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CRIMINOGENIC RISKS OF INTERROGATION

Margareth Etienne* & Richard McAdams**

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INTRODUCTION

American detectives frequently use an interrogation tactic that is unseemly or even repellant, but rarely discussed: they minimize the moral wrongfulness of the crime. Moral minimization involves the interrogator trivializing the crime or offering moral excuses and justifications for its commission, attempting to convince the suspect that even the police do not regard the suspected criminal conduct to be seriously wrong. As an example, consider this script from the most popular interrogation training manual, for an employee theft suspect:

Egads, man, how in the world can anybody with a family the size of yours get along on that kind of money in this day and age? . . . Anyone else confronted with a similar situation probably would have done the same thing, Joe. Your company is at fault. . . . I can tell you this—if you received a decent salary in the first place, you wouldn't be here.¹

Interrogators here minimize the theft by saying that “anyone” in the same situation would have done the same, and blame the victim by suggesting that the employer was at fault for paying a miserly wage.

As we show, victim-blaming is a very common form of minimization, but there are several other techniques: diminishing the harm the suspect caused the victim, emphasizing how common the crime is, finding honorable motives for the crime, and shifting the blame to society or others, in addition to the victim. American interrogators are trained to focus much of their attention on developing the right *theme* of moral minimization, to present that theme in a monologue near the beginning of the interrogation, and to refer back to it regularly.

Why do interrogators work to minimize the seriousness of the crime? That question is our focus, and we find three possible answers. One

¹ FRED E. INBAU, JOHN E. REID, JOSEPH P. BUCKLEY & BRIAN C. JAYNE, CRIMINAL INTERROGATION AND CONFESSIONS 223 (5th ed. 2013) (proposing the script for an employee theft interrogation).

possibility is that the tactic is simply misguided and does not contribute to the law enforcement interest in confessions. The world of interrogation is not the world of science and data. Interrogators learn from and follow a conventional wisdom that lacks a solid empirical grounding. So it would not be very surprising if moral minimization contributed nothing to the causal efficacy of interrogation. If so, the tactic is an unfortunate waste of limited resources, consuming scarce time for training interrogators and scarce time for interrogating suspects.²

A second possibility is that moral minimization induces true confessions by conveying a promise or prediction of official leniency. If detectives do not take the crime seriously and sympathize with the offender's motive for offending, then the suspect may infer that the prosecutor and judge will also view the crime as less serious and worthy of less punishment. However plausible, no one defending the tactic would offer *this* understanding of its effects because the law of confessions disfavors police promises of leniency. The sound and long-standing judicial reasoning is that such promises may induce the innocent to confess, especially given that American interrogators are allowed to lie to the suspect about evidence of their guilt. A modern psychological literature on false confessions raises the concern that minimization promises leniency by implication, so this "defense" of the practice would actually condemn it.³

So we reach the final explanation for moral minimization, which is the one advocated by the interrogation manuals that teach its use. The manuals claim that the tactic works to induce true confessions by lowering the psychological costs of confessing to the interrogators.⁴ By making the crime seem less shameful, the guilty suspect will feel less shame in admitting guilt to the detectives in the interrogation room. Again, there is no empirical testing that validates this theory, and there is certainly room for skepticism. Nonetheless, we agree that this account is *plausible*. Officially endorsed rationalizations for criminality are likely to be powerful because they are surprising – coming from law enforcement officials the suspect

² See *infra* text accompanying notes 122-124.

³ See *infra* text accompanying notes 125-128.

⁴ INBAU, ET AL., *supra* note 1, at 203–04.

expects to strongly disapprove of felonies – and are delivered persistently and sympathetically in the intimate setting of an interrogation room.

In this article, we assume that this psychological account is correct, *i.e.*, that minimization is neither a mistake nor does it work by impliedly promising official leniency. We then demonstrate what unexpectedly follows if one takes the psychological account seriously.⁵ If moral minimization lowers the internal costs of *confessing* to crimes, it also lowers the internal costs of *committing* crimes. Thus, if moral minimization actually works as advertised, it does something worse than just wasting scarce resources; it risks promoting recidivism.⁶

We identify several legal and psychological literatures that support our claim that moral minimization risks increasing recidivism. First and foremost, the interrogation manuals explain the tactic's effectiveness by pointing to a psychological theory – neutralization – that holds that people are more likely to offend if they can first *neutralize* the shame and guilt they would ordinarily experience from committing a crime.⁷ In other words, many offenders have internalized the social norms against violent and fraudulent behavior that the criminal law enforces, but will still offend if they can mentally diminish the norm's psychological power with some superficially plausible moral justification or excuse. The avowed aim of moral minimization is to “reinforce” this process of deflecting guilt and shame. Ironically, then, the same theory that explains why moral minimization will disinhibit an individual's confession of crime predicts that minimization will disinhibit the individual's subsequent commission of crime.

⁵ There is a legal and psychological literature discussing whether the accusatory style of interrogation, which includes minimization and other tactics, causes false confessions. See *infra* note 15. This article focuses only on moral minimization and our contribution lies in identifying two novel adverse consequences of that tactic.

⁶ In another article, we identify a second cost: the training and practice of victim-blaming (one type of moral minimization) adversely affects policing and policing culture. The sexist stereotypes used to blame women, for example, reinforce hyper-masculine police culture, which impedes the investigation of domestic and sexual assaults of women.

⁷ See *infra* Part II-B-1.

Alongside neutralization, we explore six social science or legal theories that buttress our criminogenic claim: moral disengagement theory,⁸ the concept of the marginal offender,⁹ restorative justice research,¹⁰ the entrapment defense,¹¹ the social norms literature,¹² and research on legal legitimacy.¹³ Each of these discourses points in the same direction: moral minimization weakens internal and/or informal motivations for legal compliance. The tactic is likely to be criminogenic. No one has previously explored the social science that draws the connection between interrogation practices and their criminogenic risks.¹⁴

As we explain, moral minimization is most likely to encourage recidivism when the offender's motivation to comply with criminal law is real but *marginal* (i.e., someone who may offend but still experiences guilt and shame for offending) and the minimizations are *generalizable* (i.e., applicable to future criminal opportunities), conditions that apply frequently to crimes like theft, assault, and sexual assault.¹⁵ These conditions are less likely to apply to certain offenses, such as homicide, for reasons we explore. But the fact that no one has ever considered these risks makes it certain that police currently use the tactic in some cases where the criminogenic costs substantially exceed the interrogation benefits.

We consider various objections to our claim, most prominently the possibility that the subsequent prosecution, conviction, and punishment of the offender will undo any criminogenic effects of moral minimization by sending a counter-message validating the moral seriousness of the offense and the offender's responsibility. As we explain, for a variety of reasons,

⁸ See *infra* Part II-B-2.

⁹ See *infra* Part II-B-3.

¹⁰ See *infra* Part II-B-4.

¹¹ See *infra* Part II-B-5.

¹² See *infra* Part II-B-6-a.

¹³ See *infra* Part II-B-6-b.

¹⁴ A partial exception is Anne Coughlin, who drew attention to the misogynistic tropes in rape interrogations and "speculat[ed]" about the effect on rapists. See Anne M. Coughlin, *Interrogation Stories*, 95 VA. L. REV. 1599, 1599 (2009). Coughlin's focus is different than ours in various ways, as her concern is limited to the crime of rape, she does not discuss the general tactic of "minimization," and her framework is narrative theory rather than neutralization or the other social science theories we employ.

¹⁵ See *infra* Part II-C.

this objection is not compelling.¹⁶ We consider specific actors in the system – attorneys, judges, jurors, and victims – and conclude that none of them are likely to send an effective counter-message that offsets the detective’s moral minimization and undoes its criminogenic damage, at least not when, as is currently the case, there is no awareness of the risks that minimization poses.

A final word of introduction: in a separate article, we argue that the specific moral minimization tactic of victim-blaming risks a second negative consequence.¹⁷ The interrogation training in and practice of victim-blaming produces a cadre of detectives more inclined to blame victims, making them worse at the investigation of certain violent crimes, especially those against women.

We proceed as follows. Part I describes the evidence that police detectives employ moral minimization extensively. From the case law, we show the exact wording of real world interrogations. Part II explores the tactic’s criminogenic risks, based on neutralization theory and six other legal or social science literatures. We identify the factors that determine the magnitude of the risk and answer the objection that the criminal process undoes the damage of moral minimization. Part III addresses the normative implications – what should be done to limit the risks of moral minimization. Part IV concludes.

I. MORAL MINIMIZATION IN AMERICAN POLICE INTERROGATIONS

The United States and a few other nations predominantly employ a “confrontational” or “accusatory” method of interrogation, in contrast to the “information-gathering” methods favored by the United Kingdom and other nations.¹⁸ The confrontational method prominently includes the tactics

¹⁶ See *infra* Part II-C.

¹⁷ See Margareth Etienne and Richard H. McAdams, *Training Detectives to Blame Victims*, draft on file with authors.

¹⁸ See Christian A. Meissner, *et al.*, *Improving the Effectiveness of Suspect Interrogations*, 11 ANN. REV. L. & SOC. SCI. 211, 216 (“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.”).

known as *maximization* and *minimization*. For the former, interrogators maximize the apparent certainty they have of the suspect's guilt, suggesting that the evidence is decisive, cutting off and rejecting protestations of innocence, and on some occasions falsely describing evidence of guilt.¹⁹ For *minimization*, interrogators suggest mitigating factors for the suspect's behavior which make it less appear less culpable or even fully justified.

Within the category of minimization, our focus is on *moral* minimizations. We define that subcategory in Part A. Part B explores the content of the tactic, relying on widely used interrogation manuals. Part C documents the extensive use of moral minimization in real world interrogations based on surveys, observational studies, and case law. Part D roughly estimates how frequently American detectives morally minimize criminal offenses each year.

A. *Moral Minimization Defined*

Although the training manuals we survey below do not explicitly make the distinction, there are two principal types of minimization: legal and moral. *Legal* minimization suggests to suspects that the crime may not be as legally serious as they believe or perhaps they have a legally valid defense. In a homicide investigation, for example, the detective may suggest that the suspect could have killed the victim accidentally or in self-defense, though the manuals advise caution when relying on a theme that implies official leniency, given that courts may exclude confessions produced by false promises of prosecutorial leniency.²⁰ Nonetheless, where the strategy is used, investigators hope to get closer to confessions by inviting suspects to accept a version of the facts that appears to lessen their legal liability while nonetheless connecting them to the crime.

¹⁹ See DAN SIMON, IN DOUBT: THE PSYCHOLOGY OF THE CRIMINAL JUSTICE PROCESS 135 (2012) (explaining maximization tactics as including, in the absence of "powerful incriminating evidence," that "interrogators often fabricate it and deceive the suspect into believing it exists").

²⁰ INBAU, ET AL., *supra* note 1, at 203, 425; BRIAN JAYNE & JOSEPH BUCKLEY, A FIELD GUIDE TO THE REID TECHNIQUE 277–79 (2014) [hereinafter JAYNE & BUCKLEY, FIELD GUIDE] "[T]he theme should not provide the suspect with a legal defense for his criminal behavior." *Id.* at 276.

Moral minimization, however, is our focus. With moral minimization, the interrogator seeks to persuade the suspect that, whatever the law might say, her conduct is morally excused or justified, at least to some degree, so the crime is not a serious moral transgression. Decades ago, the Supreme Court in *Miranda* described this technique in its review of interrogation practices: “Like other men, perhaps the subject has had a bad family life, had an unhappy childhood, had too much to drink, had an unrequited desire for women. The officers are instructed to *minimize* the moral seriousness of the offense, to cast blame on the victim or on society.”²¹ *Miranda* illustrated the technique with facts from its 1954 case of *Leyra v. Denno*,²² where the interrogator, a psychiatrist, had said to the accused, “We do sometimes things that are not right, but in a fit of temper or anger we sometimes do things we aren't really responsible for,” and again, “We know that morally you were just in anger. Morally, you are not to be condemned.”²³

The remainder of this part demonstrates the nature and frequency of moral minimization.

B. *The Reid Interrogation Manuals and Moral Minimization*

To move beyond generalities, we explore the most influential interrogation manuals, those defining the “Reid” technique.²⁴ *Miranda* relied on, among other sources, the second edition of the police training guide by Fred E. Inbau and John E. Reid, titled *Criminal Interrogation and Confessions*.²⁵ Since *Miranda*, the Supreme Court has twice referenced

²¹ *Miranda v. Arizona*, 384 U.S. 436, 450 (1966).

²² *Leyra v. Denno*, 347 U.S. 556 (1954).

²³ Appendix to Opinion of the Court, *id.* at 562, 582; *Miranda*, 384 U.S. at 450 n.12.

²⁴ 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 . . . [T]he Reid Manual, affectionately known as the Interrogator's Bible, has set the standard.”).

²⁵ *Miranda*, 384 U.S. at 448–49 n.9 (1966) (citing FRED E. INBAU & JOHN E. REID, CRIMINAL INTERROGATIONS AND CONFESSIONS (2nd ed. 1962), and noting that the first edition of the Inbau & Reid manual was a revision and enlargement of an earlier text by the authors, LIE DETECTION AND CRIMINAL INTERROGATION (3d ed. 1953)). Chief Justice

Reid interrogation manuals, reflecting its dominant position in the field.²⁶ John E. Reid & Associates, Inc. remains the leading authority on police interrogations, through its training manuals²⁷ and courses.²⁸ Reid states that “hundreds of thousands of investigators have received [its] training,”²⁹ a claim substantiated by an independent survey of law enforcement personnel, which found that over half had received instruction on the Reid technique.³⁰ *Criminal Interrogation and Confession* is now in its fifth edition, published in 2013, and we refer to it as “the manual.”

Warren noted that the three leading texts on interrogation – two of which were authored by Inbau, Reid and associates – had total combined sales and circulation of over 44,000. *Id.*

²⁶ See *Missouri v. Seibert*, 542 U.S. 600, 610 n.2 (2004) (citing two Reid manuals and one other to show what “[m]ost police manuals” advise about *Miranda* warnings); *Stansbury v. California*, 511 U.S. 318, 324 (1994) (citing the Reid manual as evidence that an aspect of *Miranda* doctrine was “well settled”).

²⁷ The primary manual is the newest edition of the one *Miranda* cited: INBAU, ET AL., *supra* note 1. 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. 2013) [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* (2d ed. 2014) (described as “a compilation of articles and essays about The Reid Technique”) [hereinafter JAYNE & BUCKLEY, *ANTHOLOGY*]; JAYNE & BUCKLEY, *ANTHOLOGY*; JAYNE & BUCKLEY, *FIELD GUIDE*, *supra* note 20; 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, AND MOTIVATE CHILD ABUSE OFFENDERS TO TELL THE TRUTH* (2d ed. 2015).

²⁸ See also SIMON, *supra* note 19, at 121–22 (“[U]sed most widely by American law enforcement agencies . . . the Reid Technique of Interviewing and Interrogation has been taught to well over 100,000 law enforcement agents.”). In addition to its books and DVDs, Reid offers training seminars and certificate training programs through its Institute. See *Store*, JOHN E. REID & ASSOCS, INC. (last visited Jan. 21, 2022), <https://reid.com/store/products>.

²⁹ See INBAU, ET AL., *ESSENTIALS*, *supra* note 27, at viii. Beyond law enforcement, the method is popular with private security personnel employed to detect and prevent theft and fraud. See “How to Conduct Better Interviews & Interrogations,” Security Director’s Report of the Institute of Management and Administration (IOMA), issue 02–12, p.11 (December 2002) (“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.”).

³⁰ See N. Dickon Reppucci, *et al.*, *Custodial Interrogation of Juveniles: Results on a National Survey of Police*, in *POLICE INTERROGATIONS AND FALSE CONFESSIONS: CURRENT RESEARCH, PRACTICE, AND POLICY RECOMMENDATIONS* 67 (G. Daniel Lassiter & Christian A. Meissner eds. 2010) (reporting that 54% of respondents had been trained in the Reid technique). See also Melissa B. Russano *et al.*, *Structured Interviews of Experienced HUMINT Interrogators*, 28 *APPL. COG. PSYCH.* 847, 848–50 (2014) (reporting on a survey of 42 experienced federal interrogators, half from law enforcement and half from the

The Reid Technique has nine steps.³¹ Step one is the direct, positive confrontation, in which the detective expresses confidence in the guilt of the suspect.³² Step two – our subject – is “Theme Development.”³³ The term “theme” refers only to what we call moral minimization; the manual explains 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.”³⁴ 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”³⁵ “Psychologists refer to this internal process [of rationalization] as techniques of *neutralization*,”³⁶ a topic to which we will return. (Even the competitors of the Reid technique use this particular tactic³⁷).

military, in which 50% indicated they had received formal training in the Reid technique, the highest percentage of any source).

³¹ INBAU, ET AL., *supra* note 1, at 187–90.

³² *Id.*, at 192–98.

³³ *Id.* at 202–55; INBAU, ET AL., ESSENTIALS, *supra* note 27, at 115–35. *See also* SENESE, *supra* note 27, which is a 342-page supplemental manual devoted entirely to “interrogation themes.”

³⁴ INBAU, ET AL., ESSENTIALS, *supra* note 27, at 115.

³⁵ *Id.* *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 20, 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.”).

³⁶ *Id.* at n.7, 325–26 (emphasis added) (citing MICHAEL J. LILLYQUIST, UNDERSTANDING AND CHANGING CRIMINAL BEHAVIOR 153–60 (1980) and Heith Copes, *et al.*, *Bridging the Gap Between Research and Practice: How Neutralization Theory Can Inform Reid Interrogations of Identity Thieves*, 18 J. CRIM. JUST. EDUC. 444 (2007).

³⁷ For example, the Zulawski & Wicklander interrogation method differs in critical ways from the Reid Technique, but the former also devote a chapter to “rationalizations,” which are essentially minimizations. *See* DAVID E. ZULAWSKI & DOUGLAS E. WICKLANDER, PRACTICAL ASPECTS OF INTERVIEW AND INTERROGATION 305 (2d ed. 2002) (recommending a “one-sided discussion presented to the suspect by the interrogator, who offers excuses or reasons that minimize the seriousness of the crime.”). The corporation, Wicklander-Zulawski & Associates, Inc., parted ways with the Reid method in 2017 over concerns that it leads to false confessions. *See* Liz Martinez, *Security, Law Enforcement React to Change in U.S. Interrogation Technique: Wicklander-Zulawski Decision to Drop the ‘Reid Method’ Has Generated Mixed Opinions*, SECURITYINFOWATCH.COM (Mar. 10, 2017), at <https://www.securityinfowatch.com/security-executives/article/12314618/security-law->

Developing this kind of minimizing theme takes time, which is why the manual describes it as a “monologue.” “For a theme to be effective, the investigator must be able to maintain a continuous monologue of theme material.”³⁸ During an interrogation that may last hours, “[t]he investigator must continue offering the suspect a theme.”³⁹ To avoid a theme statement that “only lasts a few minutes,” the manuals offer several ways to “draw out the length of a theme.”⁴⁰ Thus, even though most of the examples below are short, it is important to remember that they are mere illustrations of a brief moment in what is supposed to be an extensive, repeated development of the theme.

The manuals offer specific minimization themes. First is “*Sympathize with the Suspect by Saying That Anyone Else Under Similar Conditions or Circumstances Might Have Done the Same Thing.*”⁴¹ Inbau and co-authors explain: “A criminal offender . . . derives considerable mental relief and comfort from the investigator’s assurance that anyone else under similar conditions or circumstances might have done the same thing.”⁴² The manual cautions against promising legal leniency, but notes: “There is, of course, no legal objection to extending sympathy and understanding in order to feed into the suspect’s own justifications for his criminal behavior”⁴³

The manual offers two illustrations. One concerns a hit-and-run suspect, and this script is said to be drawn from an actual case: “Your car hit something. You were not sure what it was, but you had some doubts; so

enforcement-react-to-change-in-us-interrogation-technique. But the Wicklander-Zulawski shift does not abandon their focus on “rationalizations.”

³⁸ JAYNE & BUCKLEY, ANTHOLOGY, *supra* note 27, at 165.

³⁹ JAYNE & BUCKLEY, FIELD GUIDE, *supra* note 20, at 271 (offering to answer the question “How can a theme last 30, 60, or even 90 minutes?”).

