J. Gordon & William L. Fleisher, *Effective Interviewing and Interrogation Techniques* 119-31 (Academic Press 2002).

⁸⁷For examples of the advice cards and waiver forms, see O'Hara & O'Hara, *supra* note ___, at 131, 133. 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* 214 (1991); see also Richard A. Leo, *Questioning the Relevance of Miranda in the Twenty-First Century*, 99 *Mich. L. Rev.* 1000, 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).

⁸⁸The Supreme Court itself has directly confirmed this interpretation of *Miranda*. See *Moran v. Burbine*, 475 U.S. 412, ___ (1986) (asserting that *Miranda* held that “[p]olice questioning, often an essential part of the investigatory process could continue in its traditional form, . . . if the suspect clearly understood” the content of the *Miranda* warnings”).

Indeed, what is remarkable about the Inbau book is that the victim-blaming stories recommended for use in rape cases by the current edition – by now, the book is in its fourth edition, which was published in 2001 – are *exactly* the same (with one telling exception) as those put forward in the first. I suppose that, by itself, the *Miranda* decision could not be expected to have an impact on many (or most or even all?) interrogation stories. Although *Miranda* (once) was thought to be a very big deal, no commentator has suggested that the Justices intended to disrupt or regulate heavily the use of interrogation stories. However, we would expect to see some of those stories evolve in response to ongoing developments in the substantive law, but, at least in the official advice manuals, we detect no progress whatsoever in interrogation stories. Here's the basic point: During the very decades covered by the four editions of the Inbau book, the law of rape was undergoing an historical transformation, and yet these substantive innovations have not laid a hand or even a finger on the victim-blaming stories recommended for use in rape interrogations. To the contrary, the fourth edition sells to police interrogators precisely the same old victim-blaming scripts that the first edition peddled to cops trying to trip up perpetrators of the common law version of the crime.

As consumers of criminal procedure literature, whether scholarly or popular, would predict, the master plot sponsored by the Inbau book for use in rape interrogations involves direct condemnation of the rape victim.⁸⁹ The authors assert that the strategy is effective when questioning a variety of offenders, but it is said to be *the* method-most-likely-to-succeed in rape interrogations, and many of their general examples of victim-blaming stories are taken from interrogations of rape suspects. Here, we encounter precisely the same representations of guilty

⁸⁹See also John E. Hess, *Interviewing and Interrogation for Law Enforcement* 70 (1997).

rape victims that the feminist movement has been determined to overthrow and that I had thought that the substantive law was moving, perhaps like molasses in winter, but still moving, to eliminate from the criminal justice system.

For example, interrogators are counseled that it will be helpful 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 passion.” Here, as at other points throughout the manuals, the experts offer police some very precise dialogue about what the victim did wrong for them to incorporate directly into their own interrogation scripts:

“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.”⁹⁰

Likewise, cops are advised that they should fault the victim “for behaving in such a way as to arouse the suspect sexually to a point where he just had to have an outlet for his feelings.” In other words, they should urge the suspect to believe that, by her sexual conduct, the victim brought about her own rape. Here is another snippet of dialogue that the experts believe that interrogators will find useful:

“Joe, this girl was having a lot of fun for herself by letting you kiss her and feel her breast. For her, that would have been sufficient. But men aren’t built the same way. There’s a limit to the 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.”⁹¹

⁹⁰Inbau 4, supra note ____, at 257. (Cite pages in other editions too.) See also Hess, supra note ____, at 70 (“I saw how she looked, and it looked like she was on the make to me.”)

⁹¹Inbau 4, supra note ____, at 257. (Add cites to other editions). See also Hess, supra note ____, 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

Finally, “where circumstances permit,” the officer should hypothesize that what really happened is that “the rape victim . . . acted like she might have been a prostitute and . . . the suspect . . . assumed she was a willing partner.”⁹² Once again, the authors provide some dialogue for interrogators to use to persuade the suspect to endorse particular interrogation story:

“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?”⁹³

By thus “condemning” 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 her company at the time of the crime.”

