

Combating Contamination in Confession Cases

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*Convicting the Innocent: Where Criminal
Prosecutions Go Wrong*

Brandon L. Garrett. Harvard, 2011. Pp 1, 367.

INTRODUCTION

“Sometimes eyewitnesses make mistakes. Snitches tell lies. Confessions are coerced or fabricated. Racism trumps the truth. Lab tests are rigged. Defense lawyers sleep. Prosecutors lie.” So declared Barry Scheck, Peter Neufeld, and Jim Dwyer in their pathbreaking 2000 treatise on wrongful convictions, *Actual Innocence: When Justice Goes Wrong and How to Make It Right*.¹ As had never been done before, *Actual Innocence* presented story after story of wrongful convictions (and near executions) of the indisputably innocent, with each chapter devoted to exposing each of these flaws in the justice system. *Actual Innocence* was nothing short of a revelation, a wake-up call concerning the reality of wrongful convictions and the truth-telling power of DNA evidence. It was not merely descriptive; it was also prescriptive, setting out a lengthy recipe of reforms needed to prevent future wrongful convictions.

University of Virginia law professor Brandon L. Garrett’s extraordinary new book—*Convicting the Innocent: Where Criminal*

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¹ Jim Dwyer, Peter Neufeld, and Barry Scheck, *Actual Innocence: Five Days to Execution and Other Dispatches from the Wrongfully Convicted* xv (Doubleday 2000). An expanded version was published in 2001. Barry Scheck, Peter Neufeld, and Jim Dwyer, *Actual Innocence: When Justice Goes Wrong and How to Make It Right* xx (Signet 2001).

Prosecutions Go Wrong—picks up the honorable mantle that has so long been carried by *Actual Innocence* (pp 5–13). In the twelve years since *Actual Innocence* was first published, the aggregate number of DNA exonerations has more than quadrupled from 67 to 289.² In *Convicting the Innocent*, Garrett analyzes the first 250 of these DNA exonerations. This much larger data set, coupled with Garrett’s academically rigorous method of analysis, has enabled him to make the strongest case yet both for the reforms identified in *Actual Innocence* and for additional reforms to the justice system.

Part I of this Review examines Garrett’s comprehensive new work with an eye to the contributions that it makes to the field of criminal defense and, in particular, to the critical subfield of innocence work. Because one problem that Garrett highlights—the fascinating problem of false confessions—has been the focus of our own casework and study for many years,³ Part II follows by drawing special attention to Garrett’s theories and real-world findings concerning the contamination of confessions. Part III concludes by presenting a practitioners’ guide for defense attorneys who are confronted with contaminated confessions. Using one of our own clients’ confessions as an example, we offer techniques, tactics, and legal theories that can be used to attack the credibility of—or even argue for the wholesale suppression of—confessions that are contaminated and unreliable.

I. REVIEW OF *CONVICTING THE INNOCENT*

Garrett has designed his book much like *Actual Innocence*: by focusing each individual chapter on one particular breed of error that can cause wrongful convictions. To seasoned criminal justice practitioners, his book presents a familiar list of errors: eyewitness misidentifications (pp 45–83), flawed or misleading forensic science (pp 84–117), false confessions (pp 14–44), jailhouse snitches (pp 118–44), overzealous or sometimes unethical prosecutors (pp 167–71), and inadequate or underfunded defense attorneys (pp 165–67). All of these failures are well represented within the corpus of DNA exonerations—if not as direct causes of wrongful convictions, then at

² Innocence Project, *Know the Cases: Innocence Project Case Profiles*, online at <http://www.innocenceproject.org/know/> (visited Apr 2, 2012); Jim Dwyer, Peter Neufeld, and Barry Scheck, *Five Days to Execution* at xiv (cited in note 1).

³ See, for example, Joshua A. Tepfer, Laura H. Nirider, and Lynda M. Tricarico, *Arresting Development: Convictions of Innocent Youth*, 62 Rutgers L Rev 887, 904–08 (2010); Steven A. Drizin and Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 NC L Rev 891, 907–23 (2004).

least as significant factors that contribute to and perpetuate them. In *Convicting the Innocent*, we learn, for example, that eyewitness identification errors were present in 76 percent of the 250 exonerations that Garrett studied (p 48). Of the 74 percent of exonerations involving forensic evidence, moreover, the great majority involved invalid or unreliable evidence (pp 89–90), whereas the use of snitch testimony and false confessions respectively contributed to 21 percent and 16 percent of them (pp 18, 124).

Garrett's statistical breakdown of wrongful conviction causes is thorough and abundantly useful—and it becomes particularly interesting when one compares his statistics to those from circa 2001 that are presented in *Actual Innocence*⁴—but Scheck, Neufeld, and Dwyer have mined this terrain before, and similar numbers can be obtained from the Innocence Project's website.⁵ For this reason, the true legacy of Garrett's work—and what separates it from all previous scholarship in this area—is the painstaking research Garrett did before he ever put pen to paper. With admirable ambition, Garrett immersed himself in each case of wrongful conviction by reviewing police reports, confession statements, judicial opinions, lab reports, and, most importantly, court transcripts whenever possible. Not content only to scour trial-level records, Garrett also reviewed pleadings and decisions from direct appeals, state postconviction proceedings, and federal habeas corpus proceedings, becoming as familiar as possible with the life cycle of each of these 250 cases (p 184).

⁴ In the second Appendix to *Actual Innocence*, Scheck, Neufeld, and Dwyer quantified the various sources of error in the first seventy-four DNA exoneration cases. They concluded that 81 percent of those wrongful convictions were the result of mistaken identifications, 19 percent were due to snitch or informant testimony, and 22 percent were attributed to false confessions. Scheck, Neufeld, and Dwyer, *Actual Innocence* at 361 (cited in note 1) (providing graphical data as to the sources of error in seventy-four wrongful convictions). In subsequent editions, as the authors gathered more data, the percentages differed only slightly. For example, in the 2003 edition of *Actual Innocence*, the authors crunched the numbers for 130 DNA exonerations and came up with the following approximate percentages: 78 percent were the result of mistaken identifications, 16 percent were due to snitch or informant testimony, and 27 percent were attributed to false confessions. Barry Scheck, Peter Neufeld, and Jim Dwyer, *Actual Innocence: When Justice Goes Wrong and How to Make It Right* 365 (New American Library 2003).

⁵ Innocence Project, *Understand the Causes: The Causes of Wrongful Conviction*, online at <http://www.innocenceproject.org/understand/> (visited Nov 15, 2011) (identifying the contributing causes of wrongful convictions as 77 percent eyewitness misidentification, 52 percent unvalidated/improper forensics, 23 percent false confessions/admissions, and 16 percent informants/snitches, and noting that the total is greater than 100 percent because wrongful convictions can have more than one cause).