⁴⁰ JAYNE & BUCKLEY, ANTHOLOGY, *supra* note 27, at 165 (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.*

⁴¹ INBAU, ET AL., ESSENTIALS, *supra* note 27, at 210.

⁴² *Id.*

⁴³ *Id.* at 211.

you got excited and drove away You are no different than anyone else and, under the same circumstances, *I probably would have done what you yourself did.*”⁴⁴ The second example concerns sexual assault, where the manual advises “indicat[ing] to the suspect that the investigator has a friend or relative who indulged in the same kind of conduct . . . [I]t may even be appropriate for the investigator himself to acknowledge that *he has been tempted to indulge in the same behavior.*”⁴⁵

The Reid manual’s second minimization theme is: “*Reduce the Suspect’s Feeling of Guilt by Minimizing the Moral Seriousness of the Offense.*”⁴⁶ The initial illustration is, again, sexual assault, where the manual offers the following script, “has been found effective”:

In matters of sex, we’re very close to most animals, so don’t think you’re the only human being – or that you’re one of a very few – who ever did anything like this. There are plenty of others, and these things happen every day and to many persons, and they will continue to happen for many, many years to come.⁴⁷

The manual also refers to an actual spousal murder case in which “the deceased wife had treated her husband miserably over the years” and the interrogator’s theme was as follows:

⁴⁴ *Id.* at 210 (emphasis added).

⁴⁵ INBAU, ET AL., *supra* note 1, at 211 (emphasis added). We shall discuss a California case where the detective followed this advice. *See infra* text accompanying notes 118–119. *See also* Coughlin, *supra* note 14, at 1650–51 (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.”).

⁴⁶ *Id.* *See also* ZULAWSKI & WICKLANDER, *supra* note 37, at 317 (explaining that “the interrogator also minimizes the seriousness of the crime from the suspect’s perspective. . . . saying, ‘And sometimes it’s really nothing more than an error in judgment, a mistake’”) and 331 (“Nobody is perfect. A lot of time, our mistakes seem a lot bigger than they probably are.”).

⁴⁷ *Id.* at 211–12. This script has been in the Reid manuals since the first edition. *See* FRED. E. INBAU & JOHN E. REID, CRIMINAL INTERROGATION AND CONFESSIONS 36 (1962) [hereinafter INBAU & REID, FIRST EDITION].

Joe, as recently as just last week, my wife made me so angry with her nagging that I felt I couldn't stand it anymore, but just as she was at her worst, there was a ringing of the doorbell by friends from out of town. Was I glad they came! Otherwise, I don't know what I would have done. You were not so lucky as I was on that occasion.⁴⁸

If this gendered script sounds like it comes from an earlier era, that's because it did; the example has been used without alteration since the first edition of the Reid manual in 1962.⁴⁹

The final illustration of this second theme involves employee theft crimes, where the manual recommends using statistics on the ubiquity of such crimes. For example, to minimize the seriousness of stealing from an employer, the interrogator could invoke the claim noted in one Reid manual that "75% of employees steal from the workplace" and that "most do so repeatedly."⁵⁰

The third specific minimization theme is: "*Suggest a Less Revolting and More Morally Acceptable Motivation or Reason for the Offense than That Which is Known or Presumed.*"⁵¹ The manual offers several illustrations including that the suspect committed the crime only because alcohol or drugs had impaired his judgment, that a suspected embezzler only intended to borrow the money and would have replaced it if not for the discovery, and that a thief took "money . . . for the benefit of a spouse, child, or another person."⁵² The manual offers a table listing self-serving

⁴⁸ INBAU, ET AL., *supra* note 1, at 212.

⁴⁹ See INBAU & REID, FIRST EDITION, *supra* note 47, at 37.

⁵⁰ See SENESE, *supra* note 27, at 141. The main manual includes a lower estimate of one-third of all employees. INBAU, ET AL., CRIMINAL INTERROGATION, *supra* note 27, at 213–14 (listing a number of bullet points about the high frequency of employee theft). One of the non-Reid manuals notes how easy it is for employees to rationalize workplace theft. See ZULAWSKI & WICKLANDER, *supra* note 37, at 306.

⁵¹ *Id.* at 214.

⁵² See INBAU, ET AL., *supra* note 1, at 215. See also ZULAWSKI & WICKLANDER, *supra* note 37, at 339 (recommending that the interrogator "minimizes the loss" by suggesting that the suspect "had intended to return the money or property" and was only borrowing it). See also *id.* at 332 ("Medical bills, family problems, and financial pressures are things that can push a person into doing something he never dreamed he would do. We all have our breaking

motives that offenders have offered during confessions for each of eleven different crimes.⁵³

The fourth specific theme merits special attention: “*Sympathize with the Suspect by Condemning Others*,” a subpart of which is “*Condemning the victim*.”⁵⁴ “[T]he investigator should develop the theme that the primary blame, or at least some of the blame, for what the suspect did rests upon the victim.”⁵⁵ Or, as the manual puts it at one point, the strategy is to “*degrad[e] the character of the victim*.”⁵⁶

There are suggestions here for blaming victims of assault and robbery.⁵⁷ Referencing again “the case of a man suspected of killing his wife,” the manual says that the investigator portrayed the suspect’s wife as an “unbearable”

creature . . . 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. In this respect, however, the

points.”). This family motive, when genuine, and especially in extreme cases, would actually mitigate the offense in a way that a judge should consider in sentencing. If the criminal system will actually reduce the sentence because of a mitigating factor, there is no harm to interrogation that incorporates that mitigation (or any other such genuine factor). We note, however, that few of the moral minimizations are relevant in this way. Efforts to trivialize the offense and blame the victim fall outside of a legitimate sentencing judgment.

⁵³ INBAU, ET AL., *supra* note 1, at 216–17. *See also* ZULAWSKI & WICKLANDER, *supra* note 37, at 325 (“First, the interrogator might use frustration at being unable to control the child’s crying . . . [and second] the strength of an adult and the fragility of a small child.”).

⁵⁴ INBAU, ET AL., *supra* note 1, at 220. The other suggestions 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 37, at 306 (advising “the interrogator to create the perception of transferring guilt to someone . . . other than the suspect. . . . [thereby] psychologically minimizing the seriousness of the suspect’s offense.”).

⁵⁵ INBAU, ET AL., *supra* note 1, at 220. *See also* ZULAWSKI & WICKLANDER, *supra* note 37, at 333–34 (noting that “[t]he victim can be blamed in almost any crime from 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.”).

⁵⁶ INBAU, ET AL., *supra* note 1, at 222 (emphasis added).

⁵⁷ *See id.* (“In assault cases, the victim may be referred to as someone who . . . finally got what was coming to him.”) and *id.* (“In a robbery case, the victim may be blamed for having previously cheated the suspect . . . [or] for ‘flashing money’ or putting the suspect down in front of friends.”).

investigator stated that the suspect's wife was just like most other women. He also said 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."⁵⁸

In making such appeals, the manual recommends empathy:

[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 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'?*⁵⁹

Although there is no separate example for domestic battery (as opposed to domestic murder), the manual's logic of victim-blaming endorses the same approach there as well.

Regarding sex offenses, the suggested blame-the-victim theme is: "The victim initially came on to the suspect and he acted the way *any man* would under the circumstances."⁶⁰ The Reid manual offers specific scripts, such as this one:

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

⁵⁸ INBAU, ET AL., ESSENTIALS, *supra* note 27, at 148–49.

⁵⁹ INBAU, ET AL., *supra* note 1 at 221 (emphasis added).

⁶⁰ *Id.*, at 204 (emphasis added).

willing to go all the way, she ought to stop way short of what this gal allowed you to do.⁶¹

The Reid manuals recommend similar themes when the sexual abuse victim is a child.⁶²

These examples are from the current edition of the main manual published in 2013, which is before the greater salience of the “Me Too” movement. However, a more recent supplemental Reid text from 2020 provides similar examples and states that “*the most common theme to develop in sexual assaults is to blame the victim for doing something that provoked the suspect.*”⁶³

Given the recommendation of misogynistic insults of victims, one wonders whether racial or other stereotypes are also used as a minimization theme. Interestingly, the current edition of the main Reid manual *comprehensively* ignores the issue of race,⁶⁴ a curious omission in light of (a) its frequent endorsement of sexist stereotypes and (b) a brief reference to race in earlier editions.⁶⁵ The primary Reid manual does not address hate

⁶¹ *Id.* at 222 (proposing the script for a rape interrogation).

⁶² *See id.*, at 204 (“Suggested theme: Having sexual contact with a child the age of the victim (who was nine years old) is much more understandable than if the suspect had the same contact with a two-year-old girl.”); *id.* at 221 (offering theme blaming rape on victim’s revealing clothing); ZULAWSKI & WICKLANDER, *supra* note 37, at 334 (“The suspect became involved because the victim dressed or acted in a certain way.”). In the supplemental Reid manual specific to child abuse, BUCKLEY, *supra* note 27, there are examples that seem to distinguish the suspect’s “perception” from reality, *id.* at 220, but other recommended themes lack this nuance: “Blame the child’s curiosity; they brought up the subject of sex.” *Id.* at 223, and “Present 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.* *See also* ZULAWSKI & WICKLANDER, *supra* note 37, at 334 (“The interrogator can even blame a child victim of sexual abuse for appearing older and tempting the suspect.”).

⁶³ *See* SENESE, *supra* note 27, at 224 (first emphasis added; second in original).

⁶⁴ There is no entry on the subject of race in the index of a 450+ page book.

⁶⁵ In the first edition of the Reid Manual, in 1962, at 115, there was a section titled “An Unintelligent, Uneducated Criminal Offender, with a Low Cultural Background, Should Be Interrogated on a Psychological Level Comparable to That Usually Employed in the Questioning of a Child Respecting an Act of Wrongdoing.” One passage of that section raised the issue of race:

In instances where a subject of the type of under consideration

crimes, but the obvious logic of victim-blaming in these cases is clear: 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, this logic seems to apply not just to what are technically hate-crimes but to any crime where the suspect and victim are of different races (or ethnicities, religions, etc.) because the suspect might have rationalized the offense with bigoted and stereotyped reasoning. If a simple theft crime is cross-racial, for example, a detective following the technique might experiment with a theme that members of the victim's racial (or other) group have plenty of money to spare or acquire their money by nefarious means.

Theft cases are another major opportunity for victim-blaming. For employee theft cases, the primary manual states: “[T]he employer should be condemned for having paid inadequate and insufficient salaries or for some unethical or careless practice that may have created a temptation to steal.”⁶⁶ We saw one such script in the introduction.⁶⁷ Another suggests proposing to a maid accused of theft that she stole fur coats because the owner had so many and didn’t treat them well.⁶⁸

happens to be a member of a minority race or group, the interrogator must never make a derogatory remark about that race or group. (Nor should he assume that a person's attitude, conduct, or even his criminality are the result of the color of his skin or his nationality!) To the contrary, the interrogator should (and in good conscience he always can) eulogize some outstanding member of that race or group and suggest that the subject try to measure up to the conduct exemplified by that particular individual.

Id. at 116. The same text exists in the second edition of 1966, but the entire section is omitted starting with the third edition of 1986. While we applaud the statement that the interrogator should not assume that race determines criminality, it is disturbing that race was discussed in the book only in reference to “unintelligent” suspects “with a Low Cultural Background.”

⁶⁶ INBAU, ET AL., *supra* note 1, at 222. *See also id.* at 204 (“[B]lame the company for their poor security.”); *id.* at 223 (“[A]n employer may be blamed for some perceived unfair treatment of the suspect”); ZULAWSKI & WICKLANDER, *supra* note 37, at 312 (recommending “rationalizations that placed blame on financial problems” caused by medical problems); *id.* at 333 (“Bob, if this happened out of frustration because of the way your boss picked on you”).

⁶⁷ *See supra* text accompanying note 1.

⁶⁸ INBAU, ET AL., *supra* note 1, at 223. *See also* SENESE, *supra* note 27, at 141–47 (describing nineteen minimization themes for employee theft, many involving victim-

Finally, the Reid manuals also recommend casting blame on targets other than the victim – accomplices, society, government, parents, or other relatives.⁶⁹ For example, when the suspect is a juvenile, blame the parents, suggesting that the suspect was “worse off than an orphan.”⁷⁰ “When the offense is theft,” blame “a spendthrift wife or the financial burden of a child.”⁷¹ Or the suspect’s creditors may be blamed for pressuring for repayment and “forc[ing]’ him to steal.”⁷² Bringing in politics, the suspected embezzler’s behavior may be compared favorably to the national government’s behavior in “squeez[ing] citizens with burdensome taxes to obtain money to waste on foreign countries.”⁷³ For hate crimes, “Blame the liberal politicians for creating an unfair situation by ‘selling out’ for the vote by enacting laws that favor the victimized individual’s group,” and “Blame the government for reverse discrimination.”⁷⁴ In the actual wife-murder interrogation, the investigator blamed the wife’s family for meddling, stating “[a]t one point,” that “probably the relatives themselves deserved to be shot.”⁷⁵

Returning to sexual assault examples, the Reid manual offers a variety of other targets for blame: pornography, the internet, or “differing cultural beliefs.”⁷⁶ “A person who has taken indecent sexual liberties with a young girl may be told that her parents are to blame for letting her roam around by herself as they did.”⁷⁷ If the suspect is married, the interrogator

blaming); ZULAWSKI & WICKLANDER, *supra* note 37, at 334 (“Cindy, I don’t know how you can make it on just \$7.00 per hour.”); *id.* at 335 (recommending interrogators blame the victim’s poor security as creating too great a temptation for theft).

⁶⁹ See INBAU, ET AL., *supra* note 1, at 224–30. See also ZULAWSKI & WICKLANDER, *supra* note 37, at 310 (recommending the blaming of parents for giving too much attention to the suspect’s sibling).

⁷⁰ INBAU, ET AL., *supra* note 1, at 251.

⁷¹ *Id.* at 228.

⁷² *Id.* at 229.

⁷³ *Id.* at 230.

⁷⁴ SENESE, *supra* note 27, at 170–72.

⁷⁵ INBAU, ET AL., *supra* note 1, at 227.

⁷⁶ See SENESE, *supra* note 27, at 226.

⁷⁷ INBAU, ET AL., *supra* note 1, at 228. See also BUCKLEY, *supra* note 27 at 222 (“Blame the victim’s parents for not showing any love or attention to the victim . . . [or] allowing their child to spend the night, go on a camping trip, ski outing, etc.”). This is in addition to blaming society and the media. *Id.* at 224.

can cast blame on the suspect's wife, as with this script: "If your wife had taken care of you sexually . . . you wouldn't be here now. You're a healthy male; you needed and *were entitled to sexual intercourse*. When a fellow like you doesn't get it at home, he seeks it elsewhere."⁷⁸

This final strategy of blaming women, like the others, comes from the latest Reid manual published in 2013, though it also traces back to the first edition of 1962.⁷⁹

C. *Moral Minimization in Real World Interrogations*

Do police follow the manuals that recommend moral minimization? 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.⁸⁰ He described their interrogation techniques, including moral minimization, in this passage:

Beat your child to death and a police detective will wrap his arm around you in the interrogation room, telling you about how he beats his own children all the time, how it wasn't your fault if the kid up and died on you. 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."⁸¹

Simon did not quantify the number of interrogations he observed, but in one study criminologist Richard Leo observed 182 felony interrogations.⁸² Leo separately categorized two tactics that involve the type

⁷⁸ INBAU, ET AL., *supra* note 1, at 228 (emphasis added). See also BUCKLEY, *supra* note 27, at 222 ("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 never have happened.'").

⁷⁹ See INBAU & REID, FIRST EDITION, *supra* note 47, at 51–52.

⁸⁰ DAVID SIMON, HOMICIDE: A YEAR ON THE KILLING STREETS (1991).

⁸¹ *Id.* at 212.

⁸² Richard A. Leo, *Inside the Interrogation Room*, 86 J. CRIM. L. & CRIMINOL. 266

of minimization that concerns us: (1) to “offer moral justifications or psychological excuses” for the criminal conduct and (2) to “minimize the moral seriousness of the offense.”⁸³ Police offered moral justifications or excuses in 34% of the interrogations, and minimized the crime’s moral seriousness in 22%.⁸⁴ Detectives use multiple tactics in any interrogation, but 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.⁸⁵

Second, consider a 2007 survey of law enforcement interrogators.⁸⁶ Over six hundred law enforcement officers (574 members of sixteen U.S. police departments plus 57 customs officials from two Canadian provinces) answered questions on interrogation practices. The survey asked which of sixteen tactics they employed using a five-point scale ranging from “never” (1) to “always” (5).⁸⁷ For the tactic “[o]ffering the suspect sympathy, moral justifications and excuses,” the mean answer was 3.38, which falls between “sometimes” (3) and “often” (4). Six percent answered this question by saying they never used the tactic (1) and 13% by saying they always did

(1996) [hereinafter *Interrogation Room*] (reporting on 60 recorded interrogations from police departments in two small cities and 122 contemporaneously observed interrogations at a major urban police department).

⁸³ *Id.* at 278 (table 5).

⁸⁴ *Id.*

⁸⁵ 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, and found that minimization was present in only 17% of interrogations. Barry C. Feld, *Real Interrogation: What Actually Happens When Cops Question Kids*, 47 L. & SOC’Y REV. 1 (2013) (table 4). Most recently, Christopher Kelly and co-authors reviewed twenty-nine interrogations (totaling forty-five hours) conducted by the Los Angeles Police Department in homicide, rape, and robbery cases, and found that interrogators offered moral rationalizations in 83% (24 of 29) of the interrogations. Christopher E. Kelly, *et al.*, *On the Road (to Admission): Engaging Suspects with Minimization*, 25 PSYCH. PUB. POL’Y & L. 166, 171 (2019) (Table 1). (These researchers also coded the frequency of different interrogation tactics by examining each interview in 5-minute segments. They found that detectives offered rationalizations in 4.7% of the 5-minute intervals, making it the sixth most frequently used tactic.) *Id.* at 172.

⁸⁶ Saul M. Kassir *et al.*, *Police Interviewing and Interrogation: A Self-Report Survey of Police Practices and Beliefs*, 31 L. & HUM. BEHAV. 381, 385 (2007).

⁸⁷ The other options for answering were 2 – rarely, 3 – sometimes, and 4 – often. *Id.* at 387.

(5).⁸⁸ For the tactic “[m]inimizing the moral seriousness of the offense,” the mean response was 3.02, with 11% saying never and 8% saying always.⁸⁹ Of the interrogation tactics that involve the substance of questions, these two were the fifth and eighth most frequently employed tactics (where investigators routinely employ multiple tactics in a given interrogation).⁹⁰ The mean responses for these two tactics – within a range of “sometimes” to “often” – are consistent with Leo’s study showing that the strategies were employed in at least one-third of the cases.

A final source for confirming the use of minimization are the judicial opinions discussing interrogations. Appellate opinions cannot give us a reliable basis for estimating the frequency of station house minimization. Not only are there the usual concerns that litigated appeals may fail to represent cases not so litigated, but also note that moral minimization is not usually relevant to the lawfulness of interrogation, so defense lawyers have little reason to raise issues concerning its use.⁹¹ Nonetheless, the opinions do confirm as a matter of sworn testimony that

⁸⁸ *Id.* at 388, Table 2.

⁸⁹ *Id.*

⁹⁰ Including all tactics, those described in the text were still among the top ten of most frequently employed. *Id.* See also Allison D. Redlich, *et al.*, *The Who, What, and Why of Human Intelligence Fathering: Self-Reported Measures of Interrogation Methods*, 28 APPLIED COG. PSYCH. 817 (2014) (finding similar frequency results from a survey of 152 U.S. military and federal law enforcement about the use of “moral rationalizations” and “minimization” (Table 1A, not reported in publication but shared by author Allison Redlich and on file).

⁹¹ See, e.g., *United States v. Jacques*, 744 F.3d 804, 812 (1st Cir. 2014) (finding that “statements . . . minimizing the gravity of Jacques’s offense . . . fall safely within the realm of the permissible ‘chicanery’”). We have found three state cases in which courts suppressing a confession recognized that minimization was one relevant factor in a totality of the circumstances test for 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), all discussed *infra* note 121 and accompanying text. But those cases involved many traditional circumstances supporting involuntariness and we find no similar cases elsewhere.

