THE CONSEQUENCES AND CONSTITUTIONALITY OF TRAINING POLICE TO BLAME VICTIMS

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ABSTRACT

A common technique in American interrogations is "moral minimization," in which investigators excuse or justify the suspect's criminal behavior on moral grounds. A surprising type of moral minimization is explicit victim-blaming, which includes blaming the victim by endorsing negative stereotypes on the basis of gender, race, religion, or sexual orientation, what we call victim-blaming-by-stereotype. No one has previously considered the policy wisdom or constitutionality of this technique. We explore the unintended consequences. One cost is the secondary victimization of those who suffer from crime, especially when they discover how detectives have disparaged them. The second is the effect on the interrogators. Using the economic concept of self-selection and psychological theories of persuasion, we explain why the training and practice in the pretense of victim-blaming produces a detective cadre that is more likely to actually blame victims. Victim-blaming detectives are less likely to effectively investigate crime. Finally, we consider constitutional objections to victim-blaming-by-stereotype. The practice does not

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plausibly violate the suspect's due process or Miranda *rights—the constitutional challenges that commonly garner the most attention among scholars of interrogation—but it plausibly violates the equal protection rights of the victim.*

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INTRODUCTION

A large legal literature explores issues of police interrogation, notably focusing on due process voluntariness, *Miranda*, the permissibility of police deception, and the causes of false confessions.[1] We focus here on a neglected topic: the perils of the common interrogation tactic of victim-blaming, a form of "moral minimization."[2] The most popular police training manuals advocate degrading the victim on the theory that anything that shifts blame away from the suspect makes the suspect more likely to confess. That theory leads the manual to recommend interrogation scripts that endorse gender stereotypes. Consider one proposed script from a manual and another one from an actual case, both aimed at a male sexual assault suspect:

> 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.[3]

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1. *See, e.g.*, DAVID M. NISSMAN & ED HAGEN, LAW OF CONFESSIONS (2d ed. 2024); GEORGE C. THOMAS III & RICHARD A. LEO, CONFESSIONS OF GUILT: FROM TORTURE TO *MIRANDA* AND BEYOND (2012).

2. We have critiqued the broader category of moral minimization in prior work, though for different reasons than we explore here. See Margareth Etienne & Richard McAdams, *Criminogenic Risks of Interrogation*, 98 IND. L.J. 1031, 1031-34 (2023) [hereinafter *Criminogenic Risks*], where we argue that if moral minimization lowers the internal, psychological costs of confessing to crimes, it also lowers the internal, psychological costs of committing future crimes. The tactic therefore bears criminogenic risks that remain unaccounted for. In Margareth Etienne & Richard McAdams, *Police Deception in Interrogation as a Problem of Procedural Legitimacy*, 54 TEX. TECH L. REV. 21 (2021), we argued that the tactic is just one more way that police are deceptive and that all police deception undermines the procedural legitimacy of law.

3. FRED E. INBAU, JOHN E. REID, JOSEPH P. BUCKLEY & BRIAN C. JAYNE, CRIMINAL INTERROGATION AND CONFESSIONS 221 (5th ed. 2013) (proposing the script for a rape interrogation) [hereinafter INBAU ET AL.]. This example has remained unchanged since the original edition: FRED E. INBAU & JOHN E. REID, CRIMINAL INTERROGATIONS AND CONFESSIONS 45-46 (1st ed. 1962) [hereinafter INBAU & REID FIRST EDITION]. *See also* DAVID E. ZULAWSKI & DOUGLAS E. WICKLANDER, PRACTICAL ASPECTS OF INTERVIEW AND INTERROGATION 334 (2d ed. 2001) ("The suspect became involved because the victim dressed or acted a certain way.").

> Everyone gets blasted on New Year's Eve and that's where I think everything went wrong because you just made an error in judgment.... Alcohol is ... where people get themselves into trouble, cause they lose their inhibitions.... Women are a lot more promiscuous, you know. They flirt more, you know when they're on alcohol ... cause they lose their inhibitions.[4]

As in these examples, our focus is on the subset of victim-blaming that involves the use of degrading stereotypes. Here, the stereotype concerns female victims of sexual assault and declares that they are likely to have provoked the attack by their manner of dress or to have encouraged the sex because of their intoxication. As we will see, in other cases, the victim-blaming stereotype involves race, religion, or sexual orientation. We label such tactics *victim-blaming-by-stereotype*.

Blaming victims is morally repulsive. Invoking negative stereotypes as the means of blaming victims is especially repulsive. But what if the unseemly tactic nevertheless raises the true confession rate for serious crimes? Might it be necessary to disparage victims to protect against future victimization? The question, it turns out, is merely hypothetical because no credible evidence supports the value of victim-blaming-by-stereotype. American interrogations do produce many true confessions, but no evidence suggests that victim-blaming techniques contribute to that success. American interrogation methods are based on decades-old anecdotes and mid-century intuition, more art than science. As we have learned about other domains of intuition-based policing, sometimes conventional wisdom is simply false.[5]

Part of the empirical problem is quite general: there is no evidence that the overall style of accusatory interrogation used in the United States is better at producing true confessions than

4. State v. Baker, 465 P.3d 860, 864 (Haw. 2020) (internal quotation marks omitted).

5. *See, e.g.*, Erin Blakemore, *FBI Admits Pseudoscientific Hair Analysis Used in Hundreds of Cases*, SMITHSONIAN MAG. (Apr. 22, 2015), https://www.smithsonianmag.com/smart-news/FBI-Admits-Pseudoscientific-Hair-Analysis-Used-in-Hundreds-of-Cases-180955070/ [https://perma.cc/5W52-9DSJ] (reporting on forensic scandal about the nature of hair analysis); Daniel T. O'Brien, Chelsea Farrell & Brandon C. Welsh, *Looking Through Broken Windows: The Impact of Neighborhood Disorder on Aggression and Fear of Crime Is an Artifact of Research Design*, 2 ANN. REV. CRIMINOLOGY 53, 62 (2019) (reporting on a meta-analysis finding no support for the claim that disorder contributes to crime, the assumption of many policing strategies).

non-accusatory styles, such as the information-gathering techniques used in the United Kingdom, Australia, and elsewhere.[6] But even if we did know that accusatory methods were generally more effective than the alternatives at inducing true confessions and avoiding false ones, there is absolutely no evidence that the particular tactic of victim-blaming contributes to any such success, much less the particular subset of victim-blaming-by-stereotype.[7]

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6. *See* Christian A. Meissner, Christopher E. Kelly & Skye A. Woestehoff, *Improving the Effectiveness of Suspect Interrogations*, 11 ANN. REV. L. & SOC. SCI. 211, 216 (2015). There are no rich field data to allow such a comparison between real world interrogators who use different methods, much less do we have a randomized trial comparing different methods. *See, e.g.*, Major Peter Kageleiry, Jr., *Psychological Police Interrogation Methods: Pseudoscience in the Interrogation Room Obscures Justice in the Courtroom*, 193 MIL. L. REV. 1, 2 (2007). Experimental results tentatively suggest that the information-gathering method is superior to accusatory methods. *See* Christian A. Meissner, Allison D. Redlich, Stephen W. Michael, Jacqueline R. Evans, Catherine R. Camilletti, Sujeeta Bhatt & Susan Brandon, *Accusatorial and Information-Gathering Interrogation Methods and Their Effects on True and False Confessions: A Meta-Analytic Review*, 10 J. EXPERIMENTAL CRIMINOLOGY 459, 460 (2014) (finding field studies lack the ability to measure false confessions, but twelve experiments suggest the superior diagnosticity of information-gathering over accusatory methods); *see also* Jacqueline R. Evans, Christian A. Meissner, Amy B. Ross, Kate A. Houston, Melissa B. Russano & Allyson J. Horgan, *Obtaining Guilty Knowledge in Human Intelligence Interrogations: Comparing Accusatorial and Information-Gathering Approaches with a Novel Experimental Paradigm*, 2 J. APPLIED RSCH. MEMORY & COGNITION 83, 86-87 (2013) (reporting experimental results showing the superiority of information-gathering over accusatory methods in an intelligence setting).

7. There are no randomized trials of different interrogation techniques, nor rich data allowing comparison of interrogators using the Reid techniques, which are dominant in the United States, to those using all the techniques except moral minimization. Leo found higher confession rates in interrogations with certain moral minimizations than without. Richard A. Leo, *Inside the Interrogation Room*, 86 J. CRIM. L. & CRIMINOLOGY 266, 272, 293-94 (1996) (reporting in Table 14 the success rate with the tactic of "moral justifications/psychological excuses" in 60 recorded interrogations from police departments in two small cities and 122 contemporaneously observed interrogations in a major urban police department); *id.* at 295-96 (reporting in Table 15 the success of "offer[ing] moral rationalizations"). The chi-squared test showed significance at the level of $p < .01$ for the first case and $p < .05$ for the second case. *Id.* at 294-96. For a variety of reasons, Leo does not assert that this correlation shows the success of the technique, but one paper later cited Leo as evidence that the tactic is "highly effective." Heith Copes, Lynne Vieraitis & Jennifer M. Jochum, *Bridging the Gap Between Research and Practice: How Neutralization Theory Can Inform Reid Interrogations of Identity Thieves*, 18 J. CRIM. JUST. EDUC. 444, 448, 450 (2007). But this is not a sound inference. Leo had no way to discern whether confessions were true or false and therefore no way to judge the tactic a net success. Nor did he compare the accusatory style of interrogation with a competitor, such as information-gathering or the improvisations of an untrained interrogator. Finally, one cannot make causal inferences because Leo was not controlling for a host of relevant variables, such as the experience of the detective or length of the interrogation.

A recent interrogation study measures a variable that Leo lacked—the frequency by which

We invite interrogation scholars to provide evidence that moral minimization generally and victim-blaming specifically are effective. Until then, we think the immorality of blaming victims cannot be justified.

Yet the problem is worse than moral repulsiveness. Victim-blaming in interrogation produces negative consequences. Victim-blaming-by-stereotype harms crime victims and undermines effective policing. When victims discover that police have disparaged and blamed them, they suffer the additional psychological harm of "secondary victimization."[8] Even when the victim does not discover

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detectives use techniques in actual interrogations, as well as temporally connected self-incriminating statements. The results are mixed, finding that offering moral rationalizations was not significantly associated with admissions, but rationalizations do significantly increase crying by the suspect, which significantly increases the odds of a suspect admission. Christopher E. Kelly, Melissa B. Russano, Jeaneé C. Miller & Allison D. Redlich, *On the Road (to Admission): Engaging Suspects with Minimization*, 25 PSYCH. PUB. POL'Y & L. 166, 170, 173 (2019) (reporting on results from forty-five hours of twenty-nine felony interrogations by Los Angeles Police Department detectives). The researchers had some reason to think that all the suspects were guilty, but could not be certain, which means the study offers no way to assess how the tactic affected the false confession rate. *See id.* at 177-78.

Several experiments cast doubt on the net effectiveness of minimization. Their design involved the interrogation of participants who had violated some rules of the experiment. *See, e.g.*, Melissa B. Russano, Christian A. Meissner, Fadia M. Narchet & Saul M. Kassin, *Investigating True and False Confessions Within a Novel Experimental Paradigm*, 16 PSYCH. SCI. 481, 482-83 (2005). The experiment allowed measurement of true and false confessions and true and false non-confessions, in response to changes in interrogation tactics. Moral minimization increased confessions among the guilty but increased confessions by the innocent to a greater extent. Thus, minimization lowered the overall diagnosticity of the interrogation. *See id.* at 484 tbl.1. For experiments reaching similar results, see Jessica R. Klaver, Zina Lee & V. Gordon Rose, *Effects of Personality, Interrogation Techniques and Plausibility in an Experimental False Confession Paradigm*, 13 LEGAL & CRIMINOLOGICAL PSYCH. 71, 79 (2008); Fadia M. Narchet, Christian A. Meissner & Melissa B. Russano, *Modeling the Influence of Investigator Bias on the Elicitation of True and False Confessions*, 35 L. & HUM. BEHAV. 452, 462 (2011); Allyson J. Horgan, Melissa B. Russano, Christian A. Meissner & Jacqueline R. Evans, *Minimization and Maximization Techniques: Assessing the Perceived Consequences of Confessing and Confession Diagnosticity*, 18 PSYCH. CRIME & L. 65, 74-75 (2012). Experiments that do not involve actual criminality nor real detectives raise obvious external validity concerns. There is also the possibility that false confessions in the real world might be identified as such before trial, so they may matter less for assessing ultimate diagnosticity. *See* Christopher Slobogin, *Manipulation of Suspects and Unrecorded Questioning: After Fifty Years of* Miranda *Jurisprudence, Still Two (or Maybe Three) Burning Issues*, 97 B.U. L. REV. 1157, 1163-64 (2017). Because of these uncertainties, our claim is merely that the effectiveness of moral minimization remains empirically unproven. We return to this topic in Part III.C.

8. *See infra* notes 111-12 and accompanying text.

how police disparaged them in the interrogation, police reinforcement of suspects' degrading stereotypes of victims increases the risk of their recidivism and thus the risk that people will suffer primary victimization again in the future.[9]

Beyond the costs for victims are the negative effects of victim-blaming-by-stereotype on the interrogators themselves. When they routinely blame victims in interrogations as a matter of training and practice, the result is a detective cadre that is more inclined to hold, for real, stereotypical victim-blaming beliefs.[10] That result occurs both because victim-blaming in interrogation affects who chooses to become a detective—a self-selection theory[11]—and it slowly influences detectives to hold such beliefs—a persuasion theory.[12] Police culture has long been criticized for being hypermasculine and racist. Among the many possible causes, the role of interrogation training and interrogation practice is surprising and overlooked.

The results are inferior investigations of violent crime. Detectives with stereotypical victim-blaming beliefs are worse at the job of clearing cases because they bring excessive skepticism to the stories that victims tell and are less motivated to investigate such stories diligently.[13] Victims are less likely to trust police that hold such stereotypical victim-blaming beliefs and therefore less likely to report certain crimes.[14] In short, the training in and practice of victim-blaming-by-stereotype contributes to a stereotyping police culture, low trust of police, and the low clearance rate of certain crimes.

Perhaps these costs have been ignored to date because interrogation scholars, when examining the constitutionality of interrogation practices, naturally think in terms of *Miranda* and the due

9. *See Criminogenic Risks*, *supra* note 2, at 1034-35.
10. *See infra* notes 149-71 and accompanying text.
11. *See infra* text accompanying notes 179-81.
12. *See infra* text accompanying notes 186-87.
13. *See infra* Part II.B.
14. *See infra* Part II.A.

process bar on involuntary confessions.[15] Victim-blaming-by-stereotype does not plausibly raise such issues. It clearly does not violate *Miranda* nor create unconstitutional pressures to confess. Instead, to see the constitutional issue, one must focus not on suspects but *victims*. Victim-blaming-by-stereotype plausibly violates the constitutional rights of victims to the equal protection of the law.[16] To be clear, we would call for the elimination of the tactic even if it did not offend constitutional law because government officials should not endorse stereotypes based on race, sex, sexual orientation, religion, and the like. We advocate that state and municipal legislatures command that the funds they budget for law enforcement not be used to acquire interrogation manuals or training that recommend victim-blaming-by-sterotype. We also develop a doctrinal argument that such endorsement does violate the equal protection rights of victims. The official decision to interrogate suspects differently based on the race, sex, or religion of the victim is a classification that should trigger heightened scrutiny. As there is no evidence that these classifications serve the compelling government interest in securing true confessions, they cannot withstand any such scrutiny.[17]

We proceed in three parts. Part I describes the use of victim-blaming techniques in American police interrogations. The most dominant manuals are particularly explicit in endorsing the use of stereotypes to blame women victims, but the manuals' logic explicitly carries over to blaming victims based on race, religion, and sexual orientation. We review existing field evidence that detectives follow this victim-blaming logic and provide corroboration from some appellate cases.

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15. Scholars and litigants focus on interrogations that contravene *Miranda* and due process because such violations render confessions inadmissible. *See* Miranda v. Arizona, 384 U.S. 436, 476 (1966); Mincey v. Arizona, 437 U.S. 385, 398 (1978). For scholarly analyses, see George C. Thomas III, *Separated at Birth but Siblings Nonetheless:* Miranda *and the Due Process Notice Cases*, 99 MICH. L. REV. 1081, 1086 (2001); Albert W. Alschuler, *A Peculiar Privilege in Historical Perspective: The Right to Remain Silent*, 94 MICH. L. REV. 2625, 2638 (1996); Charles J. Ogletree, *Are Confessions Really Good for the Soul? A Proposal to Mirandize* Miranda, 100 HARV. L. REV. 1826, 1844 n.97 (1987); YALE KAMISAR, POLICE INTERROGATION AND CONFESSIONS: ESSAYS IN LAW AND POLICY 25 (1980).

16. *See* U.S. CONST. amend. XIV, § 1.

17. *See infra* Part III.

Parts II and III critique victim-blaming-by-stereotype. Part II identifies the neglected costs just described. First, victim-blaming in interrogation harms crime victims, especially when they learn that government agents have blamed them for the crime based on derogatory stereotypes. Second, the pretense of victim blaming produces a detective cadre that is more willing in actuality to blame victims, which undermines effective policing. We explore two explanations. One is self-selection: the need to perform victim-blaming in interrogation is likely to attract into detective work those already less sympathetic to certain victims. The second is persuasion: the practice of victim-blaming nudges detectives towards believing the stereotypes they employ. In short, what starts in the interrogation room spills over into the rest of policing.

Part III describes how the tactic offends the principles of antidiscrimination law. For the police to deploy specific interrogation tactics *because of* the sex, race, or religion of the crime victim is a suspect classification that demands heightened scrutiny under standard equal protection doctrine. We also explore the more novel theory that, regardless of classification, government actors should not be allowed to endorse demeaning stereotypes based on sex, race, or religion, at least not without satisfying heightened scrutiny. Such scrutiny would put the burden of proof on those who defend victim-blaming-by-stereotype. This Part concludes by returning to the empirical issue and demonstrating even more fully why we say there is no social science evidence that the tactic increases the true confession rate or otherwise contributes to public safety.[18]

In our conclusion, we call for the immediate end of the interrogation tactic of blaming victims by stereotype. In addition to civil rights litigation challenging the practice on equal protection grounds, we propose that municipal and state governments stop allocating budgetary resources to purchase interrogation manuals or training that recommend the tactic.

18. Indeed, we have previously argued that the broader interrogation tactic of moral minimization (of which victim-blaming is but one part) carries criminogenic risks and erodes public trust and fidelity in the criminal justice system. *See supra* note 2.

I. VICTIM-BLAMING IN AMERICAN POLICE INTERROGATIONS

Consistent with their training, American interrogators commonly seek to convince criminal suspects that the crimes they are believed to have committed are not morally serious and caused no real harm. This is part of the standard interrogation strategy of "moral minimization," which we define in Section I.A. A primary form of moral minimization is victim-blaming. American interrogators routinely develop the theme that the true blame for the crime rests not with the suspect under interrogation but with the victim. Much of the victim-blaming takes the form of demeaning stereotypes. We document the training in victim-blaming in Section I.B, which reviews the most popular set of interrogation manuals, and we survey the evidence of victim-blaming in the field in Section I.C, which includes discussion of the technique in appellate opinions.

A. Moral Minimization Defined

Although the tactic of moral minimization is not well known outside of criminal procedure circles, the practice is as ubiquitous as what we know as the "good cop/bad cop" routine. In the latter interrogation tactic, the good cop offers to protect the suspect from the bad cop, who threatens and yells, seeking to frighten the suspect into a confession. Not surprisingly, the law on confessions has been largely focused on regulating "bad cops." Yet we focus here on the tactics of the "good" cop, who receives less legal and scholarly scrutiny.[19]

In reality, the good cop does more than offer to protect the suspect from the bad cop. Good-cop detectives minimize the seriousness of the crime they are investigating. *Legal* minimization involves convincing the suspect that the crimes are less legally serious than they suppose. By contrast, *moral* minimization seeks to reduce the normative wrongfulness of the crime. Detectives may suggest that

19. Regarding the legality of moral minimization, see *infra* note 87. The only academic scrutiny we are aware of is Anne M. Coughlin, *Interrogation Stories*, 95 VA. L. REV. 1599, 1600 (2009). Coughlin productively drew attention to the misogynistic tropes in rape interrogations and "speculat[ed]" about the effect on rapists. *Id.* Coughlin did not, however, consider the effect of victim-blaming on the interrogators.

there is nothing immoral in committing the particular crime in the particular circumstances, that it caused no actual harm, that everyone does it, or that the true blame lies elsewhere, most commonly with the victim.[20] The idea is to comfort the suspect by the fact that this law enforcement figure believes that, regardless of the law, some moral factor justifies, excuses, or at least mitigates the crime.[21] The theory for how moral minimization works—posited in the interrogation manuals that recommend the tactic—is that it lowers the psychological costs of confession.[22] By making the crime seem less shameful, the guilty suspect will feel less shame in admitting guilt to the detectives.