Garrett's unprecedented level of familiarity with these cases enables him to tell the exonerees' stories with a richness of detail missing from *Actual Innocence*. By presenting these gripping tales of justice gone terribly wrong, Garrett absorbs the reader by speaking at once of villains who falsify evidence, intimidate witnesses, and abuse suspects, and of innocents victimized by the law who win back their freedom after fighting for decades. Indeed, Garrett's ability to tell so many previously untold stories allows him to vividly demonstrate how the protections afforded criminal defendants in our adversarial system of justice—the privilege against self-incrimination,⁶ the rights to the effective assistance of counsel⁷ and to a jury trial,⁸ the requirement that prosecutors prove defendants guilty beyond a reasonable doubt, the ability to access appellate review⁹—have failed again and again to protect the innocent.

For example, in his chapter entitled “Judging Innocence,” Garrett asks a simple question that—perhaps surprisingly—has never been asked before: “Why was it so hard for these innocent people to challenge their flawed convictions?” (p 182) The demon here, it turns out, is the doctrine of “harmless error,” a bedrock legal principle created in 1967 by the United States Supreme Court that permits appellate courts to overlook errors of constitutional magnitude when the errors did not contribute to the guilty verdict at trial.¹⁰ When properly applied, the harmless error doctrine requires the reviewing court to assess only whether an error affected the outcome of the trial beyond a reasonable doubt.¹¹ Reviewing courts, however, too often contort the meaning of this test and apply one that is far different—one that asks whether the evidence of guilt in the record outweighs the impact of the constitutional error.¹² Garrett's findings reveal that appellate courts' misapplication of this doctrine has generated a terrible track record when it comes to assessing evidence of guilt or innocence. Although we now know that the defendants in the cases Garrett studied were actually innocent, reviewing courts—often acting on the basis of a mistaken belief that

⁶ See *Murphy v Waterfront Commission of New York Harbor*, 378 US 52, 55 (1964).

⁷ See *Strickland v Washington*, 466 US 668, 684–86 (1984).

⁸ See *Duncan v Louisiana*, 391 US 145, 149, 155 (1968).

⁹ See *Griffin v Illinois*, 351 US 12, 18 (1956).

¹⁰ See *Chapman v California*, 386 US 18, 22 (1967).

¹¹ See *id.* at 23–24.

¹² See Harry T. Edwards, *To Err Is Human, but Not Always Harmless: When Should Legal Error Be Tolerated?*, 70 NYU L Rev 1167, 1170–72 (1995) (noting that appellate judges' “natural inclination is to view an error as harmless whenever a defendant's conviction appears well justified by the record evidence,” and describing the application of the harmless-error doctrine as the “guilt-based approach”).

the defendants were guilty—routinely classified the defendants’ meritorious claims of constitutional error as harmless and denied them relief. For those exonerees whose cases included written appellate decisions, courts found “harmless error” 30 percent of the time when affirming their convictions—many of them driven to such a conclusion by a flawed belief in the defendant’s guilt (p 201).

Similarly flawed assessments of guilt caused appellate courts to routinely dismiss defendants’ claims of ineffective assistance of counsel and claims that prosecutors failed to disclose exculpatory evidence to the defense. In both situations, reviewing courts are required to determine if the defendant was prejudiced by the errors of trial counsel or the prosecution—an analysis similar to the harmless error analysis in that it asks whether the errors of trial counsel or prosecutors resulted in a different outcome for the defendant.¹³ Eighteen percent of those exonerees whose cases included written appellate opinions had their appeals rejected because they did not suffer prejudice as a result of trial errors (p 201).

Perhaps most significantly, appellate judges overtly based denials of relief on the defendants’ likely guilt in a full 47 percent of the cases Garrett studied; in 10 percent of the cases, appellate judges were so certain of the defendants’ guilt that they described the state’s evidence as “overwhelming” (pp 201–02). This alone is powerful evidence that the appellate court process does not protect the innocent who are mistakenly convicted. Indeed, a full 62 percent of the cases Garrett studied involved appellate judges who were so moved by the apparent evidence of guilt that they commented on guilt, deemed an error harmless, or found a lack of prejudice (p 202).

If there is one weakness in Garrett’s otherwise illuminating analysis of the appellate court system, it is that he is short on solutions that will make the criminal review process a more effective safety net for the wrongfully convicted. Garrett could and perhaps should have joined the chorus of commentators who seek to limit the scope of the harmless error rule, especially in cases of involuntary confessions.¹⁴ Indeed, before 1991, whenever a reviewing court

¹³ See *Strickland*, 466 US at 691–96. See also *Brady v Maryland*, 373 US 83, 86–87 (1963).

¹⁴ See, for example, Alan Hirsch, *Confessions and Harmless Error: A New Argument for the Old Approach*, 12 Berkeley J Crim L 1, 26–27 (2007); Charles J. Ogletree Jr, *Arizona v. Fulminante: The Harm of Applying Harmless Error to Coerced Confessions*, 105 Harv L Rev 152, 165–66 (1991) (“[C]oerced confessions generally are not susceptible to harmless error analysis because of the overwhelming, prejudicial effect such confessions have on jurors’ beliefs. . . . The trial becomes skewed, and appellate courts cannot meaningfully apply harmless error analysis.”).

determined that an involuntary confession had been used against a defendant at trial, it was required to reverse the defendant's conviction—period.¹⁵ The admission of a coerced confession at trial was believed to be so prejudicial that it could never be truly harmless.¹⁶ In the 1991 case *Arizona v Fulminante*,¹⁷ however, the Supreme Court ruled that a trial court's admission of an involuntary confession was simply another error to be evaluated under the harmless error rule.¹⁸ *Fulminante* was harshly criticized by numerous commentators who feared that the decision would encourage detectives to coerce confessions and that jurors, in turn, would convict defendants on the basis of unreliable confessions.¹⁹ These arguments have only grown stronger since the discovery of so many DNA-proven false confessions post-*Fulminante*.²⁰ In this book, at least, Garrett may have missed a golden opportunity to use his powerful statistics and stories to call for the Supreme Court to revisit *Fulminante*.

At any rate, perhaps the most haunting takeaway from Garrett's study is that after poring over 250 cases of wrongful conviction, he concludes that “[t]he unremarkable criminal trials of so many of these exonerees looked no different than those of countless others” (p 263). When the truth of this sentence washes over the reader, the implications are gut-wrenching. Both the common use of untrustworthy evidence (misidentifications, false confessions, and flawed forensics alike) and the system-wide failure of actors in the criminal justice system (defense attorneys, prosecutors, and judges alike) must necessarily occur in many cases in which evidence with the power to exonerate, like DNA, is irrelevant, unavailable, or ignored. Without irony, Garrett forces the reader to conclude that the DNA exonerees he studied, who spent on average thirteen years incarcerated for other people's crimes (p 5), were the lucky ones. Many other innocent people are living behind bars with no real hope of ever proving their innocence.

Garrett's own data compels this inescapable conclusion. The DNA exonerees in Garrett's study were overwhelmingly accused

¹⁵ See, for example, *Blackburn v Alabama*, 361 US 199, 205 (1960).

¹⁶ See *id.* at 210.

¹⁷ 499 US 279 (1991).

¹⁸ *Id.* at 310.

¹⁹ See, for example, Hedieh Nasheri and Victor J. DeMarco, *True Confessions? A Critique of Arizona v. Fulminante*, 21 Am J Crim L 273, 283–84 (1994); Ogletree, 105 Harv L Rev at 161–72 (cited in note 14).