Appellate courts typically avoid describing moral minimization even when it is present. See, e.g., *Schumaker v. Kirkpatrick*, 808 F. App’x 47, 49 (2d Cir. 2020) (describing the defendant’s claim that interrogators used “minimization[.]” though without details). Even in a case finding that false promises of leniency rendered a confession involuntary and inadmissible, the 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 & n.1 (Me. 2016).

the minimization tactics are a “fairly common” practice and confirm the influence of the Reid technique.⁹² Moreover, these cases offer a glimpse into the actual minimizing words the interrogators use.

Consider murder cases. In Minnesota, Kelly Ritt was accused of purposely starting a fire to kill her twenty-three month old, special needs daughter (but not her other three children, who survived).⁹³ The detective who interrogated Ritt energetically used the tactic when “he confided that he too had a disabled child whose care was very demanding, that often he wished he ‘could throw’ his son out the window, that sometimes he wanted to see the child die rather than suffer, and that his own wife ‘could have intentionally done this’ too.”⁹⁴ In a Massachusetts case, the detectives offered to a murder suspect “reasons why he might have killed the victim [his mother] without being ‘a bad guy,’ including . . . the possibility that he had been provoked by mistreatment from his mother or his aunt.”⁹⁵ “The officers acknowledged at trial that they had been trained in techniques known as ‘minimization.’”⁹⁶ In a recent Illinois case, “detectives used minimization tactics and attempted to diminish the legal seriousness and moral seriousness of” the defendant’s killing by remarking “that they, too, would remember and seek vengeance on someone [like the victim,

⁹² 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*, 2016-Ohio-1104, 2016 WL 1071457, at *8 (Ohio Ct. App. Mar. 16, 2016). *See also United States v. Woody*, No. CR-13-08093-001-PCT, 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 the agent “acknowledged that he generally employs minimization”).

⁹³ *See State v. Ritt*, 599 N.W.2d 802 (1999).

⁹⁴ *See Coughlin*, *supra* note 14 at 1649 (citing transcripts). Confirming that the appellate courts have no doctrinal reason to describe moral minimization when it occurs, the appellate opinion upholding Ritt’s conviction for murder does not mention these astonishing facts, even though the interrogation was a major issue for the appeal. *See State v. Ritt*, 599 N.W.2d 802 (Minn. 1999). *See also United States v. Hunter*, 912 F. Supp.2d 388, 393 (E.D. Va. 2012) (describing the detective in a child-murder case as telling suspect that “every parent had been in the defendant’s position and that no one would ‘fault’ her”).

⁹⁵ *Commonwealth v. Cartright*, 84 N.E.3d 851, 857 (Mass. 2017).

⁹⁶ *Id.*

purportedly] who murdered their brother.”⁹⁷ Several other judicial opinions in murder cases turn up examples of moral minimization.⁹⁸

The police minimize the seriousness of sexual assault. In an Idaho case, police suspected the adult defendant of inappropriately touching a fifteen-year-old foster child at his residence, which would constitute a crime punishable by up to fifteen years in prison.⁹⁹ Yet the detective “repeatedly and substantially downplayed the seriousness of the allegations,”¹⁰⁰ saying: “So [the girl] has made a few statements about some pretty minor issues, in the big scheme of things. . . . This case is (inaudible) not even a blip on the radar hardly because it’s not really major allegations. . . . [E]ven if those things are true, they are just minor issues,” which might be handled that same day, as by an apology letter.¹⁰¹ Later the detective said that the accusations were “not the end of the world,” and that the greater crime would be lying to the police.¹⁰² Several other reported sexual assault interrogations have used a similar approach,¹⁰³ especially when the suspect is a juvenile.¹⁰⁴

⁹⁷ *People v. Jones*, No. 1–17–1623, 2021 WL 1227837, *13 (Ill. App. Ct. Mar. 31, 2021).

⁹⁸ *See Dassey v. Dittmann*, 877 F.3d 297, 335 (7th Cir. 2017) (en banc) (Rovner, J., dissenting) (“The investigators in this case employed classic minimization techniques by” blaming confederate); *State v. Stone*, 303 P.3d 636, 642 (Idaho Ct. App. 2013) (interrogator stated “[T]his is not the crime of the century” and that being “a liar” is worse “by far”); *Commonwealth v. Harris*, 11 N.E.3d 95, 103 n.6 (Mass. 2014) (interrogators stated “that people get passionate . . . and ‘snap everyday of their lives’”); *Dock v. State*, No. 02–18–00462-CR, 2019 WL 6205248, at *5 (Tex. Ct. App. Nov. 21, 2019) (“detectives’ interrogation followed [the] approach” of interrogation manuals “to minimize the moral seriousness of the offense and to cast blame on the victim and society”).

⁹⁹ *State v. Valero*, 285 P.3d 1014, 1015–16, 1018 (Idaho Ct. App. 2012).

¹⁰⁰ *Id.* at 1017.

¹⁰¹ *Id.* at 1017–19 (“[These allegations] are not like some major issue that you and I can’t get resolved today.”).

¹⁰² *Id.* at 1018–19.

¹⁰³ *See State v. Chavez-Meza*, 456 P.3d 322, 326 (Or. Ct. App. 2019) (reporting that in a rape case involving a twelve-year-old victim, the detectives stated: “Like, we can deal with mistakes. People make mistakes all the time, and you still live your life.”); *People v. Morales-Cuevas*, 2018 WL 4501114, *9–10 (Ct. App. Cal. 2018) (interrogator used “minimization” techniques regarding defendant’s sexual assaults on stepdaughter beginning when she was nine years old); *State v. Stone*, 237 P.3d 1229, 1241–42 (Kan. 2010) (interrogators minimized crime with nine-year old victim by stating: “I mean, she’s not saying that you had sex with her but that you just had her, just basically just jack you off. And that’s, you know, that’s not a big deal.”).

¹⁰⁴ In a California case, *In re Elias V*, 188 Cal. Rptr. 3d 202, 215–16 (Cal. Ct. App.

Rhode Island state police used similar tactics in a child pornography case, where the detective stated that “downloading of child pornography was ‘not the end of the world’ . . . [and] that things can be thought of as ‘a spectrum, with the monster at one side . . . good old American porn [on the other end] . . . [a]nd then right next to that, is like the stuff you're looking at, inappropriate CP, we call it, Child Porn.’¹⁰⁵ The Court found these statements were “clearly based on the Reid Technique”¹⁰⁶

The sexual assault cases also illustrate the tactic of redirecting blame to other factors, such as alcohol and genetics, and of blaming the victim. From a recent sexual assault case from Hawaii, where the victims were minors, here a sample of the detective’s monologue:

[Y]ou just made an error in judgment. . . . You were just not in the right frame of mind . . . Alcohol is . . . where people get themselves into trouble, cause they lose their inhibitions[.] . . . Women are a lot more promiscuous, you know. . . . Everybody fucks up in life, okay . . . [O]ur brains are programmed a certain way Guys are programmed to procreate. . . . We all get busted. This is how our brains are wired. . . . You just drank too much, dude. You drank too much. You smoked too much. Bad error in judgment.¹⁰⁷

2015), the court described how the detective, interrogating a 13-year old boy, employed “minimization” by offering him two “understandable” explanations for the sexual touching of a three-year old: “natural ‘curiosity,’” or “that the act was one any normal person in his shoes would find ‘exciting.’” *Id.* at 216. *See also* Commonwealth v. Bell, 365 S.W.3d 216, 219–220 (Ky. Ct. App. 2012) (interrogating detective said to the thirteen year old suspect of sexual assault of six-year old cousin “that thirteen-year-old boys ‘have a lot of hormones,’” and that “you did it because you were horny, had a hard on, and you were curious.”); *In re A.W.*, No. A-0244–09T2, 2011 WL 386999, at *7 (N.J. Super. Ct. App. Div. Feb. 3, 2011), *aff’d sub nom. State ex rel. A.W.*, 51 A.3d 793 (N.J. 2012) (interrogator provided juvenile suspect of the sexual assault of a child the excuse of “experimentation”); *In re Welfare of J.M.B.*, No. C5–00–144, 2000 WL 890401, at *3 (Minn. Ct. App. July 3, 2000) (noting that the “detective told J.M.B. that if any sexual contact occurred, it was not a big deal, it was “normal experience stuff,” during interrogation of juvenile for the sexual abuse of a three-year old).

¹⁰⁵ United States v. Monroe, 264 F.Supp.3d 376, 391 n.143 (D.R.I. 2017).

¹⁰⁶ *Id.*

¹⁰⁷ State v. Baker, 465 P.3d 860, 864 (Haw. 2020).

Minimization of statutory rape crimes includes the ideas that children can initiate and consent to sex and that some minors are particularly mature and attractive. In one California case, the adult male defendant was convicted of 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.¹⁰⁸ The interrogating detectives suggested to Gomez that

A.C. was mature for her age, was fully developed with large breasts, and probably ‘came on’ to defendant. . . . [Detective] Skrinde said he and [Detective] 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 . . . Skrinde said to defendant, ‘You’re a man. And that I get. *It’s happened to me.*’¹⁰⁹

Many other cases use the same minimizations along with alcohol consumption to rationalize underage sex crimes.¹¹⁰

Consider further the Commonwealth of Massachusetts. No state holds that moral minimization alone can render a confession involuntary, but Massachusetts is one of the few American jurisdictions to recognize that

¹⁰⁸ See *Gomez v. California*, No. 1:18-cv-00642-DAD-SAB-HC, 2019 WL 358631, at *1, 2 (E.D. Cal. Jan. 29, 2019).

¹⁰⁹ *Id.* at *11 (emphasis added). See also Coughlin, *supra* note 14 (explaining how later editions of INBAU, ET AL, deleted the suggestion from earlier editions that the detective minimize a sex crime by claiming to have committed a similar one in his youth).

¹¹⁰ See *People v. Aguirre*, No. H041415, 2016 WL 3679901, at *2 (Cal. Ct. App. July 6, 2016) (interrogator said victim under 14 was “very attractive” and “probably came on to” suspect); *People v. Cortez*, 2016 WL 6962539, at *8 (Cal. Ct. App. Nov. 29, 2016) (interrogator “referenced” the “physical appearance and conduct” of the victim, under age 14, and “suggested she was also guilty.”); *State v. Chavez-Meza*, 456 P.3d 322, 324, 327 (Or. Ct. App. 2019) (interrogator said of twelve year old victim, “I believe that it was probably consensual, she wanted to have sex with you”); *State v. Fernandez-Torres*, 337 P.3d 691, 695 (Kan. Ct. App. 2014) (interrogator excused inappropriately touching a seven-year old girl because suspect “had too much to drink,” and “it’s ok because you didn’t keep on touching her.”); *Commonwealth v. Gonzalez*, No. 2009–00639, 2011 WL 649942, at *7 (Mass. Super. Feb. 14, 2011) (offering the suspect in the sexual assault of two children the excuse: “[W]e know it’s not you it’s the booze”).

minimization is a relevant factor within the “totality of circumstances” that determines the voluntariness, and thus admissibility, of a confession.¹¹¹ That legal stance explains why there are more cases from this state – defense lawyers have at least a weak reason to litigate moral minimizations. In one Massachusetts robbery case, detectives offered the defendant reasons for why he may have committed the alleged robberies, such as needing money to buy food for himself and his infant daughter.¹¹² A Massachusetts arson case describes a detective’s minimization in “an hour-long near monologue,” comparing “his view of the defendant’s conduct to the sort of mischief, pranking and “tomfoolery” that could take place on ‘cabbage night,’” referring to “the night before Halloween,” and also offering alcohol as an excuse.¹¹³

In another Massachusetts arson case, the court recognized the “standard interrogation tactic of ‘minimization’” and its origin in the Inbau/Reid interrogation manual.¹¹⁴ The defendant had a dispute with his landlord over the latter’s failure to make repairs to the apartment, which presented an opportunity to blame the victim.¹¹⁵ According to the court, the trooper “downplay[ed] the crime itself” “by pointing out that . . . in light of the deplorable condition of the premises, the trooper could ‘relate to’ and ‘understand’ his anger at the landlord and the desire to ‘do something like that.’”¹¹⁶

¹¹¹ See *Commonwealth v. DiGiambattista*, 813 N.E.2d 516, 525 (Mass. 2004). The court has *not* found that moral minimization alone could render a confession involuntary. See also *State v. Baker*, 465 P.3d 860, 873 (Haw. 2020) (finding that moral minimization statements and gender-based stereotypes were two of seven factors that made the defendant’s confession involuntary); *State v. Stone*, 237 P.3d 1229, 1241–42 (Kan. 2010) (finding that minimizing sexual assault of a nine-year old as “not a big deal” and not really “sex” was one factor of many in finding confession involuntary).

¹¹² *Commonwealth v. Monroe*, 35 N.E.3d 677, 686 (Mass. 2015). See also *Commonwealth v. Quint Q.*, 84 Mass. App. Ct. 507, 511 (Mass. App. Ct. 2013) (interrogator of a 15-year old suspected of breaking and entering said: “maybe what you did . . . [was] a momentary lapse of judgment; you made a mistake”).

¹¹³ *Commonwealth v. Baye*, 967 N.E.2d 1120, 1124 (Mass. 2012).

¹¹⁴ *Id.* at 527.

¹¹⁵ *Id.* at 519.

¹¹⁶ *Id.* at 520.

In sum, law enforcement surveys, direct observations, and judicial opinions all make clear that American police frequently employ the interrogation tactic of moral minimization.

D. A Very Rough Estimate of the Frequency of Moral Minimizations

Consider a “back of the envelope” estimate for the number of moral minimizations in the United States in one year. In 2019, state and local law enforcement made over ten million arrests.¹¹⁷ If we narrow our focus to likely felonies of the sort discussed above, then the relevant subset contains 1.5 million arrests for violent and property crimes.¹¹⁸ The violent crimes are murder, non-negligent homicide, rape, robbery, and aggravated assault; the property crimes are burglary, larceny-theft, motor vehicle theft, and arson.¹¹⁹ FBI Uniform Crime Reports do not separate felony and misdemeanor arrests, but these crimes are nearly always classified as felonies. The number is a conservative estimate considering we are leaving out arrests for non-aggravated assaults and other relevant crimes that are sometimes felonies (and also because the police sometimes interrogate suspects they never arrest). The limited available evidence suggests that, post-Miranda, police manage to interrogate arrestees in about 80% of felonies.¹²⁰ This figure implies that police manage to deploy some interrogation tactics on about 1.2 million felony suspects per year.

Using the Leo observations from before, under which the conservative estimate is that police use the tactic in one-third of

¹¹⁷ Criminal Justice Information Services Division, FBI, *2019 Crime in the United States*, FBI: UCR (last visited Jan. 21, 2022), <https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/topic-pages/persons-arrested> (estimating 2019 arrests at 10,085,207).

¹¹⁸ *Id.* (estimating 495,871 violent crime arrests and 1,074,367 property crime arrests).

¹¹⁹ *Id.* at Table 29, n.3.

¹²⁰ See Paul G. Cassell & Bret S. Hayman, *Police Interrogation in the 1990s: An Empirical Study of the Effects of Miranda*, 43 UCLA L. REV. 839, 854, 869 (1996) (reporting on a sample of 219 felony arrestees in Salt Lake City in which police failed to question 21% of felony suspects); FLOYD FEENEY, ET AL., ARRESTS WITHOUT CONVICTION: HOW OFTEN THEY OCCUR AND WHY 13 (1983) (table 15–2) (reporting that police failed to question 18.5% of burglary arrestees in Jacksonville, Florida and 20.1% of burglary arrestees in San Diego); Richard A. Leo, *The Impact of Miranda Revisited*, 86 J. CRIM. L. & CRIMINOL. 621, 654 (1998) (finding that 78% of a suspects in a sample waive their *Miranda* rights).

interrogations, we arrive at an estimated 400,000 times a year that police detectives minimize the moral seriousness of the suspected offense and/or shift moral blame away from the suspect. One could work to make the estimates better at each stage, but the exact number is not of great concern for our purposes. The phenomenon would be significant even if it we were overestimating it by an order of magnitude.

We also note a final reason to think the number 400,000 understates the significance of the practice. There is no perfect acoustic separation¹²¹ between the interrogation room and the rest of the world. Suspects no doubt recount what the police said to them to others. Although some of those who receive these reports from interrogated suspects might not believe them, others no doubt do. If interrogated suspects credibly conveyed the interrogator's statements to a little more than, one average, one close friend or relative, then our best guess is that more than a million Americans receive a message each year that law enforcement authorities regard some serious crime as trivial and/or that society or the victim is to blame. As indicated, this remains a very rough guess.

II. THE CRIMINOGENIC RISKS OF MORAL MINIMIZATION

This Part develops our claim that the ubiquitous practice of moral minimization marginally increases crime. Section A identifies the one plausible theory by which moral minimization works, *i.e.*, how it could increase true confessions (more than it increases false confessions). The Reid manual identifies the psychological theory as that of neutralization, as we explain. Section B then explores legal and/or social science literatures that reveal the criminogenic risks of moral minimization, beginning with neutralization and continuing with research on moral disengagement, the concept of the marginal offender, restorative justice, the doctrine of the entrapment defense, legal legitimacy, and the connection between informal social norms and law's expressive effects. Section C synthesizes the argument by identifying particular crimes and particular defendants for which the criminogenic claim is most -- and least -- powerful. Section D defends the claim against an objection to our thesis, the idea that criminal

¹²¹ Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. LAW REV. 625 (1984).

prosecution, conviction, and punishment contain enough expressive condemnation of the perpetrator's crime to undo all the damage of moral minimization.

A. *Why Might Moral Minimization Increase Confessions?*

American police are committed to using moral minimization in interrogation. Is that because the tactic increases confessions, or more importantly, because the tactic increases true confessions more than it increases false confessions?

One possible answer is no, the widespread use of the tactic does not promote true confessions, but is simply a misguided practice. Interrogation is more art than science and, as with other discredited domains of intuition-based policing, sometimes the conventional wisdom is false.¹²² There is no rigorous empirical testing that demonstrates the causal contribution of moral minimization to the success of interrogations. Part of the testing problem is general: there is no evidence that the overall style of accusatory interrogation, such as the Reid Technique, is better than the overall non-accusatory styles, such as the information gathering techniques used in the United Kingdom, Australia, and other places.¹²³ But even if we did know

¹²² See, e.g., Erin Blakemore, *FBI Admits Pseudoscientific Hair Analysis Used in Hundreds of Cases*, SMITHSONIAN MAG., April 22, 2015 (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. CRIMINOL. 53 (2019) (reporting on meta-analysis finding no support for claim that disorder contributes to crime, the assumption of many policing strategies).

¹²³ See Meissner *et al.*, *supra* note 18, at 216. There is 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., Peter Kageleiry, Jr., *Psychological Police Interrogation Methods: Pseudoscience in the Interrogation Room Obscures Justice in the Courtroom*, 193 MIL. L. REV. 1 (2007). Experimental results tentatively suggest that the information-gathering method is superior to accusatory methods. See Christian A. Meissner, *et al.*, *Accusatorial and Information-Gathering Interrogation Methods and Their Effects on True and False Confessions: a Meta-Analytic Review*, 10 J. EXP. CRIMINOL. 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, *et al.*, *Obtaining Guilty Knowledge in Human Intelligence Interrogations: Comparing Accusatorial and Information-Gathering Approaches with a Novel Experimental Paradigm*, 2 J. APPLIED

that accusatory methods were more effective overall than the alternatives at inducing true confessions and avoiding false ones, there is no evidence that the particular tactic of *moral minimization* is important to the success of the overall technique.¹²⁴ In short, perhaps the reality is that moral minimization does not work, and it is a mistaken tradition.

RSCH. MEMORY & COGNITION 83, 86–87 (2013) (reporting experimental results showing the superiority of information-gathering over accusatory methods in an intelligence setting).