Between the first and fourth editions of the Inbau book, the authors did move to 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 50 years ago. According to the authors of the Inbau book and other experts, one useful technique for giving a suspect “mental relief and comfort” is to confide that the investigator has a friend or relative who indulged in the same kind of conduct for which the suspect stands accused. If you want to make the suspect really comfortable, the experts continue, it may even be appropriate for the investigator himself to confess that he has been tempted to commit the crime too.⁹⁴ It is at the

thought.”); Zulawski & Wicklander, *supra* note 1, at 334 (“Did she come on to you or did you start this whole thing?”)

⁹²Inbau 4, *supra* note ____, at 257.

⁹³Inbau 4, *supra* note ____, at 257.

⁹⁴Add wife-nagging-murder example from Inbau. See also Yeschke, *supra* note ____, at 40 (“. . . I suggest . . . giving the impression that if you were in a similar circumstance, you might

point of offering specific bits of dialogue that the authors promote a new interrogation plot-line for cops to use. In the first edition of the Inbau book, the authors tell this war-story, which they encourage other interrogators to include in their own portfolio of interrogation narratives:

“[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.”

In the fourth edition, the instructors substitute the following speech for interrogators to use at this juncture. Keep in mind that the objective is to make the suspect comfortable by reassuring him that his crime was not so bad – really, the conduct is almost normal – because even the investigator’s own “friends and relatives” have been tempted to do 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 sister 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. In think in your situation this gal allowed

have done something similar to what the interviewee did, even though you know that you would never engage in that particular behavior.”)

the relationship to get much closer than what my sister did and, we both know, guys reach a certain point of no return.”⁹⁵

Surely, it was sensible for the authors to decide to scrub their true rape war-story. Not all suspects fed that line will make the fortunate decision to plead guilty. 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 incriminating admissions. 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 effects of interrogation stories that blame the girls who got themselves “roughed up,” there are plenty of reasons to redact this vivid monologue. Yet, the new script contains a particularly ugly variation on the some-of-my-best-friends-and-relatives-are-culpable theme. In the updated version, it is the woman – any woman and all women, right up to the experts’ own sisters – who are morally at fault for engaging in culpable conduct that tempts men to commit the crime of rape.

III.

[The third part of the essay – which is still gleaming in my eye – will take up implications and return to some of the specific questions identified in the introduction. My tentative recommendation is that the police should cease using (some or most or all?) victim-blaming stories in rape interrogations because the stories may be reinforcing sexist attitudes on the part of

⁹⁵Inbau 4, supra note ____, at 243.

the cops who must recount the stories on a daily basis; on the part of the rape suspects, whether guilty or innocent, who find them soothing; and, ultimately, on the part of the public as well. To be sure, the police do not have an unlimited stock of stories – and my proposal might require them to do some work developing new ones – but they already use a variety of techniques when interrogating suspects. Indeed, they use a number of different voices, even take on distinct personas – for example, there’s Mutt, there’s Jeff and, maybe, Geoff – and I would encourage them to retire the victim-blaming pose because it is incompatible with the goals of our substantive law as embodied in the rape reform movement.

The project raises questions that are empirical, as well as theoretical, and, though I have collected no empirical data, it would be good to identify some of the areas where data would be useful. One of my concerns goes to the effect that interrogation stories may have on the suspects who hear them. A rape suspect who is interrogated – but never charged – may conclude that he is innocent of any crime and further that he is innocent for the precise reasons that his interrogator identified in the victim-blaming script. The suspect may depart the interrogation room feeling pleased as punch about his old victim-blaming views. After all, the cop’s objective was to impart mental relief and comfort, and the experts tell us over and over again that their techniques work that way. Thus, this suspect might be left with the impression: Hey, the cops agree that these seductive gals are asking for it! Gosh, darn it, even the cop’s sisters are asking for it when they put on sexy clothing and hang around in bars!