²⁰ See Brandon L. Garrett, *The Substance of False Confessions*, 62 Stan L Rev 1051, 1052 & n 2 (2010).

and convicted of raping a stranger: 68 percent were convicted of rape alone, and an additional 21 percent were convicted of rape-murders (p 278). Why do so many exonerations occur in stranger-rape cases? The answer is simply that DNA evidence is most often available, and most probative, in these cases. In the overwhelming majority of other cases, especially cases involving lesser crimes or property offenses, DNA is unavailable; and if it is available, it is frequently deemed less probative of a suspect's guilt. But there is no reason to believe that the factors contributing to wrongful convictions are any less likely to occur in other kinds of cases.

Even if one isolates the small number of serious cases in which DNA-testable evidence might be available, it is still clear that the 250 cases of wrongful conviction in Garrett's book are just the tip of the iceberg. Many times, probative DNA evidence is lost or misplaced by the state; other times, the evidence becomes degraded due to poor storage conditions or is collected by evidence technicians in quantities insufficient for effective testing.²¹ Further, despite the fact that sixteen individuals in Garrett's dataset pleaded guilty (p 278), some states explicitly bar defendants who have pleaded guilty from subsequently testing the evidence in their case.²² In the vast majority of states, it is unsettled whether a defendant who has pleaded guilty can test the evidence in his case, because the applicable statutes are ambiguous.²³ Given that 97 percent of federal convictions and 94 percent of state convictions are the result of guilty pleas,²⁴ a significant portion of the convicted population lacks procedural access to testing.

Other categories of convicted defendants not mentioned by Garrett may lack access to DNA testing as well. For instance, there is not a single example in Garrett's book of a child convicted in juvenile court who later was exonerated by DNA testing, despite the fact that juvenile courts may be troublingly predisposed to find the innocent guilty.²⁵ Some jurisdictions have not granted their children

²¹ See Cynthia E. Jones, *The Right Remedy for the Wrongly Convicted: Judicial Sanctions for Destruction of DNA Evidence*, 77 *Fordham L Rev* 2893, 2900 (2009); James Herbie DiFonzo, *In Praise of Statutes of Limitations in Sex Offense Cases*, 41 *Houston L Rev* 1205, 1266 (2004).

²² See, for example, Ohio Rev Code Ann § 2953.72(C)(2); 13 Vt Stat Ann § 5561(e); *People v O'Connell*, 879 NE2d 315, 319 (Ill 2007).

²³ Joshua A. Tepfer and Laura H. Nirider, *Adjudicated Juveniles and Post-conviction Litigation*, 63 *Maine L Rev* *11-12 (forthcoming 2012), online at <http://ssrn.com/abstract=2013530> (visited Apr 18, 2012).

²⁴ *Missouri v Frye*, 132 S Ct 1399, 1407 (2012).

²⁵ See Steven A. Drizin and Greg Luloff, *Are Juvenile Courts a Breeding Ground for Wrongful Convictions?*, 34 *N Ky L Rev* 257, 321-22 (2007); Tepfer, Nirider, and Tricarico,

the same access to postconviction remedies like DNA testing; and in many other jurisdictions, the issue remains unsettled.²⁶ Even beyond the question of procedural access to the remedy, it is also questionable whether such children have the resources or years-long dedication required to fight for DNA testing.

Finally, even in less serious cases where DNA-testable evidence could be available, it is rare that journalists, lawyers, or other individuals ever put resources toward pursuing such relief. Without this type of extraordinary help, it remains next to impossible for a pro se litigant locked behind bars to get any court to listen to his protestations of innocence.

To ensure a more accurate and cost-effective criminal justice system, Garrett's excellent list of proposed reforms must be implemented. Video recording of police procedures, including custodial interrogations and identification procedures, is an important and manageable first step. Requiring eyewitness-identification procedures to follow best practices supported by a mountain of social science research—including double-blind and sequential lineups—is another logical step. And the creation of *independent* crime labs—labs that are regularly audited and that are disassociated from law enforcement—could solve many of the forensic-fraud issues that contributed to almost three-quarters of the wrongful convictions in Garrett's book. Finally, states would be well served to follow the lead of North Carolina, which has recently developed a unique body called the Actual Innocence Commission. This independent commission, which includes law enforcement officers, prosecutors, defense attorneys, social scientists, victim's advocates, law professors, and judges, proposed and recommended innocence-driven reforms that have been adopted by the legislature. The commission also developed an independent Innocence Inquiry Commission that reviews individual cases of innocence and, if warranted, recommends them for judicial review (pp 241–43).²⁷

62 Rutgers L Rev at 893 (cited in note 3). See also *Welch v United States*, 604 F3d 408, 432 (7th Cir 2010) (Posner dissenting).

²⁶ Compare 11 Del Code Ann § 4504(a) with 10 Del Code Ann § 1009(h). See also Ala Code §§ 15-18-200, 15-19-7; *In re William M.*, 795 NE2d 269, 274 (Ill 2003). Tepfer and Nirider, 63 Maine L Rev at *7–8 (cited in note 23).

²⁷ Notably, the North Carolina Innocence Inquiry Commission allows defendants who pleaded guilty to apply for relief. In fact, on September 22, 2011, the Commission exonerated Robert Wilcoxson and Kenneth Kagonyera, two men who had each spent almost eleven years in prison for the murder of Walter Rodney Bowman. Both Kagonyera and Wilcoxson pleaded guilty to the Bowman murder; DNA and other evidence later linked other men to the murder. See Jon Ostendorff, *Judges Free 2 Men in Innocence Review*, USA Today 3A (Sept 23, 2011). See also Editorial, *Scrutinizing Justice*, St Petersburg Times P3 (Dec 13, 2009) (lauding the

Until these and other reforms are instituted, however, something else can be done: prosecutors, judges, and even defense attorneys can adjust their mind-sets to acknowledge and account for the reality of wrongful convictions. Such an adjustment necessarily includes not immediately discounting non-DNA evidence of innocence. Because the vast majority of convicted defendants will never have DNA to test, exculpatory evidence—such as a recantation from a crucial witness or new information about an alternative suspect—should be carefully scrutinized. At bare minimum, courts should order evidentiary hearings to determine the reliability of this kind of new information from witnesses under oath, appointing counsel for indigent defendants.

Sadly, we appear to be very far away from this kind of progress. One of the most disheartening portions of Garrett's book is his eighth chapter, entitled "Exoneration." Here, Garrett details the "[l]ong [r]oad to [e]xoneration" faced by the exonerees he studied, even after DNA evidence proved their innocence (pp 215–17). In too many of the 250 cases, prosecutors and courts often resisted efforts even to test available and probative evidence (p 216). Equally troublingly, these 250 individuals had to wait on average over a full calendar year to become officially exonerated *after* postconviction DNA results conclusively proved their innocence (p 216).