¹²⁴ There are no randomized trials of different interrogation techniques, nor rich data allowing comparison of interrogators using the Reid techniques to those using all the techniques except moral minimization. Leo found higher confession rates in interrogations with certain moral minimizations than without. Leo, *Interrogation Room*, *supra* note 82, at 294 (reporting in Table 14 the success rate with the tactic of “moral justifications/psychological excuses”); *id.* at 295–96 (reporting in Table 15 the success of “offer[ing] moral rationalizations”). In each case, the chi-squared test showed significance at the level of $p < .05$. *Id.* 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.” Copes, *et al.*, *supra* note 36, at 448, 450. 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. Moreover, one cannot make reliable causal inferences from the data because Leo was not controlling for a host of relevant variables, such as the experience of the detective or length of the interrogation. Among possible confounds, Leo, *Interrogation Room*, *supra* note 82, at 297, reports that longer interrogations are more successful, and that police had longer interrogations when the victim was female, *id.*, which is precisely when we might expect police to be more likely to minimize by blaming the victim. If so, it could be that the tactic’s correlation with confessions is due to interrogation length rather than the moral minimization that is merely correlated with length.

A recent interrogation study measures a variable Leo lacks – the frequency by which 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. Kelly, *et al.*, *supra* note 85, at 173 (reporting on results from 45 hours of 29 felony interrogations by Los Angeles Police Department detectives). The experimenters 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.

Several experiments cast doubt on the net effectiveness of minimization. Their design involved the interrogation of participants who had actually violated some rules of the experiment. *See, e.g.*, Melissa B. Russano, *et al.*, *Investigating True and False Confessions Within a Novel Experimental Paradigm*, 16 PSYCH. SCI. 481 (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 (table 1). Reaching similar results, *see* Jessica R. Klaver, *et al.*, *Effects of Personality, Interrogation Techniques and Plausibility in an Experimental False Confession Paradigm*, 13 LEGAL & CRIMINOL.

If the tactic fails, then it would be far better for American police to abandon it. American governments currently spend money training detectives on interrogation methods. American detectives currently spend scarce interrogation time spinning out themes of minimization. Another cost occurs whenever the victim-blaming tactic leaks out into the world and victims suffer the anguish of learning that detectives told the offender that the victim was to blame for the crime. Whatever their magnitude, there is no reason to bear *any* of these costs if the tactic does not work.

We will nonetheless assume for the sake of argument the other possibility, that accusatory methods like the Reid technique are more effective than the alternatives at inducing true confessions and avoiding false ones, and that the tactic of moral minimization is an important contributor to its success. Although not empirically verified, there are two plausible mechanisms for success, two reasons it might increase true confessions.

One possible theory is that moral minimization convinces suspects that prosecutors and judges will treat them with lenience in charging and sentencing. But the manual strictly avoids offering this rationale because it explicitly warns interrogators of the legal risks of making promises of leniency in exchange for a confession.¹²⁵ Of course, prosecutors can negotiate with defense lawyers for a confession and guilty plea, but state and federal courts view police promises of official leniency, made to

PSYCH. 71 (2008); Fadia M. Narchet, *et al.*, *Modeling the Influence of Investigator Bias on the Elicitation of True and False Confessions*, 35 L. HUM. BEHAV. 452 (2011); Allyson J. Horgan, *et al.*, *Minimization and Maximization Techniques: Assessing the Perceived Consequences of Confessing and Confession Diagnosticity*, 18 PSYCH. CRIME & L. 65 (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. LAW REV. 1157, 1163–64 (2017). Because of these uncertainties, our claim is merely that the effectiveness of moral minimization remains plausible but empirically unproven.

¹²⁵ INBAU, ET AL., *supra* note 1, at 203, 425; JAYNE & BUCKLEY, FIELD GUIDE, *supra* note 20, at 276.

unrepresented suspects in interrogation, as undermining the voluntariness and reliability of a confession.¹²⁶ The social science scholarship on false confessions supports the concern that American interrogation tactics generally cause false confessions¹²⁷ and specifically do so, in part, because minimization promises official leniency “by implication.”¹²⁸ If this implication of official leniency were the very mechanism by which moral minimization increases confessions, then courts should insist that American police abandon the practice.

Which leads us to the third and final possibility, the only plausible mechanism by which moral minimization uniquely produces desirable confessions: by making it seem likely that people *other than* the prosecutor and judge will be sympathetic. When detectives minimize the moral wrongfulness of a crime, they make it appear, at a minimum, that *the detectives* will be more “sympathetic and forgiving” of the confessed perpetrator. The detectives’ attitude also implies that the broader society

¹²⁶ Federal courts have been wary of such promises for more than a century. *See, e.g.*, *Wilson v. United States*, 162 U.S. 613, 622 (1896) (stating that confessions are “inadmissible if made under any . . . promise, or encouragement of any hope or favor”); *Bram v. United States*, 168 U.S. 532 (1897) (quoting with approval from a treatise: “But a confession, in order to be admissible, must be free and voluntary; that is, must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight.”). Modern courts evaluate whether a promise of leniency renders a confession involuntary and exclude involuntary confessions. *See, e.g.*, *United States v. Lopez*, 437 F3d 1059, 1066 (10th Cir. 2006) (upholding exclusion of confession for involuntariness because of police promise of sentencing leniency); *Squire v. State*, 193 So.3d 105, 108 (Dist. Ct. App. Fla. 2016) (agreeing “that the detective’s comments created an implied promise of leniency,” such that “the confession was induced by impermissible conduct”); *State v. Rezk*, 840 A.2d 758, 765 (N.H. 2004) (holding that “defendant’s confessions were induced by specific promises of leniency and were involuntary”). *See also* Michael J.Z. Mannheimer, *Fraudulently Induced Confessions*, 96 NOTRE DAME LAW REV. 799, 818 (2020) (“Another ploy courts regularly hold impermissible is making false promises of leniency, nonprosecution, immunity, or the like in exchange for a confession.”).

¹²⁷ *See, e.g.*, Saul M. Kassin, *et al.*, *On the General Acceptance of Confessions Research: Opinions of the Scientific Community*, 73 AMER. PSYCHOLOGIST 63 (2018) (reporting on survey of 87 experts on the psychology of confessions to identify scientific consensus, including on the causes of false confessions); Brent Snook, *et al.*, *Urgent Issues and Prospects in Reforming Interrogation Practices in the United States and Canada*, 26 LEGAL & CRIMINOL. PSYCH. 1, 10–11 (2021) (discussing what each of 11 authors views as the critical research and reform issues in the psychology of interrogation).

¹²⁸ *See* Saul M. Kassin & Karlyn McNall, *Police Interrogations and Confessions: Communicating Promises and Threats by Pragmatic Implication*, 15 L. & HUM. BEHAV. 233, 239 (1991); Snook *et al.*, *supra* note 127, at 14–15.

will be less disapproving of the confessed perpetrator. These implications reduce the expected shame or stigma from confessing, rendering a confession more likely. On this view, moral minimization does not imply official leniency in sentencing, but instead reduces the anxiety the suspect will experience from admitting the crime to the detectives and, later, to family, friends, and acquaintances.

Yet to understand this psychological mechanism precisely is to understand its danger. Expected psychological costs work to prevent future criminal behavior. The government's persistent effort to trivialize crime and cast blame away from the offender undermines multiple internal and informal mechanisms of legal compliance, as we explore in this Part. The risk is that moral minimization increases recidivism.

To be clear, these costs of moral minimization stand on similar empirical footing as the purported benefits of the tactic (their tendency to produce true confessions). *Neither* is empirically validated; both are merely plausible. But our thesis in this article is that the criminogenic risks are *as plausible* as the claim that the interrogation tactic is effective at inducing true confessions. As we show, the same psychological processes – especially neutralization – that arguably lead to confessions also makes it more likely that the interrogated suspect will offend in the future. We also identify mechanisms other than neutralization – social norms and legal legitimacy – that link moral minimization to increased crime. In that sense, our criminogenic claim is more plausible than the effectiveness of moral minimization because the latter strictly depends on neutralization theory while the former does not.

B. The Risks of Minimizing Internal Motives for Compliance

1. Neutralization Theory

The manual emphasizes that the goal is to *reinforce* the same neutralizations that actually motivated the suspect to commit the crime.¹²⁹

¹²⁹ See INBAU, ET AL., *supra* note 1, at 210 (advocating “a persuasive effort on the part of the investigator to reinforce those existing excuses or rationalizations within the guilty

For what reason? To justify minimization, the Reid manual points to the psychological theory of *neutralization*, initially proposed in the 1950s.¹³⁰ Neutralization is not an all-purpose theory of crime, but a resolution of a particular puzzle that arises for some people and some crimes. The puzzle is: How can people who have internalized a norm against certain criminal conduct, such as against stealing or violence, nonetheless engage in the conduct? Or, to put it differently, should we always disbelieve those who intentionally commit a crime when they subsequently claim to feel remorse and suffer guilt? On a simplistic account, those who have internalized the norm against the criminal act of violence or theft would not commit such crimes, so those who commit those crimes show themselves not to have internalized the norms. Their expressed remorse would not be genuine.

The better view, however, is that those who internalize the norm can still intentionally violate it, and then feel guilt and remorse. One possibility is that the internal motive for avoiding crime usually leads to legal compliance, but in some instances the expected benefit from the crime is so high as to overcome the expected feeling of guilt. Another explanation, complimentary to the first, is that the individuals managed to *neutralize* their internal commitments. Consider this recent description, which focuses on the delinquency of minors:

When people are committed to a particular value system, they typically experience guilt or shame for violating, or even contemplating violating, its norms. This guilt, and its potential for producing a negative self-image, dissuades most people from engaging in crime or delinquency. Therefore, to participate in delinquent behavior under such conditions,

suspect's mind"); at 207 ("If the investigator's suggested moral or psychological justifications are not already present in the suspect's mind, the suspect will often reject the implications of the theme."); at 202 (noting that the detective aims to "reinforce the guilty suspect's *own* rationalizations and justifications for committing the crime") (emphasis added); Jayne & Buckley, *FIELD GUIDE*, *supra* note 20, at 276 (recommending that the interrogator "reinforce the defense mechanisms that already exist in the suspect's mind."). The main alternative to the Reid Technique suggests the same. *See* ZULAWSKI & WICKLANDER, *supra* note 37, at 308 ("The motive behind the incident will often lead the interrogator to the proper rationalization.").

¹³⁰ *See* INBAU, ET AL., *supra* note 1, at 325–26, nn.7 & 15. *See also infra* note 133.

youths must find ways to *neutralize* the guilt associated with their actions. They do this by relying on patterned thoughts and beliefs that blunt the moral force of the law and *neutralize* the guilt of criminal participation. . . . allowing individuals to engage freely in delinquency without serious damage to their self-image.¹³¹

Neutralization theory thus explains one necessary causal step for a certain group of people – those who have internalized social norms some criminal provisions enforce – to violate those particular criminal provisions.

Stated more briefly: The criminal “distorts what was done and the motives for doing it until the behavior is consistent with self-concept.”¹³² The primary Reid manual quotes this explanation of neutralization theory by psychologist Michael Lillyquist as part of its general effort to explain why moral minimization works to elicit confessions.¹³³ The idea is that the suspect expects to experience psychological costs, e.g., anxiety and shame, from confessing. Moral minimization lowers those costs. First, the tactic demonstrates that the detectives themselves will not make critical judgments of the suspect. As noted in a psychological appendix to the third edition of the primary manual: “The mere embarrassment of having to admit an act of wrongdoing can pose a formidable barrier to overcome during an interrogation.”¹³⁴ Second, the suspect makes inferences from the detectives’ minimizations. “[I]f the suspect who is concerned about avoiding personal consequences believes that the interrogator can

¹³¹ Robert G. Morris & Heith Copes, *Exploring the Temporal Dynamics of the Neutralization/Delinquency Relationship*, 37 CRIM JUST. REV. 442, 443 (2012).

¹³² See INBAU, ET AL., *supra* note 1, at 326, n.15 (quoting LILLYQUIST, *supra* note 36, at 152).

¹³³ See INBAU, ET AL., *supra* note 1, at 325–26, n.7 (citing LILLYQUIST, *supra* note 36, at 153–60 and Copes, *et al.*, *supra* note 36. The third edition of the manual, INBAU ET AL., CRIMINAL INTERROGATION AND CONFESSIONS 327–47 (3d ed. 1986) [hereinafter, INBAU, ET AL., THIRD EDITION] contained an Appendix titled “The Psychological Principles of Criminal Interrogation,” written by Brian C. Jayne. That appendix, *Id.* at 340–41 nn.1 & 2, also explains how offenders rationalize their crimes by citing Lillyquist, as well as the seminal article on neutralization, Gresham M. Sykes & David Matza, *Techniques of Neutralization: A Theory of Delinquency*, 22 AM. SOCIO. REV. 664, 667–69 (1957).

¹³⁴ INBAU, ET. AL, THIRD EDITION, *supra* note 133, at 328 (from the appendix titled “The Psychological Principles of Criminal Interrogation,” by Brian C. Jayne).

understand and seem to forgive the offense or suspect, he may believe that others will also be sympathetic and forgiving.”¹³⁵

Yet the cited pages of the Lillyquist book are a clear warning to those who would minimize crimes or criminal responsibility. Neutralization theory implies that the easier it is for an individual to neutralize the moral objections to a crime, *the easier it is for the individual to commit the crime*. Although there are many causes of crime, Lillyquist states (on the same page from which the Reid manual quotes): “It is often the case that the words which a person offers *after* an event, as a rationalization, were available to the person *before* the event, and, furthermore, that were they not available, the person may not have committed an action inconsistent with his or her self-concept.”¹³⁶ Lillyquist also quotes the sociologist C. Wright Mills: “Often anticipation of acceptable justifications will control conduct. (‘If I did this, what could I say? What would they say?’) Decisions may be, wholly or in part, delimited by answers to such queries.”¹³⁷ In other word, the claim being made on the very pages the Reid manual cites, is that, at the margin, *neutralizations cause crime*. The causal claim is made throughout the cited chapter.¹³⁸

As should now be apparent, there is no difference between what the Reid manuals call “theme-development,” what we call “moral minimization,” and what this psychological literature calls “neutralization.”

¹³⁵ *Id.* at 341. By “personal consequences,” the psychological appendix refers to effects on the “individual’s self-concept,” such as “loss of self-esteem, pride, or integrity.” *Id.* at 328. *See also Id.* at 343 (“[t]he interrogator must be careful in his condemnations; the suspect should experience anxiety not because of the crime committed, but rather because he is lying about it.”).

¹³⁶ LILLYQUIST, *supra* note 36, at 152–53 (emphasis in original).

¹³⁷ *Id.* (quoting C. WRIGHT MILLS, *POWER, POLITICS, AND PEOPLE* 443 (1963)).

¹³⁸ *See* LILLYQUIST, *supra* note 36, at 160, where Lillyquist asks and answers the causal question: “Are the neutralizations ‘mere’ rationalizations or do they operate before the offense and facilitate it? . . . [T]he theorists who use the term neutralization intend it to be viewed as a pre-offense activity, not just an excuse mustered after being caught.” He quotes a trio of sociologists for the proposition that neutralizations are “not merely ex post facto excuses or rationalizations invented for the authorities’ ears, but rather phrases which actually facilitate or motivate the commission of deviant actions by neutralizing a preexisting normative constraint.” *See id.* (citing IAN TAYLOR, PAUL WALTON & JOCK YOUNG, *THE NEW CRIMINOLOGY: FOR A SOCIAL THEORY OF DEVIANCE* 176 (1973)).

On pages cited by the Reid manual, Lillyquist lists the classic “techniques of neutralization” (taken from the seminal article on the subject¹³⁹): (1) denial of responsibility, (2) denial of injury, (3) denial of victim, (4) condemnation of the condemners, and (5) appeal to higher loyalties.”¹⁴⁰ As the manual indicates, these five neutralization techniques supply the Reid themes of moral minimizations.

The first category, “Denial of responsibility” includes claims that one was “intoxicated with liquor or drugs,”¹⁴¹ which, as we saw, is a common interrogation tool.¹⁴² It also includes “tak[ing] the approach of the extreme environmental attributionist who sees all actions as completely determined by situational factors.”¹⁴³ Interrogators use this technique when they blame society or an emotional state.¹⁴⁴ “Denial of injury” involves adopting a narrow view of harm and describing some criminal acts as mere “mischief” or “pranks.”¹⁴⁵ We saw this narrowing in child sexual abuse cases where detectives suggested that minors could and did consent to sex, and in a Massachusetts case comparing arson to “cabbage night” pranks.¹⁴⁶ “Denial of victim” includes the idea that “they had it coming.”¹⁴⁷ We saw many such victim-blaming techniques.

¹³⁹ Sykes & Matza, *supra* note 133, at 667–69. *See also* W. William Minor, *Techniques of Neutralization: A Reconceptualization and Empirical Examination*, 18 J. RSCH. CRIME & DELINQ. 295 (1981).

¹⁴⁰ LILLYQUIST, *supra* note 36, at 153 (citing Sykes & Matza, *supra* note 133. *See id.* at 667 (“It is by learning these techniques [of neutralization] that the juvenile becomes delinquent.”). Neutralization theory is “no longer confined to the study of juvenile delinquents,” but is applied to a wide variety of adult criminal behaviors. *See* Shadd Maruna & Heith Copes, *What Have We Learned from Five Decades of Neutralization Research?*, 32 CRIME & JUST. 221, 223 (2005).

¹⁴¹ LILLYQUIST, *supra* note 36, at 153.

¹⁴² *See supra* notes 52, 63, 107, 115 and accompanying text.

¹⁴³ LILLYQUIST, *supra* note 36, at 153. *See also* Sykes & Matza, *supra* note 133, at 667 (“In effect, the delinquent approaches a ‘billiard ball’ conception of himself in which he sees himself as helplessly propelled into new situations.”).

¹⁴⁴ *See supra* notes 21–23, 113, and accompanying text. Recall the sexual assault case in which the interrogator had offered that the suspect acted when he was “not in the right frame of mind.” *State v. Baker*, 465 P.3d 860, 864 (Haw. 2020).

¹⁴⁵ *See* Sykes & Matza, *supra* note 133, at 667–68. *See also* LILLYQUIST, *supra* note 36, at 154.

¹⁴⁶ *See supra* note 126–32, 137, and accompanying text.

¹⁴⁷ LILLYQUIST, *supra* note 36, at 154. *See* Sykes & Matza, *supra* note 133, at 668 (“The injury . . . is a form of rightful retaliation or punishment”).

The neutralization technique of “condemning the condemner” posits that everyone commits similar crimes or is corrupt, so the prosecution is hypocritical.¹⁴⁸ The Reid method specifically proposes to tell those suspected of stealing from their employer how surprisingly common such crime is, and to blame the government for “squeez[ing] citizens with burdensome taxes . . . to waste on foreign countries.”¹⁴⁹ Finally, the “higher loyalties” technique justifies the crime as serving values more important than law, such as the protection and welfare of one’s family or friends.¹⁵⁰ Several Reid minimization themes involve proposing that the suspect acted on behalf of his family.¹⁵¹

Given the overlap, our claim is simple. First, there is a theory that proposes that people who have internalized social norms against criminal acts are able to talk themselves into committing such acts only if they succeed at “neutralization.” Second, there is an interrogation technique that explicitly seeks to *reinforce* the suspect’s precise neutralizations. Thus, to secure a confession for a past crime, moral minimization endorses and encourages the very psychological processes that the referenced theory says will lead to criminality. The technique is not a fleeting moment of the interrogation, but a persistent theme requiring an extended monologue. And the theme is memorable and powerful because it is presented with apparent empathy by police officers from whom the suspect expected only disapproval.

2. Moral Disengagement Theory

Bolstering neutralization theory is the related idea of *moral disengagement*. This social cognitive theory identifies the mechanisms by which ordinary people who want to continue thinking of themselves as decent and moral come to rationalize their bad conduct.¹⁵² Moral

¹⁴⁸ *Id.* at 156; Sykes & Matza, *supra* note 133, at 668.

¹⁴⁹ INBAU, ET AL., *ESSENTIALS*, *supra* note 27, at 230.

¹⁵⁰ LILLYQUIST, *supra* note 36, at 156–57; Sykes & Matza, *supra* note 133, at 669.

¹⁵¹ See INBAU, ET AL., *supra* note 1, at 60.

