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THE SUBSTANCE OF FALSE CONFESSIONS

Brandon L. Garrett

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A puzzle is raised by cases of false confessions: How could an innocent person convincingly confess to a crime? Postconviction DNA testing has now exonerated over 250 convicts, more than forty of whom falsely confessed to rapes and murders. As a result, there is a new awareness that innocent people falsely confess, often due to psychological pressure placed upon them during police interrogations. Scholars increasingly examine the psychological techniques that can cause people to falsely confess and document instances of known false confessions. This Article takes a different approach, by examining the substance of false confessions, including what was said during interrogations and how the confession statements were then litigated at trial and postconviction. Doing so sheds light on the phenomenon of confession contamination. Not only can innocent people falsely confess, but all except two of the exonerees studied were induced to deliver false confessions with surprisingly rich, detailed, and accurate information. We now know that those details could not have likely originated with these innocent people, but rather must have been disclosed to them, most likely during the interrogation process. However, our constitutional criminal procedure does not regulate the postadmission interrogation process, nor do courts evaluate the reliability of confessions. This Article outlines a series of reforms that focus on the insidious problem of contamination, particularly videotaping interrogations in their entirety, but also reframing police procedures, trial practice, and judicial review. Unless criminal procedure is reoriented towards the reliability of the substance of confessions, contamination of facts may continue to go undetected, resulting in miscarriages of justice.

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INTRODUCTION

False confessions present a puzzle: How could innocent people convincingly confess to crimes they knew nothing about? For decades, commentators doubted that a crime suspect would falsely confess. For example, John Henry Wigmore wrote in his 1923 evidence treatise that false confessions were “scarcely conceivable” and “of the rarest occurrence” and that “[n]o trustworthy figures of authenticated instances exist”¹ That understanding has changed dramatically in recent years, as, at the time of this writing, postconviction DNA testing has exonerated 252 convicts, forty-two of whom falsely confessed to rapes and murders.² There is a new awareness among

1. 1 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW §§ 835, 867 (2d ed. 1923).

2. See Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55 (2008); The Innocence Project, <http://www.innocenceproject.org> (last visited Nov. 19, 2009) (providing count of U.S. postconviction DNA exonerations). The study set closed with the 250th DNA exoneration, which occurred in February 2010 as this Article approached publication. As a result, the 251st and 252nd DNA exonerations were not included in the study set. Both involved false confessions. The 251st, that of Ted Bradford in Washington state, involved a

scholars, legislators, courts, prosecutors, police departments, and the public that innocent people falsely confess, often due to psychological pressure placed upon them during police interrogations.³ Scholars increasingly study the psychological techniques that can cause people to falsely confess and have documented how such techniques were used in instances of known false confessions.⁴

This Article takes a different approach by examining the substance of false confessions, including what was said during interrogations and how confessions were litigated at trial. Doing so sheds light on the phenomenon of confession contamination.⁵ Police may, intentionally or not, prompt the suspect on how the crime happened so that the suspect can then parrot back an accurate-sounding narrative. Scholars have noted that “on occasion, police are suspected of feeding details of a crime to a compliant suspect,” and have described several well-known examples.⁶ However, no one has previously

false confession reported to have included “details that would only be known to the rapist.” Mark Morey, *Jurors Find Bradford Innocent of Rape*, YAKIMA HERALD-REPUBLIC, Feb. 11, 2010. The 252nd, that of Anthony Caravella in Florida, involved a confession that initially included details inconsistent with the crime, but which over a series of interrogations was reported to include accurate details, including information “suggested to him by leading questions.” Paula McMahon, *DNA Result Just One Troubling Aspect in Convicted Man’s Case*, SOUTH FLA. SUN SENTINEL, Sept. 4, 2009.

3. Saul M. Kassin et al., *Police Interviewing and Interrogation: A Self-Report Survey of Police Practices and Beliefs*, 31 LAW & HUM. BEHAV. 381, 382 (2007) [hereinafter Kassin et al., *Police Interviewing and Interrogation*] (“Largely as a result of recent DNA exonerations, many of which had contained false confessions in evidence, a spotlight of scrutiny has been cast on the processes of police interviewing and interrogation.”). The American Psychology and Law Society issued a landmark white paper on the subject, which began by citing to a new awareness of the problem of false confessions “[i]n this new era of DNA exonerations.” Saul M. Kassin et al., *Police-Induced Confessions: Risk Factors and Recommendations*, 34 LAW & HUM. BEHAV. 3, 3 (2010) [hereinafter Kassin et al., *Police-Induced Confessions*].