We now turn to the evidence showing that police use the tactic of moral minimization, particularly by blaming victims.

B. Interrogation Manuals Advocate Victim-Blaming-by-Stereotype

The minimization tactic has gained popularity in the interrogation room with the ascendency of the Reid/Inbau school of police training, the so-called Reid Technique.[23] Since 1962, John E. Reid and Associates, Inc. (hereinafter Reid and Associates, or Reid) has promoted a method of interrogation that has remained remarkably unchanged even as society and cultural norms have greatly

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20. *See In re* Elias V., 188 Cal. Rptr. 3d 202, 214 (Ct. App. 2015) ("[M]inimization tactics are designed to provide the suspect with moral justification and face-saving excuses for having committed the crime in question."); Commonwealth v. DiGiambattista, 813 N.E.2d 516, 540 n.2 (Mass. 2004) (Spina, J., dissenting) ("'Minimization' is a 'soft-sell' technique in which the police interrogator tries to lull the suspect into a false sense of security by offering sympathy, tolerance, face-saving excuses, and even moral justification, by blaming a victim or accomplice, by citing extenuating circumstances, or by playing down the seriousness of the charges." (quoting Saul M. Kassin & Karlyn McNall, *Police Interrogations and Confessions: Communicating Promises and Threats by Pragmatic Implication*, 15 L. & HUM. BEHAV. 233, 235 (1991))).

21. *See Criminogenic Risks*, *supra* note 2, at 1055.

22. INBAU ET AL., *supra* note 3, at 203-04; *see Criminogenic Risks*, *supra* note 2, at 1055.

23. *See* Dylan J. French, *The Cutting Edge of Confession Evidence: Redefining Coercion and Reforming Police Interrogation Techniques in the American Criminal Justice System*, 97 TEX. L. REV. 1031, 1034-35 (2019) ("While there are different styles of accusatory interrogation, all major tropes can be traced back to a man named John E. Reid and his original work .... For over half a century, the Reid Manual, affectionately known as the Interrogator's Bible, has set the standard for interrogation practices in the American criminal justice system." (footnote omitted)).

changed.[24] In *Miranda v. Arizona*, the Supreme Court relied on, among other sources, the first edition of the police training guide by Fred E. Inbau and John E. Reid, titled *Criminal Interrogation and Confessions*.[25] At the time, Chief Justice Warren noted that the three leading texts on interrogation—two of which were authored by Inbau, Reid, and their associates—had "total [combined] sales and circulation of over 44,000."[26]

Reid and Associates remains the leading authority on police interrogations, through its multiple training manuals[27] and courses.[28] Since *Miranda*, the Supreme Court has twice referred to Reid interrogation techniques or manuals, reflecting its dominant position in the field.[29] One Reid manual states that "hundreds of

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24. *See id.*

25. 384 U.S. 436, 448-49, 449 n.9 (1966) (citing INBAU & REID FIRST EDITION, *supra* note 3) (noting that this 1962 manual was "a revision and enlargement" of an earlier text by the authors, LIE DETECTION AND CRIMINAL INTERROGATION (3d ed. 1953)). Recognizing the "heavy toll" exacted by these psychological techniques and their ability to "trade[ ] on the weakness of individuals," the Court described itself as being concerned "primarily with this interrogation atmosphere and the evils it can bring," *id.* at 455-56, meaning their inherent threat to the constitutional privilege against self-incrimination.

26. *Id.* at 448-49, 449 n.9.

27. The primary manual is the newest edition of the one *Miranda* cited: INBAU ET AL., *supra* note 3, at viii-ix. A separate abridged version is FRED E. INBAU, JOHN E. REID, JOSEPH P. BUCKLEY & BRIAN C. JAYNE, ESSENTIALS OF THE REID TECHNIQUE: CRIMINAL INTERROGATION AND CONFESSIONS (2d ed. 2015) [hereinafter INBAU ET AL., ESSENTIALS]. There are at least four related texts published by John E. Reid and Associates, Inc., some in the second edition: BRIAN C. JAYNE & JOSEPH P. BUCKLEY, THE INVESTIGATOR ANTHOLOGY: A COMPILATION OF ARTICLES AND ESSAYS ABOUT THE REID TECHNIQUE OF INVERVIEWING AND INTERROGATION (2d ed. 2014) [hereinafter JAYNE & BUCKLEY, ANTHOLOGY]; BRIAN JAYNE & JOSEPH BUCKLEY, A FIELD GUIDE TO THE REID TECHNIQUE (2014) [hereinafter JAYNE & BUCKLEY, FIELD GUIDE]; LOUIS C. SENESE, ANATOMY OF INTERROGATION THEMES: THE REID TECHNIQUE OF INTERVIEWING AND INTERROGATION (2d ed. 2020); and DAVID M. BUCKLEY, HOW TO IDENTIFY, INTERVIEW & MOTIVATE CHILD ABUSE OFFENDERS TO TELL THE TRUTH (2d ed. 2015) [hereinafter BUCKLEY, CHILD ABUSE OFFENDERS].

28. *See* DAN SIMON, IN DOUBT: THE PSYCHOLOGY OF THE CRIMINAL JUSTICE PROCESS 121-22 (2012) ("The technique for questioning suspects that is used most widely by American law enforcement agencies is the one marketed by John E. Reid & Associates, a Chicago-based commercial entity. Over the years, the Reid Technique of Interviewing and Interrogation has been taught to well over 100,000 law enforcement agents."); Miriam S. Gohara, *A Lie for a Lie: False Confessions and the Case for Reconsidering the Legality of Deceptive Interrogation Techniques*, 33 FORDHAM URB. L.J. 791, 808 (2006) (describing the Reid Technique as the "probably most widely used" interrogation method). In addition to its training books, Reid offers CDs, DVDs, CD-ROMs, training seminars, and certificate training programs through its Institute. *See Store*, JOHN E. REID & ASSOCS., INC., https://reid.com/store/products [https://perma.cc/G9JA-V676].

29. *See* Missouri v. Seibert, 542 U.S. 600, 610 n.2 (2004) (citing two Reid manuals and one

thousands of investigators hav[e] received [its] training,"[30] a claim substantiated by an independent survey of law enforcement personnel, which found that over half had received instruction on the Reid technique.[31] *Criminal Interrogation and Confession* is now in its fifth edition, published in 2013, and we refer to it as "the manual" (or sometimes the "main" manual to distinguish other Reid interrogation manuals).[32] Some competitors of the Reid technique also recommend moral minimization.[33]

The Reid method of interrogation is not as simple as a "good cop" attempting to sympathize with a suspect or develop rapport with a few statements or small talk. It involves a detailed nine-step process,[34] the most important of which is "Theme Development."[35]

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other to show what "[m]ost police manuals" advise about *Miranda* warnings); Stansbury v. California, 511 U.S. 318, 324 (1994) (per curiam) (citing the Reid manual as evidence that an aspect of *Miranda* doctrine was "well settled").

30. *See* INBAU ET AL., ESSENTIALS, *supra* note 27, at viii. Beyond American law enforcement, the method is popular with security personnel employed by private firms to detect and prevent theft and fraud and has been adopted in other nations. *See How to Conduct Better Interviews & Interrogations*, IOMA'S SEC. DIR.'S REP., Dec. 2002, at 1, 11 ("When asked which vendors they rely on most for building their own skills and that of staff, a whopping 80% of security pros cited John E. Reid & Associates."). The Reid and Associates website lists over thirty nations in which it has been awarded training contracts or conducted training programs. *See About*, JOHN E. REID & ASSOCS., INC. [hereinafter *About Reid*], https://reid.com/about [https://perma.cc/ZH9U-YS4G].

31. *See* N. Dickon Reppucci, Jessica Meyer & Jessica Kostelnik, *Custodial Interrogation of Juveniles: Results of a National Survey of Police*, *in* POLICE INTERROGATIONS AND FALSE CONFESSIONS: CURRENT RESEARCH, PRACTICE, AND POLICY RECOMMENDATIONS 67, 76 (G. Daniel Lassiter & Christian A. Meissner eds., 2010) (reporting that "approximately 24% of all respondents and 54% of the detectives" had been trained in the Reid technique); *see also* Melissa B. Russano, Fadia M. Narchet, Steven M. Kleinman & Christian A. Meissner, *Structured Interviews of Experienced HUMINT Interrogators*, 28 APPL. COG. PSYCH. 847, 848-50 (2014) (reporting on a survey of forty-two experienced federal interrogators, half from law enforcement and half from the military, in which 50 percent indicated they had received formal training in the Reid technique, the highest percentage of any source).

32. *See generally* INBAU ET AL., *supra* note 3.

33. For example, the Zulawski & Wicklander interrogation method differs in critical ways from the Reid Technique, but the former also devotes a chapter to "rationalizations," which are essentially moral minimizations. *See* ZULAWSKI & WICKLANDER, *supra* note 3, at 305 (beginning chapter ten on "rationalizations," which involve a "one-sided discussion presented to the suspect by the interrogator, who offers excuses or reasons that minimize the seriousness of the crime .... The rationalization is an integral part of the introductory statement method and the participatory accusation method.").

34. INBAU ET AL., *supra* note 3, at 187-90.

35. *See id.* at 202-55; INBAU ET AL., ESSENTIALS, *supra* note 27, at 115-35; SENESE, *supra* note 27, which is a 342-page supplemental manual devoted entirely to "interrogation themes."

The term "theme" seems open-ended, but the manual uses it to refer only to what we call moral minimization, explaining that a "theme" is "a monologue presented by the interrogator in which reasons and excuses are offered that will serve to psychologically justify or minimize the moral seriousness of the suspect's criminal behavior."[36] Theme development involves "presenting a 'moral excuse' for the suspect's commission of the offense or minimizing the moral implications of the conduct."[37] The Reid manual explains that "it is natural for [the offender] to justify or rationalize the crime in some manner" and that "[m]ost interrogation themes reinforce the guilty suspect's own rationalizations and justifications for committing the crime."[38]

Developing this kind of minimizing theme takes time, which is why the manuals describe it as a monologue. "For a theme to be effective, the investigator must be able to maintain a continuous monologue of theme material."[39] During an interrogation that may last hours, "the investigator must continue offering the suspect a theme."[40] To avoid a theme statement that "only lasts a few minutes," the manuals offer several ways to "draw out the length of a theme."[41]

The starkest example of the use of moral minimization is the blaming of victims. To quote from the manual: *"Sympathize with [the] Suspect by Condemning Others,"* a subpart of which is "*Condemning the Victim*."[42] "[T]he investigator should develop the

36. INBAU ET AL., ESSENTIALS, *supra* note 27, at 115.

37. INBAU ET AL., *supra* note 3, at 202.

38. *Id.* at 202-03; *see also id.* at 210 ("The interrogation theme represents a persuasive effort on the part of the investigator to reinforce those existing excuses or rationalizations within the guilty suspect's mind."); JAYNE & BUCKLEY, FIELD GUIDE, *supra* note 27, at 276 ("For a guilty suspect to relate to an interrogation theme, the justifications offered by the investigator must be similar to how the suspect himself justified the crime.").

39. JAYNE & BUCKLEY, ANTHOLOGY, *supra* note 27, at 165.

40. JAYNE & BUCKLEY, FIELD GUIDE, *supra* note 27, at 271 (offering to answer the question, "How can a theme last 30, 60, or even 90 minutes[?]").

41. JAYNE & BUCKLEY, ANTHOLOGY, *supra* note 27, at 165 (beginning the section titled "Expanding the Duration of the Theme"). Part of the technique here is to present some themes as not being about the suspect (and his or her motivation), but about third parties or personal stories of the interrogator. *Id.* at 165-69.

42. INBAU ET AL., *supra* note 3, at 220. The other subsections for this theme are "*Condemning the accomplice*" and "*Condemning anyone else upon whom some degree of moral responsibility might conceivably be placed*." *Id.* at 224, 227; *see also* ZULAWSKI & WICKLANDER, *supra* note 3, at 306 ("The process of rationalization also allows the interrogator to create the

theme that the primary blame, or at least some of the blame, for what the suspect did rests upon the victim."[43] Or, as the manual puts it at one point, the strategy is to "*degrad[e] ... the character of the victim*."[44]

Many of the manuals' examples and scripts involve blaming female victims of intimate partner violence (IPV), sexual assault, and other gendered violence. For an example of victim-blaming in an IPV case, one Reid manual recommends the approach from what it describes as an actual interrogation of a man suspected of killing his wife.[45] In the model script, the interrogator calls the female victim an "unbearable creature," the sort "who would either drive a man insane or else to the commission of an act such as the present one in which she herself was the victim."[46] The manual adds gratuitously: "In this respect, however, the investigator stated that the suspect's wife was *just like most other women*."[47] In another script, the detective implies that he—the detective—would have struck his own wife the prior week because of her "nagging," but for the unplanned arrival of friends.[48]

In making such misogynistic appeals, the manual recommends that the interrogator extend empathy, not to the victim, but to the male suspect:

> The investigator should condemn the wife for her conduct, making the point that, by her own conduct, she herself had brought on the incident of the killing.... [M]uch can be gained by the investigator's adoption of an emotional ("choked up") feeling about it all as he relates what is known about the victim's conduct toward her spouse. This demonstrable attitude of

perception of transferring guilt to someone or something other than the suspect. This guilt transference assists the interrogator in psychologically minimizing the seriousness of the suspect's offense. It makes the suspect a victim of circumstances.").

43. INBAU ET AL., *supra* note 3, at 220; *see also* ZULAWSKI & WICKLANDER, *supra* note 3, at 333-34 ("The victim can be blamed in almost any crime from a homicide to a sex crime to theft. The guilt is transferred to the victim by the interrogator, who portrays the suspect as a victim of circumstances.").

44. INBAU ET AL., *supra* note 3, at 222 (emphasis added).

45. INBAU ET AL., ESSENTIALS, *supra* note 27, at 123.

46. *Id.* (also recounting the investigator stating that "many married men avoid similar difficulties by becoming drunkards, cheats, and deserters, but unfortunately the suspect tried to do what was right by 'sticking it out,' and it got the better of him in the end.").

47. *Id.* (emphasis added).

48. INBAU ET AL., *supra* note 3, at 212.

> sympathy and understanding may be rather easily assumed by placing one's self "in the other fellow's shoes" and pondering this question: "What might I have done under similar circumstances?"[49]

The Reid manuals devote considerable attention to describing similar themes for sexual assault interrogations. As one Reid manual states, "the most common theme to develop in sexual assaults is to blame the victim for doing something that *provoked* the suspect."[50] We saw one example in the Introduction, a script where the interrogator told "Joe" that "no woman should be on the street alone at night looking as sexy as she did," which is "too much of a temptation for any normal man."[51] Other recommended themes also endorse, essentially, the stereotypes by which women were historically blamed for their rape. Consider:

> Joe, this girl was having a lot of fun for herself by letting you kiss her and feel her breasts. For her, that would have been sufficient. But men aren't built the same way. There's a limit to the teasing and excitement they can take; then something's got to give. A female ought to recognize 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.[52]

> [For a married man:] [Y]ou needed and were entitled to sexual intercourse. And when a fellow like you doesn't get it at home, he seeks it elsewhere. Moreover, since you're not able to search for and date a female as a single man is free to do, a fellow like you has to take what he finds; and sometimes, because of his terrific, pent-up urge, he has to go about it in a rather hurried-up fashion, as you did here. That's the reason, isn't it Joe?[53]

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49. *Id.* at 221. This exhortation for empathy is a reminder that the capacity for empathy serves manipulative as well as compassionate ends. *See* Richard H. McAdams, *Empathy and Masculinity in Harper Lee's* To Kill a Mockingbird, *in* AMERICAN GUY: MASCULINITY IN AMERICAN LAW AND LITERATURE 239, 246-58 (Saul Levmore & Martha C. Nussbaum eds., 2014).

50. SENESE, *supra* note 27, at 224.

51. INBAU ET AL., *supra* note 3, at 221.

52. *Id.* at 222 (proposing the script for a rape interrogation).

53. *Id.* at 228 (proposing the script for a rape interrogation).

The Reid manuals recommend similar themes even when the sexual abuse victim is a child.[54]

Alternatively, the manual proposes: "Where circumstances permit," suggest "that the rape victim had acted like she might have been a prostitute and that the suspect had assumed she was a willing partner. In fact, the investigator may even say that the police knew she had engaged in acts of prostitution on other occasions."[55]

As with IPV, the manual recommends the performance of empathy for those suspected of sexual assault:

> [I]t is particularly helpful to indicate to the suspect that the investigator has a friend or relative who indulged in the same kind of conduct as involved in the case under investigation. In some situations, it may even be appropriate for the investigator himself to acknowledge that *he has been tempted to indulge in the same behavior*.[56]

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54. In the supplemental Reid manual specific to interrogating child abuse suspects, BUCKLEY, CHILD ABUSE OFFENDERS, *supra* note 27, there is some effort to avoid fully endorsing the victim-blaming. Recommended themes include: "[b]lame the subject's perception of the child's actions and behavior that they thought were sexually provocative," and, "[b]lame the subject's perception of the child's style of dress." *Id.* at 220. Blaming the suspect's *perception* of the victim is not exactly the same as blaming the victim, though one wonders if the effectiveness of the interrogation tactic (if any) depends on the suspect not noticing the difference but interpreting the interrogator's words as endorsing his rationalizations. In any event, other recommended themes lack this nuance: "[b]lame the child's curiosity; they brought up the topic of sex," and "[p]resent the argument that children are more mature in today's society ... due to television, movies, magazines, news reports, the internet and social media. They are exposed to sex at an early age and are curious to experiment with sex." *Id.* at 220, 223; *see also* ZULAWSKI & WICKLANDER, *supra* note 3, at 334 ("The interrogator can even blame a child victim of sexual abuse for appearing older and tempting the suspect.").

55. INBAU ET AL., *supra* note 3, at 222. Note that the manual does not explicitly limit this suggestion to those circumstances in which the statement is true. Courts generally allow interrogators to engage in deception, French, *supra* note 23, at 1052, and the manual here recommends what may constitute the tort of defamation.

56. INBAU ET AL., *supra* note 3, at 211 (emphasis added). We shall discuss a California case where the detective followed this advice. Gomez v. California, No. 1:18-cv-00642-DAD-SAB-HC, 2019 WL 358631, at *11 (E.D. Cal. Jan. 29, 2019) (noting that the detective said to a sexual assault suspect: "You're a man. And that I get. It's happened to me."), discussed *infra* text accompanying notes 102-04; *see also* Coughlin, *supra* note 19, at 1649-50 (describing how the third edition of the Reid manual recounted a case in which the interrogator stated that he "himself, as a young man in high school, 'roughed it up' with a girl in an attempt to have intercourse with her").

The recommended script—that "one of the authors used"—refers to the interrogator's sister:

> Jim, I think what happened here is that this gal came on to 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. I think in your situation this gal allowed the relationship to get much closer than what my sister did and, we both know, guys reach a certain point of no return.[57]

If these examples seem to emerge from an earlier era, it is because most of them trace back to the first edition of the Reid manual published in 1962,[58] but they nevertheless remain in the most recent primary manual published in 2013. That year is prior to the salience of the "Me Too" movement after revelations about Harvey Weinstein in 2017.[59] But even the more recent supplemental Reid text published in 2020 provides the earlier quotation above that "*the most common theme* to develop in sexual assaults is to blame the victim for doing something that *provoked* the suspect."[60]

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57. INBAU ET AL., *supra* note 3, at 211.

58. *See* INBAU & REID FIRST EDITION, *supra* note 3, at 51-52.

59. Jaclyn Diaz, *Where the #MeToo Movement Stands, 5 Years After Weinstein Allegations Came to Light*, NPR (Oct. 28, 2022, 5:00 AM), https://www.npr.org/2022/10/28/1131500833/me-too-harvey-weinstein-anniversary [https://perma.cc/NR49-922J].

60. SENESE, *supra* note 27, at 224 (first emphasis added). See also the 2015 manual: BUCKLEY, CHILD ABUSE OFFENDERS, *supra* note 27, at 222 ("Blame the suspect's spouse for neglect. This is exemplified by offender #3 who had an incestuous relationship with his teenage daughters after his wife refused to have sex with him.... In a case like this the investigator would suggest, '*If your wife would have taken care of you the way she was supposed to this would have never happened.*'").