II. THE CONTAMINATION OF CONFESSIONS

The first systemic problem underlying wrongful convictions that Garrett identifies in *Convicting the Innocent* is the problem of false confessions (p 8). Given that the number of wrongful convictions based on false confessions pales in comparison with those involving eyewitness identification errors, flawed forensics, or even jailhouse snitches (p 279), his choice to begin with a chapter on false confessions is bold. It is a wise choice, however, given that the concept is absolutely foreign to so many. Many jurors—and many members of the general public and even of the legal profession—struggle profoundly with the idea that a person would ever confess to a crime that he or she did not commit.²⁸ It is for this reason that—

creation of a Florida organization modeled after North Carolina's Actual Innocence Commission).

²⁸ See *Colorado v Connelly*, 479 US 157, 182 (1986) (Brennan dissenting) (observing that "[t]rials of fact accord confessions such heavy weight in their determinations that 'the introduction of a confession makes the other aspects of a trial in court superfluous'"); *Miranda v Arizona*, 384 US 436, 466 (1966), citing *Mapp v Ohio*, 367 US 643, 685 (1961) (Harlan dissenting) (explaining that a confession is "the most compelling possible evidence of guilt"); *Hopt v Utah*, 110 US 574, 584–85 (1884) (recognizing that a "voluntary confession of guilt is

although false confessions may be less prevalent than other sources of error—the road to exoneration for false confessors is often exceptionally long and exceptionally arduous.

Garrett's analysis and findings concerning false confessions are nothing short of groundbreaking. At the beginning of his foray into the case materials, Garrett expected that the DNA exonerees' confessions would lack detail and be riddled with errors (pp 18–19). Stunningly, he found just the opposite: in thirty-eight of the forty false confessions he studied, the confessions were detailed and often factually accurate descriptions of the criminal acts (pp 19–20). If these men are truly innocent, Garrett asks the reader, how is it that they were able to give such detailed and accurate confessions? His answer is that their DNA-proven false confessions were “contaminated” forms of evidence—as tainted and unreliable as contaminated physical evidence.

What is contamination? Many who watch television crime dramas like *Law & Order* or *CSI* probably associate the notion of contamination with evidence mishandling at a crime scene or in a crime lab. In this context, contamination is defined as the “unwanted transfer of material from another source to a piece of physical evidence.”²⁹ To prevent contamination, state technicians usually create a perimeter around a crime scene using yellow tape of the type made familiar in television and movies. Other standard precautions include identifying a path of entry into the crime scene and an exit path out of it, preventing unauthorized individuals from accessing the crime scene, and keeping a log of all those who enter the scene.³⁰ Police personnel who enter a crime scene must also wear protective clothing—gloves, masks, eyewear, and footwear—both to protect themselves from biological or chemical hazards and to protect the evidence from contamination. In the crime lab, similarly, technicians must wear masks, hairnets, and gloves to keep their own hair, skin cells, or saliva off evidence samples. A simple sneeze or an

among the most effectual proofs in the law”). See also Saul M. Kassin and Katherine Neumann, *On the Power of Confession Evidence: An Experimental Test of the Fundamental Difference Hypothesis*, 21 *L & Human Beh* 469, 481 (1997); Gerald R. Miller and F. Joseph Boster, *Three Images of the Trial: Their Implications for Psychological Research*, in Bruce Dennis Sales, ed., *Psychology in the Legal Process* 19, 20–21 (Spectrum 1977).

²⁹ National Institute of Justice, Office of Justice Programs, *Crime Scene Investigation: A Guide for Law Enforcement* 42 (Department of Justice 2000), online at <https://www.ncjrs.gov/pdffiles1/nij/178280.pdf> (visited Nov 16, 2011).

³⁰ *Id.* at 19–20.

errant hair could compromise the evidence and jeopardize the chances of conviction.³¹

In the confession context, contamination is the transfer of inside information—nonpublic details about the crime that only the true perpetrator could have known—from one person to another person during a police investigation.³² The problem of contamination in false confession cases usually arises during interrogation itself, when the interrogator pressures a suspect to accept a particular account of the crime story—one that usually squares with the interrogator’s preordained theory of how the crime occurred. The interrogator then uses leading questions, deliberately or inadvertently, to suggest specific facts about the crime to the suspect, which are then parroted back in the form of a confession. The presence of these types of specific facts in the suspect’s confession lends it credibility and creates an all-important illusion of corroboration.

Just as crime scene technicians are trained to avoid contaminating crime scenes, police interrogators are trained to avoid contaminating confessions. As Joseph Buckley, the president of the leading police-interrogation training firm in the United States and coauthor of the leading interrogation-training manual in the United States, said in 2006:

[I]t is imperative that interrogators do not reveal details of the crime so that they can use the disclosure of such information by the suspect as verification of the confession’s authenticity. In each case there should be documented “hold back” information about the details of how the crime was committed; details from the crime scene; details about specific activities perpetrated by

³¹ Christopher B. Mueller, *Introduction: O.J. Simpson and the Criminal Justice System on Trial*, 67 U Colo L Rev 727, 734 (1996). When people of a certain generation think of contamination, they think of the O.J. Simpson case. It was during this highly publicized trial that defense lawyer Barry Scheck introduced the public to the problem of evidence contamination when he attacked the collection procedures of the LAPD and the testing procedures of the LAPD’s crime lab. Scheck carefully demonstrated how human error could have compromised the reliability of the evidence, educating viewers on the importance of changing gloves each time a piece of evidence is handled. Scheck also highlighted the “cesspool of contamination” at the LAPD’s crime lab, demonstrating that reference vials containing blood standards of both Nicole Brown Simpson and Ron Goldman contained DNA alleles that came from O.J. Simpson. See William C. Thompson, *DNA Evidence in the O.J. Simpson Trial*, 67 U Colo L Rev 827, 832–40 (1996).

³² See Richard J. Ofshe and Richard A. Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 Denver U L Rev 979, 993 (1997).

the offender; etc. The goal is to match the suspect's confession against these details to establish the veracity of the statement.³³

Indeed, contamination is counterproductive, because it prevents police from testing and corroborating the reliability of the admissions and confessions they elicit. They are simply unable to distinguish true from false confessions because both contain "guilty" knowledge.³⁴ More importantly, contamination can jeopardize public safety by blinding police to the reality that the true perpetrator is still on the streets. For these reasons, law enforcement trainers and leaders almost universally agree that contamination has no legitimate place in American interrogation.

The problem of police contamination in the interrogation room triggers a number of events at trial that only increase the likelihood of a wrongful conviction. In his review of the trial transcripts, Garrett discovered a striking pattern. In 95 percent of the false confessions he studied, Garrett found that detectives testified that it was the defendants who offered key details about the crime (p 20). In many cases, the detectives went a step further, testifying that they scrupulously avoided leaking such details (p 20). The defendants' knowledge of these nonpublic facts then became the crux of the State's case at trial. In twenty-two of the thirty-six cases for which Garrett obtained trial transcripts, prosecutors recited the nonpublic facts in their closing arguments as evidence of the defendants' guilt (p 31).

Garrett is not the first researcher to discuss the phenomenon of confession contamination. Numerous researchers before him have described both how contamination during interrogation causes innocent suspects to incorporate accurate crime scene details into their confessions, and how jurors can be misled into thinking that defendants are guilty because their confessions appear to be corroborated.³⁵ Garrett's major contribution to this literature is his

³³ Joseph P. Buckley, *The Reid Technique of Interviewing and Interrogation*, in Tom Williamson, ed., *Investigative Interviewing: Rights, Research, Regulation* 190, 204–05 (Willan 2005).