4. See Saul M. Kassin & Lawrence S. Wrightsman, *Confession Evidence*, in THE PSYCHOLOGY OF EVIDENCE AND TRIAL PROCEDURE 67, 67-94 (Saul M. Kassin & Lawrence S. Wrightsman eds., 1985); Richard A. Leo & Richard J. Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 J. CRIM. L. & CRIMINOLOGY 429, 431, 435 (1998). For experimental work concerning false confessions, see Saul M. Kassin & Holly Sukel, *Coerced Confessions and the Jury: An Experimental Test of the “Harmless Error” Rule*, 21 LAW & HUM. BEHAV. 27, 28 (1997); Saul M. Kassin, *On the Psychology of Confessions: Does Innocence Put Innocents at Risk?*, 60 AM. PSYCHOL. 215, 216, 223 (2005) [hereinafter Kassin, *On the Psychology of Confessions*]; Saul M. Kassin & Katharine L. Kiechel, *The Social Psychology of False Confessions: Compliance, Internalization, and Confabulation*, 7 PSYCHOL. SCI. 125 (1996); Corey J. Ayling, Comment, *Corroborating Confessions: An Empirical Analysis of Legal Safeguards Against False Confessions*, 1984 WIS. L. REV. 1121, 1186-87.

5. Richard J. Ofshe & Richard A. Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 DENV. U. L. REV. 979, 1119 (1997) (developing the concept of confession “contamination”).

6. See Joshua E. Kastenberg, *A Three-Dimensional Model for the Use of Expert Psychiatric and Psychological Evidence in False Confession Defenses Before the Trier of*

studied the factual statements in a set of false confessions.⁷

The set of forty cases that this Article examines has important limitations. As will be developed further, false confessions uncovered by DNA testing are not representative of other false confessions, much less confessions more generally. These forty cases cannot speak to how often people confess falsely. Nor can these examples themselves tell us whether reforms, such as recording interrogations, prevent more false convictions than they discourage true confessions. But these data provide examples of a very troubling problem that deserves further study.

In the cases studied here, innocent people not only falsely confessed, but they also offered surprisingly rich, detailed, and accurate information. Exonerees told police much more than just “I did it.” In all cases but two (ninety-seven percent—or thirty-six of the thirty-eight—of the exonerees for whom trial or pretrial records could be obtained), police reported that suspects confessed to a series of specific details concerning how the crime occurred.⁸ Often those details included reportedly “inside information” that only the rapist or murderer could have known. We now know that each of these people was innocent and was not at the crime scene. Where did those details, recounted at length at trial and recorded in confession statements, come from? We often cannot tell what happened from reading the written records. In many cases, however, police likely disclosed those details during interrogations by telling exonerees how the crime happened. Police may not have done so intentionally or recklessly; the study materials do not provide definitive information about the state of mind of the officers. Police may have been convinced the suspect was guilty and may not have realized that the interrogation had been mishandled.

An illustrative case is that of Jeffrey Deskovic, a seventeen-year-old when he was convicted of rape and murder. Deskovic was a classmate of the fifteen-year-old victim, had attended her wake, and was eager to help solve the crime.⁹ Deskovic spoke to police many times and was interrogated for hours over

Fact, 26 SEATTLE U. L. REV. 783, 789 (2003).

7. See RICHARD A. LEO, POLICE INTERROGATION AND AMERICAN JUSTICE 166 (2008) (calling on scholars to examine “the postadmission portion of police interrogation” and noting that “it has received far less attention from scholars, lawyers, and the media” than the voluntariness of the admission of guilt); see also GISLI H. GUDJONSSON, THE PSYCHOLOGY OF INTERROGATIONS AND CONFESSIONS 523-37 (2003) (highlighting the “dangers of relying on special knowledge of the crime as proof of guilt”).

8. The characteristics of all forty cases are summarized in the Appendix, which is available online at a University of Virginia School of Law Library research collection webpage together with relevant portions of exonerees’ interrogation records and trial transcripts. See Univ. of Va. Sch. of Law, False Confessions, Transcripts and Testimony, http://www.law.virginia.edu/html/librarysite/garrett_falseconfess.htm (last visited Feb. 23, 2010).

9. See Trial Transcript at 1207-08, *People v. Deskovic*, No. 192-90 (N.Y. Sup. Ct. Nov. 30, 1990) [hereinafter Deskovic Trial Transcript]; Innocence Project Profile of Jeff Deskovic, <http://www.innocenceproject.org/Content/44.php> (last visited Nov. 20, 2009).

multiple sessions, including a session in which police had a tape recorder, but turned it on and off, only recording thirty-five minutes.¹⁰ During one discussion, he “supposedly drew an accurate diagram,” which depicted details concerning “three discrete crime scenes” which were not ever made public.¹¹ He never actually confessed to raping or murdering the victim, but he offered other details, including that the victim suffered a blow to the temple, that he tore her clothes, struggled with her, held his hand over her mouth, and “may have left it there a little too long.”¹² In his last statement, which ended with him in a fetal position and crying uncontrollably, he reportedly told police that he had “hit her in the back of the head with a Gatoraid [sic] bottle that was lying on the path.”¹³ Police testified that, after hearing this, the next day they conducted a careful search and found a Gatorade bottle cap at the crime scene.¹⁴