The most recent manual, SENESE, *supra* note 27, is more exhaustive about minimization themes than the main manual. Senese offers various ways to minimize the seriousness of sexual assault. *See id.* at 225-29. Senese also lists these specific victim-blaming "[r]ape themes":

1. Blame the victim's style of dress for leading the suspect on
2. Blame the victim's actions and or behavior, such as
   a. Coming into the suspect's office

We also note, that with a single exception in a supplemental manual on child abuse cases, the Reid manuals do not ever say the recommended victim-blaming statements are false.[61]

So far, our examples of victim-blaming all involve gender. What about other ways of blaming victims? With one exception, the main Reid manual comprehensively ignores the issue of race,[62] which seems strange in light of its frequent use of gendered examples. (The exception is a troubling reference to race in a section on interrogating "[*a*]*n unintelligent, uneducated criminal suspect*."[63]) Yet the logic of victim-blaming in these cases seems clear enough.

> b. Sitting next to the suspect
> c. Inviting the suspect to victim's house
> d. Flirting with the suspect
> e. Allowing the suspect to drive the victim home
> f. Inviting the suspect out on a date
> g. Not securing their residence
> h. Allowing the drapes of the residence to be open ...
> m. Rejecting the suspect's advances ...
>
> 11. Blame the victim for being intoxicated, under the influence of drugs or alcohol, or even passing out
>
> 12. Blame the suspect's perception of the victim's reputation as being promiscuous ...
>
> 18. Suggest the suspect may have been mistreated by the opposite sex his entire life, *thus blaming women in general*[.]

Id. at 225-26 (emphasis added). For the separate crime of indecent exposure, see *id.* at 186-87 (noting various ways to minimize the moral seriousness of the offense and two ways to "[b]lame the victim[ ]": for "taunting or flirtatious behavior for leading the suspect on" and for a "provocative style of dress").

61. *See* text accompanying notes 3-4; *see also* Coughlin, *supra* note 19, at 1646-48.

62. There is no entry about race in the index of the current edition, which has over 450 pages. *See* INBAU ET AL., *supra* note 3, at 451-69.

63. *Id.* at 332-33. The complete phrase is "an unintelligent, uneducated offender with a low cultural background." *Id.* at 333. The reference to race is as follows:

> In instances when an unintelligent or uneducated suspect happens to be a member of a minority race or group, an investigator must never make a derogatory remark about that race or group, even in jest. Nor should it be assumed that a person's attitude, conduct, or even his criminality are the result of skin color or nationality. To the contrary, an investigator should, and in good conscience always can, eulogize some outstanding member of that race or group and suggest that the suspect try to measure up to the conduct exemplified by that particular individual.

Id. While we applaud the statement that the interrogator should not assume that race determines criminality, we find it disturbing that race is discussed only in reference to "unintelligent" suspects "with a low cultural background." *Id.* The tactic also seems to appeal to the rationalization that one is not racist as long as one approves of at least one exemplary member of another racial group.

If rape crimes require misogynistic themes, as the manuals claim, then hate crimes would seem to require racist, homophobic, or Islamophobic themes, or others of a similar nature, whatever might have motivated the suspect to commit the crime. Moreover, the manuals' logic applies not just to explicitly hate-motivated crimes but to any cross-racial (or cross-ethnic, cross-religious, et cetera) crime where it is possible the suspect rationalized the crime using bigoted and stereotyped reasoning.

We need not rely entirely on speculation to determine how the Reid manual approaches hate crimes. One supplemental Reid manual states that "the primary themes" for such interrogations should "address the specific motive—namely, the offender's bias or attitudes toward the specific group or individual."[64] How should the detective "address" the motive? Here are some of the specific proposals for shifting blame for hate crimes to the victim:

> 9. Blame the fact that the victim's clothing suggested a racial or religious bias
>
> 10. Blame the victim's behavior, i.e., being arrogant, cocky, antagonistic, confrontational, aggressive, etc. ...
>
> 12. Blame the victim's actions (forcing his views, opinion, or beliefs on the suspect, the suspect's children, relatives or friends) for provoking the suspect's response
>
> 13. Blame the victim for coming into the suspect's neighborhood for apparently no other reason than to offer a challenge
>
> 14. Blame the suspect's religious convictions, moral beliefs or lifestyle for creating the impetus for his actions ...
>
> 32. Compliment the suspect for standing up for his rights/beliefs and not being hypocritical
>
> 33. Compliment the suspect for standing up for the "silent majority[.]"[65]

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64. SENESE, *supra* note 27, at 169.

65. *Id.* at 170-71. These themes are all for "[h]ate crimes against individuals." *Id.* at 169. There is another set for hate crimes against property, which includes "[b]lam[ing] the victim

The advice here is carefully general, but it is difficult to imagine how an interrogator could implement these victim-blaming themes without endorsing the suspect's negative stereotypes. The ninth example does not explicitly mention a hijab or yarmulke, but surely those are the kinds of clothing contemplated if the detective is going to blame the victim for exhibiting "religious bias" based on clothing.[66] Reading the tenth example, one wonders what hate-crimes involve victims who are "arrogant" or "cocky,"[67] and then one realizes that these are convenient synonyms for "uppity," a racist code word for non-subservient Black Americans.[68] More generally, the thirty-second example is to *compliment* a hate crime suspect for "standing up for his ... beliefs," when the relevant beliefs are inevitably negative stereotypes based on race, religion, or sexual orientation.[69]

To illustrate these many themes, the supplemental manual offers only a single interrogation script concerning the assault of a gay man. In the script, the interrogator tells the suspect that the victim "should have recognized" that the suspect did "not agree with [his] alternative lifestyle," but that the victim "began to talk back to you and before you knew it, you struck him."[70] Perhaps this illustrates the twelfth theme, blaming the victim for "forcing his views, opinion or beliefs on the suspect,"[71] which seems like a stereotype that LGBTQ+ victims "flaunt" their sexuality.[72] It is telling that no other scripts are offered, thus avoiding mention of specific stereotypes against racial and religious minorities, but only by avoiding the illustration of any of the other theme suggestions just quoted.

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for using his property as an obnoxious or offensive display of his lifestyle/behavior," or "[b]lam[ing] the victim's property as being an 'eyesore' or blemishing a nice neighborhood or lowering property values." *Id.* at 172.

66. *See id.* at 170.

67. *Id.*

68. *Racial Offense Taken When 'Uppity' Rolls Off Certain Tongues*, ABC NEWS (Sept. 17, 2008, 11:53 AM), https://abcnews.go.com/US/story?id=5823018&page=1 [https://perma.cc/UM4B-2299].

69. SENESE, *supra* note 27, at 171.

70. *Id.* at 172-73.

71. *Id.* at 170.

72. *See, e.g.*, David J. Lick, Kerri L. Johnson & Simone V. Gill, *Why Do They Have to Flaunt It? Perceptions of Communicative Intent Predict Antigay Prejudice Based Upon Brief Exposure to Nonverbal Cues*, 5 SOC. PSYCH. & PERSONALITY SCI. 927, 933 (2014).

Another proposed theme is to "[b]lame the suspect's lack of contact or understanding of the victim, *other than viewing the victim as stereotyped based on biased information*."[73] The meaning of this recommendation is not entirely clear, but the final caveat appears to advise the interrogator to *avoid* saying that any of the suspect's beliefs about the victim are "stereotypes" or "biased." In other words, the supplemental manual advises the detective to endorse unreservedly the suspect's reasons for blaming the victim.

Standing out from the other examples, however, there is one suggestion that distances the interrogator from the stereotype: "[b]lame the suspect's *misguided* perceptions of the victim for causing him to act in a way that he believed was appropriate."[74] Note that nothing in the same manual suggests that the interrogator refer to the suspect's beliefs as "misguided" when the manual recommends that the interrogator "[c]ompliment the suspect for standing up for his ... beliefs."[75] There is nothing in the main manual's discussion of sex crimes to suggest that the gender stereotyping and rape myths are "misguided."[76] The single instance of "misguided" only emphasizes how much the manuals generally recommend the endorsement of victim-blaming-stereotypes *without qualification*.

In sum, the dominant interrogation manuals overtly and repeatedly endorse victim-blaming-by-misogynistic-stereotype, with no caveat as to their falsity, and in a slightly more guarded way, recommend the usefulness of stereotyping themes that blame victims on the basis of race, religion, and sexual orientation.

C. Victim-Blaming in Real World Interrogations

Do police follow the manuals that recommend moral minimization and victim-blaming? A variety of evidence confirms that they do. David Simon, a journalistic observer of the first order, famously spent a year embedded with the homicide unit of the Baltimore Police Department.[77] He described their interrogation techniques,

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73. SENESE, *supra* note 27, at 170 (emphasis added).
74. *Id.* (emphasis added).
75. *See id.* at 171.
76. *See, e.g.*, INBAU ET AL., *supra* note 3, at 220-22, 233-34.
77. *See* DAVID SIMON, HOMICIDE: A YEAR ON THE KILLING STREETS 586 (1991).

including moral minimization, as illustrated by this description: "Kill your woman and a good detective will come close to real tears as he touches your shoulder and tells you how he knows that you must have loved her, that it wouldn't be so hard for you to talk about if you didn't."[78]

Simon did not quantify the number of interrogations he observed, but more systematic academic studies confirm that moral minimization is a common practice, although not quantifying the particular tactic of victim-blaming. Criminologist Richard Leo observed 182 felony interrogations[79] and found that detectives "[o]ffer[ed] moral justifications [or] psychological excuses" for the criminal conduct in 34 percent of cases and "[m]inimize[d] the moral seriousness of the offense" in 22 percent.[80] Detectives use multiple tactics in any interrogation, so we read these results to indicate that detectives minimized the crime's moral seriousness and/or offered moral justifications or excuses, such as blame-shifting, in one-third to one-half of interrogations.[81] Surveys of law enforcement interrogators found similar results.[82]

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78. *Id.* at 202-03.

79. Leo, *supra* note 7, at 274.

80. *Id.* at 278 tbl.5. He also reported on the tactic in which police would "[m]inimize the facts/nature of the offense," which was used in only 6 percent of the interrogations. *Id.* This tactic does not implicate our thesis because it would not undermine the seriousness of a crime nor the offender's responsibility to point to particular facts that legally mitigate the crime. For the same reason, we are not concerned here with questions that "[m]inimize the nature/purpose of questioning," used in only 1 percent of interrogations. *Id.* That tactic may involve deception, but it does not attack the moral status of law nor defend the moral status of the crime.

81. *See id.* Subsequent observations report significantly different numbers but confirm that minimization is a real-world tactic. In 2013, Barry Feld reported on his review of 307 delinquency files of sixteen- and seventeen-year-olds charged with felonies in Minnesota. Barry C. Feld, *Real Interrogation: What Actually Happens When Cops Question Kids*, 47 L. & SOC'Y REV. 1, 6, 15-16, 16 tbl.4 (2013). The article says that Minnesota discourages minimization, but Feld nonetheless found minimization was used in 17 percent of the interrogations. *Id.* at 15-16. Most recently, Christopher Kelly and co-authors reviewed twenty-nine interrogations (a combined duration of forty-five hours) conducted by the Los Angeles Police Department in homicide, rape, and robbery cases. Kelly et al., *supra* note 7, at 170. They found that interrogators offered moral rationalizations in 83 percent (twenty-four of twenty-nine) of the interrogations. *See id.* tbl.1.

82. Saul M. Kassin, Richard A. Leo, Christian A. Meissner, Kimberly D. Richman, Lori H. Colwell, Amy-May Leach & Dana La Fon, *Police Interviewing and Interrogation: A Self-Report Survey of Police Practices and Beliefs*, 31 L. & HUM. BEHAV. 381, 385, 389 (2007). Over six-hundred law enforcement officers (574 members of sixteen U.S. police departments plus fifty-seven customs officials from two Canadian provinces) answered questions on

Occasionally, a videotaped interrogation becomes public. One recent interrogation recording illustrates victim-blaming in a case of intimate partner violence.[83] The detective asks a suspect (of a separate shooting) about his girlfriend's allegation of assault.[84] The detective initiates the possibility that she is lying by describing her allegation as just "typical back and forth stuff that guys like you go through with their baby mama all the time and they're all, y'know, there's a lot of guys out there in your spot. You know? And a lot of times you know, maybe, it's not always fair to them."[85]

A final source for confirming the use of minimization—perhaps the most compelling—are judicial opinions discussing interrogations. Appellate opinions cannot give us a reliable basis for estimating the *frequency* of minimization in American interrogations. First, there are the usual concerns that litigated appeals may fail to represent the larger number of interrogations that are not litigated. For example, the fact that most of the appellate cases we discuss below[86] involve the sexual assault of minors may reflect only that defendants accused of such crimes are less likely to accept a plea bargain, so more of these cases produce appellate decisions. Second, moral minimization is not usually relevant to the lawfulness of interrogation, so defense lawyers have little reason to raise issues concerning its use.[87]

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interrogation practices. *Id.* at 385. The survey asked which of sixteen tactics they employed using a five-point scale ranging from never (1), rarely (2), sometimes (3), often (4), and always (5). *Id.* at 387. For the tactic of "[o]ffering the suspect sympathy, moral justifications and excuses," the mean answer was 3.38, falling between "sometimes" (3) and "often" (4). *Id.* at 388 tbl.2. For the tactic "[m]inimizing the moral seriousness of the offense," the mean response was 3.02, essentially "sometimes." *Id.* For similar results, see also Allison D. Redlich, Christopher E. Kelly & Jeaneé C. Miller, *The Who, What, and Why of Human Intelligence Gathering: Self-Reported Measures of Interrogation Methods*, 28 APPLIED COGNITIVE PSYCH. 817, 819-20 (2014) (reporting on a survey of 152 U.S. military and federal law enforcement interrogators about sixty-seven interrogation techniques and finding the mean response to the use of "moral rationalizations" was 3.59 (Table 1A not reported in publication but shared by author Allison Redlich and on file)). These survey responses are consistent with Leo's study showing that the strategies were employed in at least one-third of the cases. Leo, *supra* note 7, at 278 tbl.5.

83. *See* Law & Crime Network, *Police Grill Darrell Brooks Over Girlfriend's Claims of Abuse in Interrogation Room*, YOUTUBE (Oct. 18, 2022), https://www.youtube.com/watch?v=CdEtTE9usA4 [https://perma.cc/ACQ2-TUKC].

84. *Id.*

85. *Id.*

86. *See infra* notes 87-107.

87. *See, e.g.*, United States v. Jacques, 744 F.3d 804, 812 (1st Cir. 2014) ("[T]he agents'

Nonetheless, the opinions do confirm as a matter of sworn testimony that the minimization tactics are a "fairly common" practice and confirm the influence of the Reid technique.[88] Moreover, these cases offer a glimpse into the actual wording of victim-blaming tactics. What shows up in the appellate record are interrogators characterizing women victims as promiscuous and essentially "asking for it."

In a recent California case, the defendant was convicted of sexual assault crimes against several victims under the age of ten.[89] In the

statements exaggerating the quality of their evidence[ ] [and] minimizing the gravity of Jacques's offense ... fall safely within the realm of the permissible 'chicanery' sanctioned by this and other courts."). We have found three state cases in which the courts suppressing a confession recognized that minimization was one relevant factor in a totality of the circumstances test for determining its voluntariness. *See* Commonwealth v. DiGiambattista, 813 N.E.2d 516, 525 (Mass. 2004); State v. Baker, 465 P.3d 860, 873 (Haw. 2020); State v. Stone, 237 P.3d 1229, 1241-42 (Kan. 2010). But those cases involved many more traditional circumstances supporting involuntariness and we found no similar cases in other states or in federal courts. Thus, appellate courts typically avoid describing moral minimization even when it is present. *See* People v. Morales-Cuevas, No. A151929, 2018 WL 4501114, at *9-10 (Cal. Ct. App. Sept. 20, 2018) (noting that police "undoubtedly used" some "minimization techniques" regarding defendant's sexual assaults on his stepdaughter beginning when she was nine years old but reporting no detail other than defendant's assertions that police offered "possible excuses" for his behavior and "express[ed] understanding of the conduct"); Schumaker v. Kirkpatrick, 808 F. App'x 47, 49 (2d Cir. 2020) (describing the defendant's claim that interrogators used "'minimization[,]' a ploy that implies to a suspect that his commission of the offense was understandable and justifiable," though without any details (alteration in original)). Even in a case finding that false promises of leniency rendered a confession to sexual assault involuntary and inadmissible, the appellate court noted that the trial judge stated that the police interrogation techniques had "includ[ed] minimization of the crime," but "did not specifically describe the 'interrogation techniques' used." State v. Hunt, 151 A.3d 911, 915, 915 n.1 (Me. 2016).

88. In an Ohio case involving sexual misconduct with a minor, the detective agreed that his effort to "minimize the extent of the crime" is a "fairly common police tactic." State v. Fouts, No. 15CA25, 2016 WL 1071457, at *8 (Ohio Ct. App. Mar. 16, 2016). In the interrogation, the detective characterized the conduct as "iffy" and told the suspect that she believed he "made a mistake" and "mistakes can be fixed." *Id.* at *9 (internal quotation marks omitted); *see also* State v. Reyes, No. A-1340-18, 2022 WL 120463, at *14-15 (N.J. Super. Ct. App. Div. Jan. 13, 2022) (noting the explanation of a detective that "one of the things that we do is we try to minimize" the crime); Commonwealth v. Cartright, 84 N.E.3d 851, 857 (Mass. 2017) ("The officers acknowledged at trial that they had been trained in techniques known as ... 'minimization'—i.e., diminishing the severity of the crime and implying the possibility of leniency."); United States v. Woody, No. CR-13-08093-001-PCT-NVW, 2015 WL 1530552, at *10 (D. Ariz. Apr. 6, 2015), *rev'd*, 652 F. App'x 519 (9th Cir. 2016) (noting that an FBI agent "has received training in the Reid technique and sometimes uses aspects of it during interrogations" and that the agent "acknowledged that he generally employs minimization, for instance by suggesting a suspect ... had an out-of-character experience").

89. People v. Trujillo, No. F077583, 2022 WL 519938, at *1 (Cal. Ct. App. Feb. 22, 2022)

interrogation, the police detective told the suspect (defendant) that "he understood what [the] appellant was going through because *he too was 'a man.*'"[90] The suspect "stated that when he fell on top of Y.S., she told him to get up 'or people will think we're making love,'" even though Y.S. was only five or six years old at the time.[91] The detective "responded by saying, '[s]o the child was a little dirty,'" and that "'[a] child who is a little dirty' was a 'different' situation."[92] The detective told the suspect that "rape was different from 'her wanting it.'"[93] The court explained that the detective used various techniques of minimization, including to "victim blame[ ]," and that the quotations above were "just examples" and "the entire interview was replete with other iterations of these techniques."[94]

In the Introduction, we quoted from a recent sexual assault case from Hawaii, where the victims were minors, and the detective directed blame to the fact that "[a]lcohol is [...] where people get themselves into trouble, cause they lose their inhibitions[.] ... *Women are a lot more promiscuous, you know*. They flirt more, you know when they're on alcohol ... cause they lose their inhibitions."[95]

In a California sexual assault case, where the victim was under the age of fourteen, the detective told the suspect:

> [T]his is not all your fault.... I've seen this young lady. I know she's very attractive. And she probably was very attractive as—girl, okay. And she probably had some curiosities and she may have been interested in you in that way.... And I can understand how you could be attracted to her because she probably came on to you, okay. But we understand that.[96]

In another California case, the defendant was convicted of multiple counts of sexual assault of two children under the age of fourteen.[97] The court reports that the interrogator "referenced the victim's

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(reversing convictions on the basis of *Miranda* violations).

90. *Id.* at *4 (emphasis added).

91. *Id.* at *5.

92. *Id.*

93. *Id.*

94. *Id.* at *12.

95. State v. Baker, 465 P.3d 860, 864 (Haw. 2020) (second alteration in original) (emphasis added) (internal quotations omitted).

96. People v. Aguirre, No. H041415, 2016 WL 3679901, at *2 (Cal. Ct. App. July 6, 2016).

97. People v. Cortez, No. H041081, 2016 WL 6962539, at *1 (Cal. Ct. App. Nov. 29, 2016).

physical appearance and conduct, [and] suggested she was also guilty."[98]

Minimization of statutory rape crimes includes the idea that children can consent to sex. An Oregon case involved such an interrogation tactic when the victim was twelve.[99] One detective asked the defendant if the victim "agree[d] to have sex," while the other stated: "You're not a violent guy.... This is a consensual thing," and "[i]f this was a consensual thing, that's—that's a completely different story, okay?,"[100] and "*I believe that it was probably consensual, she wanted to have sex with you*."[101]

Similarly, in *Gomez v. California*, the adult male defendant was convicted of various sexual assault crimes involving a girl, A.C., whom he began molesting when she was ten years old and with whom he had anal sex when she was thirteen years old.[102] The interrogating detectives proposed to Gomez that

> it was possible A.C. was mature for her age, was fully developed with large breasts, and probably "came on" to defendant. [Detective] Skrinde noted they had talked to A.C.'s friends and A.C. was a fun, outgoing person. [Detective] Garcia ... wondered if they had a relationship [that] A.C. was partially responsible for, and suggested the possibility that A.C. put her hand on defendant's penis to masturbate him.... Skrinde said he and Garcia were starting to wonder if it was more A.C. than defendant, suggesting A.C. was a beautiful, fully developed woman who may have been attracted to defendant, who was not her real dad. Skrinde said to defendant, "You're a man. And that I get. *It's happened to me*."[103]

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98. *Id.* at *8.