And what of the suspect who is interrogated and ultimately convicted of rape? Will that suspect understand that his penalty was deserved, morally as well as legally? Or will he continue to believe that the victim was to blame? Of course, rapists are likely to hold misogynist views

long before they hear their interrogator tell them victim-blaming stories. Still, the interrogation scripts might reinforce those ways of thinking, and, if so, we might worry about their effect, especially on offenders who are likely to be recidivist. The Inbau book provides one disturbing example of the potential for these stories to have lasting effects. Another theme recommended by the Inbau book involves advising a suspect who has committed prior similar offenses that his present crime is no different from his past misdeeds. The authors then 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," as in "tough" for the suspect, not for the woman he strangled to death. 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.)"

Once again, we must pause and recall that the interrogator's objective in using this theme is to console the suspect. The theory is that the suspect will be more willing (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 interrogation of the rape-murder suspect was highly successful, as the authors of the Inbau book proudly report that "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." However, when judged in the light of other objectives – including

some of those supporting the substantive criminal law – we might be less sanguine about this technique at least if this man’s life had been spared. Again, who knows? The advice might have made him feel comfortable enough to go around committing additional crimes.

Let’s continue testing the intuition that victim-blaming stories may have undesirable effects on rape suspects by considering very briefly some arguments the experts might offer in their favor. First, as I mentioned in the introduction, interrogators are sure to point to the significant benefits of victim-blaming. True, they will say, the stories may impose some costs by reinforcing outdated, sexist stereotypes, but the benefit is worth it. By telling these stories, we catch rapists. Far from being misogynist, therefore, the stories support the feminist agenda to promote a vigorous law of rape. The problem with this claim is that I’ve seen no empirical studies that back it up. The interrogation manuals assert that these strategies work, but the only support they cite consists of the authors’ own experience⁹⁶ and some references to the techniques that parents “universally” use to persuade their kids to tell the truth.⁹⁷ As far as I can tell, therefore, the case in favor of the claim that “interrogation stories work” has not been made. At the same time, Bruner’s work goes a long way towards persuading me that Inbau and Reid were folk geniuses, since Bruner’s account maps almost perfectly onto their methodology. Still, the burden should be on the police to persuade us that there are no other mitigating accounts that would work just as well. If there are other effective strategies, the police should discard victim-blaming in favor of those alternatives. After all, in the system we have, the police inescapably are going to be helping to put words in guilty suspects’ mouths. Let’s assist them to come up with

⁹⁶Add cites.

⁹⁷Cite Inbau, Hess, and others.

new ones.

Second, the interrogators are likely to insist, look, we don't believe these victim-blaming stories are true, and no one else (except for the rapists?) does either. Come on, they will say, don't be naive! These stories are the bait we use in the confessional. We have a big fat portfolio of deception. As you Criminal Procedure professors know full well, we tell a whole bunch of lies to make suspects comfortable confessing, and these victim-blaming stories are just one of our many packs of lies. As for this claim, one glaring problem is that it is false. Interrogation stories "work" – if they do – is that (at one level or another) lots of folks believe them. Indeed, as Alan Wertheimer poignantly remarks in his recent book on rape,⁹⁸ even rape victims tend to be convinced that they are to blame. Drawing upon studies by social scientists, Wertheimer argues that one of the unique experiential injuries of rape – unique in the sense that other assault victims are 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."⁹⁹ To the extent that victim-blaming stories are reinforcing that sense of injury, we should move to eliminate them, not only from the substantive law and the criminal trial, but from other spaces in the system as well.

Another way to think about this potential rebuttal – i.e., rape-victim-blaming stories are no big deal because no one believes them anyway – is to contemplate the related assertion that interrogators might make, namely, that they employ victim-blaming across the board. To be sure, they may assert, victim-blaming is especially tempting bait for rape suspects, but we spread blame

⁹⁸Alan Wertheimer, *Consent to Sexual Relations* (2003).