¹⁵² See generally ALBERT BANDURA, *MORAL DISENGAGEMENT: HOW PEOPLE DO HARM AND LIVE WITH THEMSELVES* (2016).

disengagement is broader than neutralization because it focuses not only on crimes, but also on legal but morally dubious activities. For example, how do manufacturers of deadly commodities like cigarettes come to terms with selling them, especially to minors, and with making agricultural and chemical changes to increase their addictive properties?¹⁵³ The psychological mechanisms of disengagement includes some techniques familiar from neutralization theory: diffusion of responsibility to others, denial of the harm, appeals to honorable purposes, and dehumanizing the victim.¹⁵⁴ Another disengagement mechanism is the use of euphemistic language that diverts attention away from the moral wrong.¹⁵⁵

As with neutralization, moral disengagement is incremental. The first instance of moral disengagement “will not instantly transform considerate individuals into cruel ones.”¹⁵⁶ Instead, individuals initially “perform mildly harmful acts they can tolerate with some twinges of guilt,” and then “[a]fter their self-reproof has been diminished through repeated enactments, the level of ruthlessness increases until eventually acts they originally regarded as abhorrent can be performed with little anguish or self-censure.”¹⁵⁷

Legal scholars have started to pay attention to moral disengagement and related psychological ideas.¹⁵⁸ That people are internally motivated to maintain a positive self-image –including as being honest and moral – is potentially good news for legal compliance. But that people have the capacity for rationalization to avoid experiencing a loss of self-image, even when acting badly, is bad news. Yuval Feldman’s book on the subject is

¹⁵³ *Id.* at 239–51.

¹⁵⁴ *Id.* at 62–64 (discussing diffusion of responsibility); 64–69 (discussing distortion and denial of harmful effects); 49–53 (discussing moral and social justifications); 84–91 (discussing dehumanization and attribution of blame).

¹⁵⁵ *Id.* at 53–56.

¹⁵⁶ *Id.* at 97.

¹⁵⁷ *Id.* at 97–98.

¹⁵⁸ See Janice Nadler, *Ordinary People and the Rationalization of Wrongdoing*, 118 MICH. LAW REV. 1205, 1206 (2020) (“[T]he emerging field of Behavioral Ethics . . . demonstrates . . . that wrongdoing is remarkably easy to provoke, in part because people fail to fully recognize the ethical implications of their actions”).

entitled *The Law of Good People*¹⁵⁹ to emphasize the problem that law usually faces is *not* the need to constrain the Holmesian “bad man”¹⁶⁰ without moral scruples, but to regulate “good” people who will obey the law unless they are able to succeed at rationalization.

Much of Feldman’s book aims to show how law might be structured to *impede* the mechanisms of moral disengagement, so as to improve legal compliance.¹⁶¹ Some of the recommendations involve subtle changes in legal language.¹⁶² In this article, we add one simple recommendation: do not have agents of the state endorse and reinforce the mechanisms of moral disengagement. If a major problem of legal compliance is that well-motivated people disengage from the moral wrongness of their acts by denying that they caused harm, diffusing their personal responsibility, and dehumanizing the victim, then it is risky to have detectives in interrogation insist that a suspect’s theft or assault did no real harm, was justified by higher moral considerations, and is really the fault of others, including the victim. Because “[p]eople do not usually engage in harmful conduct until they have justified to themselves the morality of their actions,”¹⁶³ the interrogation practice of minimization, by reinforcing these disengagement mechanisms, is making it easier for suspects to rationalize future harmful behavior.

3. The Marginal Offender

One might resist the analysis by arguing that the police cannot further corrupt guilty suspects, who have already successfully neutralized

¹⁵⁹ YUVAL FELDMAN, *THE LAW OF GOOD PEOPLE: CHALLENGING STATES’ ABILITY TO REGULATE HUMAN BEHAVIOR* (2018).

¹⁶⁰ See Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897).

¹⁶¹ See FELDMAN, *supra* note 159, at 24 (noting the danger of vague legal mandates because “[i]n the presence of vagueness . . . good people are more likely to find ways to justify their bad behavior”); 200 (noting the importance of improving the certainty of punishment rather than its severity, because good people are more likely to behave well when reminded to do so by the punishment of others).

¹⁶² *Id.* at 162–63 (“[T]his project suggests not only that minor language choices, which do not have any instrumental importance, affect behavior in unexpected directions but also have conflicting effects on people’s behavior.”). See also Alfred L. McAlister, *et al.* *Promoting Tolerance and Moral Engagement Through Peer Modeling*, 6 CULTURAL DIVERSITY & ETHNIC MINORITY PSYCH. 363 (2000).

¹⁶³ BANDURA, *supra* note 152, at 49.

the internalized aversion to committing criminal acts (and/or morally disengaged). This reply is flawed in two ways.

First, those guilty of offending often retain some internal motivation for complying with law. Recall that the whole point of neutralization and moral disengagement theory is to explain that the offender may experience genuine remorse and feelings of guilt. Whether such an individual re-offends depends in part on whether that linkage – between offending and negative emotions – is weakened or strengthened by the experience of offending. Committing a long series of offenses is likely to “harden” the perpetrator, who thereby loses the capacity for feeling guilt or remorse for that type of offense (perhaps accompanied by entry into a subculture that esteems that criminality).¹⁶⁴ But a single successful neutralization will usually fail to eliminate the linkage, which is why the offender still struggles with guilt.

Indeed, the experience of being apprehended for an offense may instead produce “softening.” Being apprehended may raise the salience of all the arguments against one’s rationalizations. The perpetrator’s experience of guilt or remorse may be greater than expected, perhaps accompanied by the realization that the supporting rationalizations are flimsy and unconvincing. Neutralization theory therefore applies as much to the decision to re-offend as it does to the decision to offend for the first time.¹⁶⁵

¹⁶⁴ See, e.g., Maruna & Copes, *supra* note 140, at 274 (suggesting that “in early stages of delinquency, youths may need to use neutralizations to relieve the cognitive dissonance that occurs when their actions are not in line with their values,” but “[b]y using these neutralizations, delinquents’ commitment to those conventional values are eventually weakened to the point that there is no longer a need to neutralize”); William W. Minor, *Neutralization as a Hardening Process: Considerations in the Modeling of Change*, 62 SOC. FORCES 995, 1018 (1984) (arguing that “over time, either the desire or the moral disapproval should dissipate, leading one to either conformity or guilt-free deviance”).

¹⁶⁵ Thus, even if, contrary to the claim of LILLYQUIST, *supra* note 36 and those he cites, neutralizations were in the first instance after-the-fact rationalizations, they may still provide the “rationale or moral release mechanism facilitating future offending.” Maruna & Copes, *supra* note 140, at 271, citing TRAVIS HIRSCHI, *CAUSES OF DELINQUENCY* 208 (1969). See also RONALD L. AKERS, *DEViant BEHAVIOR: A SOCIAL LEARNING APPROACH* 60 (3d ed. 1985) (as quoted in Maruna & Copes, *supra* note 140, at 271) (If “they successfully mitigate others’ or self-punishment, they become discriminative for repetition of the deviant acts and,

Second, we should not forget that some of the suspects who listen to interrogators minimize the crime and blame the victim are *innocent*. The probable cause needed for an arrest is a low evidentiary bar, so police are sometimes wrong in their suspicions of those they interrogate.¹⁶⁶ In each case, a person erroneously suspected of a sexual assault or theft is told by detectives that the crimes are not serious and the victim or society is really to blame. Aside from endorsing these neutralizations, the interrogation conveys the meta-rationalization: “if the cops don’t think this is a big deal, why should I?” Those who have not previously found it possible to neutralize a sexual assault or theft may now do so.

The economic concept of marginality is helpful here.¹⁶⁷ Moral minimization works on *marginal* offenders, those who are still capable of feeling guilty or shame from the offense. Away from the margin of criminality are (1) *infra-marginal non-offenders*, law-abiding citizens whose circumstances in life do not present them with sufficiently strong temptations to overcome their internalized commitment not to offend, and (2) *infra-marginal offenders*, the individuals who have not internalized the social norm and will readily offend when the opportunity arises, without guilt or shame.¹⁶⁸ The logic of using moral minimization in interrogation does not apply to either of these infra-marginal types. Non-offenders should not confess and the infra-marginal offenders experience no guilt or shame from which minimization offers relief.¹⁶⁹ The logic of minimization,

hence, precede the future commission of the acts.”). On some accounts, neutralization “theory . . . is best understood as an explanation of persistence or desistance rather than of onset of offending.” Maruna & Copes, *supra* note 140, at 271–27. See also Jennifer G. McCarthy & Anna L. Stewart, *Neutralization as a Process of Graduated Desensitisation: Moral Values of Offenders*, 42 INT’L J. OFFENDER THERAPY & COMPAR. CRIMINOL. 278 (1998).

¹⁶⁶ Recall our rough estimate that police use moral minimizations on 400,000 suspects per year, *supra* text accompanying note 117-21. If only 20% were innocent, that would translate into 80,000 suspects. This seems like a conservative estimate as detectives sometimes interrogate suspects they haven’t even arrested.

¹⁶⁷ See, e.g., THOMAS J. MICELI, *THE PARADOX OF PUNISHMENT: REFLECTIONS ON THE ECONOMICS OF CRIMINAL JUSTICE* 121–48 (2019).

¹⁶⁸ These distinctions could all be made more complex and realistic, as positions on a continuum, but the basic point would remain.

¹⁶⁹ For example, those whose identity comes from a subculture that values a certain kind

therefore, applies only to the marginal offender. But these offenders are precisely the ones who might be moved to re-offend or not depending on whether their neutralizations for the crime are reinforced or diminished.

We call this last observation the “goose/gander” point. The Reid argument for using moral minimization in interrogations is plausible only in cases where neutralization theory is plausible. If a suspect possesses no internal motivation for complying with law, there is no criminogenic risk to offering moral minimizations, *but there is also no plausible case for why the minimizations would elicit a confession* (other than the impermissible one, that it impliedly promises official leniency).

The goose/gander point is important for another objection. One might resist our criminogenic claim by noting that the police currently lack legitimacy for large parts of the American population¹⁷⁰ and/or that the legal estrangement of many Americans renders them immune to the influences we describe.¹⁷¹ Although our argument would be strengthened for suspects who view police as legitimate authority figures representing an inclusive criminal justice system, it does not depend on that perception. Our claim only depends on suspects expecting police disapproval and instead being surprised by police endorsement of their neutralizations. From the surprising fact that *even the police* minimize the moral seriousness of the crime and blame others, one can confirm one’s neutralizations. But what if

of criminality will not be inclined to experience guilt or shame when committing those crimes and therefore have no need to rationalize their behavior with their values. *See, e.g.,* Volkan Topalli, *The Seductive Nature of Autotelic Crime: How Neutralization Theory Serves as a Boundary Condition for Understanding Hardcore Street Offending*, 76 SOCIO. INQUIRY 475 (2006).

¹⁷⁰ *See infra* text accompanying notes 220-226.

¹⁷¹ *See, e.g.,* Robert J. Sampson & Dawn Jeglum Bartusch, *Legal Cynicism and (Subcultural?) Tolerance of Deviance: The Neighborhood Context of Racial Differences*, 32 LAW & SOC’Y REV. 777, 778 (1998) (arguing that “legal cynicism” “is a concept distinct from subcultural tolerance of deviance” and is found especially “in levels of concentrated disadvantage, residential instability, and immigrant concentrations”); Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE LAW J. 2054, 2086–87 (2017) (“A person could simultaneously see the police as a legitimate authority . . . and feel estranged from the police (believing that the legal system and law enforcement . . . are fundamentally flawed and chaotic, and therefore send negative messages about the group’s societal belonging.)”).

suspects are so skeptical of the police that they do not believe anything the detective says, including the minimizing statements? Then the goose/gander point applies: if the suspect completely disbelieves the minimizations, there is certainly no criminogenic risk, but also no legitimate reason that the minimizing tactic will elicit a confession.¹⁷² Either way, we should abandon the tactic.

What do the Reid manuals offer in reply to the criminogenic claim we raise? Almost nothing. With one exception, there is no indication that the authors of the manuals realize that they could be helping suspects to neutralize future crimes.¹⁷³ The exception is a passage from (an early edition of) a supplemental Reid manual focused solely on child abuse interrogations, where David Buckley states:

[I]n offering these themes the author is, in no way, suggesting that a child is to blame for the abuse or that emotions or alcohol decrease the legal consequences of abusing a child. . . . [T]he goal of theme development is to lower the offender's perception of the seriousness of the offense and to encourage him to tell the truth about his offensive behavior. Having the offender take psychological responsibility for his actions and acknowledge the trauma and harms he caused his victims is beyond the scope of this book and *will need to be addressed by other professionals*

¹⁷² See INBAU, ET AL., THIRD EDITION, *supra* note 133, at 334 (noting the importance of the interrogator's credibility with the suspect to the success of interrogation).

¹⁷³ In the psychological appendix that accompanied INBAU, ET AL., THIRD EDITION, *supra* note 133, at 345, Jayne states that the interrogator's initial accusation – the statements of “direct positive confrontation” – will “abolish[]” the neutralizations the offender had used up to that point. But this confrontation occurs *before* the interrogator offers themes of moral minimization, which “reintroduce[e]” the neutralizations. *Id.* Outside of the Reid manuals, ZULAWSKI & WICKLANDER, *supra* note 37, at 341–42, has a section on “correcting the rationalizations,” but it is concerned only with “correcting” the *legal* and not the moral minimizations the interrogators have used. The concern is that rationalization might cause problems for the prosecution where it “remove[s] the intent necessary to prove a violation of the law” (the only example given). *Id.* at 341. The manual does not suggest “correcting” the interrogator's efforts to minimize the moral seriousness of the offense nor by moral excuses and justifications.

subsequent to the offender's acknowledgement of the abuse in the victim.¹⁷⁴

Notably, this is the only occasion we discovered in which a Reid manual acknowledges the falsity of its recommended victim-blaming tactics. The passage, however, is not reassuring. Buckley tacitly admits that minimization works against the offender's taking psychological responsibility for the harm he has caused the victim. As feelings of guilt and responsibility are correlated with lowering the risk of recidivism,¹⁷⁵ and is part of rehabilitation therapy,¹⁷⁶ Buckley acknowledges the need for subsequent work "by other professionals" to convince the suspect not to believe the themes the detectives sympathetically endorsed. No doubt, even *more* work is necessary when detectives followed the Reid technique by reinforcing the offender's neutralizations.

Nor is there any reason to limit the concern to sex offenses against children. If moral minimization works to elicit confessions for any crime, it is because it works at lowering the guilt and shame the offender expected from committing that crime. Weakening internal incentives to comply undermines compliance. In short, if the tactic works as advertised, it is also criminogenic.

¹⁷⁴ DAVID M. BUCKLEY, *HOW TO IDENTIFY, INTERVIEW & INTERROGATE CHILD ABUSE OFFENDERS* 274 (1st ed. 2006) (emphasis added). The reference to "other professionals" does not appear in the substantially similar passage of the second edition, BUCKLEY, *supra* note 28. That edition instead says "Expecting the offender to take psychological responsibility . . . at this stage of the process is unrealistic and beyond the scope of this book." *Id.* at 212.

¹⁷⁵ See, e.g., June P. Tangney, et al., *Two Faces of Shame: Understanding Shame and Guilt in the Prediction of Jail Inmates' Recidivism*, 25 *PSYCHOL. SCI.* 799, 801 (2014) ("Inmates' propensity to experience guilt, assessed shortly upon incarceration, negatively predicted criminal recidivism during the first year post-release."). See also *United States v. Beserra*, 967 F.2d 254, 256 (7th Cir. 1998) (Posner, J.) ("A person who is conscious of having done wrong, and who feels genuine remorse . . . is on the way to developing those internal checks that would keep many people from committing crimes even if the expected costs of criminal punishment were lower than they are.").

¹⁷⁶ See, e.g., Elias Mpofo, et al., *Cognitive-Behavioral Therapy Efficacy for Reducing Recidivism Rates of Moderate- and High-Risk Sexual Offenders: A Scoping Systemic Literature Review*, 62 *INT'L J. OFFENDER THERAPY & COMP. CRIMINOL.* 170, 172 (2018) ("The efficacy of CBT to reduce recidivism is premised on the assumption that acceptance of responsibility for offense" or, failing that, to offenders "owning up to responsibility for their future actions.").

4. The Lessons of Restorative Justice

As another possible objection to our criminogenic claim, one might optimistically hope that the effects of moral minimization exist only in the very short term. Perhaps the effect is sufficient to induce a true confession, but then wears off within hours after the suspect signs a statement and leaves the influence of the interrogating detectives.

There is nothing to support this optimistic account. In the quotation above, Buckley does not suggest that the problem he identifies is solved by the passage of time. To the contrary, some criminal offenders manage to resist *forever* any feeling of personal responsibility for their crimes; they may never empathize with their victims. One might think that the critical moment for shattering the offender's neutralizations would be in a confrontation with police immediately after their apprehension, but that when detectives instead use that moment to validate those neutralizations, that they become all the more entrenched.

In any event, an important criminological literature examines the long term effects of a brief intervention that is the mirror image of moral minimization – that of *restorative justice* (“RJ”).¹⁷⁷ According RJ theorists, the ordinary process of criminal trials fails to meaningfully convey to the offender the serious wrongfulness of their actions and the harm to the victim.¹⁷⁸ RJ theory says that to persuade the offender to take responsibility requires face-to-face, emotional engagement during which others might critique the offender's neutralizations of the crime. This engagement occurs in RJ “conferences” that include victims, offenders, their families and friends, and sometimes a convener (often a police officer) trained in restorative justice techniques.¹⁷⁹ Governments in different parts of the world

¹⁷⁷ See RESTORATIVE JUSTICE: PHILOSOPHY TO PRACTICE (Heather Strang & John Braithwaite eds., 2017); Erik Luna, *Introduction: The Utah Restorative Justice Conference*, 2003 UTAH LAW REV. 1.

¹⁷⁸ John Braithwaite, *Restorative Justice: Assessing Optimistic and Pessimistic Accounts*, 25 CRIME & JUST. 1, 53 (1999) (noting that criminal defense lawyers “have a trained competence” in neutralization methods, such as “condemning condemners, denying victim, denying injury, and denying responsibility”).

¹⁷⁹ See Lawrence W. Sherman & Heather Strang, *Restorative Justice as Evidence-Based Sentencing*, in THE OXFORD HANDBOOK OF SENTENCING AND CORRECTIONS 215, 216 (Joan

employ restorative justice conferences at different points in the criminal process: as a diversionary program that avoids prosecution entirely; as a step after a guilty plea and before formal sentencing; as a supplement to a sentence of probation; or as a preparation for release from prison.¹⁸⁰

John Braithwaite explicitly links the need for RJ to the problem of neutralization, explaining: “Restorative justice conferences may prevent crime by facilitating a drift back to law-supporting identities from law-neutralizing ones.”¹⁸¹ Braithwaite explains how offenders find it difficult to sustain their neutralization techniques when confronted in a conference by their victims, community members, and even members of their own family.¹⁸² The idea is that engagement will push offenders to appreciate the wrongfulness of their behavior and the flimsiness of their imagined excuses and justifications, which makes it more difficult to neutralize the same kind of crime in the future. If so, then efforts at restorative justice would decrease recidivism.

The evidence from randomized controlled trials – the gold standard in empirical testing – shows exactly this result. A recent meta-review identified studies using a standard protocol for RJ conferences.¹⁸³ The

Petersilia & Kevin R. Reitz eds., 2012) (noting that an RJ conference “brings together offenders, their victims, and their respective kin and Communities”).

¹⁸⁰ See Lawrence W. Sherman, Heather Strang, Evan Mayo-Wilson, Daniel J. Woods & Barak Ariel, *Are Restorative Justice Conferences Effective in Reducing Repeat Offending? Findings from a Campbell Systematic Review*, 31 J. QUANT. CRIMINOL. 1, 3 (2015); United Nations OFF. ON DRUGS & CRIME, HANDBOOK ON RESTORATIVE JUSTICE PROGRAMMES 13–31 (2006).

¹⁸¹ Braithwaite, *supra* note 178, at 47.

¹⁸² *Id.* at 47–53. With the victim present, “it is hard to sustain denial of victim and denial of injury.” *Id.* at 47. “[V]ictim supporters will often move offenders through the communicative power, the authenticity that comes from their love of the victim.” *Id.* Second, “[c]ondemnation of the condemners is also more difficult to sustain when one’s condemners engage in a respectful dialogue about why the criminal behavior of concern to them is harmful.” *Id.* “Conferences and healing circles are designed to make the condemners members of an in-group rather than an outgroup by two moves: inviting participants from all the in-groups that matter most to offenders; encouraging victims and victim supporters to be respectful.” *Id.* at 48.