99. State v. Chavez-Meza, 456 P.3d 322, 324 (Or. Ct. App. 2019).

100. *Id.* at 327 (internal quotations omitted).

101. *Id.*; *see also* Commonwealth v. Monroe, 35 N.E.3d 677, 680, 686 (Mass. 2015) (noting that detectives "minimized [a] rape allegation by pointing out that both the defendant and the alleged victim were old enough to engage in consensual sexual activity," although she was only sixteen years old).

102. No. 1:18-CV-00642-DAD-SAB-HC, 2019 WL 358631, at *1-2 (E.D. Cal. Jan. 29, 2019).

103. *Id.* at *11 (emphasis added); *see also* State v. Hines, 648 S.W.3d 822, 826 (Mo. Ct. App. 2022) (describing how a detective told a suspect "a story about an uncle [of the detective] who had engaged in an act with a minor in order to 'relate with the subject to build rapport'"); Coughlin, *supra* note 19, at 1648-50 (explaining how later editions of INBAU ET AL., *supra* note 3, deleted the suggestion from earlier editions that the detective minimize a sex crime by claiming to have committed a similar one in his youth).

As is usual, the California Court rejected defendant's claim that his confession was involuntary, reasoning that the detective's "minimization"—"presenting [the defendant] with justifications for his crime and suggesting the victim shared blame in the offense conduct"—did not include promises of leniency.[104]

In a recent Illinois case, the defendant was convicted of sexual assault of a minor.[105] The court quoted the law enforcement agent as stating that he "used tactics such as that it's not a big deal, that it wasn't your fault, *that she had come on to you*, things of that nature, to make him feel more comfortable in admitting the truth."[106] The agent stated that "[h]e learned those tactics at the Reid school, Illinois State Police Basic Investigator's Course," and that "such tactics are commonly used in law enforcement and accepted across the nation as approved forms of interview techniques."[107]

In sum, direct observations, law enforcement surveys, and judicial opinions all make clear that American police interrogators blame victims, sometimes with demeaning stereotypes.

II. NEGATIVE CONSEQUENCES OF VICTIM-BLAMING-BY-STEREOTYPE: ADVERSE EFFECTS ON VICTIMS AND POLICING

No one should be surprised that demeaning stereotypes have negative consequences. The case against the interrogation tactic of victim-blaming-by-stereotype is strengthened when one considers its unintended costs. The costs to victims are straightforward. We discuss them briefly and then develop the less obvious claim that victim-blaming-by-stereotype degrades policing.

The interrogation tactic has two adverse effects on victims. First, the victim's discovery of what police said to the suspect during interrogation creates a type of secondary victimization.[108] Although interrogation transcripts are not widely available online, the contents of interrogations are not a complete secret. Defense motions to suppress incriminating statements are public, and those

104. *Gomez*, 2019 WL 358631, at *17 (internal quotations omitted).
105. People v. Johnson, No. 5-18-0371, 2022 WL 810191, at *1 (Ill. App. Ct. Mar. 17, 2022).
106. *Id.* at *2 (emphasis added) (internal quotations omitted).
107. *Id.*
108. *See infra* notes 111-13 and accompanying text.

motions frequently refer to a transcript of the interrogation. Those motions sometimes lead to hearings in which defense counsel cross-examines the detective about the interrogation, and such hearings are public, as are the appellate opinions that discuss such interrogations. Consider the examples above where appellate opinions described detectives blaming the child victims of sexual assault.[109] Finally, the suspect himself may tell others—including the victim—what the detectives said.[110] As a result, it is inevitable that the victim whom the detectives blame sometimes hears true accounts of how the detectives minimized the moral responsibility of the suspect in part by blaming them and degrading their character.

The official blaming and disparagement of crime victims is a severe transgression of any principled conception of victim's rights.[111] At the least, the government should not intensify the indignity of the crime. Aside from principled political theory, any consequentialist concern for human welfare must count the inevitable shock, outrage, and pain that such discovered victim-blaming causes. A legal and social science literature already discusses the problem of "secondary victimization," the negative social reactions that a victim suffers from the revelation of the crime they survived, including the harm the criminal investigation and prosecution impose on the victim.[112] A number of studies document

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109. *See supra* notes 87-107 and accompanying text.

110. *Cf.* Okin v. Vill. of Cornwall-On-Hudson Police Dep't, 577 F.3d 415, 420, 434, 436 (2d. Cir. 2009) (finding that police officers "implicitly communicated to [accused batterer] Sears that domestic violence against [complainant] Okin would go unpunished," and that this implicit message was communicated back to Okin when Sears told her that he had told the local police chief that he sometimes "smacks [] Okin around" but the police chief and his officers took no action).

111. G.A. Res. 40/34, Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, ¶ 4 (Nov. 29, 1985) ("Victims should be treated with compassion and respect for their dignity."); JONATHAN DOAK, VICTIMS' RIGHTS, HUMAN RIGHTS AND CRIMINAL JUSTICE: RECONCEIVING THE ROLE OF THIRD PARTIES 51-114 (2008) (discussing the problem of secondary victimization).

112. *See, e.g.*, Uli Orth, *Secondary Victimization of Crime Victims by Criminal Proceedings*, 15 J. SOC. JUST. RSCH. 313, 313 (2002) ("[C]riminal proceedings cause psychological harm to the crime victims involved, that is, cause secondary victimization."); Rebecca Campbell & Sheela Raja, *The Sexual Assault and Secondary Victimization of Female Veterans: Help-Seeking Experiences with Military and Civilian Social Systems*, 29 PSYCH. WOMEN Q. 97, 102 (2005) (finding that 82 percent of surveyed victims who reported to civilian police "stated that this contact made them feel guilty or blame themselves for the assault" and that "65% of the

that law enforcement causes secondary victimization when it subjects victims, particularly women victims of intimate partner violence and sexual assault, to routine and unjustified skepticism and blame.[113] We must now add the additional harm that occurs when victims learn that police, when speaking to the suspect, worked to "degrade" their character[114] in order to shift blame away from the perpetrator.

Even if the victim does not discover how the police disparaged them during the interrogation, we have separately written about a second concern. The police reinforcement of the suspect's rationalizations for the crime encourages recidivism.[115] As our prior article explains, all tactics of moral minimization in interrogation seek to endorse and build up the psychological process by which the offender rationalized the crime.[116] The same theory that predicts that this will ease a path towards a confession also predicts that it will ease a path to commit the crime again.[117] This is especially true of victim-blaming-by-stereotype. Where the reinforcement signals that police approve of the crime, or at least do not disapprove of it, the perpetrator finds it easier to rationalize another such crime against the same victim or the class of victims whom the officers negatively stereotyped.

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victims who had contact with civilian police said that the encounter made them reluctant to seek further help."); Debra Patterson, *The Linkage Between Secondary Victimization by Law Enforcement and Rape Case Outcomes*, 26 J. INTERPERSONAL VIOLENCE 328, 330-42 (2011) (examining differences in secondary victimization by victims whose cases were and were not prosecuted).

113. *See* Campbell & Raja, *supra* note 112, at 103 ("Among the victims who had contact with the legal system (military or civilian) there was a significant positive relationship between experiencing secondary victimization and PTS[D]."); DOAK, *supra* note 111, at 51 ("Research has illustrated that the psychological impact of victimisation can be considerably exacerbated by insensitive treatment ... by agencies and organisations within the criminal justice system.... [M]any different classes of victims have reported feeling increased levels of stress and anxiety as a result of the manner in which they are treated."). The consequence of secondary victimization is a lowered willingness to report crimes. *See id.*

114. *See supra* note 44 and accompanying text.

115. *See Criminogenic Risks*, *supra* note 2, at 1034, 1056, 1075-77.

116. *See id.*

117. The relevant theory—neutralization theory—is empirically controversial, but the causal link between neutralization and crime has been tested far more (with mixed results) than the causal link between neutralization and confessions. The experimental evidence on the causal link to confessions shows that moral minimizations cause more false confessions, not more true ones. *See id.* at 1052-56.

While the adverse effects on victims are relatively straightforward, especially if they discover what detectives have said, the effect of victim-blaming on interrogators is more complex. We develop that effect in the rest of this Part. Section II.A describes the existing problem in policing culture: how it is infected by a victim-blaming mentality that undermines effective investigation of certain crimes. Section II.B posits a causal claim: that the interrogation training and practice of victim-blaming makes the problem worse or at least impedes its reform.

A. The General Problem of Victim-Blaming by Police

A culture of blaming victims is already one reason that police struggle to clear certain cases. Detectives cannot take seriously crimes against victims they do not trust, and victims will not report crimes to police they do not trust. We speak here mostly of violent crimes against women, though we shall see the problem is more general.

Victim-blaming is a pervasive type of reasoning. Psychologists studying the phenomenon describe a common "belief in a just world," that people generally get what they deserve and generally deserve what they get.[118] Of course, there often is a positive correlation between desert and outcomes, but through a series of experiments psychologists find that people believe the correlation to be greater than it actually is and greater than rational inferences can support. To preserve this exaggerated belief in a just world, people search for ways to rationalize good and bad outcomes as being deserved. For bad outcomes, that search leads to blaming the victim. Undeserved suffering threatens the just world belief; victim-blaming

118. The experimental literature begins with Melvin J. Lerner & Carolyn H. Simmons, *Observer's Reaction to the "Innocent Victim": Compassion or Rejection?*, 4 J. PERSONALITY & SOC. PSYCH. 203 (1966). For reviews of the literature, see Rael J. Dawtry, Mitchell J. Callan, Annelie J. Harvey & Ana I. Gheorghiu, *Victims, Vignettes, and Videos: Meta-Analytic and Experimental Evidence That Emotional Impact Enhances the Derogation of Innocent Victims*, 24 PERSONALITY & SOC. PSYCH. REV. 233 (2020); Carolyn L. Hafer & Robbie Sutton, *Belief in a Just World*, *in* HANDBOOK OF SOCIAL JUSTICE THEORY AND RESEARCH 145 (Clara Sabbagh & Manfred Schmitt eds., 2016). The psychological idea has generated broad interest in the social sciences. *See, e.g.*, Roland Bénabou & Jean Tirole, *Belief in a Just World and Redistributive Politics*, 121 Q.J. ECON. 699 (2006); Dhammika Dharmapala, Nuno Garoupa & Richard McAdams, *Belief in a Just World, Blaming the Victim, and Hate Crime Statutes*, 5 REV. L. & ECON. 311 (2009).

sustains it. A large experimental literature supports these findings[119] but as one real-world example, consider that surveys of Americans during World War II show that they became *more likely* over this time to view Jews as wielding too much power in the United States.[120] "Far from evoking sympathy, the Nazi persecutions apparently sparked a rise in anti-Semitism in this country."[121]

Police encounter the victims of violent crime in situations that intensely threaten the just world belief. When conducting interviews, police are physically proximate to the victims and their suffering is vivid, two variables that one recent study identifies as particularly likely to cause victim-blaming.[122] The experiment by the psychologist Rael Dawtry and colleagues found that the "more emotionally impactful stimuli" of videos depicting victimization "led to greater [relative] victim derogation than less impactful stimuli" of merely textual vignettes of the same event.[123] Police engagement with victims is even more powerful than videos by virtue of being in-person; therefore, it is no surprise that when Dawtry and colleagues identify the "practical implications" of their study, they point to criminal justice professionals *such as police* who "are regularly exposed to *real* victims, in an immediate, vivid, and emotionally intensive way, precisely the conditions that our findings suggest are most likely to elicit victim derogation."[124]

Another factor predicts that police will particularly blame women victims: the hyper-masculine culture of policing. Large majorities of

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119. *See, e.g.*, Dawtry et al., *supra* note 118; Beyza Tepe, Sevim Cesur & Diane Sunar, *Just World Belief and Ethics of Morality: When Do We Derogate the Victim?*, 39 CURRENT PSYCH. 183, 183 (2020); Patrícia Aguiar, Jorge Vala, Isabel Correia & Cícero Pereira, *Justice in Our World and in that of Others: Belief in a Just World and Reactions to Victims*, 21 SOC. JUST. RES. 50, 51 (2008).

120. *See* GERTRUDE J. SELZNICK & STEPHEN STEINBERG, THE TENACITY OF PREJUDICE: ANTI-SEMITISM IN CONTEMPORARY AMERICA 63 (1969).

121. *Id.*

122. *See, e.g.*, Dawtry et al., *supra* note 118, at 242 ("Vividness and proximity ... significantly moderated the victim derogation effect."); *id.* at 252 ("[V]ictimization contexts that are vivid, real, or ostensibly real, and spatiotemporally proximal are more emotionally impactful than those that lack any one of these attributes."). The authors use these variables to explain why some recent experiments failed to find as much victim-blaming as older experiments: because older experiments created more emotionally intense stimuli of victimization. *Id.* at 237-47 (describing the meta-analysis of existing research).

123. *Id.* at 249.

124. *Id.* at 252.

American police officers are male,[125] and police culture often embraces a militaristic, warrior ethos that values aggression and absence of emotion, neither of which favors the sensitive treatment of emotional victims.[126] The male-dominated culture also tends to be self-perpetuating, as it deters and resists entry by women officers.[127]

A third concern is that police readily identify with aggressors because they are often themselves in the position of justifying their uses of force. Police often defend their uses of force, including their most questionable ones, by asserting that the blame lies with the civilian victim who failed to follow commands promptly and precisely.[128] Thus, police officers can readily identify with the need to blame the victim for the victim's own role in creating a situation where violence or aggression is required.[129]

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125. Lindsey Van Ness, *Percentage of Women in State Policing Has Stalled Since 2000*, STATELINE (Oct. 20, 2021, 12:00 AM), https://stateline.org/2021/10/20/percentage-of-women-in-state-policing-has-stalled-since-2000/ [https://perma.cc/9M2C-UXJ4] ("[W]omen make up less than 13% of full-time police officers in the United States."); *see also* Cortney A. Franklin, *Male Peer Support and the Police Culture: Understanding the Resistance and Opposition of Women in Policing*, 16 WOMEN & CRIM. JUST., no. 3, 2005, at 1, 20 ("[P]olice culture as a social structure ... functions to degrade, subordinate, and oppress female police officers.").

126. Sean P. Griffin & Thomas J. Bernard, *Angry Aggression Among Police Officers*, 6 POLICE Q. 3, 4 (2003) (explaining police culture of pre-emptive aggression as arising from three factors: that policing is highly stressful, that police are socially isolated and operate in an echo chamber, and that police feel helpless to avoid the chronic stress levels on the job).

127. For the fact that the predominant gender of police remains stable, see Van Ness, *supra* note 125. For how the hypermasculine culture preserves itself through harassment and targeting of female officers, see Angela Sands, Laurel Westerman, Jenna Prochnau & Henry Blankenau, *"Police Sexual Violence: A Study of Policewomen as Victims,"* 26 POLICE Q. 3, 5 (2023); Timothy C. Brown, Julie M. Baldwin, Rick Dierenfeldt & Steven McCain, *Playing the Game: A Qualitative Exploration of the Female Experience in a Hypermasculine Policing Environment*, 23 POLICE Q. 143, 145 (2020); Anastasia Prokos & Irene Padavic, *'There Oughtta Be a Law Against Bitches': Masculinity Lessons in Police Academy Training*, 9 GENDER, WORK & ORG. 439, 441 (2002). Recent litigation reflects these struggles. *See, e.g.*, Mosby-Grant v. City of Hagerstown, 630 F.3d 326, 328 (4th Cir. 2010) (describing sexual harassment of sole African American woman at police academy); Tresa Baldas, *Former Michigan Cop Sues Brotherhood, Says They Bet on Who Would Sleep With Her First*, USA TODAY (Mar. 21, 2023, 6:58 AM), https://www.usatoday.com/story/news/nation/023/03/21/michigan-woman-cop-sues-department-sex-harassment/11510490002/?gnt-cfr=1 [https://perma.cc/Z5E4-9YUU].

128. *See* Frank Rudy Cooper, *America's Police Culture Has a Masculinity Problem*, THE CONVERSATION (July 19, 2016, 6:07 AM), https://theconversation.com/americas-police-culture-has-a-masculinity-problem-62666 [https://perma.cc/AT4E-LE5K]; Frank Rudy Cooper, *"Who's the Man?": Masculinities Studies*, Terry *Stops, and Police Training*, 18 COLUM. J. GENDER & L. 671, 674, 677 (2009).

129. *See* Cooper, *America's Police Culture Has a Masculinity Problem*, *supra* note 128.

Whatever the exact reason, abundant evidence demonstrates the corresponding reality: police blame victims. Social science evidence reveals that police are at least as prone to victim-blaming as the average person.[130] For sexual assault crimes, they blame victims in accord with rape myths. As Corey Rayburn Yung explains,

> [P]olice are the largest obstacle to the prosecution and conviction of rapists in the United States. Police disbelieve rape victims far more often than the public and other agents involved in rape investigations. Research shows police believe "rape myths" at a much higher rate leading to widespread distrust of rape victims; ... sixty-five percent agree that women with "bad reputations" make the most rape complaints. As a result, police often conclude that rape complaints are false without investigating or, in some cases, even interviewing the victim.... Research shows that police departments failed to investigate approximately one million forcible rape complaints from 1995 to 2012.[131]

Similarly, in qualitative studies, the survivors of intimate partner violence often have negative experiences with police officers on the scene. Consider three examples:

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130. For a review of the relevant academic literature, see generally Emma Sleath & Ray Bull, *Police Perceptions of Rape Victims and the Impact on Case Decision Making: A Systematic Review*, 34 AGGRESSION & VIOLENT BEHAV. 102 (2017); *see also* Amy Dellinger Page, *Behind the Blue Line: Investigating Police Officers' Attitudes Toward Rape*, 22 J. POLICE & CRIM. PSYCH. 22, 22 tbl.1 (2007) (finding, in a large survey of American police officers, that 20.1 percent agree that provocatively dressed women are inviting sex, 22.7 percent agree that any victim can resist a rapist if they want to, and 19.7 percent agree that women make false allegations of rape to draw attention to themselves).

131. Corey Rayburn Yung, *Rape Law Gatekeeping*, 58 B.C. L. REV. 205, 209-10 (2017) (footnotes omitted); *see also* Deborah Tuerkheimer, *Underenforcement as Unequal Protection*, 57 B.C. L. REV. 1287, 1297 (2016) ("[P]olice doubted victims' credibility if they knew or were even minimally acquainted with the assailant." (quoting REBECCA CAMPBELL, GIANNINA FEHLER-CABRAL, STEVEN J. PIERCE, DHRUV B. SHARMA, DEBORAH BYEBEE, JESSICA SHAW, SHEENA HORSFORD & HANNAH FEENEY, NAT'L CRIM. JUST. REFERENCES SERV., THE DETROIT SEXUAL ASSAULT KIT (SAK) ACTION RESEARCH PROJECT (ARP), FINAL REPORT 115 (2015))); David P. Bryden & Sonja Lengnick, *Rape in the Criminal Justice System*, 87 J. CRIM. L. & CRIMINOLOGY 1194, 1230, 1233 (1997) ("[T]he unfounding rate for rape is roughly four times higher than for other major crimes."); Karen Rich & Patrick Seffrin, *Police Interviews of Sexual Assault Reporters: Do Attitudes Matter?*, 27 VIOLENCE & VICTIMS 263, 265 (2012) ("Officers tend to overestimate the percentage of false reports reflecting the myth that rape is rare." (citation omitted)).