³⁴ As Dr. Richard Leo has noted, the failure of the police to ferret out false confessions on the front lines of the investigative process sets in motion a stunning series of consequences for the innocent. Suspects who confess are more likely to be charged, detained pending trial, pressured by their attorneys to plead guilty, convicted at trial, and sentenced to serve more time. See Richard A. Leo, *Inside the Interrogation Room*, 86 J Crim L & Criminol 266, 298–99 (1996). See also Richard A. Leo, *Police Interrogation and American Justice* 248 (Harvard 2008).

³⁵ See Garrett, 62 Stan L Rev at 1066–92 (cited in note 20); Leo, *Police Interrogation* at 165–73 (cited in note 34); Richard A. Leo, et al, *Bringing Reliability Back In: False Confessions and Legal Safeguards in the Twenty-First Century*, 2006 Wis L Rev 479, 511; Saul M. Kassin, *A Critical Appraisal of Modern Police Interrogations*, in Williamson, ed., *Investigative Interviewing* 207, 221–23 (cited in note 33); Gisli H. Gudjonsson, *The Psychology*

finding that the problem of contamination is epidemic, not episodic, in cases of false confessions.

At bottom, confession contamination may be far more dangerous than contaminated physical evidence at a crime scene or in the crime lab. While forensic testing can reveal the unwanted presence of a technician's DNA on crime scene evidence, there is no such foolproof test to identify confession contamination. For this reason, we offer in the next Part some guidance for practitioners concerning how to identify and combat the contaminated confession.

III. A PRACTITIONER'S GUIDE TO COMBATING CONTAMINATION IN CONFESSION CASES

To facilitate our discussion of contaminated confessions, we will use the confession of sixteen-year-old Brendan Dassey as a case study.³⁶ In 2006, Brendan was accused of helping his uncle sexually assault and murder a young woman in Wisconsin.³⁷ He was a special-education student who had never before been in trouble with the law—but that would change after a young woman who made a living photographing cars for classified ads went missing. Suspicion fell on Brendan's uncle after police learned that she had last been seen at his home photographing a vehicle that was for sale. That suspicion was amplified when her abandoned SUV was found covered in branches on Brendan's uncle's property with its license plates missing—and it hit a fevered frenzy when her charred remains were found in a bonfire pit behind his uncle's garage.³⁸ The media swarmed over the gruesome story like ants on a juicy piece of fruit—made all the more juicy, in this case, by the fact that Brendan's uncle was Steven Avery, Wisconsin's first DNA exoneree. If the story of Avery's DNA-driven redemption had been trumpeted in the press, his apparent subsequent fall from grace was blared at top volume.

of Interrogations and Confessions: A Handbook 178–79 (Wiley 2003); Richard A. Leo and Richard J. Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 *J Crim L & Criminol* 429, 438 & n 24, 439–40 (1998); Gisli H. Gudjonsson, *The Psychology of Interrogations, Confessions and Testimony* 259 (Wiley 1992).

³⁶ The authors are postconviction counsel for Brendan Dassey, who was convicted in 2007 of murder and is currently appealing his conviction. The facts relating to Brendan's confession are taken from Memorandum of Facts and Law Accompanying Section 809.30 Post-Conviction Motion, *State v Dassey*, No 2006 CF 88 (Manitowoc County, Wis, filed Aug 21, 2009) (“Dassey Memorandum of Facts”), online at http://cwcy.org/resources/67_attach_Memorandum%20of%20Facts%20and%20Law%20with%20Signatures.pdf (visited Nov 16, 2011).

³⁷ *Id* at *36–37.

³⁸ *Id* at *2–3, 5.

Nearly every fact about the investigation into the case was publicized in television broadcasts and newspaper headlines across Wisconsin and the country.³⁹

After Steven was arrested, however, the case went cold very quickly. Little additional evidence against him was found, despite one of the largest investigations in Wisconsin history.⁴⁰ Perhaps frustrated by the unforgiving media spotlight, investigators eventually turned to his sixteen-year-old nephew, Brendan Dassey, who lived next door to Avery.⁴¹ Brendan was of interest in part because he had told investigators that he had attended a bonfire at his uncle's house on the night that the victim went missing, although he'd always said he saw nothing suspicious in the fire. Based on little else, investigators interviewed him outside the presence of a parent or attorney twice on February 27, 2006, and followed up with a full-blown interrogation two days later, on March 1, 2006.⁴²

After undergoing interrogation—which would later be challenged postconviction as psychologically coercive⁴³—Brendan eventually began making inculpatory statements indicating not only that he was at the bonfire, but that he had, in fact, seen a body in the fire.⁴⁴ When pushed by investigators, he eventually told a story in which, while delivering the mail to his uncle's house, he stumbled upon Avery sexually assaulting the victim and—at Avery's urging—took part in the assault and subsequent murder.⁴⁵

At this point in the interrogation, the investigators needed Brendan to deliver the correct narrative regarding the victim's murder. Interrogators have long held, after all, that the key to obtaining a convincing confession is to get the suspect to produce a postadmission narrative that coincides with the facts of the crime.⁴⁶ And while in the abstract it was plausible that the victim had been sexually assaulted, there was no evidence of any such assault either on her remains or in the uncle's home.⁴⁷ The only physical evidence that investigators had been able to glean from her remains, in fact, indicated that she had been shot in the head.⁴⁸ While Brendan's

³⁹ See *id.* at *6–8.

⁴⁰ See Dassey Memorandum of Facts at *11–12 (cited in note 36).

⁴¹ *Id.* at *1.

⁴² *Id.* at *12–35.

⁴³ See *id.* at *112.

⁴⁴ *Id.* at Dassey Memorandum of Facts at *14–15 (cited in note 36).

⁴⁵ *Id.* at *23–27.

⁴⁶ Fred E. Inbau, et al, *Essentials of the Reid Technique: Criminal Interrogation and Confessions* 213–17 (Jones & Bartlett 2005).

⁴⁷ Dassey Memorandum of Facts at *11–12 (cited in note 36).

⁴⁸ See *id.* at *5.

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account of sexual assault was good theater, the investigators needed more to prove their murder case. They needed him to give a statement that matched the physical evidence; they needed him to say that she had been shot. The following exchange ensued.