¹⁸³ See Lawrence W. Sherman, *et al.*, *Are Restorative Justice Conferences Effective in Reducing Repeat Offending? Findings from a Campbell Systematic Review*, 31 J. QUANT. CRIMINOL. 1 (2015).

review considered only those studies in which crime victims had consented to participate in a randomized trial – into RJ or the non-RJ control – before the random assignment occurred, and which measured recidivism rates for at least two subsequent years.¹⁸⁴ There were ten such studies involving a total of 1,880 offenders who committed violent or property crimes over five jurisdictions (and three continents). Nine of out ten studies showed lowered recidivism for those selected for an RJ conference and this pattern across the studies is statistically significant.¹⁸⁵ The “average effect size is .155 standard deviations less repeat offending among the offenders in cases randomly assigned to RJ [conferences] than among the offenders in cases assigned not to have an RJ [conference].”¹⁸⁶ Put differently, there were 7 to 45 per cent fewer repeat convictions (or in one study, arrests) across the ten experiments.¹⁸⁷ Contrary to some expectations, the effects were higher in violent than property crimes, and as high for adult offenders as juvenile offenders.¹⁸⁸

In sum, the studies show that an RJ conference *lasting only a few hours* can have effects measured over the next two years.¹⁸⁹ If brief RJ conferences that undermine offender neutralizations can measurably decrease recidivism over a period of years, there is every reason to think that the opposite intervention – interrogations that reinforce the offender neutralizations – can have the opposite effect, *also over a period of years*. As RJ conferences decrease recidivism, the obvious risk of their negation is to increase recidivism. This seems especially true when there is no subsequent RJ conference, but one might also expect an RJ conference to

¹⁸⁴ *Id.* at 1–3. In addition, the review only looked for studies published in English on or after 1994, when there was some standardization of RJ procedures. The review excluded victim-offender mediations, which operate on a very different model.

¹⁸⁵ *Id.* at 11.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* The benefits of RJ are substantially larger than the costs. *See Id.* at 18, Table 2 (reporting monetized benefits that exceed costs by ratios of 3.7 to 1 to 8.1 to 1).

¹⁸⁸ *Id.* at 12–13.

¹⁸⁹ RJ conferences last one to three hours. *See* LAWRENCE W. SHERMAN & HEATHER STRANG, *RESTORATIVE JUSTICE: THE EVIDENCE* 39 (2007). Compare Leo, *Interrogation Room*, *supra* note 82, at 279 Table 6 (finding that 65% of interrogations lasted longer than 30 minutes; 28% lasted longer than an hour); Kelly, *et al.*, *supra* note 85 at 171 (reporting on interrogations that average 1.5 hours).

achieve less if the detectives have first entrenched the offender's neutralizations.

While there is much discussion of RJ ideas in the United States,¹⁹⁰ and efforts persist to introduce or expand their use,¹⁹¹ no one has previously noted that it is the common practice of American police interrogators to do precisely the opposite. RJ theory demonstrates that the first step in RJ reform would be to constrain the anti-restorative element of moral minimization.

5. The Lessons of Entrapment Doctrine

Our claim is that the governmental reinforcement of crime neutralizations can increase crime. There is a legal doctrine that recognizes the ability of government actors to cause crime – the entrapment defense. There would be no need for the defense if it were not possible that undercover agents or informants could persuade individuals to commit crimes they would not otherwise commit outside of a sting operation. On close inspection, entrapment doctrine recognizes the risk of persuading someone to commit a crime when government agents engage in certain neutralizations. Although the courts do not use these terms, they find entrapment in some instances because the undercover agent too effectively minimized the crime.

In *Sorrells v. United States*,¹⁹² the first Supreme Court case on entrapment, a crucial fact was the undercover agent's appeal to a military bond with the defendant, based on shared service in World War I. The undercover crime was the sale of intoxicating liquor. As one witness said at trial, he believed "one former war buddy would get liquor for another."¹⁹³

¹⁹⁰ See, e.g., Lynn S. Branham, 'Stealing Conflicts' No More?: The Gaps and Anti-Restorative Elements in States' Restorative-Justice Laws, 64 ST. LOUIS U. L.J. 145 (2020) (providing a comprehensive analysis of the gaps in American RJ practices).

¹⁹¹ See, e.g., Seema Gajwani & Max G. Lesser, *The Hard Truths of Progressive Prosecution and a Path to Realizing the Movement's Promise*, 64 N.Y. LAW SCHOOL LAW REV. 69 (2020).

¹⁹² *Sorrells v. United States*, 287 U.S. 435 (1932).

¹⁹³ *Id.* at 440.

The Court vacated the conviction and remanded so the jury could consider the entrapment defense.¹⁹⁴

Something similar occurred in *Sherman v. United States*, where the Court held that the defendant, convicted of selling narcotics, was entitled to an entrapment defense as a matter of law.¹⁹⁵ On several occasions, Sherman had acquired and shared narcotics with an undercover agent he met when they were both (he thought) undergoing medical treatment for addiction. The agent had befriended Sherman and told him that he was “not responding to treatment” and needed to find narcotics.¹⁹⁶ On each occasion, Sherman charged the agent only his expenses in acquiring the drugs, which the two shared. The Court noted this unconventional motive for distributing narcotics and held that the agent’s “resort to sympathy” induced Sherman, as a fellow addict, to secure the drugs.¹⁹⁷

Using the terminology of neutralization, *Sorrells* and *Sherman* involved the tactic of appealing to “higher loyalties” than law, based on bonds of military service or the alleviation of shared pain. Lower court cases show other uses of the higher loyalties appeal, as when undercover operatives claim they need the defendant’s help in committing a crime to make money needed for their children.¹⁹⁸ When considering entrapment in such a context, contemporary courts are wary precisely when government “takes advantage of [such] an alternate, non-criminal type of motive,”¹⁹⁹ *i.e.*, when they morally justify the crime.

¹⁹⁴ *Id.* at 452.

¹⁹⁵ *Sherman v. United States*, 356 U.S. 369 (1958).

¹⁹⁶ *Id.* at 371.

¹⁹⁷ *Id.* at 373. *See also id.* at 383, 384 (Frankfurter, J., concurring in the result) (stating that the government should not be allowed to exploit “[a]ppeals to sympathy” “based on mutual experiences with narcotics addiction” or “friendship”).

¹⁹⁸ *See United States v. Kessee*, 992 F.2d 1001, 1003 (9th Cir.1993). *See also United States v. Sullivan*, 919 F.2d 1403, 1419 & n. 21 (10th Cir. 1990); *United States v. Montanez*, 105 F.3d 36, 38–39 (1st Cir. 1997).

¹⁹⁹ *See United States v. Gendron*, 18 F.3d 955, 961 (1st Cir. 1994) (Breyer, J.) (noting that the entrapment element of “‘inducement’ consists of an ‘opportunity’ [to offend] plus something else—typically, excessive pressure by the government upon the defendant or the government’s taking advantage of an alternative, non-criminal type of motive.”). According to a Westlaw search on February 1, 2022, thirty-two of the federal cases and three of the state cases citing *Gendron* quote its language about the government’s exploitation of a

The last Supreme Court case on the defense, *Jacobson v. United States*,²⁰⁰ is more complicated but tells a similar story. The Court found the defendant Jacobson entrapped as a matter of law into the crime of ordering child pornography via the mail. Crucial to the Court's decision were various communications the government mailed to Jacobson. One was a letter ostensibly from an American Hedonist Society, which stated that members have a "right to read what we desire . . . [and] to seek pleasure without restrictions placed on us by outdated puritan morality."²⁰¹ A second letter from a different (fake) organization "founded to protect and promote sexual freedom and freedom of choice" claimed to be lobbying for the repeal of legislation defining an age of consent.²⁰² A third letter, purportedly from a private individual, engaged in "mirroring," i.e., "reflect[ing] whatever the interests are of the person" addressed, which, for Jacobson, meant stating a shared interest in images of young men; the fictional letter-writer also expressed a preference for amateur pornography because "the actors enjoy it more."²⁰³ Finally, the letter offering to sell child pornography, from a supposedly distinct source, decried the "hysterical nonsense" about pornography and asked "why is your government spending millions of dollars to exercise international censorship while tons of drugs, which makes yours the world's most crime ridden country are passed through easily"?"²⁰⁴

In one sense, the facts of *Jacobson* are obviously distinguishable from a few hours of interrogation because the government's persuasion campaign there lasted for 26 months. Yet the longevity of the operation in *Jacobson* should not obscure the comparison. Many sting operations using the same tactics are quite brief, as in *Sorrells*. And the governmental actions in *Jacobson* were clearly the tactics of neutralization. There is denial of injury (the actors enjoy it), condemnation of the condemners (blaming the government for an "outdated puritan morality" and for not taking care of

"noncriminal" "motive."

²⁰⁰ *Jacobson v. United States*, 503 U.S. 540 (1992).

²⁰¹ *Id.* at 544.

²⁰² *Id.*

²⁰³ *Id.* at 545.

²⁰⁴ *Id.* at 546.

more serious crime), and appeals to higher authority (the importance of sexual freedom and freedom of expression). The overall effect of these ostensibly different sources of communication is to convey that “that receiving this material was something that petitioner ought to be allowed to do,” i.e., “that he had or should have the right to engage in the very behavior proscribed by law.”²⁰⁵ This is the message of the minimization tactics reviewed above, especially for sexual assault crimes.

In sum, criminal defendants are sometimes entrapped because the government agents, *using the tools of neutralization*, persuade an individual into a crime. Of course, the undercover agents intend to induce a crime and police interrogators do not intend to induce the suspect to offend in the future. But the psychological mechanisms are the same, as are the intended and unintended risks. Where we recognize the criminogenic possibility for persuasion in undercover operations, it makes no sense to ignore the parallel risks of persuasion in interrogation.

6. Social Norms and Legal Legitimacy

One might object to our criminogenic claim by rejecting the theories of neutralization and moral disengagement. The theories claim that the rationalizations precede and cause the rationalized misbehavior, but it is difficult to rigorously demonstrate the claim empirically, and powerful evidence does not exist.²⁰⁶

²⁰⁵ *Id.* at 553.

²⁰⁶ For longitudinal evidence of the causal effects of neutralization on crime, *see, e.g.*, Ian W. Shields & Georgia C. Whitehall, *Neutralization & Delinquency Among Teenagers*, 21 CRIM. JUST. & BEHAV. 223, 231–32 (1994) (finding among juvenile offenders, weak but positive correlation between high neutralization scores and subsequent recidivism); Robert Agnew, *The Techniques of Neutralization and Violence*, 32 CRIMINOL. 555, 572 (2014) (“the longitudinal data suggest that neutralization may be a relatively important cause of subsequent violence”). An experimental paper demonstrates how an interlocutor can successfully influence subsequent behavior by arguing for or against the neutralizations. *See* Immo Fritsche, *Predicting Deviant Behavior by Neutralization: Myths and Findings*, 26 DEVIANT BEHAV. 483, 494–95 (2005) (finding experimental support). Yet other evidence fails to validate the theory. *See* Maruna & Copes, *supra* note 140, at 226–27, 228 (concluding that “the relationship between neutralization and offending is probably not a causal one”); Morris & Copes, *supra* note 131. The bottom line is that empirical evidence on the causal effects of neutralization is ultimately mixed.

We have two responses. First, there is the goose/gander point previously explained. The case for using moral minimization is only plausible if neutralization theory is plausible.²⁰⁷ If neutralization theory is false, *there is no reason to engage in moral minimization*. Our second reply is to note that other legal theories and literatures – besides restorative justice and entrapment doctrine – lead to the same conclusion: that moral minimization is criminogenic.

a. Social Norms and Expressive Theory

One of the law's expressive mechanisms for influencing behavior derives from its ability to signal and strengthen the informal sanctions that enforce social norms.²⁰⁸ Social norms involve a pattern of disapproval for counter-normative behavior. The expectation of disapproval itself creates some incentive to follow the norm because people generally value the esteem of others.²⁰⁹ Disapproval also predicts more serious informal sanctions ranging from a censorious look or comment, to gossip and social ostracism, to violence.²¹⁰

Where law and social norms overlap, these informal sanctions explain some legal compliance. People may presume that democratically enacted laws reveal underlying attitudes of disapproval for the behavior the law condemns, so that one needs to comply with law to avoid disapproval, confrontation, and negative gossip. For example, local laws against public smoking and in favor of public breastfeeding of babies respectively signal

²⁰⁷ That is why the Reid manual emphasizes reinforcing the same neutralizations the suspect used to commit the crime. *See supra* note 139 and accompanying text.

²⁰⁸ *See, e.g.*, RICHARD H. MCADAMS, *THE EXPRESSIVE POWERS OF LAW: THEORIES AND LIMITS* 139–52 (2015) [hereinafter MCADAMS, *EXPRESSIVE POWERS*]; Richard H. McAdams, *An Attitudinal Theory of Expressive Law*, 79 OREGON LAW REV. 339–390 (2000) [hereinafter McAdams, *Attitudinal Theory*]; Alex Geisinger, *A Belief Change Theory of Expressive Law*, 88 IOWA LAW REV. 35 (2002).

²⁰⁹ Loss of esteem serves as a basic norms sanction. *See* MCADAMS, *EXPRESSIVE POWERS*, *supra* note 208, at 1141–43; McAdams, *Attitudinal Theory*, *supra* note 208, at 142–43. *See also* GEOFFREY BRENNAN & PHILIP PETTIT, *THE ECONOMY OF ESTEEM: AN ESSAY ON CIVIL AND POLITICAL SOCIETY* (2004).

²¹⁰ *See* ROBERT ELLICKSON, *ORDER WITHOUT LAW* 57–59 (1994); MCADAMS, *EXPRESSIVE POWERS*, *supra* note 208, at 83–84, 139–40.

disapproving attitudes about exposing others to one's cigarette smoke and approving attitudes about breastfeeding.²¹¹ A large part of the compliance with under-enforced laws may be due to law's expressive effects.²¹² But even if the expected criminal sanctions against, say, theft, are much more serious than the informal sanctions, the latter still add to the formal sanctions and generate higher levels of compliance.

Consistent with these ideas, the empirical evidence further demonstrates that some people comply with law out of a sense of reciprocity with others.²¹³ For instance, people are more likely to pay their taxes if they believe others are paying their taxes; less likely if they believe cheating is rampant.²¹⁴ Dan Kahan explains the psychology: "The more strongly she anticipates being condemned by others should she be caught, the more likely an individual is to refrain from evading. By the same token, the more regret or remorse an individual believes she'd experience for engaging in evasion, the less likely she is to do so."²¹⁵ Thus, if perceived compliance is high, the expected social disapproval from violating the law is high, which makes it shameful; if non-compliance is understood to be widespread, then the expected disapproval and shame seems not so great.

²¹¹ See MCADAMS, EXPRESSIVE POWERS, *supra* note 208, at 143, 145.

²¹² See, e.g., Cevat G. Aksoy, *et al.*, *Do Laws Shape Attitudes? Evidence from Same-Sex Relationship Recognition Policies in Europe*, 124 EUROPEAN ECON. REV. (2020) (Article 103399) (finding that legal changes recognizing same-sex unions preceded increased tolerant attitudes toward sexual minorities); Roberto Galbiati, *et al.*, *How Laws Affect the Perception of Norms: Empirical Evidence from the Lockdown*, PLOS ONE (Sept. 24, 2021) (finding that lockdown orders significantly strengthened perception of the relevant social norm); Patricia Funk, *Is There an Expressive Function of Law?*, 9 AMER. LAW & ECON. REV. 135 (2007) (finding that mandatory voting laws increased voting for reasons not explained by expected sanctions); Maggie Wittlin, *Buckling Under Pressure: An Empirical Test of the Expressive Effects of Law*, 28 YALE J. REG. 419 (2011) (finding evidence that mandatory seat belt laws increase belt usage for reasons not explained by sanctions).

²¹³ See, e.g., Dan M. Kahan, *The Logic of Reciprocity: Trust, Collective Action, and Law*, 102 MICH. LAW REV. 71, 74 nn.4–8 (2003).

²¹⁴ *Id.* at 80–85 and especially 81, n.21. More recent and more sophisticated empirical research reaches the same conclusions. See Cristina M. Bott, *et al.*, *You've Got Mail: A Randomized Field Experiment on Tax Evasion*, 66 MANAGEMENT SCI. 2801, 2810–12 (2020) (informing taxpayers of high compliance rate increased self-reported taxable income); James Alm, *et al.*, *When You Know Your Neighbour Pays Taxes: Information, Peer Effects and Tax Compliance*, 38 FISCAL STUDIES 587 (2017) (same).

²¹⁵ Kahan, *supra* note 213, at 81.

Moral minimization obviously weakens these informal incentives. Detectives strive to convince the suspect that the crime is not serious by giving reasons to expect that the social disapproval will be lower than the suspect initially believes. As noted, the Reid manual identifies this precise mechanism: “[I]f the suspect . . . believes that the interrogator can understand and seem to forgive the offense or suspect, he may believe that others will also be sympathetic and forgiving.”²¹⁶ The logic is strong because the suspect expects the police, perhaps more than anyone, to disapprove of felonies. Yet if burning a structure is a mere “prank”²¹⁷ or if sexual assault merely demonstrates that “Everybody fucks up in life,”²¹⁸ then the expected social disapproval is lowered. Moral minimizations thus undermine the enforcement of social norms and the external incentives to comply with a law that embodies those norms.

Moreover, the tactic explicitly attacks the reciprocity motive for compliance by referring to how “everybody” misbehaves in life and “anyone” would commit the crime under the same circumstances.²¹⁹ For employee theft crimes, one manual offers the detectives the most inflated figures for the frequency of such crimes – that “75% of employees steal from the workplace and that most do so repeatedly” – precisely to allow the detective to tell the suspect that far more people commit this type of crime than they had previously assumed.²²⁰ The empirical evidence suggests that if people believe a crime is exceptionally common, it weakens their reciprocal incentives to obey the law.

b. Legal Legitimacy Theory

Another literature in law and social science finds that compliance with the law is inextricably linked with the public’s perception of the law’s legitimacy.²²¹ In recent years, much has been written about the law’s

²¹⁶ INBAU, ET AL., THIRD EDITION, *supra* note 133, at 341.

²¹⁷ Commonwealth v. Baye, 967 N.E.2d 1120, 1130 (Mass. 2012)

²¹⁸ State v. Baker, 465 P.3d 860, 864 (Haw. 2020).

²¹⁹ *Id.* and INBAU, ET AL., ESSENTIALS, *supra* note 27, at 210.

²²⁰ See SENESE, *supra* note 27, at 141.

²²¹ See generally MAX WEBER, ECONOMY AND SOCIETY (1921) (Guenther Roth & Claus Wittich eds., 2013).

procedural sources of legitimacy, and the evidence that many people are more likely to obey law and cooperate with law enforcement if they perceive the courts and police to treat them fairly and with respect.²²² Other research emphasizes what might be called the *substantive* sources of law's legitimacy, where many people are more likely to obey law if its content aligns with their own moral intuition.²²³ Law is less effective in generating compliance when people believe the law consistently deviates from what is morally right.

To see the legitimacy problem posed by moral minimization, consider some themes from the Reid training that directly attack the substantive or procedural legitimacy of regulatory offenses. For smuggling and customs offenses, interrogators should: “[b]lame the laws, rules, regulations and policies as being unfair, unrealistic or outdated.”²²⁴ For passport fraud the suggestion is: “Blame the government policy for placing unfair restrictions on certain countries.”²²⁵ For lacking the appropriate hunting license: “Blame the licensing agency for not providing enough licensed guides.”²²⁶

These examples, however, only make explicit what is already implicit: moral minimizations inevitably drive a wedge between the formal criminal law and common moral intuitions. The criminal law treats the offender's conduct as morally serious, but the detectives say it is not

²²² For evidence of the relationship between procedural justice and legal compliance, see TOM TYLER, *WHY PEOPLE OBEY THE LAW* (revised ed. 2006); Jonathan Jackson, *et al.*, *Why Do People Comply with the Law? Legitimacy and the Influence of Legal Institutions*, 52 *BRIT. J. CRIMINOLOGY* 1051, 1052–53 (2012).