> (1) "The police acted as if it was my fault because I was married. One policeman said, if he was my husband, he'd beat me."[132]
>
> (2) "I was told I shouldn't make my abuser angry. I should try to make him happy."[133]
>
> (3) "They feel as though that the woman automatically did something to provoke the man."[134]

In a recent Milwaukee case, a station-house video captured an officer's hostile reaction to a woman reporting an assault she suffered at the hands of her ex-boyfriend, who weeks later was arrested for her murder.[135]

When the United States Department of Justice (DOJ) investigates individual police departments for a "pattern or practice" of misconduct,[136] they usually focus on unlawful uses of force, but another common theme is the failure to properly investigate violent crimes against women. Regarding sexual assault and intimate partner violence, the DOJ has issued stinging reports on grossly inadequate investigations in Maricopa County, Arizona;[137] Puerto Rico;[138]

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132. Edna Erez & Joanne Belknap, *In Their Own Words: Battered Women's Assessment of the Criminal Processing System's Responses*, 13 VIOLENCE & VICTIMS 251, 256 (1998).

133. *Id.*

134. Michele R. Decker, Charvonne N. Holliday, Zaynab Hameeduddin, Roma Shah, Janice Miller, Joyce Dantzler & Leigh Goodmark, *"You Do Not Think of Me as a Human Being": Race and Gender Inequities Intersect to Discourage Police Reporting of Violence Against Women*, 96 J. URB. HEALTH 772, 778 (2019).

135. *See* Ashley Luthern, *A Woman Told Milwaukee Police an Ex-Boyfriend Beat Her. Experts Say the Officer's Response Was 'Disturbing,'* MILWAUKEE J. SENTINEL (Apr. 10, 2023, 8:43 AM), https://www.jsonline.com/in-depth/news/investigations/2023/04/10/milwaukee-police-officers-response-to-domestic-abuse-disturbing-experts-say/69982619007/ [https://perma.cc/7UWQ-3FS3] (reporting that an officer who falsely blamed a woman for failing to follow through on a prior assault complaint referred to her to other officers as a "bitch" and a "c--t").

136. *See* 34 U.S.C. § 12601 (originally codified as 42 U.S.C. § 14141); *see also* CIV. RTS. DIV., U.S. DEP'T OF JUST., THE CIVIL RIGHTS DIVISION'S PATTERN AND PRACTICE POLICE REFORM WORK: 1994-PRESENT (2017), https://www.justice.gov/crt/file/922421/download [https://perma.cc/JT5X-6LVV].

137. *See* Letter from Thomas E. Perez, U.S. Dep't of Just., to Bill Montgomery, County Attorney of Maricopa County 16 (Dec. 15, 2011), https://www.justice.gov/sites/default/files/crt/legacy/2011/12/15/mcso_findletter_12-15-11.pdf [https://perma.cc/3VMU-8JYB] ("The Sheriff's office has acknowledged that 432 cases of sexual assault and child molestation were not properly investigated over a three-year period ending in 2007.").

138. *See* CIV. RTS. DIV., U.S. DEP'T OF JUST., INVESTIGATION OF THE PUERTO RICO POLICE DEPARTMENT 16-17 (2011), https://www.justice.gov/sites/default/files/crt/legacy/2011/09/08/

Newark, New Jersey;[139] New Orleans, Louisiana;[140] Missoula, Montana;[141] and Baltimore, Maryland.[142] The DOJ has recently begun an investigation limited to such underenforcement by the New York Police Department.[143] Given resource constraints, the absence of a DOJ investigation for other cities is *not* a sign that no problem exists.[144]

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prpd_letter.pdf [https://perma.cc/62TP-DFEV] (discussing the problem of domestic violence within the Puerto Rico Police Department).

139. *See* CIV. RTS. DIV., U.S. DEP'T OF JUST., INVESTIGATION OF THE NEWARK POLICE DEPARTMENT 46-47 (2014), https://www.justice.gov/sites/default/files/usao-nj/legacy/2014/07/22/NPD%20Findings%20Report.pdf [https://perma.cc/452A-CCWN] ("[C]rucial deficiencies in the way the NPD has responded to and investigated sexual assault complaints.").

140. *See* CIV. RTS. DIV., U.S. DEP'T OF JUST., INVESTIGATION OF THE NEW ORLEANS POLICE DEPARTMENT 43-51 (2011) [hereinafter NOLA REPORT], https://www.justice.gov/crt/about/spl/nopd_report.pdf [https://perma.cc/WPG8-R762] (finding a constitutional "Failure to Adequately Investigate Allegations of Sexual Assault and Domestic Violence").

141. *See* Letter from Thomas E. Perez & Michael W. Cotter, U.S. Dep't of Just., to Mayor John Engen, Re: The United States' Investigation of the Missoula Police Department 3 (2013) [hereinafter Missoula Report], https://www.justice.gov/sites/default/files/crt/legacy/2013/05/22/missoulapdfind_5-15-13.pdf [https://perma.cc/C64A-LEHU].

142. *See* CIV. RTS. DIV., U.S. DEP'T OF JUST., INVESTIGATION OF THE BALTIMORE POLICE DEPARTMENT 123-27 (2016), https://www.justice.gov/media/887696/dl?inline [https://perma.cc/GJ5Y-L4GD] (finding various shortcomings in the section highlighting that "BPD Fails to Adequately Investigate Reports of Sexual Assault").

143. *See* Press Release, Off. of Pub. Affs., U.S. Dep't of Just., Justice Department Announces Investigation of New York City Police Department's Special Victims Division (June 30, 2022), https://www.justice.gov/opa/pr/justice-department-announces-investigation-new-york-city-police-department-s-special-victims [https://perma.cc/X4ZM-NME5].

144. *See* RACHEL HARMON, THE LAW OF THE POLICE 787 (2021) (noting that the DOJ opens and negotiates "no more than a handful of new pattern-or-practices cases" against police departments each year due to limited budget and attorneys). Substantial evidence points to the problems in other cities. *See, e.g.*, CAMPBELL ET AL., *supra* note 131 (discussing the widespread failure to test rape kits in Detroit, Michigan); CASSIA SPOHN & KATHARINE TELLIS, NAT'L CRIM. JUST. REFERENCE SERV., POLICING AND PROSECUTING SEXUAL ASSAULT IN LOS ANGELES CITY AND COUNTY: A COLLABORATIVE STUDY IN PARTNERSHIP WITH THE LOS ANGELES POLICE DEPARTMENT, THE LOS ANGELES COUNTY SHERIFF'S DEPARTMENT, AND THE LOS ANGELES COUNTY DISTRICT ATTORNEY'S OFFICE 134-39 (2012) (describing failures of policing and prosecution of sexual assault in Los Angeles); Jeremy Kohler, *What Rape?*, ST. LOUIS POST-DISPATCH (Jan. 16, 2005), https://gilee.gsu.edu/files/2020/02/What-Rape-St-Louis-Post-Dispatch-January-6-2005.pdf [https://perma.cc/V8Z8-G4M4] (describing the police practice of diverting rape complaints from formal processing in St. Louis, Missouri); Erin Alberty & Janelle Stecklein, *Study: Most Rape Cases in Salt Lake County Never Prosecuted*, SALT LAKE TRIB. (Jan. 7, 2014, 9:48 AM), https://archive.sltrib.com/article.php?id=57323282&itype=CMSID [https://perma.cc/5WLZ-F7X9] (describing an audit of 270 rape cases in Salt Lake County in which only 6 percent were prosecuted).

To illustrate the findings, in 2011, the DOJ found that gender-biased policing in New Orleans resulted in a massive under-investigation of sexual assault and domestic violence incidents.[145] The New Orleans Police Department had, for years, "systematically misclassified large numbers of possible sexual assaults, resulting in a sweeping failure to properly investigate many potential cases of rape, attempted rape, and other sex crimes."[146] When they did investigate complaints, detectives frequently used "problematic interviewing techniques such as blaming or leading questions, and stereotypes regarding how a victim behaves in a 'real' case of rape."[147] The DOJ noted: "The documentation we reviewed was *replete with stereotypical assumptions and judgments about sex crimes and victims of sex crimes*, including misguided commentary about the victims' perceived credibility, sexual history, or delay in contacting the police."[148]

In the DOJ's investigation of Missoula Police Department, which focused entirely on its failure to properly investigate sexual assault crimes, a major theme of its report was gender stereotyping.[149] The DOJ found evidence that Missoula detectives expressed unjustified skepticism of women complainants and "improperly rel[ied] on women's sexual histories in evaluating their veracity."[150] The report found that the detectives' behavior discouraged women from following through on their reports. "[One woman] described follow up conversations with the same detective as having 'her spirits ... crushed daily.'"[151] Given that the Reid interrogation manuals specifically recommend that detectives perform empathy for the suspect, another finding is particularly troubling:

> MPD detectives investigating sexual assault ... relied on practices that often substantially compromised the investigation,

145. NOLA REPORT, *supra* note 140, at 43.

146. *Id.* at xi.

147. *Id.* at 47.

148. *Id.* at xi (emphasis added). Thus, they "routinely ask[ed] questions that are likely to heighten many victims' feelings of shame and self-blame, fear of not being believed, and lack of confidence in the criminal justice system." *Id.* at 46.

149. *See* Missoula Report, *supra* note 141, at 6, 12-14 ("[T]hese investigative weaknesses appear due, at least in part, to stereotypes and misinformation about women and victims of sexual assault.").

150. *Id.* at 13.

151. *Id.* at 12.

> including by demonstrating disproportionate concern for the male suspects. This apparent empathy for the suspects was often communicated to the women reporting the sexual assault.... Communicating this empathy about the suspect to the woman reporting the sexual assault conveys that investigators do not appreciate that non-stranger sexual assault, like assault by strangers, can be traumatic and devastating. Communicating empathy for the suspect also actively, and perhaps intentionally, discourages women from continuing to seek criminal justice.[152]

Beyond these failures to conduct a proper investigation, police across the nation sometimes turn interviews of sexual assault complainants into hostile interrogations, seizing on inevitable inconsistencies as evidence of fabrication,[153] and sometimes arresting the complainant for filing a false police report.[154] The skepticism and hostility that accompany victim-blaming contribute to the unwillingness of sexual assault victims to report the crimes.[155]

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152. *Id.* at 13-14.

153. *See* Megan R. Greeson, Rebecca Campbell & Giannina Fehler-Cabral, "Nobody Deserves This": *Adolescent Sexual Assault Victims' Perceptions of Disbelief and Victim Blame from Police*, 44 J. CMTY. PSYCH. 90, 92 (2015) ("[F]or many adult victims, the interview process moves beyond information gathering to *interrogation of the victim*: The survivor is grilled for information, her story and credibility are questioned, and the officer may express outright disbelief and blame.").

154. *See* Adrian Horton, *'Kafka-esque Nightmare': What Many Women Face When Reporting Rape*, GUARDIAN (May 20, 2023, 11:00 AM), https://www.theguardian.com/film/2023/may/20/netflix-documentary-victim-suspect-women-rape [https://perma.cc/6BKB-K3GY] (reporting on 2023 documentary *Victim / Suspect*, which "found over 160 cases over the past decade in which the person voluntarily reporting to police turned into the suspect, charged with false reporting"); Reedy v. Evanson, 615 F.3d 197, 203-09 (3d Cir. 2010) (describing a case where charges against Reedy for false reporting were dropped only after a man arrested for a subsequent rape confessed to raping Reedy); T. Christian Miller & Ken Armstrong, *An Unbelievable Story of Rape*, PROPUBLICA (Dec. 16, 2015), https://www.propublica.org/article/false-rape-accusations-an-unbelievable-story [https://perma.cc/D3XR-Y5WX] (describing how police coerced a rape complainant into confessing the falsity of her report, later proved to be true when police arrested a serial rapist who had committed several more similar rapes). *See generally* Lisa Avalos, *The Chilling Effect: The Politics of Charging Rape Complainants with False Reporting*, 83 BROOK. L. REV. 807 (2018).

155. *See, e.g.*, Decker et al., *supra* note 134; Dara E. Purvis & Melissa Blanco, *Police Sexual Violence: Police Brutality, #MeToo, and Masculinities*, 108 CAL. L. REV. 1487, 1491-92 (2020); Jodie Murphy-Oikonen, Karen McQueen, Ainsley Miller, Lori Chambers & Alexa Hiebert, *Unfounded Sexual Assault: Women's Experiences of Not Being Believed by the Police*, 37 J. INTERPERSONAL VIOLENCE 8916, 8918-19 (2020), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC9136376/ [https://perma.cc/JH7R-5ZY8] ("[I]ncreased victim blame by police during the investigation of sexual assault resulted in fewer investigative steps and decreased the

Finally, police are all the more likely to blame the victims of intimate partner violence when one considers that police officers themselves are more likely than members of the general population to be the perpetrators of such violence.[156] Conor Fiedersdorf summarizes the existing studies as finding a domestic violence rate two to four times higher than in the general population.[157] Even the International Association of Chiefs of Police (IACP) recognizes the prevalence of intimate partner incidents among police officers.[158] As a particularly striking example, the DOJ's report on the Puerto Rico Police Department (PRPD) found that, from 2005 to 2010, it "received 1,459 civilian complaints alleging domestic violence by officers."[159] From 2007 to 2010, eighty-one PRPD officers were arrested at least twice for domestic violence, seventy-three of whom remained on the force at the time of the report.[160] According to the DOJ and legal scholars, tolerating domestic abuse within police exacerbates the general difficulty of investigating domestic abuse because it makes victims more reluctant to report such crimes.[161]

Along with this abundant evidence that police blame women victims of violent crime, there is evidence of a similar phenomenon

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likelihood of the case proceeding to prosecution.").

156. *See* Brenda L. Russell & Nicholas Pappas, *Officer Involved Domestic Violence: A Future of Uniform Response and Transparency*, 20 INT'L J. POLICE SCI. & MGMT. 134, 135 (2018); Leigh Goodmark, *Hands Up at Home: Militarized Masculinity and Police Officers Who Commit Intimate Partner Abuse*, 2015 BYU L. REV. 1183, 1191; Leanor Boulin Johnson, Michael Todd & Ganga Subramanian, *Violence in Police Families: Work-Family Spillover*, 20 J. FAM. VIOLENCE 3, 3 (2005); Andrew H. Ryan, Jr., *The Prevalence of Domestic Violence in Police Families*, *in* DOMESTIC VIOLENCE BY POLICE OFFICERS 297, 300-02 (Donald C. Sheehan ed., 2000).

157. *See* Conor Fiedersdorf, *Police Have a Much Bigger Domestic-Abuse Problem Than the NFL Does*, ATLANTIC (Sept. 19, 2014), https://www.theatlantic.com/national/archive/2014/09/police-officers-who-hit-their-wives-or-girlfriends/380329/ [https://perma.cc/F4SF-HX9P].

158. *Domestic Violence*, INT'L ASS'N OF CHIEFS OF POLICE 13 (Apr. 2019), https://www.theiacp.org/resources/policy-center-resource/domestic-violence [https://perma.cc/EEX3-3A6C]. The IACP issued a comprehensive report along with a model policy on the issue of domestic violence by law-enforcement officers that remains the blueprint for police departments around the United States. *Id.* at 1-7. The IACP proposed education and training in addition to aggressive prosecution of all confirmed instances. *Id.* at 13, 16-17.

159. PR REPORT, *supra* note 138, at 16.

160. *Id.* at 17 tbl.2. At least three officers shot their spouses in one year, 2010. *Id.*

161. U.S. DEP'T OF JUST., IDENTIFYING AND PREVENTING GENDER BIAS IN LAW ENFORCEMENT RESPONSE TO SEXUAL ASSAULT AND DOMESTIC VIOLENCE 3, 21 (2015), https://www.justice.gov/opa/file/799366/download [https://perma.cc/NJ9J-WHPD]; *see also* Keith W. Strandberg, *Domestic Abuse Among Cops*, 26 LAW ENF'T TECH., June 1999, at 38; Goodmark, *supra* note 156, at 1199-1204.

regarding race. To begin, there is evidence that people in general are more likely to blame Black victims.[162] From journalistic accounts, some police appear to discount the significance of Black homicide victims by blaming their race.[163] Jill Leovy discovered in Los Angeles that

> [B]lack residents, to many officers, appeared more violent than Hispanics. Their own eyes told them so.... "Maybe the stereotype is true," said [one detective] .... "I like to think it is a choice." ... But talk of "choices" also inevitably raised questions of blame. And since blame also served as a satisfying distancing mechanism, officers ended by blaming not just suspects but victims for the "choices" they'd made. Some version of "good riddance" summed up much of the cops' private response to violence there.[164]

It is difficult to imagine that the attitude of "good riddance" does not undermine the detective's motivation for the investigation, and therefore its quality.

Perhaps the pinnacle of the police tendency to blame victims is when they blame civilians against whom they used violence. We see this idea embodied in the title of Sunil Dutta's infamous op-ed: *I'm a Cop. If You Don't Want to Get Hurt, Don't Challenge Me.*[165] We see the same sentiment in the words of Cleveland's former Police Patrolmen's Association President, Jeff Follmer, who spoke in the context of the police shooting death of twelve-year-old Tamir Rice (who was in possession of a toy gun): "How about this: Listen to police officers' commands. Listen to what we tell you, and just stop.... I think that eliminates a lot of problems. I think the nation needs to realize that when we tell you to do something, do it."[166]

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162. *See* Layanne Vieira Linhares, Ana Raquel Rosas Torres, Ana Karolynne Vasconcelos de Lucena & Nathalia Soeiro Calabresi de Napolis, *Blaming the Black Victim: The Victim's Skin Color and Belief in a Just World*, 31 TRENDS PSYCH. 1, 12 (2023).

163. *See* JILL LEOVY, GHETTOSIDE: A TRUE STORY OF MURDER IN AMERICA 64-65 (2015).

164. *Id.* at 65.

165. Sunil Dutta, *I'm a Cop. If You Don't Want to Get Hurt, Don't Challenge Me.*, WASH. POST (Aug. 19, 2014, 6:00 AM), https://www.washingtonpost.com/posteverything/wp/2014/08/19/im-a-cop-if-you-dont-want-to-get-hurt-dont-challenge-me/ [https://perma.cc/A7RY-FC5E].

166. Robby Soave, *Police Union Boss Defends Killing of Tamir Rice: 'When We Tell You to Do Something, Do It'*, REASON (Dec. 17, 2014, 3:56 PM), https://reason.com/2014/12/17/police-

Where the public has an interest in minimizing the police use of lethal force, the logic here is that the victims are to blame if they did not immediately and precisely obey any and all police commands. As police disproportionately kill Black Americans,[167] this form of victim-blaming is also racially disproportionate.[168]

In summary, police are prone to blame victims both because victim-blaming is a common way to preserve the belief in a just world and because the job presents situational factors that encourage it—proximity to emotional victims, hyper-masculinity that disapproves of vulnerability, and the personal use of victim-blaming to rationalize aggression and violence.[169] Victim-blaming especially characterizes policing responses to sexual assault and domestic violence offenses, which impedes the successful prosecution of such crimes.[170] But victim-blaming arises more generally, including for blaming racial minorities.[171] Where it occurs, victim-blaming undermines effective law enforcement by deterring victims from reporting crimes and by degrading the quality of the detective's investigation of the crime.[172]

That is the status quo of policing culture. Now we explain why the training in and use of victim-blaming narratives in interrogations

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union-boss-defends-killing-of-tam/#.6a02fd:cTJh [https://perma.cc/J9F9-GRRC].

167. The *Washington Post*'s database of police shootings shows that Black Americans are killed at a rate (6.1 per million) more than twice that of white Americans (2.4 per million). *See Police Shootings Database*, WASH. POST (May 10, 2024), https://washingtonpost.com/graphics/investigations/police-shootings-database/ [https://perma.cc/M8UD-FQN4].

168. *See, e.g.*, Kaela R. Dunn, Note, *Lessons From #MeToo and #BlackLivesMatter: Changing Narratives in the Courtroom*, 100 B.U. L. REV. 2367, 2395 (2020) ("In police violence prosecutions, victim blaming occurs through a subtle determination that the victim deserved what happened because they were aggressive or threatening and that they were aggressive or threatening simply because of their racial identity."); David Dante Troutt, Screws, Koon, *and Routine Aberrations: The Use of Fictional Narratives in Federal Police Brutality Prosecutions*, 74 N.Y.U. L. REV. 18, 116-17 (1999) ("The use of authority narratives to invoke [myths] of black male dangerousness and criminality maintains a status quo in which victims of color are easily objectified, dehumanized, and physically and verbally violated."); Frank Rudy Cooper, *Cop Fragility and Blue Lives Matter*, 2020 U. ILL. L. REV. 621, 650 ("It is common for police advocates to suggest that overpolicing of racial minority communities and disproportionate killings of unarmed racial minorities are the fault of those people being criminals.").

169. *See supra* notes 118-31 and accompanying text.

170. *See supra* notes 132-34, 136-42, 146-47, 153-55 and accompanying text.

171. *See supra* notes 162-68 and accompanying text.

172. *See supra* notes 136-42, 145-46, 153-55, 161-62 and accompanying text.

tend to make the cultural problem worse or at least impede its reform.