- Officer: What happens next? . . .
- Brendan: Then he went in, back in there and he stabbed her. . . .
- Officer: We know he did something else to her, what else did he do to her?
- Brendan: He choked her. . . .
- Officer: What else did he do to her? We know something else was done. Tell us, and what else did you do? Come on. Something with the head. Brendan? . . .
- Brendan: Huh? . . .
- Officer: What else did you guys do, come on. . . .
- Brendan: That he cut off her hair. . . .
- Officer: OK, what else? What else was done to her head?
- Brendan: That he punched her.
- Officer: What else? [pause]What else? . . . What did he make you do to her? [pause] What did he make you do Brendan? It's OK, what did he make you do?
- Brendan: Cut her.
- Officer: Cut her where?
- Brendan: On her throat. . . .
- Officer: What else happens to her in her head? It's extremely, extremely important you tell us this, for us to believe you. Come on Brendan, what else? [pause] We know, we just need you to tell us.
- Brendan: That's all I can remember.
- Officer: All right, I'm just gonna come out and ask you. Who shot her in the head?
- Brendan: He did.
- Officer: Then why didn't you tell us that?
- Brendan: Cuz I couldn't think of it.⁴⁹

After obtaining this admission, the investigators went on to elicit a number of other details from Brendan, including the fact that he

⁴⁹ Calumet County Sheriff's Department, *Interview of Brendan Dassey*, Complaint No 05-0157-955 *578-79, 584-87 (Mar 1, 2006), online at <http://convolutedbrian.com.s3.amazonaws.com/dassey/01Mar2006/01Mar2006Transcript.pdf> (visited Nov 15, 2011). The interrogation excerpts herein have been shortened. In addition, for simplicity, the questions posed by two interrogators have been collapsed into one "Officer."

and his uncle had cleaned up using a bottle of bleach from Avery's bathroom; the fact that he and his uncle had purportedly hidden the SUV in a section of Avery's property known as the "pit" area; and the fact that the SUV's license plates had been removed. These facts were elicited in the following exchanges:⁵⁰

- Officer: [W]hat do you guys do next?
Brendan: Go take the jeep down in the pit.
Officer: Tell us how. . . .
Brendan: He drove it down there and . . . he put it back by the trees and covered it with branches and a hood. . . .
Officer: OK. After [Avery] put the car there, what do you do next?
Brendan: We walk out. . . .
Officer: [T]he license plates were taken off the car, who did that?
Brendan: I don't know.
Officer: Did you do that?
Brendan: [shakes head "no"] No.
Officer: Did [Avery] do that?
Brendan: Yeah. . . .
Officer: If we took you to that garage, would you be able to show us where [you cleaned]?
Brendan: Yeah. . . .
Officer: Where'd you get the bleach from?
Brendan: In his house by, in his bathroom.

Brendan's entire interrogation was captured on camera, per the Wisconsin Supreme Court's July 2005 ruling that required any statements made by juveniles during interrogations to be electronically recorded.⁵¹

How should a defense practitioner proceed when confronted with a detailed confession like this one? The answer is simple. As Garrett notes, most false confessions nonetheless include largely correct statements about how the crime occurred due to contamination (p 20). Therefore, a defense practitioner must review the confession with an eye to answering one key question: was the client ever able to produce any verifiably true facts about the crime, *absent* contamination?

The first step in answering this question is to investigate the confession for potential contamination. Contamination usually arises

⁵⁰ Id at *600-02, 610.

⁵¹ See *In re Jerrell C.J.*, 699 NW2d 110, 123 (Wis 2005).

out of fact-feeding by police, as Garrett identifies (p 28), but it can also result from a suspect's exposure to media coverage, knowledge of community gossip or rumors about the case, and independent familiarity with the crime scene. Each of these sources should be investigated in turn.

Examining whether police fed facts to a suspect is a simple task that can be enormously fruitful—but it is not always possible. As Garrett emphasizes, the review of an interrogation for fact-feeding is almost impossible in the absence of an electronic recording of the interrogation *in its entirety*. He points out that many jurisdictions record only the suspect's final statement, in which the suspect delivers a story of guilt in response to investigators' open-ended questions (p 32)—a story that has often been rehearsed, sometimes for hours, before the recorder was turned on (p 32). Such recordings are not useful for the purpose of detecting contamination.⁵² Instead, it is essential to have a recording of the entire process of interrogation (pp 43, 247–48), including the all-important stage during which police extract a postadmission narrative account of how the crime unfolded. If the suspect cannot get the facts of the crime right during this stage, police tend to begin questioning him in a leading style, perhaps inadvertently and often out of frustration (pp 33–34). Those leading questions, however, feed the suspect facts about the crime that can be later parroted back (pp 33–34, 43–44). An inquiry into whether fact-feeding occurred, accordingly, requires a transcript of the interrogation and a close and careful hunt for leading questions.

While most contamination takes the form of fact-feeding, other sources of contamination should also be investigated. Whether a suspect could have learned facts about the crime from media coverage, of course, will only be a factor in relatively rare high-profile cases. In those cases, however, a defense practitioner should first learn the sources of media to which the client had been exposed in the time period between the crime and his confession; and he should make every effort to obtain copies of those news stories, whether in the form of television news transcripts, newspaper articles, blog postings, or police press releases. By reviewing those

⁵² The failure to record the interrogation process in its entirety has implications for trial. If an interrogation is unrecorded, then the interrogator is free to assert that crime facts were volunteered by the suspect, at which point the trial may well devolve into a swearing contest between the suspect and the interrogators concerning who was the true source of the details in the confession. If the entire process is recorded, however, then it may be possible to trace contamination where it exists.

news stories, the practitioner will have an understanding of what information about the crime was public knowledge.

Even where the suspect cannot point to particular media stories he himself viewed, the practitioner should nevertheless familiarize himself with all information that was in the public domain. Even if he cannot prove that the suspect read or viewed the source of media that publicized a particular fact, other people that the suspect may have known did. The information could have filtered back to the suspect through those sources.

Similarly, it is also important for the practitioner to investigate whether the client could have learned details of the crime from rumors or gossip. This avenue of inquiry, of course, is particularly fruitful in cases that generate buzz in the client's own circle of acquaintances—in cases, for instance, in which an involved party was a classmate, family member, coworker, or neighbor of the client. When that factual premise exists, practitioners should interview other members of the client's circle of acquaintances to see what facts they had heard about the crime through the rumor mill.

Finally, practitioners should also ask common-sense questions concerning the client's independent familiarity with the crime scene. Imagine a case in which a husband confesses to killing his wife with a knife that he had gotten out of the left-hand kitchen drawer. The fact that the husband correctly identified the drawer in which his own knives were stored can hardly be viewed as evidence of guilt, of course, for the simple reason that his knowledge of that fact need not have arisen solely from his participation in the crime. When reviewing a confession for this sort of contamination, accordingly, a practitioner simply needs to ask his client about his prior experience with and exposure to the crime scene.

Once all these sources of potential contamination have been identified, the practitioner will be well on his way to answering the key question: Was the client ever able to produce any verifiably true facts about the crime, *absent* contamination? To be able to answer that question completely, however, the practitioner must turn his attention to the matter of "fit." Fit can be roughly defined as the degree to which the suspect's narrative matches the provably true facts of the crime.⁵³ It is a matter that, as previously referenced, preoccupies officers during interrogation, but it should concern defense practitioners even more. Police reports, crime scene photographs and videos, witness statements, and laboratory reports,

⁵³ See Ofshe and Leo, 74 *Denver U L Rev* at 990–94 (cited in note 32).

of course, are all familiar sources of information concerning what can be objectively known about the crime itself.