²²³ See John M. Darley, *Citizens' Sense of Justice and the Legal System*, 10 *CURRENT DIRECTIONS IN PSYCH. SCI.* 10 (2001); Elizabeth Mullen & Janice Nadler, *Moral Spillovers: The Effect of Moral Mandate Violations on Deviant Behavior*, 44 *J. EXP. SOC. PSYCH.* 1239 (2008); Paul H. Robinson, *et al.*, *The Disutility of Injustice*, 85 *N.Y.U. LAW REV.* 1940 (2010).

²²⁴ *Id.* at 238 (example A2). Alternatively: “Blame the bureaucracy for making it so difficult to obtain the proper licenses to import items such as protected wildlife or property” (example A1) and “Blame the government/country for trying to maintain a monopoly on these goods” (example A5). *Id.*

²²⁵ *Id.* at 210 (example 1).

²²⁶ SENESE, *supra* note 27, at 165 (example C1). Other legitimacy-attacking themes: “Blame the license fee as being cost prohibitive,” *Id.* (example C4; cf. *Id.* at 166 examples D3 and E3) or “Blame license centers for being too far away.” *Id.* at 166 (example E2).

serious. The law treats the offender's claimed excuses and justifications as irrelevant, but the detective insists they are relevant. In situations where the law refuses to blame the victim, the detective energetically blames the victim. In all cases, the interrogator is criticizing the substantive content of the criminal law for its failure to track morality, thus undermining one mechanism for legal compliance. Moral minimization seems a peculiarly effective tool for undermining legal legitimacy because it is carried out by law enforcement officers – whom the suspects expect to support the legal rule.²²⁷

To summarize this section: if neutralization theory is correct, then moral minimization probably increases confessions *and* increases crime. In particular, the success of restorative justice conferences and appellate court reasoning about entrapment both demonstrate that a single psychologically intense interaction can trigger future criminal behavior. Furthermore, if social norms theory and/or legitimacy theory is correct, then moral minimization probably increases crime even if it has no effect on confessions.

C. *The Criminogenic Risk in Practice*

Synthesizing the various causal arguments of the prior section, we can describe the criminal contexts in which the criminogenic risk is most and least compelling. Moral minimization poses the greatest risk of inducing future crimes when (1) the suspect is a marginal offender, (2) the bases of moral minimization are *generalizable*. In addition, as incarceration sometimes prevents recidivism, we add a third condition, (3) that the resulting criminal sentence leaves open the possibility of recidivism. By contrast, the criminogenic risks are minimal or non-existent when the suspect is an infra-marginal offender, the moral minimization is not generalizable, or the criminal sentence itself incapacitates all further offending. As we show, this means that the risks are greatest for crimes like theft, assault, and sexual assault and are least significant for the crime of homicide.

²²⁷ Of course, those populations who do not perceive the criminal law as having any legitimacy or who are estranged from the law, will be unaffected by this problem of moral minimization. See *supra* text accompanying notes 173–174.

First, we previously explained the significance of an offender being *marginal*. If the suspect is a professional criminal, for example, who commits a certain crime whenever the frequent opportunity arises, then it is unlikely such a person feels any need to neutralize the crime. Such infra-marginal offenders have lost the capacity for feeling guilt or shame for the particular crime and are unmotivated by social disapproval or the legitimacy of law. They are therefore not made more likely to offend by moral minimization, but also not made more likely to confess (the goose/gander point). For most crimes, many offenders are marginal, but for some crimes, there may be very few marginal offenders. Drug crimes are a likely example. That sort of black market, *malum prohibitum* offense – selling contraband goods to willing buyers – are frequently committed by professionals who do not struggle with guilt or shame over the offense.

Second, we referred to moral minimizations being generalizable to future offenses. Trivializing a crime, as by suggesting that it causes no harm to steal from a corporation or wealthy individual, offers an excuse that readily applies to future opportunities for crime. Blaming a crime on alcohol or drug use does the same, as the offender is likely to be under the influence again in the future. Most obviously, blaming a female victim of assault or rape for the stereotypical reasons we saw in the scripts and appellate opinions offers an excuse that readily applies to future crimes, even against the same victim. Most moral minimizations are like these.

Yet some excuses do not generalize. Consider two murder cases discussed in Part I. Where police detectives offered the suspect the excuse for murder that he was exacting revenge against the victim for having killed the suspect's brother,²²⁸ that rationalization probably does not generalize. At least where only one person committed the sibling's murder, and the suspect does not have other family members suffering the same fate, the offender is unlikely to again encounter another temptation for this kind of revenge. In another case, detectives proposed to a mother that she set a fire to kill her special needs daughter because she was making it impossible for

²²⁸ People v. Jones, No. 1–17–1623, 2021 WL 1227837, *2 (Ill. App. Ct. Mar. 31, 2021).

her to properly raise her other three children.²²⁹ Again, it is not apparent that such an excuse could ever apply to a future situation the mother will face. A non-murder example is the accidental hit-and-run crime. Most people who accidentally hit someone with their car and then flee will not accidentally hit another person in the future; reinforcing their neutralizations for flight cannot risk causing many of them to commit the crime again.

Third, a criminal sentence may prevent future recidivism. There is no criminogenic risk if the resulting confession leads to sentence of incarceration for life and the offender cannot re-offend in prison. If a 60-year old man convicted of sexual abuse of a child receives a thirty-year sentence, he is unlikely to re-offend regardless of the reinforcement of his neutralizations, in which case there is no criminogenic downside to using the tactic to secure his confession.

In most instances, however, the resulting sentence will not permanently incapacitate the offender. First, some offenses – revenge-based assaults, for example – can be and are committed *within prison*, so the neutralization might promote recidivism during incarceration.²³⁰ Second, the Reid manuals propose moral minimizations for crimes that typically do not produce life-long prison terms: assault and sexual assault, hate crimes, arson, embezzlement, and other theft crimes. Such offenders, like most offenders, are released from prison, so we must be concerned about their re-offending.²³¹

To be clear, we do not argue in favor of prison as a means of incapacitation. To the contrary, if one wishes to decrease society's use of prison, and especially if one wants to eliminate its use, it is essential to take every non-coercive action possible to dissuade offenders from re-offending, which certainly includes *not* encouraging future crime through moral

²²⁹ See Coughlin, *supra* note 14 (citing the transcripts).

²³⁰ See Christopher Lewis, *The Paradox of Recidivism*, 70 EMORY L.J. 1209, 1221–1222 (2021).

²³¹ See Danielle Kaebler, *Time Served in State Prison, 2016*, BUREAU OF JUSTICE STATISTICS BULLETIN 1 (Nov. 2018) (“Most violent offenders (57%) released from state prison in 2016 served less than three years in prison before their initial release. About 1 in 25 violent offenders (3.6%) served 20 years or more.”).

minimization. Put differently, we should never allow government to perversely justify an increment of imprisonment for its incapacitating effect by saying that an offender is a particular threat to re-offend when that claim is even partly true *because* police detectives persuaded a marginal offender on the generalizable excuses and justifications for the crime.²³²

The net result of this analysis is that the criminogenic risk does not seem particularly large for the offenses of homicide or hit-and-run, but is great for the *far more common* crimes of theft, assault, robbery, and sexual assault.²³³ Because there are so many perpetrators of these latter crimes, it stands to reason that some non-trivial number of them are marginal offenders. The moral minimizations police offer are generalizable reasons for trivializing the crime, for avoiding responsibility, and for blaming victims. And there is no reason to think that the criminal sentence is permanently incapacitating: assault and sexual assault obviously occurs in prison; for all of these crimes, most offenders are eventually released.

To further illustrate, we offer a psychological account of a hypothetical theft case using “Joe,” the prototypical offender named in the manual’s interrogation scripts. Let’s say that Joe steals from his employer. Before embezzling funds, he rationalized away the social norms that would otherwise constrain him, wanting to preserve his identity as a “good person” who is not a “thief,” despite this anticipated crime. Joe initially succeeded at this rationalization by imagining that he is the true victim of his employer, who underpays him (denial of victim); that the corporate employer is not really harmed by the amount he takes (denial of injury); and that his duty as a parent and spouse requires that he do what he must to provide for his family (higher loyalties). Substantial evidence suggests that employees do, in fact, rationalize workplace theft by focusing on what they perceive as the

²³² Similarly, we disagree with criminologists who think there is only a social gain to fine-turning moral minimization. See Copes, *et al.*, *supra* note 36 (reporting on interviews with 59 convicted identity thieves still in prisons, as a means of helping future Reid-trained investigators interrogate identity thieves).

²³³ See John Gramlick, *What the Data Says (and Doesn’t Say) About Crime in the United States*, Pew Research Center (Nov. 20, 2020) (showing that murder and non-negligent manslaughter rates are about 5 per 100,000, while other felonies range from 42.6 per 100,000 (rape) to 1,549 per 100,000 (larceny/theft)).

unfairness of being paid too little,²³⁴ meaning that many such offenders need to neutralize their crime and are therefore marginal.

Yet Joe's rationalizations are tenuous. Joe realizes at some level that his reasoning is self-serving and suspect.²³⁵ This would be true even if he had secured some support for his neutralizations from friends or co-conspirators because he knows that they are biased in his favor and not representative of how his broader community would view his act of taking his employer's money. While his salary is not as high as he wishes, he worries that there is no real sense in which he is underpaid. (He is paid more than some, paid more than he used to be, and was lucky in some ways to have the job at all). If he lets himself think about the aggregate amount of employee theft at his firm, he realizes that his employer is seriously harmed by such theft. And he suspects that he will use much of the money he takes on himself personally, not his family.

Now assume that Joe is arrested. At this moment, he may think about these counter-considerations and "see through" his neutralizations. When "caught," he is forced to consider how his community will regard his behavior; he worries that most people will find the pro-responsibility reasons more compelling than his self-serving rationalizations. This is the time when he is most likely to reject his neutralizations, which would mean that he would find it difficult to rely on them again in the future.

Except that American detectives step into this pivotal psychological moment armed with the Reid technique. They surprise Joe not merely by understanding all of his rationalizations, but by pre-emptively endorsing them. In the interrogation, Joe learns that, not merely close friends and family, but even strangers support his rationalizations. And not merely

²³⁴ See Jerald Greenberg, *Stealing in the Name of Justice: Informational and Interpersonal Moderators of Theft Reactions to Underpayment Inequity*, 54 *ORG. BEHAV. & HUMAN DECISION PROCESSES* 81 (1993); Jerald Greenberg, *Employee Theft as a Reaction to Underpayment Inequity: The Hidden Cost of Pay Cuts*, 75 *J. APPLIED PSYCH.* 561 (1990).

²³⁵ See INBAU, ET AL., *THIRD EDITION*, *supra* note 133, at 331 (noting that the defense mechanisms of rationalization and projection "function through distorting or denying reality," but "this does not mean that the individual loses touch with reality; reality has merely been redefined.").

unbiased strangers, but law enforcement officials whom Joe had expected to be biased against him, *i.e.*, the most likely in his community to condemn a felony. These enforcers of the law do not endorse his rationalizations blandly, but with apparent heartfelt emotion, looking him in the eye with a hand on his shoulder.²³⁶ Over the interrogation, Joe begins to think he was right to begin with and wrong to doubt himself. Whatever the law may say, community mores do *not* hold him to be a real thief. He actually is the victim; his employer really didn't suffer harm; and he in fact acted to fulfil a higher duty to his family. *Just like the detective said.*

Which means he is now a greater risk for recidivism. If he ever encounters another opportunity to steal from an employer, he will find it easier to neutralize the crime than the first time, and easier than would have been the situation where the police offered no such reinforcement. But even if he never encounters an opportunity to steal again from an employer, the neutralizations *generalize* beyond that situation. Given an opportunity, he is more likely to steal from any corporation or individual, even one does not employ him, if their wealth might prevent them from being seriously harmed by the theft (denial of harm). He is more likely to steal from someone who wronged him in some way (denial of victim), perhaps a neighbor or family member who refused a loan he needed and thought he deserved. And he is more likely to steal in any circumstance with the possibility of benefitting his family (higher loyalty).

In sum, although there are a few situations in which the criminogenic risks of moral minimization seem insignificant, in most cases, they are substantial.

D. The Expressive Objection to the Criminogenic Claim

An objection to our criminogenic claim is that other government expression contradicts the detective's moral minimization. On this view, after a confession is obtained, the government disavows and nullifies the detective's message by the subsequent prosecution, conviction, and criminal punishment of the offender. The criminal defendant infers from the

²³⁶ See *id.* at 346 (“Sympathy and expression abound from the interrogator’s voice.”).

experience that there was no truth to the interrogating detectives' moral minimizations. The interrogator said the crime was not serious, that anyone would have done the same, and that the real blame lies with the victim or society, but the prosecution and punishment show that society regards the crime to be serious and the suspect-convict to be morally responsible. The criminal process expresses the true moral status of the convict's conduct and this "counter-programming" erases any effects of the detective's moral minimization.

This optimistic account connects to an old idea in criminal theory that punishment is *expressive*, i.e., that it communicates societal condemnation of the criminal act.²³⁷ This expressive objection is, however, unduly optimistic, for three reasons.

First, as previously discussed, not everyone who is interrogated is convicted. Some suspects who receive the moral minimizations are innocent and not convicted; some are guilty, but do not confess and are not convicted. Each year, thousands of such suspects hear the interrogator minimize the seriousness of a category of offenses and/or blame victims, but receive no expressive corrective from the law.

Second, although we contend below that most suspects will never infer that the detectives were lying in their moral minimizations, we note that a distinct problem arises if suspects do reach this conclusion. Police deception undermines *procedural* legitimacy.²³⁸ The basic claims of this literature are that (1) "citizens are more likely to comply and cooperate with police and obey the law when they view the police as legitimate," and (2) "[t]he most common pathway that the police use to increase citizen perceptions of legitimacy is through the use of procedural justice," which

²³⁷ Indeed, even to define punishment, one influential account says that it is necessary to distinguish criminal sanctions from other forms of harsh treatment the government imposes on rule violators. See Joel Feinberg, *The Expressive Function of Punishment*, in *DOING & DESERVING: ESSAYS IN THE THEORY OF RESPONSIBILITY* 95–118 (1970). See also ANTONY DUFF, *PUNISHMENT, COMMUNICATION, AND COMMUNITY* (2001); Kenworthy Bilz, *Testing the Expressive Theory of Punishment*, 13 *J. EMP. LEGAL STUDIES* 358 (2016).

²³⁸ See Margareth Etienne & Richard McAdams, *Police Deception in Interrogation as a Problem of Procedural Legitimacy*, 54 *TEX. TECH LAW REV.* 21 ((2021).

involves the police treating civilians fairly and respectfully.²³⁹ Legitimacy “increase[s] both willing deference to rules and the decisions of the police and courts, as well as the motivation to help with the task of maintaining social order in the community.”²⁴⁰ Yet a simple enough prerequisite for police legitimacy is honesty; lying destroys procedural justice.²⁴¹ Thus, if suspects later infer that the detectives were deceptive when offering moral minimizations, the tactic is still criminogenic. To pin one’s hopes on suspects figuring out that the sympathy the police extended was merely a ploy, is merely to hope that the system loses procedural instead of substantive legitimacy. Either damages legal compliance.

Third, and most importantly, even when the guilty suspect confesses and is convicted, criminal proceedings will usually fail to undo the effect of the neutralizations. Remember that what matters here is not the message *intended*, or the message that *most* citizens receive, but the message the suspect receives from his encounter with the criminal justice system. To begin, nothing in the moral minimization technique leads the suspect to expect not to be prosecuted. Indeed, the manuals repeatedly express concern that the police not make promises of that level of leniency, for it would obviously incentivize false confessions if suspects thought that a confession would be the immediate end of the matter.²⁴² Even after moral minimization, therefore, the suspect expects to be prosecuted and the prosecutor’s decision to bring charges does not negate the detective’s reinforcement of the suspect’s neutralizations.

Some may argue that a defendant who pleads guilty after a confession must show some new understanding that their behavior was

²³⁹ Final Report of the President’s Task Force on 21st Century Policing, U.S. DEPT. JUST. OFF. CMTY. ORIENTED POLICING SERVS. (May 2015), at 11.

²⁴⁰ Tom R. Tyler, *et al.*, *Psychology of Procedural Justice and Cooperation*, in *ENCYCLOPEDIA OF CRIMINOLOGY AND CRIMINAL JUSTICE* 4011 (Gerben Bruinsma & David Weisburd eds., 2014).

²⁴¹ See Etienne & McAdams, *supra* note 238; Tracey L. Meares, *Everything Old is New Again: Fundamental Fairness and the Legitimacy of Criminal Justice*, 3 *OHIO STATE J. CRIM. L.* 105, 109–110 (2005) (stating that trust and belief that authority figures will act fairly is a key factor for procedural justice).

²⁴² See INBAU, ET AL., *supra* note 1, at 203, 425; JAYNE & BUCKLEY, *FIELD GUIDE*, *supra* note 20, at 277–79.

seriously wrong and not the victim's fault. Yet a guilty plea need not represent any appreciation of wrongdoing. Defendants often plead guilty for strategic reasons having little to do with consciousness of wrongdoing. The literature on false confessions and resulting guilty pleas is one example where defendants do not believe what they say in the plea colloquy.²⁴³ The literature on remorse during pleas and sentencing hearings tells a similar story.²⁴⁴ The concern that defendants sometimes tell the court just what it wants to hear²⁴⁵ is consistent with the notion that we may not really know what portion of the minimizing narrative the defendant might believe.

Next, consider the effect of the judge's sentencing decision. Punishment is arguably different, but the mere fact of punishment is not sufficient to negate the moral minimizations. First, there is uncertainty in the communicative content of non-traditional punishments, i.e., probation, fines, and community service.²⁴⁶ Even when the sentence involves prison, some observers may think that an unexpectedly light sentence fails to condemn the criminal act and even condones it. Consider the infamous sentence of six months of prison for Brock Turner for the crime of rape.²⁴⁷ Many understood the sentence as failing to condemn the crime. If the detectives in his case had, in interrogations of Turner, minimized the seriousness of his crime and/or blamed the victim, as with scripts noted above, it seems doubtful that such a short sentence, far below the mean for rape, would obliterate the effect of their neutralizations. To the contrary, a

²⁴³ *Guilty Pleas and False Confessions*, NAT'L REGISTRY OF EXONERATIONS (Nov. 24, 2015), ("People who falsely confess are likely to believe that they have no meaningful chance of winning at trial.").

²⁴⁴ See Margareth Etienne, *Remorse, Responsibility and Regulating Advocacy: Making Defendants Pay for the Sins of Their Lawyers*, 78 N.Y. U LAW REV. 2103, 2123–24 (2003) (explaining that federal courts make highly subjective findings of remorse in determining whether a defendant has accepted responsibility for their conduct for sentencing purposes); Rocksheng Zhong, *Judging Remorse*, 39 N.Y.U. REV. L. & SOC. CHANGE 133, 142 ("The existing empirical literature, though limited, generally agrees that offenders' remorse, in practice, does have an impact on legal decision-makers' perceptions and judgments about them.").

²⁴⁵ Etienne, *supra* note 244, at 2162–63 ("True remorse cannot be scheduled to appear precisely at the time of the crime or on the sentencing date").

²⁴⁶ See Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 CHI. LAW REV. 591 (1996).

²⁴⁷ See Peter Fimrite, *Ex-Stanford Swimmer to Serve 6 Months in Unconscious Woman's Rape*, SAN FRANCISCO CHRONICLE (June 3, 2016).

felon may infer from unexpected leniency that the minimizations were correct.²⁴⁸

Even where the suspect is convicted and the criminal sentence is widely perceived by the public as fully sufficient to condemn the criminal act, the punishment will not necessarily undo the effect of moral minimization on the offender. The offender has now received two conflicting governmental messages: the first from the detectives and the second from the sentencing judge who reveals the punishment the state will inflict. The question is how the offender will resolve the expressive conflict.

The optimistic account is that the second communication (punishment) nullifies the first (moral minimization). Yet another possibility exists. The offender may view the minimizing message as demonstrating that the criminal sentence does not actually reflect community sentiment. The public is sometimes surprised by the harshness as well as the leniency of a particular criminal sentence, so any given sentence might not reflect common morality.²⁴⁹ If so, then instead of interpreting the judge's criminal sentence as negating the detective's moral minimizations, the offender can interpret the detective's moral minimizations as negating the condemnatory message of the judge's criminal sentence.