⁹⁹*Id.* at 105.

around when questioning folks suspected of homicide, arson, theft, fraud, you name it.¹⁰⁰ There is nothing special about using victim-blaming in the rape context as opposed to one of these others. Let's test that notion briefly by contemplating the expert's recommended victim-blaming scripts for embezzlement cases. In such cases, the manuals suggest that the police should reassure the suspect that his employer is to blame for the crime. For example, the interrogator should commiserate with the suspect, if only your greedy employer had paid you a fair salary and/or had not been so sloppy in leaving cash lying all over the place, you wouldn't have been forced to help yourself, you poor little sticky-fingered thing. But, I wonder, does anyone actually believe that the employer is to blame, and, even if they do, is that belief as intense as the belief that the rape victim is at fault? I doubt it. Certainly, unlike the rape victim, the embezzlement victim doesn't stay up at night blaming himself for his employee's defalcations, and I bet that no one else blames him very much either. We might feel some sympathy for a suspect who was having a lot of trouble making ends meet, but economic duress? Come on. I don't think so.

If these intuitions are correct, we also may believe that rape interrogation stories run the risk of shifting not merely the moral blame, but also the legal blame, to the victim. The interrogation manuals admonish interrogators-in-training to avoid using stories that may provide the suspect with a legal defense to the crime, and they insist that victim-blaming in rape cases does not have that effect. However, we must consider carefully whether the stories may have that potential, especially in some of the date rape prosecutions that ostensibly are allowed under the reformed statutes. That is, some of the victim-blaming stories recounted above do seem to

¹⁰⁰As another interrogation puts it, "Blame everybody except the suspect." Hess, *supra* note ____, at 69.

provide the basis for a defendant to argue that, by her conduct, the victim was consenting or, as a fall-back, that he reasonably believed she was consenting. In 1962, when the Inbau book was first published, it might be plausible to conceive of these victim-blaming stories as a sound strategy for shifting moral blame and also as bait that no one took very seriously but that offered our one best chance to catch a rapist. In that world, the cops were authorized to enforce the common law definition of rape, and they were trying to prove the fact of intercourse without any help from DNA technology. Almost certainly, the suspect would be arguing that no intercourse occurred or, if it did occur, he most certainly was not the perpetrator. Notice that, by definition, the intercourse must have been very violent – if it were not, it would not qualify for prosecution under the common law definition¹⁰¹ – and, therefore, no one would be (as) inclined to blame the victim for it. In other words, persuading the suspect to sign onto a plot line in which he takes the position that forcible intercourse is consensual is far less risky because his claim would not be credible as a legal matter. Contrast this kind of case with the most difficult rape cases today. In these cases, the suspect is willing to concede – if there is DNA evidence, he *must* concede – that he and the victim did have sexual intercourse. What he is contesting is the *meaning* – not the occurrence – of the sex. And I take it that the meaning of the intercourse *is* up for grabs, right? That is what we mean, don't we?, when we refer to the “she said, he said” conundrum. In such a case, the victim-blaming story has the potential to play a crucial role by guiding the suspect – and, through his confessional speech act, the criminal justice system and, ultimately, the community – in how best to narrate, fix, and create that meaning. Here, notice the interesting twist on the false confession problem: In the cases I am imagining, the problem is not that the police are falsely

¹⁰¹Cite Blackstone.

inculcating an innocent person, but that they are assisting a person who is potentially guilty to get off the hook. For all we know going into the confession, the suspect possessed a whole range of mental states; for example, he may have known or believed that the victim was not consenting, or he may have been too intoxicated to notice or to care. Yet, by employing the victim-blaming script, the interrogators single out one psychological state, wrap it up in an exculpatory narrative, which just happens to be adjacent, if not identical, to a defense to criminal liability.

The essay will conclude with some observations about the connections between investigative practices and the meaning of the substantive criminal law. Through the plot lines of their interrogation stories, the police would seem to exercise powerful control over the meaning of the statutory prohibitions because the interrogation stories are what give those prohibitions their practical force and effect. For example, if the rape interrogation scripts are calculated to trap only those offenders who use physical violence to have their way with women, then that – and only that – is what rape will mean. These speculations will return us to the fundamental question of what the police learn about the substantive law and how they learn it. This question is particularly urgent in areas such as rape, where the law has been reformed, as we seek reassurance that the police have the contemporary elements in mind when they are forming probable cause, developing interrogation scripts, and otherwise going about the business of investigating and thereby protecting us from violent crime.]