As may be already clear, the sheer task of collecting and managing all the information that bears on this confession analysis can be daunting. It can be tempting to shortcut one's task by identifying a few instances in which the confession narrative fits the crime scene facts and concluding that the confession must be true; it can be equally tempting to identify a few instances in which the suspect appeared to volunteer unprompted details during interrogation and conclude on that basis that the confession must be true. Such shortcuts, however, are mistakes—and indeed, as Garrett's exposé makes clear, such mistakes play out in courtrooms across the country all too frequently.

Instead, a defense practitioner must cross-reference in a systematic and complete fashion the results of his investigation of contamination and fit. The best method for doing this is to create a chart that breaks down the confession, detail by painstaking detail, and sets forth (1) the sources of contamination for each detail, if any, and (2) the degree to which that detail can be corroborated by objective, physical evidence.

Brendan's confession can be charted in this manner. His knowledge of certain details—the fact that the victim was shot in the head and the fact that her vehicle's battery had been disconnected—is quite obviously the product of police fact-feeding, as can be discerned from a careful review of the transcript of his interrogation. His knowledge of other details, however, is not the product of fact-feeding. In fact, some of those details at first glance appear to be volunteered in response to open-ended questions.

On closer review, however, his knowledge of these other details can be traced to other sources of contamination. The media had widely publicized the fact that the victim's SUV and incinerated remains had been found on Avery's property, for instance.⁵⁴ Brendan, who lived next door to his uncle, was also quite familiar with these facts from overhearing his own family's discussions of the case as it unfolded.⁵⁵ Even the fact that the SUV had been covered with branches had been well publicized.⁵⁶ Further, Brendan was independently familiar with his uncle's home, which he had visited many times before, so his ability to describe where his uncle kept the bleach—in the bathroom, a room likely to be seen by a visitor—

⁵⁴ See Dassey Memorandum of Facts at *6-7 (cited in note 36).

⁵⁵ Id at *8-9.

⁵⁶ Id at *7.

again did nothing to confirm guilty knowledge.⁵⁷ And on even closer examination, those few details that Brendan gave during his confession that are not traceable to any contamination at all prove to be incorrect or, at the least, unverifiable. Despite tearing Avery's home apart, police never were able to come up with any physical evidence—no speck of DNA, no loose strand of hair, no trace of blood—establishing that the victim had been sexually assaulted, that her hair had been cut, or that she had been stabbed.⁵⁸ The below table summarizes these findings.

⁵⁷ Id at *1, 35.

⁵⁸ See Dassey Memorandum of Facts at *11–12, 35–36 (cited in note 36).

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TABLE 1: CONTAMINATION IN BRENDAN DASSEY'S CONFESSION

Confession Detail	Fit: Does this detail match the physical evidence?	Source of Contamination: Police Prompting During Interrogation	Source of Contamination: Media Coverage of Crime	Source of Contamination: Rumors and Gossip	Source of Contamination: Suspects Pre-Existing Familiarity With Crime Scene
The victim was sexually assaulted.	No				
The victim's hair was cut.	No				
The victim was shot in the head.	Yes	X			
The victim's body was burned in Avery's pit.	Yes		X	X	
Avery kept a bottle of bleach in his bathroom.	Yes				X
The victim's SUV was found in the "pit" area of Avery's land.	Yes		X	X	
The license plates on the victim's SUV had been removed.	Yes	X			

Source: Dassey Memorandum of Facts at *1-64 (cited in note 36); *Interview of Brendan Dassey* at *578-79, 584, 585-87, 600-02, 610 (cited in note 49).

When viewed in this comprehensive manner, it is plain that Brendan was not able to say anything provably correct about the crime absent the guiding hand of contamination. Such a result is a red flag of unreliability.

Determining that a confession bears signs of unreliability is one significant hurdle in a confession case, but another even more significant hurdle is convincing the fact finder to embrace that view. The traditional course that most criminal cases follow provides multiple opportunities to raise unreliability both before and during trial—and for innovative practitioners willing to deviate from tradition, there may be ways to generate even more such opportunities.

The first such opportunity occurs within the context of a pretrial written motion to suppress the confession on voluntariness grounds. Unfortunately, the vast majority of jurisdictions currently draw a bright-line distinction between voluntariness and reliability.⁵⁹ Many courts accordingly refuse to entertain an argument that appears to relate only to reliability within the context of a voluntariness motion.⁶⁰ This does not mean, however, that all of them do. From time to time, courts have suppressed or admitted confessions using reliability rationales to bolster their conclusions regarding voluntariness.⁶¹ The recurring nature of such rulings provides reason enough to pepper a motion to suppress on voluntariness grounds with evidence of unreliability, in hopes that the judge will at least tacitly consider that evidence in the voluntariness analysis. If nothing else, doing so will frame the issue of unreliability for the judge to consider later in the proceedings.

Another option is to argue that when contamination takes the form of fact-feeding by police, such contamination is itself a form of coercion—and thus that evidence of contamination is directly relevant to the court's voluntariness analysis. Such an approach was presaged in the *Miranda v Arizona*⁶² decision itself, in which the US Supreme Court questioned police tactics designed to cause a suspect to “merely confirm[] the preconceived story the police seek to have him describe.”⁶³ This approach has received more concrete support, moreover, from the New York Court of Appeals's recent decision in

⁵⁹ See, for example, *Colorado v Connelly*, 479 US 157, 167 (1986) (affirming the admissibility of an apparently unreliable confession, because “[a] statement rendered by one in the condition of respondent might be proved to be quite unreliable, but this is a matter to be governed by the evidentiary laws of the forum . . . and not by the Due Process Clause of the Fourteenth Amendment”).

⁶⁰ *Id.*

⁶¹ See, for example, *People v Ventura*, 786 NYS2d 469, 470 (NY App 2004) (affirming the conviction upon finding that the evidence established that the defendant's confessions were both voluntary and reliable).

⁶² 384 US 436 (1966).

⁶³ *Id.* at 455.

Warney v New York.⁶⁴ There, the state's highest tribunal reviewed a lower court's dismissal of a civil rights lawsuit brought by exoneree Douglas Warney. Warney had argued that his false confession had been coerced in part because the police had fed him facts during his interrogation that he was then pressured into repeating.⁶⁵ In reversing the dismissal, the court of appeals held that Warney's allegation that, "whether negligently or through intentional manipulation, police misconduct led to the inclusion of these details in Warney's statement" was sufficient to state a claim that he was "coerced into adopting the false confession."⁶⁶ By linking contamination and coercion in this manner—albeit in a civil context premised in part on DNA proof of Warney's actual innocence—the court may well have launched a new avenue of argument for practitioners.

Following the filing of the written motion to suppress, any ensuing pretrial suppression hearing represents a chance to introduce evidence of contamination and unreliability via live testimony. At most suppression hearings, of course, the interrogating officers take the stand to testify. A defense practitioner concerned about reliability can establish through cross-examination two important facts that relate to contamination: first, the officer's knowledge prior to interrogation of specific information about the crime and, second, the officer's use of leading questions during the interrogation that, in effect, fed that information straight to the client. The goal here is to document exhaustively every instance in which the police revealed correct facts about the case to the client during interrogation.⁶⁷ Such a presentation, in fact, can be quite compelling when done in a thorough manner.