The latter inference is the more likely one, for three reasons. First, the interrogators' communications may be more powerful than the judge's. The detectives deliver their patient minimizations in the intimate space of an interrogation room, as part of an emotional performance seeking to connect sympathetically with the offender.²⁵⁰ The judge is often pressed for time and delivers the sentence at some remove from the defendant in a busy

²⁴⁸ To be clear, we do not believe that the police use of neutralizations in interrogation should ever justify longer prison terms. Instead, we think that the failure of shorter prison terms or alternative sentencing to undo the damage of moral minimization is a reason not to use the tactic.

²⁴⁹ See, e.g., Robinson, *et al.*, *supra* note 223, at 1974 (reporting that many people believe the appropriate punishment for drug offenses, three-strikes laws, strict liability offenses, and felony murder are far below actual punishments); 1975–78 (describing other studies finding the same divergences).

²⁵⁰ Recall David Simon's description of detectives putting their arm around the suspect and appearing to be on the verge of tears. SIMON, *supra* note 80, at 212.

public courtroom, using legal boilerplate, and is therefore less likely to seek or create an emotional connection with the defendant. Detectives are selected in part for their ability to develop rapport with suspects during interrogation, but judges are elite technocrats selected more for legal or political proficiency. Suspects might imagine the detectives being more in touch with common morality.

Second, that fact that the judge has “the last word” by speaking after the detectives is not an advantage. To the contrary, people are often subject to “confirmation bias,” in which they interpret new evidence in a distorted way to preserve their existing belief.²⁵¹ People are particularly prone to confirmation when it comes to preserving positive opinions about themselves; they resist negative feedback.²⁵² As the detective’s minimizing message reinforces the offender’s pre-existing neutralizations, the literature on the bias predicts that the offender will make all possible inferences to preserve the neutralizing beliefs. Confirmation bias is even more likely when beliefs are motivated rather than rational,²⁵³ as is true here: the offender simply *prefers* to believe that the detectives have articulated community mores more accurately than the law or the judge. The offender knows that the criminal law does sometimes “get it wrong” (fails to track moral intuitions), and conveniently reasons that *this* sentence is one of those occasions. Offenders want to believe the forgiving and justifying things the detective says, not what society wants its criminal punishment to express. The self-serving inference is always easier than the self-critical one.

Third, if there were an advantage to the judge having the “last word” in a sentencing hearing, it would only be because the judge could *answer* the specific minimizing statements the detectives made. Yet this possible advantage is lost because the judge usually has no idea what the detectives

²⁵¹ See, e.g., Joshua Klayman, *Varieties of Confirmation Bias*, in *PSYCHOLOGY OF LEARNING AND MOTIVATION* 387 (Jerome Busemeyer, *et al.* eds, 1995); Raymond S. Nickerson, *Confirmation Bias: A Ubiquitous Phenomenon in Many Guises*, 2 *REV. GEN. PSYCHOL.* 175 (1998).

²⁵² See David Eil & Justin M. Rao, *The Good News-Bad News Effect: Asymmetric Processing of Objective Information about Yourself*, 3 *AMER. ECON. J.: MICROECON.* 114 (2011).

²⁵³ See Daniel C. Molden & E. Tory Higgins, *Motivated Thinking*, in *THE CAMBRIDGE HANDBOOK OF THINKING AND REASONING* 295, 295–96 (Keith J. Holyoak & Robert G. Morrison eds., 2005).

said to the offender during interrogation. If the defendant contests the voluntariness of the confession and if the defendant's briefing describes the minimizing details (even though they are not usually legally relevant on their own), the judge would learn what the detectives said. Yet that is rare. Ordinarily, the judge is ignorant of (1) which of the offenders they are sentencing were subject to the tactic of moral minimization, and, when the tactic was employed, (2) what the particular moral minimizations were. Detectives tailor their minimizing message to match the offender's actual neutralizations, but it hardly be called a "counter-message" if the judge does not tailor his remarks to what the detectives said.

If the prosecutor and judge fail, the final objection to our claim may be that *other* criminal justice players provide a counter-message that undoes the criminogenic damage of moral minimization. Perhaps the detectives, defense lawyer, jury, or victim provide the expressive antidote. As things stand, however, where there is no recognition of the problem, there is no reason to think these actors do provide an effective remedy.

We find no evidence that any detectives "debrief" the suspect after interrogation, which detectives might naturally resist as long as there is a chance the defendant might try to recant the confession (which such debriefing would make more likely). Defense attorneys may explain to defendants that their rationalizations for the crime are not legally relevant, but it seems improbable that any will articulate the moral wrongfulness of their client's behavior to their client.

Juries offer no counter-message for the simple reason that almost all cases are resolved by guilty plea.²⁵⁴ We pause to note that this observation provides another reason that the scarcity of criminal juries is troubling. Juries are the best positioned of all actors in the system to undo moral minimization. They are a collective body drawn from the community who can therefore speak for the community.²⁵⁵ If jury trials were common, we

²⁵⁴ Shari Seidman Diamond & Jessica M. Salerno, *Reasons for the Disappearing Jury Trial: Perspectives from Attorneys and Judges*, 81 LA. L. REV. 119, 122 (stating that 3.6% of federal criminal cases were disposed of by jury trials in 2013).

²⁵⁵ Youngjae Lee, *The Criminal Jury, Moral Judgments, and Political Representation*, 2018 UNIV. ILL. L. REV. 1255, 1270–1272 (2018).

would therefore worry less (but still worry) about the criminogenic effects of moral minimization. Note that when the first Reid interrogation manual was published in 1962, jury trials were far more common than they are today, which might be one reason for the absence of concerns about the criminogenic effects when moral minimization was first introduced.

Victim impact testimony is promising. If presented in front of the convicted defendant at a sentencing hearing, it might undo some of the damage of moral minimization. The most plausible case is where the minimization involved a detective claiming that the victim was not “really” harmed; given the chance, victims can powerfully articulate their harm. Moreover, the place of esteem and respect with which those statements are regarded within the proceeding offers evidence of the victim’s worth, pushing against any victim-blaming narrative.²⁵⁶ The need to remedy moral minimization therefore provides a non-standard rationale for giving the victim this voice.²⁵⁷

But there are severe limitations. Even among the offenses for which we claim the criminogenic effect is likely, not every case has an individual natural victim (some theft victims are collectives or corporations), not every state guarantees the victim’s right to give testimony in every case,²⁵⁸ and not every victim is available or willing to testify in this way (especially in sexual assault cases). When victims do testify, they are (thankfully) ignorant that the detectives minimized the offense during interrogation, so they cannot frame their remarks to address the minimizations. Finally, while we think victims can convincingly speak to harm, we worry that the detective’s victim-blaming tactics may render the offender immune to being persuaded by what the victim says in court, or from the respect the judge shows the victim. Certainly, victim impact statements would work *better* to induce the offender’s sympathy and remorse if they occurred without the

²⁵⁶ See Bilz, *supra* note 237.

²⁵⁷ See MARKUS DIRK DUBBER, VICTIMS IN THE WAR ON CRIME: THE USE AND ABUSE OF VICTIMS' RIGHTS 338 (2002). See also Julian V. Roberts & Edna Erez, *Communication in Sentencing: Exploring the Expressive Function of Victim Impact Statements*, 10 INT'L REV. OF VICTIMOLOGY 223, 226 (2004).

²⁵⁸ See DUBBER, *supra* note 257.

government officials having first privately “reinforced” the offender’s reasons for blaming the victim.²⁵⁹

Our ultimate point is rather simple. There are a variety of governmental actors who communicate, by words or actions, to criminal offenders. For a variety of reasons, it matters to the offender’s future behavior whether the government delivers a unified and consistent message – the offender’s conduct was seriously wrong and the offender was responsible for it – or conflicting messages that both condemn and condone the criminal act. The presence of moral minimization is particularly likely to compromise or nullify the contrary messages because they are delivered at a critical early moment in an empathetic manner by detectives from whom the suspect expects disapproval. Whatever the possibilities for remediation with other messages, the criminal system is not designed to offset the criminogenic damage of moral minimizations.

In sum, moral minimization undermines internal and informal motivations for legal compliance. American police detectives contribute to crime control by investigating and clearing crimes, but frequently employ an interrogation tactic at cross purposes, making crime more likely. The benefits of moral minimization are uncertain, and the costs are serious.

III. NORMATIVE IMPLICATIONS

The interrogation tactic of moral minimization poses risks. Section II explains how minimization weakens the internal and informal incentives to obey the law. Our aim in this article is merely to begin a conversation on what the appropriate response is. We outline two options: counter-messaging and curbing the use of the tactic.

²⁵⁹ There is also a separate normative issue whether victim impact statements exacerbate criminal law disparities because judges and juries find some victims more appealing than others for arbitrary or racial reasons. See Andrew E. Taslitz, *Racial Threat Versus Racial Empathy in Sentencing – Capital and Otherwise*, 41 AMER. J. CRIM. LAW 1, 13–18, 27–29 (2013); Susan Bandes, *Empathy, Narrative, and Victim Impact Statements*, 63 U. CHI. L. REV. 361, 376 (1996).

A. *Counter-Messaging: Neutralizing the Neutralizations*

If nothing is done to limit the tactic of moral minimization, perhaps we could improve the counter-messaging. In Part II-C, we rejected the argument that various parts of the criminal justice system currently provide an effective counter-message undoing the harm of moral minimization.²⁶⁰ Among a series of reasons for pessimism, one observation was that if no one in the criminal system has noticed the danger of moral minimization, then we cannot expect anyone to have even attempted to formulate the best counter-message. We are now in a position to ask, can we do better? If the costs we identify are no longer *unexpected*, can we retain the tactic but avoid its harm?

Ultimately, we think the answer is no, but there is room for improvement. Our focus is on the judge. There is a sentencing hearing after every conviction in which a judge may justify the announced sentence to the convicted defendant. Some judges already use this occasion to articulate the moral wrong of the offense and the basis for the defendant's responsibility. Where this message is delivered (perhaps supported by victim impact testimony), the system is doing all it can (absent a jury verdict) to create a counter-message to the detective's moral minimization. Indeed, this may be an important and neglected justification for a judge explaining the moral basis of a sentencing decision to a convicted offender: to undermine the offender's neutralizations for the crime, which may have been reinforced in interrogation via moral minimization. Not all judges take seriously this aspect of sentencing, but our analysis suggests that they should.

Yet, where the judges take this part of their role seriously, they labor under disadvantages discussed in Part II-C, one of which is that the judge usually has no idea what the detectives said to the offender during interrogation. Unlike the other disadvantages, this one is correctible. As long as we continue to permit moral minimization, we offer one concrete reform to improve the expressive position of the judge.

²⁶⁰ See supra Part II-C..

Our proposal is for pre-sentencing reports to henceforth include a section summarizing any moral minimization tactics the detectives employed during an interrogation of the offender, whether or not it led to incriminating statements. This would permit judges to tailor their remarks at sentencing to address and reject the specific minimizations the detectives employed. If the detectives in an embezzlement case blamed the employer for paying too small a salary, the judge should be informed of this tactic and then explain to the offender at sentencing why that particular rationalization is morally unpersuasive.²⁶¹

B. Limiting the Use of Moral Minimization

Counter-messaging is ultimately insufficient. First, it is not a solution for the adverse effect of victim-blaming on interrogators and policing culture. Second, it is not going to work for those exposed to moral minimizations who are never criminally charged or convicted. Third, we doubt it could ever completely undo the criminogenic damage for reasons stated in Part II-C. But even if we are wrong in the abstract, because some ideal counter-message could work perfectly, in the real world of conviction by guilty plea, busy judges who will not tailor messages to refute particular moral minimizations, and the inevitable absence of victims from some cases, the best counter-messaging plans will often fail.

As previously indicated, there is no serious empirical evidence supporting the effectiveness of the Reid interrogation methods, much less the particular tactic of moral minimization.²⁶² Even without absolute clarity about the precise costs and benefits of minimization, a new acknowledgement that there *are* these costs demands recognition of the tradeoffs in using the strategy. As no one has previously identified the costs described here, they have been ignored. If detectives sense a possible benefit, but fail to recognize the risks, they inevitably use the tactic beyond

²⁶¹ We do not propose that judges use this information to arrive at a sentence. In our view, the fact that a defendant succumbed to confession because of a moral minimization tactic is neither a sentencing aggravator nor a mitigator. Rather, the possibility that judges may have insight into pinpointing the rationale for a defendant's behavior could actually help reduce the risk of recurrence if that insight is applied well.

²⁶² See *supra* notes 123-124 and accompanying text.

the socially optimum level. Some limitation is therefore justified. We briefly discuss three options. In all cases, the reforms would be implemented either by state or local legislation or by police department policy changes.²⁶³

One approach would be a presumptive ban, i.e., to prohibit all moral minimizations *except* where the tactic would be expected to do the least harm. As we have discussed above, there are some types of crimes for which moral minimization is least likely to be criminogenic.²⁶⁴ Murder is an example where the crime will be punished by such a long prison term that the concern for recidivism is attenuated.²⁶⁵ There are also particular kinds of minimizations that are not generalizable, and therefore not likely to diminish internal and informal incentives to comply with law. We illustrated again with murder examples, as in a case where detectives blamed the murder victim for having previously killed a relative of the suspect, a reason to offend that is usually not likely to repeat itself.²⁶⁶ Considering these two factors on a case-by-case basis would be enormously complicated, but one could combine these points to justify a workable regulation that authorized moral minimization tactics in murder interrogations, but not the interrogation of other crimes.

A more ambitious approach is to abandon wholesale the accusatory method of interrogation. The Reid method is one of several accusatory or confrontational interrogation methods, in which the interrogator persistently asserts confidence in the suspect's guilt. Broadly speaking, the alternative to the accusatory method is the information-gathering method. In 1992, police in the United Kingdom moved from a confrontational interrogation method to an information-gathering method named PEACE, an acronym for its five phases – planning/preparation, engage/explain, account (clarification and challenge), closure, and evaluation.²⁶⁷ The method involves communication strategies that encourage building rapport and encouraging suspects to

²⁶³ See Brandon Garrett, *Interrogation Policies*, 49 U. RICH. L. REV. 95 (2015).

²⁶⁴ See *supra* Part II-B.

²⁶⁵ See *supra* text accompanying note 230.

²⁶⁶ See *supra* text accompanying notes 228-229.

²⁶⁷ Colin Clarke & Rebecca Milne, *National Evaluation of the PEACE Investigative Interviewing Course* 2–3 (Home Office, Report No: PRAS/149, 2001).

develop a painstaking detailed account of events. The suspect is induced to talk a great deal and on the theory that guilty suspects tend to start contradicting themselves.²⁶⁸

England and Wales adopted PEACE as a more ethical and professional approach to investigative questioning in response to several scandals involving false confessions.²⁶⁹ At least one American jurisdiction that has adopted PEACE framework for interrogations – Vermont – and thus we have reason to believe it can be compatible with a U.S. policing and the constitutional rights that attend the interrogation process.²⁷⁰

A major research question is which method of interrogation is more successful at securing true confessions while avoiding false confessions. The existing social science research is unable to provide a definitive answer, although the existing results favor the information-gathering method.²⁷¹ The PEACE model is highly regarded among law enforcement in England in Wales and has been sought after in Australian, European and North American jurisdictions.²⁷² At least one other study concluded that PEACE strategies, when properly used, produced better outcomes with outcomes defined as either obtaining a fuller version of the occurrence or a

²⁶⁸ Laura Fallon & Brent Snook, *Evaluating the Vermont State Police's PEACE Model Training Program: Phase I*, 2021 PSYCH. CRIME & L. 1, 2 (2021). The PEACE method is described as a science-based approach to interviewing in which officers are “instructed to collect evidence prior to making decisions, akin to the process of hypothesis testing in scientific disciplines (and in direct contrast to traditional accusatorial interview methods).” *Id.*

²⁶⁹ Sam Poyser & Rebecca Milne, *The Time in Between a Case of 'Wrongful' and 'Rightful' Conviction in the UK: Miscarriages of Justice and the Contribution of Psychology to Reforming the Police Investigative Process*, 23 INT'L J. POLICE SCI. & MGMT 5, 11 (2021).

²⁷⁰ Fallon & Snook., *supra* note 268, at 7.

²⁷¹ See sources cited *supra* note 123-124 and accompanying text. See also Clarke & Milne, *supra* note 267; Colin Clarke, Rebecca Milne & Ray Bull, *Interviewing Suspects of Crime: The Impact of Peace Training, Supervision and the Presence of a Legal Advisor*, 8 J. INVESTIGATIVE PSYCH. & OFFENDER PROFILING 149 (2011).

²⁷² Fallon & Snook, *supra* note 268 at 97; Mary Schollum, *Bringing PEACE to the United States: A Framework for Investigative Interviewing*, POLICE CHIEF MAG., Nov. 2017, at 30 (“The Peace model has resulted in vast improvements in policing interviewing to the extent that many countries . . . have adopted it.”).

confession.²⁷³ Finally in controlled meta-studies on the cognitive form of interviewing used in the PEACE framework, the reliability of the information obtained in the under the PEACE like model was significantly better.²⁷⁴

These empirical issues are ultimately beyond the scope of this article. Without resolving the debate, this article contributes to it by identifying two new costs of the moral minimization tactics that are exclusively a part of the accusatory method. Our concerns over the criminogenic and sexist effects of moral minimization add two reasons to the existing literature for why a switch to an information-gathering method is desirable.

Which brings us to note the obvious point that if American police interrogators abandoned the accusatory method and switched to information-gathering, the problems we identify in this article would disappear. Prohibiting an interrogation tactic is inherently complicated by issues of remedy, but the simplest way to stop the use of moral minimization is to shift entirely away from the accusatory method. What this would require is less a prohibition of certain methods (although that might be useful during the transition) than the basic training of detectives in a new approach. If American police detectives learned from a manual that did not advocate the reinforcement of neutralizations via moral minimization, then they would eventually stop using minimizations, at least not as a central and well-elaborated theme of the interrogation.

V. CONCLUSION

Moral minimization is pervasive in American police interrogations today, and yet it is a relic of the past. The misogynistic victim-blaming narratives that the manuals offer to illustrate minimization tactics are every bit as old as they sound, dating back at least to 1962. We expect twenty-first century policing to be based on data, as much as possible, and yet these

²⁷³ DAVE WALSH & RAY BULL, *What Really is Effective in Interviews with Suspects? A Study Comparing Interviewing Skills Against Interviewing Outcomes*, 15 *LEGAL & CRIMINOLOGICAL PSYCH.* 305, 318 (2010).

²⁷⁴ *Id.*

tactics were created based on early or mid-twentieth century anecdote. The argument for moral minimization is that “it works,” but there is still no real social science evidence supporting that claim, and it appears that the newer alternatives in the United Kingdom and elsewhere also “work,” possibly better, without minimization.

In 1962, it could not have occurred to anyone that interrogations with a theme of moral minimization were more or less the precise opposite procedure as a restorative justice conference, because such conferences did not (publicly) exist, much less were there randomized controlled trials demonstrating that the brief conferences could reduce recidivism by confronting and critiquing the offender’s neutralizations for the crime. In the mid-twentieth century, there was little in the way of social scientific empiricism that people obeyed the law in part because they were reciprocating the perceived compliance of others and also because they perceived the law to be substantively legitimate. As such, it would not then have been apparent that the energetic efforts of law enforcement officers to persuade suspects that “anyone” would have committed the crime in their place would damage the reciprocity motive for legal compliance, nor that convincing suspects that the crime is not serious and the blame lies elsewhere would damage the law’s legitimacy and that motive for compliance. Yet all of these problems and more are apparent now.

This article proposes balance where none exists. Police officials gather to discuss crime control, such as how to best deploy patrol officers or how to maintain their procedural legitimacy. In other meetings, detectives gather to train for interrogation techniques. These distinct groups never consider that the training is undermining the crime control. Yet the explanation for the minimization tactic – that reinforcing the offender’s neutralizations for the crime will disinhibit the offender’s confession – necessarily implies that the tactic will also make future offending more likely. These policing groups might hope that the effects we describe are small in magnitude or short-lived. We agree that more study is needed, but hoping is not enough. As long as the interrogation value of moral minimization is uncertain, we should not continue to ignore the unintended risks of the tactic when other interrogation methods exist.