B. Victim-Blaming in Interrogation Makes Victim-Blaming in Criminal Investigations More Likely

American detectives receive training in victim-blaming as an interrogation technique, and they practice that technique over long careers. In this Section, we explain the likely result: a detective cadre that is more likely to engage in victim-blaming outside of the interrogation room. Partly, this is because the anticipation of using the technique likely influences who seeks to become a detective—a *self-selection* story.[173] Partly, this is because some detectives are slowly lulled into believing the victim-blaming stories they tell, at least to some degree—a *persuasion* story.[174] If so, then the interrogation technique of victim-blaming degrades policing because detectives are less motivated to take seriously crimes for which they are less sympathetic to and trusting of the victims. Although we focus here on gender-based examples, our analysis is equally applicable to other victim-blaming based on age, race, religion, sexual orientation, or other factors.

We do not argue that the practice of moral minimization in interrogation is alone responsible for all of the victim-blaming elements in police culture. Cultural formation is far too complex for such a mono-causal claim. We argue only that the training of detectives in the techniques of victim-blaming—which includes encouraging detectives to engage the suspect with empathy while blaming the victim—makes *some* contribution to a culture of victim-blaming, or at least that it is a striking barrier to reform. The point, we think, is general. When we acquiesce to police practices involving cruelty, dishonesty, discrimination, violence and the like, we risk creating a morally and behaviorally corrupt police force. Moral minimization is one example.

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173. *See infra* Part II.B.1.
174. *See infra* Part II.B.2.

1. Self-Selection

The people who choose to apply for police jobs may differ in various ways from the people who do not choose to become police officers. S*elf-selection* in employment generally refers to the fact that the characteristic of a job affects who is drawn into that job, which means that one can indirectly change the characteristics of the employees by changing the characteristics of the job.[175]

Existing models of self-selection in policing focus on who becomes a public employee.[176] Those who become social workers are more likely to be those who gain intrinsic pleasure from "helping others" in the ways that social workers do.[177] More precisely, the average social worker is likely to be someone who gains more such intrinsic pleasure than those who are not social workers.[178]

Something similar might be said of those who become police officers. Police can help people in different ways, so they might be intrinsically motivated toward public service. The job of policing offers opportunities specifically to help victims of crime, so those more empathetic toward victims might self-select into the job. A less optimistic possibility the economic literature explores is that those who become police are more likely to gain intrinsic pleasure from enforcing rules or punishing rule-violators.[179] Stated conversely, those who gain nothing intrinsically from enforcing rules or punishing violators are less likely to be police officers. Those who actually incur intrinsic costs from enforcing rules or punishing violators are least likely to become police officers.

We wish to informally extend such models to the subsequent question of who *within* a police force becomes a police detective.[180]

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175. *See* Candice Prendergast, *The Motivation and Bias of Bureaucrats*, 97 AM. ECON. REV. 180, 188 (2007).

176. *See id.* at 191-92.

177. *Id.* at 191.

178. *Id.* at 191-92.

179. For a self-selection model of policing, see generally Dhammika Dharmapala, Nuno Garoupa & Richard H. McAdams, *Punitive Police? Agency Costs, Law Enforcement, and Criminal Procedure*, 45 J. LEGAL STUDS. 105 (2016). For evidence that the process of self-selection makes police more punitive (and also more trustworthy) than the average person, see Guido Friebel, Michael Kosfeld & Gerd Thielmann, *Trust the Police? Self-Selection of Motivated Agents into the German Police Force*, 11 AMER. ECON. J.: MICROECONOMICS 59, 72-74 (2019).

180. Most hiring to the detective rank is internal to the department. *See* Jonathan S.

Police officers have to exert themselves to gain the promotion to detective, and many never try or never push themselves to study as necessary to get the job.[181] Our claim is this: as the nature of any job tends to affect the characteristics of those who seek the job, the nature of police interrogation affects who seeks to be a detective. Starting with the most optimistic possibility, those who seek to become detectives are intrinsically motivated to help victims by apprehending offenders. Police detectives might be more empathetic than the average person towards victims.

Yet there is at least one force of self-selection pushing in the opposite direction: interrogation methods. We are assuming, of course, that the content of interrogation techniques is not a complete secret for rank-and-file officers, but that interrogation stories circulate within the police department. If so, then we think it fair to assume that rank-and-file officers understand the basic fact that interrogation techniques involve, as the manuals put it, "degrad[ing] the victim," as well as performing empathy with the suspect perpetrator.[182]

If so, how does the training in and practice of those tasks affect who seeks to become a detective? One would expect that those who suffer no intrinsic cost from degrading victims would be more likely to seek the job of detective than those who do incur such a cost. *To be clear, we are not at all saying that a person would only seek to become a detective if they enjoy degrading victims or performing empathy with suspects*. There are many factors influencing who seeks to be a detective, including the general possibility of empathy towards victims. We are not denying that some detectives are forever repulsed by this performative aspect of their job. We are simply applying the logic of self-selection to say that the interrogation method of victim-blaming works counter to any tendency to empathize with victims.

The key point is that those who empathize with victims will experience the performance of victim-blaming as more costly than those who do not empathize with victims. Conversely, one way to experience lower intrinsic costs is just that one is less offended by

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Masur, Aurélie Ouss & John Rappaport, *Labor Mobility and the Problems of Modern Policing*, 99 N.Y.U. L. REV. 128, 144-45 (2024).

181. *See id.*

182. *See supra* notes 42-44 and accompanying text.

misogynistic or bigoted tropes than others. Another possibility is that one has fully internalized victim-blaming narratives and will not need to lie to blame victims and empathize with suspects who have committed crimes against women (or other groups).[183]

By contrast, those police officers who not only disbelieve the victim-blaming tropes but are repelled by the thought of playing this role, or simply lack the psychological capacity to fake the necessary sympathy for the hate-motivated perpetrator (especially when the officer shares the victim's gender, race, sexual orientation, or religion), are less likely to seek (or keep) the job. If so, the kind of officers who find victim-blaming especially odious will see less value in acquiring a job that involves deploying such tropes and are therefore less likely on the margin to become (or remain) detectives.

As a result of self-selection, detectives will be composed more of those police officers who are less repelled by the need to endorse misogynistic and other bigoted thinking, and more of those fully capable of showing sympathy to the perpetrators' victim-blaming. Detectives who tend to blame women for rape or assault are likely to be poor investigators of those crimes, as they will bring an excessive skepticism to the claims of women victims, which will deter future reporting of the crime.[184] Patrol officers can also damage the law enforcement function, but detectives occupy the critical position most responsible for investigating crimes and making arrests.[185] Pushing the least victim-sensitive police into detective work for violent crimes undermines the overall mission to solve cases.

2. Persuasion

Perhaps more obvious than self-selection is *persuasion*. The training and practice of victim-blaming may insidiously persuade its practitioners to take such thinking more seriously.

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183. *See* Maya Oppenheim, *Victim Blaming by Police Officers Is Harming Rape Investigations, Report Finds*, INDEPENDENT (Dec. 15, 2022, 6:38 PM), https://www.independent.co.uk/news/uk/home-news/rape-investigations-police-victim-blaming-b2245885.html [https://perma.cc/KF5E-ENNU].

184. *See supra* Part II.A.

185. *See Occupational Outlook Handbook: Police and Detectives*, U.S. BUREAU LAB. STAT., https://www.bls.gov/ooh/protective-service/police-and-detectives.htm#tab-2 [https://perma.cc/3LQ9-8EA3].

In making our claim, we want initially to acknowledge that professional interrogators know they are playing an informational game with their suspects. Part of that game is a strategy of deception. We are not generally inclined to think that professional interrogators conflate what they believe and what they say to suspects. The interrogator is an actor who can generally distinguish the role from the self. Notwithstanding this general point, however, there are particular risks when interrogators repeatedly play the role of the misogynist, the racist, the homophobe, the anti-Semite, the Islamophobe, and bigots of other varieties in order to carry out a theme of victim-blaming.

Unlike criminal suspects, who may hear a victim-blaming narrative in the interrogation room once or twice in a lifetime, interrogators are exposed to the narrative repeatedly over a career, from training, from listening to a fellow detective, or from actively deploying the tactic themselves. Doubtlessly, some detectives never lose their repulsion at victim-blaming tropes even as they deploy them. Yet even if some or most detectives resist, other detectives may slowly internalize the narrative to some degree. Even dramatic actors sometimes struggle to separate their own lives with their character's lives.[186] Undercover operatives sometimes come to identify with the criminal organization they infiltrate and struggle to maintain law enforcement values, a problem dubbed the "*undercover Stockholm syndrome*."[187] Given a general human

186. *See* Steven Brown, Peter Cockett & Ye Yuan, *The Neuroscience of Romeo and Juliet: An fMRI Study of Acting*, ROYAL SOC. OPEN SCI. 14-16 (Mar. 13, 2019), https://royalsocietypublishing.org/doi/epdf/10.1098/rsos.181908 [https://perma.cc/2U4B-YXE6]; Meghan L. Meyer, Zidong Zhao & Diana I. Tamir, *Simulating Other People Changes the Self*, 148 J. EXPERIMENTAL PSYCH.: GEN. 1898, 1909-11 (2019); Suzanne Burgoyne, Karen Poulin & Ashley Rearden, *The Impact of Acting on Student Actors: Boundary Blurring, Growth, and Emotional Distress*, 9 THEATRE TOPICS 157, 160-65 (1999).

187. *See, e.g.*, Laurence Miller, *Undercover Policing: A Psychological and Operational Guide*, J. POLICE & CRIM. PSYCH. 1, 1, 11-13 (2006) (reporting that the psychological effects of undercover work included "corruption of the agent's value system and commitment to the operation, including a growing sympathy for the targets" and that "[s]ome UCOs are able to achieve the kind of mental dissociation necessary to accomplish this role, while others may be drawn into a questioning of their own loyalties and commitments, as their sympathy for the target grows"); *see also* Gary M. Farkas, *Stress in Undercover Policing*, *in* PSYCHOLOGICAL SERVICES FOR LAW ENFORCEMENT 431, 433-40 (James T. Reese & Harvey A. Goldstein eds., 1986); Devin Kowalczyk & Matthew J. Sharps, *Consequences of Undercover Operations in Law Enforcement: A Review of Challenges and Best Practices*, 32 J. POLICE & CRIM. PSYCH. 197, 198 (2017) (reporting that friendship or loyalty to criminals was reported in almost half of

tendency to blame victims, it would be surprising if this constant exposure and rehearsal of the tropes had absolutely no tendency to persuade any detectives to find victim-blaming reasoning more acceptable. We explore three theories of this persuasion.

a. Cognitive Dissonance and Counter-Attitudinal Advocacy

According to a decades-old psychological theory, if one aims to say things one does not believe, there is an uncomfortable dissonance between one's words (or actions) and beliefs, which is partly relieved by moving one's beliefs closer to the things one is saying.[188] As Kurt Vonnegut put it: "We are what we pretend to be, so we must be careful about what we pretend to be."[189]

A related literature on counter-attitudinal advocacy (CAA) explores the effects of making statements contrary to one's genuine beliefs.[190] The research first arose to study political indoctrination, soldier brainwashing, and cult membership, all of which seem to involve a process where being pressured to say certain words causes people to believe the words they say more than they did initially.[191] A convenient example is lawyering, where expressive advocacy tends to cause lawyers to believe more in the arguments they express.[192] A meta-analysis of 230 studies found that such counter-attitudinal advocacy was consistently successful in changing attitudes.[193] Cognitive dissonance is an important explanation for the transformation following advocacy behavior because "[o]ne way

undercover officers interviewed, "as a result of the divided loyalties engendered by close contact with criminal elements, and with cognitive dissonance resulting from investment in these loyalties").

188. *See* Eddie Harmon-Jones & Judson Mills, *An Introduction to Cognitive Dissonance Theory and an Overview of Current Perspectives on the Theory*, *in* COGNITIVE DISSONANCE: REEXAMINING A PIVOTAL THEORY IN PSYCHOLOGY 3-4 (Eddie Harmon-Jones ed., 2d ed. 2019).

189. KURT VONNEGUT, *Introduction* to MOTHER NIGHT, at v (Avon Books 1966) (1962).

190. *See* Sang-Yeon Kim, Mike Allen, Raymond W. Preiss & Brittany Peterson, *Meta-Analysis of Counterattitudinal Advocacy Data: Evidence for an Additive Cues Model*, 62 COMMC'N Q. 607, 607-08 (2014).

191. *Id.*

192. *See* David E. Melnikoff & Nina Strohminger, *The Automatic Influence of Advocacy on Lawyers and Novices*, 4 NATURE HUM. BEHAV. 1258, 1262 (2020).

193. Kim et al., *supra* note 190, at 607.

to make the cognitive system consistent with the behavior is to change the attitude."[194]

Cognitive dissonance theory and CAA demonstrate the potential for transformation in police officers who repeat victim-blaming narratives. Officers who do not initially believe these scripts may come to accept them as they repeat them over time and seek to persuade others of them. More precisely, to whatever degree detectives start out disbelieving the particular tropes they deploy, their beliefs will move incrementally towards the tropes the more they use them. This seems particularly plausible given the Reid manuals' recommendation that detectives seek to perform empathy with the suspect when blaming the victim.[195] Recall David Simon's observation that "a good detective will come close to *real* tears as he touches [the] shoulder" of a suspected wife murderer.[196] Over time, pretending to blame victims makes it more likely that interrogators will blame victims.

b. Desensitization

Desensitization is a familiar concept in the field of psychology, with application in areas ranging from treatment of phobias, anxiety, drug addiction, post-traumatic stress disorder, and pharmacology.[197] The idea that exposure to a particular stimulus can lead to desensitization to future exposures is a familiar one. In the case of law enforcement officers, they face first-hand and third-party exposure to violence, abuse, and other stressors in their daily work.[198] They interact with victims of horrific acts of homicide, rape, assault, robbery, and traffic accidents.[199] To be sure, this general exposure is likely to have a strong impact on police culture and policing experience regardless of interrogation technique. Our claim, however, is that the victim-blaming strategy adds another occasion

194. *Id.* at 609.

195. *See supra* note 49 and accompanying text.

196. *See* SIMON, *supra* note 77, at 203 (emphasis added).

197. *See infra* notes 201-03 and accompanying text.

198. *See* John M. Violanti, Desta Fekedulegn, Tara A. Hartley, Luenda E. Charles, Michael E. Andrew, Claudia C. Ma & Cecil M. Burchfiel, *Highly Rated and Most Frequent Stressors Among Police Officers: Gender Differences*, 41 AM. J. CRIM. JUST. 645, 652 tbl.3 (2016) (listing frequent stressors police face).

199. *See id.*

for desensitizing police officers to the plight of certain victims. Understanding precisely why this is so requires a better understanding of the process of desensitization.

Desensitization is a well-documented psychological process described as a steeling or numbing emotional response to stimuli that previously aroused an intense reaction.[200] For example, desensitization is used as a therapeutic intervention in treating phobias,[201] anxiety,[202] or post-traumatic stress.[203] An individual who is repeatedly exposed to a frightening or traumatic condition might experience a reduced response with repeated exposure over time. Specifically, desensitization to violence can trigger a decrease in empathy toward victims and greater disinhibition for violent behavior.[204]

One could argue that police are often exposed to violence and victim suffering and therefore could become desensitized even absent minimization. Surely some level of habituation could occur in day-to-day policing, but mere habituation is distinguishable from the psychological process of desensitization. Habituation comes from repeat exposure.[205] Although exposure is a necessary condition to

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200. For a description of desensitization as a form of exposure therapy, see Eric Vermetten & Ruth A. Lanius, *Biological and Clinical Framework for Posttraumatic Stress Disorder*, *in* 106 HANDBOOK OF CLINICAL NEUROLOGY 325, 326 (2012):

> Systematic desensitization ... us[es] brief, imaginal, and minimally arousing exercises. Pioneered by Wolpe (1961), systematic desensitization was among the earliest behavioral treatments studies for PTSD. It involves pairing imaginal exposure with relaxation, so that the anxiety elicited by the confrontation with the feared stimuli is inhibited by relaxation.... When a state of relaxation is achieved, the feared stimuli are introduced, via imagined scenarios, in a graded hierarchical manner, with the least anxiety-provoking scenarios presented first. When the patient begins to feel anxious, the instruction is given to erase the screen, focus on relaxation, and begin again. The scenario is repeated until it no longer elicits anxiety, at which point the next scenario is introduced. This process continues until the stimuli on the hierarchy no longer elicit anxiety.

201. *See* M.G. Gelder, I.M. Marks, & H.H. Wolff, *Desensitization and Psychotherapy in the Treatment of Phobic States: A Controlled Inquiry*, 113 BRIT. J. PSYCHIATRY, 53, 53-54 (1967).

202. *See* Richard J. McNally, *Mechanisms of Exposure Therapy: How Neuroscience Can Improve Psychological Treatments for Anxiety Disorders*, 27 CLINICAL PSYCH. REV. 750, 754 (2007).

203. *See* Vermetten & Lanius, *supra* note 200.

204. *See* Sylvie Mrug, Anjana Madan, Edwin W. Cook III & Rex A. Wright, *Emotional and Physiological Desensitization to Real-Life and Movie Violence*, 44 J. YOUTH ADOLESCENCE 1092, 1093-94, 1105 (2015).

205. *See* D.C. Demetre, *Habituation vs Desensitization in Behavioral Adaptation*, SCIENCE-BETA (Mar. 8, 2024), https://sciencebeta.com/habituation-vs-desensitization/ [https://perma.cc/

desensitization, research has shown that exposure alone is not sufficient.[206] Not every individual who is exposed responds identically, and many do not become desensitized.[207] Desensitization occurs most effectively when exposure to the arousing stimulus is paired with positive or calming stimuli like breathing or exercising, even when the pairing is manufactured.[208] Accordingly, an officer who is exposed to a violent scene or horrific pictures and is made to perform calmness or feign indifference is more likely to become desensitized. The psychological implications for the "good cop" who employs moral minimization strategies in the interrogation room is that they become less repulsed over time by the things they are saying.[209]

c. Illusory Truth

A final psychological mechanism related to persuasion is potentially at work here: the illusory truth effect. Illusory truth refers to the fact that mere familiarity makes things seem more likely to be true. This is why lies are more persuasive if they are frequently repeated.[210] A large psychological literature finds that people overweigh the truth of the repeated statement, even when it comes from a single source, because the repetition makes the statement familiar.[211] The detective who hears himself or another detective repeat the victim-blaming tropes in interrogations is therefore more likely over time to find such familiar statements to be plausible or true. At a time when some police departments are finally attempting to train detectives to be less skeptical of women complaining of

SZ3W-34VP].

206. *See id.*

207. *See id.*

208. *See* Vermetten & Lanius, *supra* note 200.

209. Further, studies show successful desensitization of phobias by pairing a mild exposure to the object of fear with a positive reward. *See id.* Any time a detective employs victim-blaming successfully, the exposure to the victim-blaming narrative is paired with a reward, which would seem to make it less repulsive.

210. Lisa K. Fazio, Nadia M. Brashier, B. Keith Payne & Elizabeth J. Marsh, *Knowledge Does Not Protect Against Illusory Truth*, 144 J. EXPERIMENTAL PSYCH.: GEN. 993, 993 (2015).

211. *See* Alice Dechêne, Christoph Stahl, Jochim Hansen & Michaela Wänke, *The Truth About the Truth: A Meta-Analytic Review of the Truth Effect*, 14 PERSONALITY & SOC. PSYCH. REV. 238, 241 (2010).

sexual assault,[212] this interrogation training and experience sends the opposite message.

In sum, like self-selection, persuasion makes it dangerous for police to adopt the role of victim-blamer. American police are too prone to blame certain victims of violent crimes. We make the problem worse or, at least, are not likely to make progress on that cultural problem while, at the same time, we encourage police detectives in interrogations to engage in victim-blaming-by-stereotype.

C. The Burden of Proof

Given the consequences, any commitment to egalitarianism must insist that government not endorse disparaging stereotypes on the basis of gender, race, religion, or sexual orientation, at the very least, *without justification*. Without empirical evidence that the specific tactic of victim-blaming-by-sterotype works to secure true confessions otherwise beyond our reach, we should end the practice. State and municipal legislatures should command that the funds they budget for law enforcement not be used to acquire interrogation manuals or training that recommend victim-blaming-by-sterotype.