While cross-examination of the interrogating officers is an essential part of any effort to prove unreliability, it is not the only avenue of attack. Frequently, the testimony of a false confession expert—in other words, a social psychologist with expertise in police interrogation tactics—can also be useful. Such an expert should be able to testify about the phenomenon of contamination and explain to the judge how contaminated confessions can be unreliable—perhaps reciting some of the same troubling statistics and stories of

⁶⁴ 947 NE2d 639 (NY 2011).

⁶⁵ Id at 642.

⁶⁶ Id at 644.

⁶⁷ See Deja Vishny, *Cross Examining Police in False Confession Cases*, 16 Wis Defender *2-5 (Winter-Spring 2008), online at <http://www.wisspd.org/html/ATPracGuides/WisDef/WinSpr08/CE.pdf> (visited Nov 16, 2011).

contamination that are included in Garrett's book. After this foundation has been laid, the expert should go on to analyze the client's confession for contamination and must identify every possible instance of contamination in the client's statement. And finally, the expert should testify that contamination is not something that concerns only the defense bar; she or he can explain that police officers are commonly trained to withhold facts during interrogation because the use of leading questions can suggest information to the suspect and taint the resulting statement. Although false confession experts generally are not permitted to opine on the truth or falsity of the confession, they can give jurors an analytical framework against which they can assess its reliability.

If the judge will not allow this type of presentation during a pretrial voluntariness hearing, practitioners should consider filing a separate pretrial motion in limine requesting the suppression of the confession squarely on *reliability*—not voluntariness—grounds.⁶⁸ Such a motion could fall under the auspices, for example, of a local rule of evidence modeled on Federal Rule of Evidence 403, which excludes evidence when the risk of prejudice outweighs the probative value.⁶⁹ Confessions, after all, are extraordinarily prejudicial evidence precisely because they appear to be compelling evidence of guilt; but when a confession is demonstrably contaminated and unreliable, it may have little real probative value.

While such an approach is admittedly innovative, there is substantial and wide-ranging precedent for the notion that judges may exclude unreliable evidence. Federal judges, for instance, have long had the power to exclude even voluntary confessions in the absence of "substantial independent evidence which would tend to establish the trustworthiness of the statement."⁷⁰ Similarly, several states allow trial courts to hold pretrial reliability hearings—often called "taint" hearings—to evaluate whether child witnesses' statements should be excluded as unreliable.⁷¹ Judges in several states also are allowed to exclude unreliable or untrustworthy eyewitness identifications before trial as a matter of routine.⁷² More broadly, almost every state permits its judges to admit or exclude hearsay

⁶⁸ See Leo, et al, 2006 Wis L Rev at 531–33 (cited in note 35).

⁶⁹ See FRE 403.

⁷⁰ *Opper v United States*, 348 US 84, 93 (1954).

⁷¹ See, for example, *Fischbach v State*, 1996 WL 145968 *2 (Del); *State v Michaels*, 642 A2d 1372, 1382–83 (NJ 1994); *People v Michael M.*, 618 NYS2d 171, 178 (NY Sup Ct 1994).

⁷² See, for example, *Manson v Brathwaite*, 432 US 98, 110–14 (1977); *People v Rodriguez*, 475 NE2d 443, 444–45 (NY 1984).

testimony based on a generalized evaluation of its reliability.⁷³ Judges in most states also regularly weigh the reliability of expert opinions before permitting them to be introduced.⁷⁴ Plainly, judges are often asked to engage in pretrial evaluations of the reliability of certain pieces of evidence; confessions should be no different.

Finally, of course, the issue of contamination must be raised directly to the fact-finder at trial. Indeed, proving contamination and coercion must be the heart of any false confession defense. Such a defense can be accomplished largely by combining effective cross-examination of the interrogating officers with expert testimony, as described above in the context of a suppression hearing. It bears noting, however, that any discussion of contamination can become repetitive and even boring, because it necessarily entails a detail-by-detail review of the confession. To keep jurors engaged, practitioners are urged to use visual aids during this portion of the defense case. The contamination and fit chart described above could be enlarged and filled out, line by line, during an expert's testimony about contamination—or, even more effectively, during cross-examination of the officer who fed each fact to the defendant. During closing argument, the defense attorney could then display the filled-out chart to the jury in an effort both to remind them of the underlying testimony and to provide them with a visual illustration of the contamination argument. If the confession was videotaped, moreover, the defense should replay the tape during its case in chief, stopping and starting it as appropriate to draw the jury's attention to each instance of fact-feeding and police prompting. A jury that sees the confession tape for the first time during the prosecution's case may be blinded to any fact-feeding by the emotional force of the confession itself. Accordingly, it is the duty of the defense attorney to replay the tape and highlight fact-feeding when it occurs.

CONCLUSION

There can be no question that with the publication of *Convicting the Innocent*, Brandon Garrett has established himself as one of this generation's most significant wrongful convictions scholars. Simply

⁷³ See FRE 807 (allowing for the admissibility of hearsay testimony, even if it does not fit into one of the established hearsay exceptions, if it bears "circumstantial guarantees of trustworthiness"); Alex Stein, *Constitutional Evidence Law*, 61 Vand L Rev 65, 106 (2008).

⁷⁴ See *Daubert v Merrell Dow Pharmaceuticals, Inc.*, 509 US 579, 591–96 (1993); *Kumho Tire Co., Ltd v Carmichael*, 526 US 137, 147 (1999). See also Martin S. Kaufman, *The Status of Daubert in State Courts* 4–23 (Atlantic Legal Foundation 2006), online at <http://www.atlanticlegal.org/daubertreport.pdf> (visited Nov 16, 2011).

put, this is one of the most important books ever written on the subject of wrongful convictions. It is a deserving heir to the critical work done by *Actual Innocence*. We are fortunate, moreover, that Garrett's work may well turn out to be the proverbial gift that keeps on giving; his data and methodology are publicly available on his University of Virginia website, accessible to other researchers who themselves will be able to contribute to and make use of them.⁷⁵ Under Garrett's leadership and direction, the ever-growing corpus of DNA exoneration data promises to be a treasure trove for many years to come.

Before *Convicting the Innocent* will have its maximal effect, however, much more must happen than just the reading of a book or the collection of a dataset. Defense lawyers must take Garrett's book off their shelves and use its data in the courtroom, in the defense of their clients. They must cite Garrett's findings in their legal briefs and motions; they must use his statistics to effectively examine witnesses; and they must use his stories of tragedy and redemption to educate jurors about the causes and consequences of wrongful convictions. Perhaps nowhere is this lesson more important than in confession cases, given the unquestioning faith that many jurors place in the reliability of confessions. This Review attempts to give practitioners some ideas concerning how to address the problem of the contaminated confession that Garrett identifies; but we recognize and acknowledge that our ideas are far from comprehensive. Together, practitioners—whether trial attorneys, appellate advocates, or clinical professors—can develop strategies to combat this problem. Together, we can teach ourselves and future generations how to use the lessons of *Convicting the Innocent* to prevent future injustices.

⁷⁵ http://www.law.virginia.edu/html/librarysite/garrett_innocent.htm (visited Nov 16, 2011).