But we must concede an empirical point. In this Part, we have proposed that victim-blaming-by-stereotype has two negative consequences. We have demonstrated the strong plausibility of these costs, but we have not empirically proven how many crime victims learn that the detectives on their case disparaged and blamed them for the crime. Nor have we proven empirically that real-world detectives who use victim-blaming in interrogation are in fact more prone to blame victims than those who do not use such techniques. Certainly, we cannot quantify the magnitude of the effect. Although we think the costs we identify are more plausible than the idea that victim-blaming-by-stereotype uniquely secures

212. *See* Shaun Griswold, *Police Respond to Bias, Victim-Blaming Concerns in MMIWR Cases*, INDIAN COUNTRY TODAY (Oct. 28, 2021), https://indiancountrytoday.com/news/police-respond-to-bias-victim-blaming-concerns-in-mmiwr-cases [https://perma.cc/7C6Y-2AXJ]; *DOJ Issues New Guidance for Police in Domestic Violence and Sexual Assault Cases*, ACLU (Dec. 15, 2015, 10:30 AM), https://www.aclu.org/press-releases/doj-issues-new-guidance-police-domestic-violence-and-sexual-assault-cases [https://perma.cc/HA6A-9WZV].

some true confessions, we admit that the skeptic may justifiably see the two sides to the issue as failing equally on empirical grounds. Such a skeptic would say, "The interrogation tactic may or may not work and it may or may not cause harms to victims and policing." On this view, neither side is convincing.

We have three replies. First, note how modest our argument is. We have not simply denounced all victim-blaming-by-stereotype regardless of the benefits.[213] We have instead explored social science literatures to argue for the plausibility of the costs we identify and advocated that the tactic not be used when the costs exceed the benefits.

Second, we should be consistent on both sides of the ledger. The claim that victim-blaming-by-stereotype causes more true confessions is not based on data. If we are going to tolerate the speculation about the possible benefits of the interrogation tactic, then we should absolutely also speculate about the possible costs, as we have done here. And while the arguments of this Part are squarely based on credible social science on self-selection and persuasion, the same cannot be said for the claim that victim-blaming-by-sterotype works to produce true confessions.

The next Part offers our third reply. We present a claim that the intentional gender and race classifications and stereotyping in interrogations trigger intermediate or strict scrutiny under the Equal Protection Clause. If so, then it is the government who bears the burden of proving that these stereotypes serve an important or compelling government interest.

III. VICTIM-BLAMING-BY-STEREOTYPE OFFENDS THE EQUAL PROTECTION CLAUSE

When state actors treat crime victims differently based on their gender, race, religion, or sexual orientation, they discriminate in a way that undermines American commitments to equality and fairness. In this Part, we argue that victim-blaming-by-stereotype contravenes the spirit and letter of anti-discrimination law,

213. For example, we are not prepared to say that an undercover agent should never engage in discriminatory speech to successfully infiltrate a sex trafficking ring or a hate group.

particularly the constitutional promise of equal protection.[214] Basic egalitarian principles stand against the government's endorsement of and reliance on demeaning stereotypes. Applied to suspect classes like race and gender, these principles demand that government bear a heightened burden of review, strict or intermediate scrutiny.[215]

Based on the extensive references to gender we found in the manuals, we begin Section III.A by examining the equal protection issue involved there. Given the more veiled references to race-based hate crimes, we separately discuss equal protection claims in that context in Section III.B. To meet their burden of proving an equal protection violation, victims who might bring either such claim would need to gather additional evidence specific to the jurisdiction in which they raise the claim. But if the evidence shows that police detectives in a jurisdiction intentionally select derogatory interrogation strategies based on the race or gender of their suspect's victim, then the burden shifts to the government to prove that the discriminatory classification serves important or compelling government objectives and is "substantially related" or "narrowly tailored" to meet those objectives.[216] In Section III.C, we return to the fact that no evidence exists that could possibly satisfy that burden.

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214. U.S. CONST. amend. XIV, § 1.

215. *See* Johnson v. California, 543 U.S. 499, 505 (2005); Price-Cornelison v. Brooks, 524 F.3d 1103, 1109 (10th Cir. 2008).

216. Regarding gender classifications, see Sessions v. Morales-Santana, 582 U.S. 47, 58-59 (2017) ("Successful defense of legislation that differentiates on the basis of gender, we have reiterated, requires an 'exceedingly persuasive justification.'"(citations omitted)); *id.* at 59 ("The defender of legislation that differentiates on the basis of gender must show 'at least that the [challenged] classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives.'" (alteration in original)); Craig v. Boren, 429 U.S. 190, 197 (1976) ("To withstand constitutional challenge ... classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives."); Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982) (requiring that government provide an "exceedingly persuasive justification" for a gender classification).

Regarding race classifications, see Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181, 206-07 (2023) (evaluating race classification first on whether it "further[s] compelling governmental interests" and second whether the "use of race is 'narrowly tailored'—meaning 'necessary' to achieve that interest").

A. Blaming Victims by Gender Stereotyping Denies Equal Protection

Throughout the criminal justice process, "[c]itizens are cloaked *at all times* with the right to have the laws applied to them in an equal fashion—undeniably, the right not to be exposed to the unfair application of the laws"[217] based on classifications such as gender or race. In the criminal context, we typically encounter claims of discrimination against defendants, but if law enforcement officers purposely discriminate against victims, witnesses, or other individuals, those individuals can bring a challenge on equal protection grounds.[218]

Our argument here is that the Equal Protection Clause protects victims of crimes, not merely defendants, from police discrimination. Even when victims are not members of a protected class, government law enforcement cannot lawfully deprive them of police protection without, at minimum, a rational basis.[219] Consider, for example, the equal protection claim brought against the Silver City Police Department in New Mexico for its failure to protect a domestic violence victim from her assailant.[220] Nikki Bascom was ultimately murdered by her boyfriend, a police captain who the local police declined to arrest or investigate following multiple domestic violence complaints.[221] Plaintiffs representing the victim's estate alleged an equal protection violation, arguing that law enforcement treated Ms. Bascom differently from other domestic violence victims and therefore violated her constitutional rights.[222] The trial and circuit courts agreed that Plaintiffs' claims were viable and should withstand summary judgment.[223] The Tenth Circuit has rendered similar rulings in support of claims by victims on equal protection

217. United States v. Avery, 137 F.3d 343, 353 (6th Cir. 1997) (emphasis added).

218. *See id.* at 355.

219. *See* Romer v. Evans, 517 U.S. 620, 631, 633 (1996); Dalton v. Reynolds, 2 F.4th 1300, 1308 (10th Cir. 2021).

220. *Dalton*, 2 F.4th at 1303, 1312 (affirming the trial court's finding that a reasonable jury could conclude that police provided the victim with less protection than similarly situated victims because of her romantic relationship with another officer).

221. *Id.* at 1303.

222. *Id.* at 1300, 1303.

223. *Id.* at 1312.

grounds, when some victims suffer disparate treatment by police in comparison to other victims.[224]

Police officers are trained to treat some crime victims, particularly in gender-based crimes, differently than others. The interrogation manuals train police officers to develop monologues that blame the victim according to harmful gender stereotypes.[225] The manuals recommend blaming the specifically female victim for having behaved in a manner that contributed to her victimization by specifically a man.[226] They blame the female victim of male violence for being "unbearable," "just like most other women."[227] Female victims of violent assaults or homicide are said to have "nagg[ed]" the offender in ways typical of women.[228] Those who were sexually assaulted are described as having "asked for it" by dressing or behaving promiscuously, as by showing off their breasts.[229] The manual recommends the performance of empathy towards the suspect, including a story that the detective himself almost came to violence recently against his "nagging" wife.[230] In the cases, we see male detectives proposing that the underaged girls who had been sexually assaulted were in fact "dirty" and "guilty" instigators of the sex.[231] Or as one male detective said to a male suspect regarding a female victim: "You're a man. And that I get. *It's happened to me*."[232]

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224. *See* Watson v. City of Kansas City, 857 F.2d 690, 695-96 (10th Cir. 1988) (applying equal protection when domestic violence victims received less police protection than other assault victims); Price-Cornelison v. Brooks, 524 F.3d 1103, 1105, 1113 (10th Cir. 2008) (applying equal protection when lesbian domestic violence victims received less protection than non-lesbian domestic violence victims). In all three of the cases discussed here, the court found plausible equal protection claims even though it applied the more government-friendly rational basis test rather than the strict or intermediate scrutiny tests. This is because the victims argued that they received less police protection than other similarly situated victims, not because of their membership in a suspect class that would trigger a heightened level of scrutiny.

225. *See supra* notes 23-47 and accompanying text.

226. *See supra* notes 23-47 and accompanying text.

227. *See supra* notes 46-47 and accompanying text.

228. *See supra* note 48 and accompanying text.

229. *See supra* notes 4, 88 and accompanying text.

230. INBAU ET AL., *supra* note 3, at 212.

231. *See supra* notes 92-94 and 97-98 and accompanying text.

232. *See* Gomez v. California, No. 1:18-CV-00642-DAD-SAB-HC, 2019 WL 358631, at * 11 (E.D. Cal. Jan. 29, 2019) (emphasis added); *see also* State v. Hines, 648 S.W.3d 822, 826 (Mo. Ct. App. 2022) (describing how a detective told a suspect "a story about an uncle [of the detective] who had engaged in an act with a minor in order to 'relate with the subject to build rapport'").

In short, police detectives conduct their investigations differently based on the gender of the victim. Courts have recognized for decades that the pernicious use of gendered and racist stereotypes degrade the subjects of those stereotypes and rob them of their autonomy and personhood. Two prominent examples in criminal law come to mind. First, rape shield laws in most states try to protect victims of sexual violence from victim-blaming rape tropes and gendered stereotyping by suppressing exactly the types of defense arguments that detectives now use in minimization interrogations.[233] While courts struggle to legally protect the vulnerable from intimate partner violence in other criminal law contexts, police detectives freely endorse old excuses for protecting the privileged.[234]

A second example is racial profiling. The Supreme Court has recognized that the use of intentional racial classifications in investigations can violate an individual's constitutional rights to equal protection, even when it does not violate the constitutional protection from unreasonable searches or seizures under the Fourth Amendment.[235] Police enforcement of our criminal law based on race, or other impermissible classifications such as gender, is the province of the Equal Protection Clause.[236]

The deployment of discriminatory stereotypes in the interrogations is constitutionally dubious and, given the right factual predicate, violates equal protection. We offer two theories for why the practice triggers heightened constitutional scrutiny. The primary theory is classification. When police detectives, as part of

233. *See generally* United States v. Pablo, 696 F.3d 1280 (10th Cir. 2012); United States v. Pumpkin Seed, 572 F.3d 552 (8th Cir. 2009); Wood v. Alaska, 957 F.2d 1544 (9th Cir. 1992); United States v. Saunders, 943 F.2d 388 (4th Cir. 1991); United States v. Driver, 581 F.2d 80 (4th Cir. 1978); United States v. Kasto, 584 F.2d 268 (8th Cir. 1978); Watts v. United States, 971 A.2d 921 (D.C. 2009).

In deciding the constitutionality of the Michigan rape shield law, the United States Supreme Court found that the law represents the valid determination by the state legislature that "rape victims deserve heightened protection" even in the face of the countervailing constitutional right of the defendant to a fair trial and to confront the evidence against him. *See* Michigan v. Lucas, 500 U.S. 145, 149-50 (1991). In addition to discrimination and prejudice, the Court also weighed the harassment and safety of the women who were portrayed as being responsible for their circumstances. *See id.* Safety and harassment are concerns for the victims of minimization cases too, whose assailants are sometimes released after having heard the minimizing or victim-blaming justification for their arrests.

234. *See supra* notes 4, 88 and accompanying text.

235. Whren v. United States, 517 U.S. 806, 813 (1996).

236. *Id.*

a deliberate interrogation strategy, blame women victims based on stereotypes of women, they are engaged in a gender classification. When they follow the manual, they target a class of victims for disparagement and that class is defined by gender.[237]

One asserting this equal protection claim would have to develop the facts demonstrating disparate use of victim-blaming by one or more detectives in a jurisdiction.[238] That some victims never discover that police have blamed them is without consequence for our analysis, as we would only expect victims who do discover the victim-blaming-by-stereotype to bring an equal protection claim. The plaintiff would then need to rule out the possibility that police equally blamed all genders, blaming male victims of sexual assault or intimate partner violence in the same way they blame female victims. We find absolutely no evidence of that even-handedness, not a single suggestion in the manual or in case law of detectives blaming men in the same way.[239] The fact that these victim-blaming strategies derive from interrogation intuitions of the mid-twentieth century when many believed the stereotypes were true,[240] that they overlap so substantially with misogynist tropes for blaming women for sexual assault and domestic violence, and that they are still usually deployed by male detectives all make it seem exceedingly unlikely that detectives who follow the manual are also improvising to treat male victims in the same way.[241]

One might push back against this claim by saying that interrogation involves the "mere" speech of government actors, not some allocation of a government burden (for example, arrest or prosecution) or benefit (for example, acceptance into a public university) on the basis of gender. But this reasoning is flawed. In interrogations, the burden to the crime victim is the denigration by an agent of the

237. *See supra* notes 46-48 and accompanying text.

238. It is well established that individuals who are personally injured by the state's discriminatory conduct—here, the disparaged victim—have standing to challenge the conduct even when the injury is stigmatizing and dehumanizing rather than economic. *See* Heckler v. Mathews, 465 U.S. 728, 739-40 (1984).

239. *See generally* sources cited *supra* note 27.

240. The Reid and Associates website says that the techniques date to 1947. *See About Reid*, *supra* note 30.

241. *See supra* notes 46-48 and accompanying text. We say "in the same way" because it would still be a gender classification if a department's detectives, in a class of cases, blamed all victims but blamed women on the basis of a gender stereotype, while blaming men on the basis of a non-gender stereotype, perhaps one associated with their age, wealth, or occupation.

state. Government actors decide which crime victims to denigrate on the basis of gender. Consider that if a department of motor vehicles had a practice of using insulting language to demean only the women applying for a driver's license; that would be the selective allocation of a burden even if the DMV granted women all the licenses they merited. So too when police detectives decide that doing their job requires that some but not all crime victims be blamed by demeaning stereotype.

Under equal protection doctrine, governmental classifications by gender trigger intermediate scrutiny.[242] While there can be no doubt that the government has a compelling interest in solving serious crimes by having the perpetrator confess, there is no evidence that victim-blaming-by-stereotype serves that interest. We made this point in the introduction[243] and return to it below. We note immediately, however, why the government's position is particularly weak: equal protection doctrine is especially skeptical of stereotypes. As Cornelia Pillard—then professor and now judge—writes, "The Supreme Court's recent equal protection jurisprudence sets a very high bar against sex-based stereotyping and overgeneralization."[244]

242. *See* Clark v. Jeter, 486 U.S. 456, 461 (1988).

243. *See supra* notes 5-7 and accompanying text.

244. *See* Cornelia T.L. Pillard, *Our Other Reproductive Choices: Equality in Sex Education, Contraceptive Access, and Work-Family Policy*, 56 EMORY L.J. 941, 948 (2007). Professor Pillard joined the D.C. Circuit in 2013. *Pillard, Cornelia Thayer Livingston*, FED. JUD. CTR., https://www.fjc.gov/history/judges/pillard-cornelia-thayer-livingston [https://perma.cc/4RME-8RC7].

Prominent Supreme Court cases make this point repeatedly.[245] In *J.E.B. v. Alabama ex rel. T.B.*, the State of Alabama brought suit on behalf of T.B., the mother in a child support case, against defendant J.E.B., the purported father.[246] Alabama used its peremptory challenges to strike nine out of the ten men in the jury pool.[247] When the jury of women rendered a verdict in favor of the State, J.E.B. appealed, arguing that the exclusion of the males on the jury violated the Equal Protection Clause.[248] Despite the fact that one of the parties was raising an argument on behalf of jurors, the Court held that "[i]ntentional discrimination on the basis of gender by state actors violates the Equal Protection Clause, particularly where, as here, the discrimination serves to ratify and perpetuate invidious, archaic, and overbroad stereotypes about the relative abilities of men and women."[249]

J.E.B. extended the Court's ruling from nearly a decade earlier in *Batson v. Kentucky*, where peremptory challenges were made on racial grounds.[250] In both instances, the use of stereotypes about the jurors could not be used as proxies to make assumptions about their competence and impartiality.[251] Critical here is the specific form of discrimination that the Court identifies as pernicious: the use of stereotypes. As the *J.E.B.* Court explains:

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245. *See, e.g.*, Orr v. Orr, 440 U.S. 268, 283 (1979) (striking down sex-specific alimony rules in part because "[l]egislative classifications which distribute benefits and burdens on the basis of gender carry the inherent risk of reinforcing the stereotypes about the 'proper place' of women and their need for special protection"); Nev. Dep't of Hum. Res. v. Hibbs, 538 U.S. 721, 730, 734-37 (2003) (holding that federal family leave law constitutionally applies to state employees in part because "[t]he long and extensive history of sex discrimination prompted us to hold that measures that differentiate on the basis of gender warrant heightened scrutiny"); Heckler v. Mathews, 465 U.S. 728, 739-40 (1984) ("[A]s we have repeatedly emphasized, discrimination itself, by perpetuating 'archaic and stereotypic notions' or by stigmatizing members of the disfavored group as 'innately inferior' and therefore as less worthy participants in the political community ... can cause serious noneconomic injuries to those persons who are personally denied equal treatment solely because of their membership in a disfavored group." (internal citation omitted)); Sessions v. Morales-Santana, 582 U.S. 47, 63 n.13 (2017) ("Even if stereotypes frozen into legislation have 'statistical support,' our decisions reject measures that classify unnecessarily and overbroadly by gender when more accurate and impartial lines can be drawn.").

246. 511 U.S. 127, 129 (1994).

247. *Id.*

248. *Id.* at 129-30.

249. *Id.* at 130-31.

250. 476 U.S. 79, 83 (1986); *J.E.B.*, 511 U.S. at 146.

251. *J.E.B.*, 511 U.S. at 146; *Batson*, 476 U.S. at 97-98.

> When state actors exercise peremptory challenges in *reliance on gender stereotypes*, they ratify and reinforce prejudicial views of the relative abilities of men and women. Because these stereotypes have wreaked injustice in so many other spheres of our country's public life, active discrimination by litigants on the basis of gender during jury selection "invites cynicism respecting the jury's neutrality and its obligation to adhere to the law." The potential for cynicism is particularly acute in cases where gender-related issues are prominent, such as cases involving rape, sexual harassment, or paternity.[252]

The Court has also soundly rejected the use of gender-based stereotypes in school admission cases. It held in *Mississippi University for Women v. Hogan* that the exclusion of men from the School of Nursing violates the Equal Protection Clause because it "tends to perpetuate the stereotyped view of nursing as an exclusively woman's job ... and makes the assumption that nursing is a field for women a self-fulfilling prophecy."[253] The Court famously held in *United States v. Virginia*[254] that the exclusion of women from the Virginia Military Institute (VMI) violated the Fourteenth Amendment by depriving women of the same opportunities as men based on gendered stereotypes of both sexes.[255]

As Judge Pillard summarizes the law:

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252. *J.E.B.*, 511 U.S. at 140 (emphasis added) (citation omitted) (quoting Powers v. Ohio, 499 U.S. 400, 412 (1991)). In the peremptory challenge cases, the party denied equal protection is the potential juror who is struck for impermissible reasons. *See* Edmonson v. Leesville Concrete Co., 500 U.S. 614, 618 (1991). Yet these cases grant relief to a party to the case who objected to the challenge, allowing a kind of third-party standing. *See id.* We have been assuming that only the crime victim can bring the equal protection claim we are describing, but we note that the logic of the peremptory challenge cases imply that criminal defendants should be allowed to raise the equal protection claims of their victims. We do not argue for such a result, given the interests of victims are so adverse to the offender that it seems important to allow the victim to control the remedy.

253. 458 U.S. 718, 729-30 (1982).

254. 518 U.S. 515 (1996).

255. *Id.* at 542-43 (citing United States v. Virginia, 52 F.3d 90, 93 (4th Cir. 1995) (Motz, J., dissenting from denial of rehearing en banc) (noting the argument and countering that "it is also probable that 'many men would not want to be educated in such an environment'").

> [E]ven statistically accurate generalizations about "typically male or female tendencies"—such as men's greater aggressiveness versus women's comparatively more cooperative temperament, or men's tendency to harass and women's victimization by sex harassment—cannot be grounds for official, sex-based discrimination.... The doctrine often seems more centrally concerned with the metastatic potential of sex-role stereotyping that sex-based disparate treatment reflects and reinforces than with the often benign or minimal concrete differences in treatment themselves. It thus recognizes that sex-role stereotyping is itself harmful because it projects patriarchal messages that make discrimination at once more likely and less apparent.[256]

There is no reason to think the police interrogation room is exempt from these constitutional constraints. Indeed, when the government defends its classifications, it usually tries to argue that they are not really a stereotype, but the whole point of the interrogation tactic is to comfort and reassure the suspect who the police believe acted out of a pernicious stereotype.[257] The government can hardly deny that the things the detectives say are the worst kinds of gender stereotyping.

Thus, the government that engages in blaming victims by gender stereotype—intentionally classifying by gender—must meet the standard the Court stated in the VMI case:

> [T]he reviewing court must determine whether the proffered justification is "exceedingly persuasive." The burden of justification is demanding and it rests entirely on the State. The State must show "at least that the [challenged] classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'" The justification must be genuine, not hypothesized or invented *post hoc* in response to litigation. And it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females.[258]

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256. Pillard, *supra* note 244, at 948.

257. *See supra* note 20 and accompanying text.

258. *Virginia*, 518 U.S. at 533 (alteration in original) (citations omitted); *see also* Clark v. Jeter, 486 U.S. 456, 461 (1988) (applying intermediate scrutiny under the Equal Protection Clause to sex-based classifications).

We explain in Section III.C why the government cannot possibly provide an "exceedingly persuasive" case for 1950s-based disparagement of women when none of the interrogation theories are grounded in hard data.

We promised a second equal protection theory and here it is, offered in the alternative to the primary theory of classification. For purposes of this argument, assume the plaintiff cannot prove the existence of a classification because they cannot prove that the government treats men and women differently. In other words, it is *possible* that police blame victims of all genders with a gender stereotype. We still think it should trigger heightened scrutiny when governmental actors, through their speech, explicitly and systematically endorse gender stereotypes. We think it would offend equal protection principles for the government to endorse disparaging racial stereotypes, even if it gave equal time to stereotypes of different races. In the same way, it offends equal protection if police detectives explicitly describe and endorse stereotypes of each gender (when blaming victims).[259]

We turn now to racial stereotyping.

B. Blaming Victims by Racial Stereotyping Denies Equal Protection

Victim-blaming-by-stereotype is not limited to gender. Interrogation manuals recommend blaming the victims of hate crimes, which means blaming victims of hate crimes targeting race, religion, and sexual orientation.

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259. The Supreme Court has not decided a case based solely on the stereotyping speech of government actors, but the doctrine supports the equal protection limitation on such speech. *See* Pillard, *supra* note 244, at 956-58 (arguing that sex education that endorses sex stereotypes is unconstitutional; "[u]nder the race cases, government can no more proclaim white supremacy than it can act on racist views to deny concrete opportunities; a similar bar should be recognized against official sex stereotyping"); Nelson Tebbe, *Government Nonendorsement*, 98 MINN. L. REV. 648 (2013) (arguing that equal protection doctrine limits the ability of governmental actors to endorse racial bias).

Given the limits of our knowledge about real-world interrogation, we concede the possibility that the use of hate crime stereotypes might be universal and in that limited sense "neutral." In other words, it is possible that detectives follow the manual by "[c]ompliment[ing]" the racial hate crime suspect for "standing up"[260] for his racist beliefs where the suspect is white, the victim is Black, and the racist beliefs are anti-Black, but are equally complementary when the suspect is Black, the victim white, and the racist beliefs are anti-white. The police might try to disparage the hate crime victim for being "arrogant, cocky, [and] aggressive"[261] without regard to whether the suspect/victim's races are Black/white, white/Black, or any other racial pairing. The same could conceivably be true when the hate crime is religious. The detectives might follow the manual by disparagingly referring to the victim's clothing as flaunting their religion just as much when the victim is a Catholic nun wearing a habit as where the victim is a Muslim woman wearing a hijab.[262] The same could be true, in theory, of hate crimes based on sexual orientation.

We deeply doubt that this theoretical even-handedness exists in reality. We suspect that the carefully neutral language of the manuals on interrogating victims of racial, religious, or sexual orientation-based hate crime obscures the fact that police disparage the non-white, non-Christian, LGBTQ victims, who are most of the victims, and not the white, Christian, straight hate-crime victims. To take the example of race, if police detectives intentionally choose to blame victims only when the suspect is white, and the victims are not, then they are classifying on the basis of race.

The resolution of the factual uncertainty must await future litigation or research. As we have said, any plaintiff must initially demonstrate a factual predicate for the equal protection claim based on data from the relevant jurisdiction.[263] But if police are making racial or ethnic classifications of victims in their interrogation decisions, then equal protection doctrine demands strict scrutiny. The Supreme Court reiterated this exacting standard in race classification cases:

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260. SENESE, *supra* note 27, at 171.
261. *Id.* at 170.
262. *See id.*
263. *See supra* note 238 and accompanying text.

> Any exception to the Constitution's demand for equal protection must survive a daunting two-step examination known in our cases as "strict scrutiny." Under that standard we ask, first, whether the racial classification is used to "further compelling governmental interests." Second, if so, we ask whether the government's use of race is "narrowly tailored"—meaning "necessary"—to achieve that interest.... Our acceptance of race-based state action has been rare for a reason. "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality."[264]

As we have just argued that victim-blaming-by-gender-stereotype cannot survive intermediate scrutiny, it is obvious that the government could not survive strict scrutiny for victim-blaming-by-racial-stereotype.[265] And, as explained in the prior section, even if police detectives disparage all races equally with demeaning stereotypes, the explicit government endorsement of such stereotypes should itself be held unconstitutional.[266]

In sum, the use of misogynistic, racist, homophobic stereotypes in state-sponsored justice proceedings not only harms the members of the classified group; it harms society as well. In the example of peremptory challenges, the Court emphasized that gender-based discrimination "causes harm to the litigants, the community, and the individual jurors."[267] Discrimination on the basis of race or gender or other forbidden characteristics harms its immediate victims, and while generally odious in many respects, courts have found it to be "especially pernicious in the administration of justice."[268] When parties are deprived of the equal protection of the

264. Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181, 206-08 (2023) (citations omitted).

265. *See* Rice v. Cayetano, 528 U.S. 495, 517 (2000) ("One of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities.").

266. *See supra* note 259 and accompanying text.

267. J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 140 (1994); *see also* Johnson v. California, 545 U.S. 162, 172 (2005) ("Yet the 'harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community. Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice.'").

268. Buck v. Davis, 580 U.S. 100, 124 (2017) (quoting Rose v. Mitchell, 443 U.S. 545, 555 (1979)).

law during the course of a criminal investigation or judicial proceeding, this "poisons public confidence" in the judicial process.[269] Not surprisingly, courts have responded with strong rebuke when prosecutors[270] or defense attorneys[271] have tainted court proceedings with conduct evidencing racial or gender bias. Law enforcement officers should be held to the same standard.

C. Unproven Victim-Blaming Tactics Fail Heightened Scrutiny

If the Equal Protection Clause puts a "demanding" burden of proof on governmental defenders of victim-blaming-by-stereotype, then the government should lose because there is no evidence that these tactics are effective. We add here to the review of the social science we provided in the introduction[272] by replying to what Reid has to say in defense of its method on its webpage.[273]

The corporate website claims on its "About" page that: "research ... has validated the core elements of the Reid Technique," describing some scattered studies and notably "the High Value Detainee Interrogation Group [hereinafter HVDI Group] created by President Obama in 2009."[274]

To be clear, none of the cited research addresses the specific tactic of victim-blaming, much less victim-blaming-by-stereotype. That is not one of the "core elements" any research addresses, so there remains absolutely no social science evidence supporting the effectiveness of the one tactic that is the focus of this Article. As its

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269. Davis v. Ayala, 576 U.S. 257, 285 (2015).

270. *See* United States v. Armstrong, 517 U.S. 456, 464 (1996) ("[T]he decision whether to prosecute may not be based on 'an unjustifiable standard such as race, religion, or other arbitrary classification.'" (quoting Oyler v. Boles, 368 U.S. 448, 456 (1962))); McCleskey v. Kemp, 481 U.S. 279, 309 n.30 (1987) ("The Constitution prohibits racially biased prosecutorial arguments.").

271. *See Buck*, 580 U.S. at 104-05 (holding that a defense attorney violated the accused's Sixth Amendment right when they introduced evidence that concluded he was statistically more likely to commit a crime because he was Black); B.K.B. v. Maui Police Dep't, 276 F.3d 1091, 1104-05, 1108 (9th Cir. 2002) (sanctioning defense counsel for introducing testimony about the plaintiff's sexual history).

272. *See supra* notes 6-7 and accompanying text.

273. *See International Research Validates the Core Elements of the Reid Technique*, JOHN E. REID & ASSOCS., INC. [hereinafter *International Research*], http://archive.reid.com/pdfs/20150511.pdf [https://perma.cc/VCG9-WEHD].

274. *See About Reid*, *supra* note 30.

origin is the mid-twentieth century, when many people believed in these stereotypes and some detectives intuited the technique of endorsing them, there is nothing like the "exceedingly persuasive" case the equal protection doctrine requires for gender classifications,[275] much less the "necessary" justification required for race classifications.[276]

We could leave the matter there, but we think it worth explaining further that no research validates the Reid method *overall* in the sense of proving that it works *better than* other methods. We are not disputing that interrogation by the Reid method works to produce confessions better than the *absence* of interrogation. Many American suspects subjected to that method do confess. But the relevant question we raise is whether the confessing suspect would have also confessed if the interrogators had used some other method, one that does not blame victims by stereotypes. If so, then there is no gain from blaming victims.

Of the various research the Reid webpage cites for support of its method, only one source purports to evaluate a variety of interrogation methods against each other—the HVDI Group report.[277] Yet the webpage fails to note that the very reason that the federal government needed the HVDI Group to evaluate interrogation tactics in 2015 was the fact that American interrogation practices had developed over time by custom and intuition, which is to say, without any scientific basis.[278] The first thing that stands out from the Group's report, then, is its tendency to ignore the Reid method altogether. While the chapter on "Interviewing Methods" devotes sections to "*Cognitive Interview*," "*Observing Rapport-Based Interview Techniques (ORBIT)*," "*The Scharff Technique*," and "*Strategic Use of Evidence*," there is no section on the Reid method,

275. Sessions v. Morales-Santana, 582 U.S. 47, 58 (2017).

276. Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181, 207 (2023).

277. *See* HIGH-VALUE DETAINEE INTERROGATION GROUP, INTERROGATION: A REVIEW OF THE SCIENCE 5 (Sept. 2016) [hereinafter HVDI REPORT], https://www.fbi.gov/file-repository/hig-report-interrogation-a-review-of-the-science-september-2016.pdf/view [https://perma.cc/D53P-YDV4].

278. *See* Christian A. Meissner, Frances Surmon-Böhr, Simon Oleszkiewicz & Laurence J. Alison, *Developing an Evidence-Based Perspective on Interrogation: A Review of the U.S. Government's High-Value Detainee Interrogation Group Research Program*, 23 PSYCH., PUB. POL'Y, & L. 438, 439 (2017).

nor even on the broader category of accusatorial or confrontational techniques.[279] That point alone rebuts Reid's self-serving claim that the report "validates" its method.

The Reid webpage goes on to say that the HVDI research "confirms the basic tenant of the Reid Technique—always treat the subject with understanding and empathy."[280] This is a way of rephrasing the HVDI report's recommendation in favor of building "rapport."[281] The Reid webpage cites to statements in the Reid manuals advising interrogators to show the suspect "decency and respect" and a "sympathetic, understanding attitude."[282] Thus, it is also about building rapport with the suspect.

But *most* interrogation methods seek to build rapport. The HVDI Group report notes that rapport-building is part of the four interrogation methods just named and is found in investigations in Canada, the United Kingdom, Indonesia, the Philippines, Sri Lanka, Australia, Norway, and Japan.[283] Of note, the report singles out for praise the method of Motivational Interviewing used in the United Kingdom.[284] The HVDI Group report "validates" the Reid method only in the sense that it validates all of the rapport-building methods, including those without a dose of victim-blaming.[285]

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279. *See* HVDI REPORT, *supra* note 277, at 24-27. The only other headings in that chapter are: "*Interrogating Across Cultures*," "*Interrogating via an Interpreter*," "*Interrogating as a team*," and "*Recording the interview*." *Id.* at 28-32.

280. *See International Research*, *supra* note 273. The same document cites Japanese research showing the value of a relationship-building approach. *Id.*

281. *See* HVDI REPORT, *supra* note 277, at 5.

282. *See International Research*, *supra* note 273.

283. *See* HVDI REPORT, *supra* note 277, at 17-18. The report identifies three components of rapport-building: mutual attention, coordination (synchrony, mimicry), and positivity (pleasant demeanor). *Id.* at 16. The Reid method is not necessarily inconsistent with these three elements, but it does not emphasize them more than other interrogation methods.

284. *Id.* at 18.

285. There is no description of victim-blaming as a tactic of any interrogation method the HVDI Report seriously reviews.

Note that a similar point applies to the second way the Reid webpage claims support from the HVDI Report. *See International Research*, *supra* note 273 (quoting Roni Jacobson, *How to Extract a Confession ... Ethically*, SCI. AMER. (May 1, 2015), https://www.scientificamerican.com/article/how-to-extract-a-confession-ethically/, on the value of storytelling). The HVDI REPORT, *supra* note 277, at 6, recommends "[e]licit[ing] information by telling stories," and the Reid document claims that "[t]his is exactly what we do in the development of our interrogation theme," which refers to the interrogator's monologue of describing "reasons and motives that will psychologically justify or excuse" the suspect's criminal act. *International Research*, *supra* note 273. But there is no claim here that Reid is the only method that

The report does refer to the main Reid manual on two occasions (not including some minor discussion of the separate issue of polygraphing). The first instance is supportive, though oddly overlooked by the Reid webpage. After discussing a psychological experiment that finds that the priming of positive self-views (self-affirmation) leads people to make more negative disclosures,[286] it states in a footnote: "The 'theme development' aspect of many law enforcement interviews may reduce resistance to disclosure by decoupling the disclosure from values important to the subject (thus avoiding self-disaffirmation)."[287] Here the report cites the main Reid manual.[288] So, one experimental study finds that priming affirmation may increase disclosure of negative or incriminating information, which is some weak evidence that interrogator statements supporting the suspect's self-image—such as the Reid method's "theme" development—may increase the number of incriminating statements.[289] This is the only positive mention of the Reid method in a dense sixty-three-page report.[290]

Again, however, there is no suggestion that other interrogation methods—all of which embrace rapport-building—*fail* to offer such

employs storytelling, so the report again provides no more support for the Reid method than many alternatives and does not speak at all to most facets of the method.

286. *See* HVDI REPORT, *supra* note 277, at 21 (citing Deborah Davis, Assaf Soref, J. Guillermo Villalbos & Mario Mikulincer, *Priming States of Mind Can Affect Disclosure of Threatening Self-Information: Effects of Self-Affirmation, Mortality Salience, and Attachment Orientations*, 40 LAW & HUM. BEHAV. 351 (2016)).

287. *See id.* n.xiv.

288. *Id.* (endnotes omitted).

289. Davis et al., *supra* note 286, is only "weak" evidence because, first, all laboratory experiments of criminal interrogation have external validity issues for reasons explained *supra* note 7, and the procedure of this experiment was not even framed as an interrogation. Second, the experiment used strong self-priming (asking participants to *write* an explanation of how their positive values shaped them) to produce weak results (greater willingness to admit embarrassing behavior and trivial crimes, such as downloading music illegally or texting while driving) among anonymous online participants, which might not predict how a detective priming affirmation would affect confessions of criminal wrongdoing by non-anonymous suspects facing the possibility of prison. Davis et al., *supra* note 286, at 353, 358. Nonetheless, because this research exists, we say that the evidence in favor of the general tactic of moral minimization is "weak," while the evidence in favor of the specific tactic of victim-blaming remains nonexistent.

290. There are neutral or negative references to Reid methods for using the polygraph. *See* HVDI REPORT, *supra* note 277, at 40, 82 nn.199, 205. There are negative references to the manual providing "unreliable cues to deception" such as "grooming gestures," and "nonverbal and paralinguistic cues of the sort that deception research has shown to be unreliable." *Id.* at 33.

affirming statements. So, this is not evidence that the Reid method outperforms any other method. And one can hardly "validate" the whole nine-step Reid method by identifying evidence that supports one element of the method. Finally, and most importantly, the cited experiments do not test and do not support the effectiveness of victim-blaming, much less victim-blaming-by-stereotype. Not only is it possible to affirm a suspect without blaming or stereotyping the victim, but the experiment primed self-affirmation only by asking participants to write positive things about themselves.[291]

Tellingly, the one other occasion on which the report mentions the Reid manual is negative. After noting that a study of 1,067 British interrogations using an information-gathering approach impressively "showed that only about 5% of the suspects remained silent," the report continues: "interview methods that encourage talking, such as the Cognitive Interview have been found to elicit significantly more cues to deceit than *accusatorial methods*, which are characterized by the interviewer talking more than the subject."[292] Here the report cites (only) to the main Reid manual.[293]

The Reid method is "accusatorial" because its first step, "Direct, Positive Confrontation," begins "with a direct statement indicating absolute certainty of the suspect's guilt."[294] Because Reid's step two is a minimizing *monologue*,[295] step three involves discouraging the subject from speaking denials,[296] and other advice insists that the detective maintain control of the interrogation by speaking,[297] the HVDI Group naturally distinguished the successful methods "that encourage talking" from the Reid method where the "interviewer

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291. *See* Davis et al., *supra* note 286, at 353.

292. HVDI REPORT, *supra* note 277, at 34 (emphasis added) (endnotes omitted).

293. *Id.* at 34, 74 n.8.

294. *See* INBAU ET AL., ESSENTIALS, *supra* note 27, at 107; *see also id.* at 5 (describing the basic "[c]haracteristics of an [i]nterrogation," the first of which is "[a]n interrogation is accusatory"); Christian A. Meissner, Christopher E. Kelly, Skye A. Woestehoff, *Improving the Effectiveness of Suspect Interrogations*, 11 ANN. REV. L. & SOC. SCI. 211, 216 (2015) ("One primary distinction has been proposed between the use of accusatorial approaches in North America and the development of information-gathering approaches in the United Kingdom, Australia, and elsewhere.").

295. *See supra* notes 34-39 and accompanying text.

296. *See* INBAU ET AL., ESSENTIALS, *supra* note 27, at 138, 140-42.

297. *See id.* at 149-59 (describing what the interrogator can say to overcome objections (step 4) and procure and retain the suspect's attention (step 5)).

talk[s] more than the subject."[298] In short, the government report that Reid offers on its own behalf, the only cited study that measures interrogation methods against each other, suggests that the Reid method is inferior to some alternatives.

To summarize, (1) there is no social science support for the initial premise that the accusatory style of interrogation, like the Reid technique, elicits more true confessions than alternative techniques;[299] (2) even if there were, there is no social science evidence that the specific minimization tactic of blaming victims causes additional true confessions; and finally, (3) even if there were, there is no social science evidence that the specific victim-blaming tactic of endorsing disparaging stereotypes causes additional true confessions.[300] If any heightened scrutiny applies, the government's defense of victim-blaming-by-stereotype loses.

CONCLUSION

The dominant interrogation manuals in American law enforcement begin with a first edition in 1962. The general tactic of moral minimization and the specific tactic of victim-blaming-by-stereotype date back to intuition and anecdote from before that time period. That is why the explicit stereotypes of women sound as if they were grounded in gender roles of the mid-twentieth century. No serious evidence demonstrates that we need to be doing this, that is, nothing demonstrates that victim-blaming-by-stereotype—whether on the basis of gender, race, religion, or sexual orientation—works to secure additional true confessions.

We have advanced three reasons to terminate the use of this interrogation technique. First, the use of gender and racial stereotypes as a means of blaming the victim in interrogation violates the victim's constitutional right to equal protection. Second, blaming the victim directly harms victims. Nothing could be a clearer form of "secondary victimization" than for the victim to learn that the detectives investigating the crime have endorsed the suspect's victim-blaming rationalization. Victims are also harmed when the

298. HVDI REPORT, *supra* note 277, at 34.
299. *See supra* note 6 and accompanying text.
300. *See supra* note 7 and accompanying text.

police endorsement of victim-blaming motivates the perpetrator to offend again. Third, blaming the victim reinforces a culture of victim-blaming within police departments, which deters the reporting of crime and undermines effective investigations. We explored two reasons that victim-blaming spills outside of the interrogation room: self-selection into the profession of detective work and the tendency of people to be persuaded by what they pretend to be.

One might use the Equal Protection Clause to litigate the issue, but we also advocate a simpler path: state and municipal legislatures should command that the funds they budget for law enforcement not be used to acquire interrogation manuals or training that recommend victim-blaming-by-stereotype. Given the profit-motive behind the private interrogation industry, even a few such budgeting decisions could generate enough commercial pressure to bring about change. In the end, our message is simple. Let us stop spending public tax dollars to train police to blame victims.