The trial transcripts highlight how central these admissions were to the State’s case. DNA tests conducted by the FBI laboratory before the trial excluded Deskovic, providing powerful evidence that he was not the perpetrator. The district attorney asked the jury to ignore that DNA evidence, speculating that perhaps the victim was “sexually active” and “romantically linked to somebody else” who she had sexual relations with shortly before her rape and murder.¹⁵ After all, “[s]he grew up in the eighties.”¹⁶ There was no investigation or DNA testing conducted to support this conjecture, either by the prosecution or the defense.

Instead, the district attorney emphasized in closing arguments the reliability of Deskovic’s statements, noting that after he told police about the Gatorade bottle, “it was found there,” and this was a heavy weapon, “not a small little bottle.”¹⁷ Detectives “did not disclose any of their observations or any of the evidence they recovered from Jeffrey nor, for that matter, to anyone else they interviewed.”¹⁸ They kept their investigative work nonpublic

for the simple reason . . . that [if a suspect] revealed certain intimate details that only the true killer would know, having said those, and be arrested could not then say, “Hey, they were fed to me by the police, I heard them as rumors, I used my common sense, and it’s simply theories.”¹⁹

10. LESLIE CROCKER SNYDER ET AL., WESTCHESTER COUNTY DIST. ATTORNEY, REPORT ON THE CONVICTION OF JEFF DESKOVIC 2, 5-6 (2007), available at <http://www.westchesterda.net/Jeffrey%20Deskovic%20Comm%20Rpt.pdf> [hereinafter Deskovic Report].

11. *Id.* at 5, 14.

12. *Id.* at 33; Deskovic Trial Transcript, *supra* note 9, at 1167, 1185.

13. Deskovic Trial Transcript, *supra* note 9, at 1185.

14. *Id.* at 1429, 1512-13.

15. *Id.* at 1492.

16. *Id.* at 1494.

17. *Id.* at 1512-13, 1537.

18. *Id.* at 1504.

19. *Id.* at 1504-05.

The district attorney told the jury to reject the suggestion that Deskovic was fed facts, stating, “Ladies and gentlemen, it doesn’t wash in this case, it just doesn’t wash.”²⁰

Deskovic was convicted of rape and murder and served more than fifteen years of a sentence of fifteen years to life. In 2006, new DNA testing again excluded him, but also matched the profile of a murder convict who subsequently confessed and pleaded guilty.²¹ Now that we know Deskovic is innocent, how could he have known those “intimate details”? The District Attorney’s postexoneration inquiry noted:

Much of the prosecution’s effort to persuade the jury that Deskovic’s statements established his guilt hinged on the argument that Deskovic knew things about the crime that only the killer could know Given Deskovic’s innocence, two scenarios are possible: either the police (deliberately or inadvertently) communicated this information directly to Deskovic or their questioning at the high school and elsewhere caused this supposedly secret information to be widely known throughout the community.²²

This confession was contaminated, either by police leaking facts or feeding them. Given the level of specificity reportedly provided by Deskovic, the second and more troubling possibility, that the officers disclosed facts to him, seems far more likely. Yet during the trial, the police and the prosecutor not only denied having told Deskovic those facts, such as the presence of the Gatorade bottle cap and the depiction of the crime scene, but were emphatic they did not leak those facts to the media or to anyone else, such as other high school students interviewed.²³ Whether the police acted inadvertently or intentionally, in hindsight we know that they provided an inaccurate account. Deskovic has commented, “[b]elieving in the criminal justice system and being fearful for myself, I told them what they wanted to hear.”²⁴ Deskovic is currently suing for civil rights violations caused by a “veritable perfect storm of misconduct by virtually every actor at every stage of his investigation and prosecution”²⁵ The suit alleges that police disclosed facts to him.

The Deskovic case illustrates how false confessions do not happen simply by happenstance. They are carefully constructed during an interrogation and then reconstructed during any criminal trial that follows. Constitutional criminal procedure does not regulate this critical phase of an interrogation. The Constitution requires the provision of initial *Miranda* warnings and then

20. *Id.* at 1505.

21. See Profile of Jeff Deskovic, *supra* note 9; see also Fernanda Santos, *Inmate Enters Guilty Plea in '89 Killing*, N.Y. TIMES, Mar. 15, 2007.

22. See Deskovic Report, *supra* note 10, at 6.

23. Deskovic Trial Transcript, *supra* note 9, at 1265-67.

24. Fernanda Santos, *DNA Evidence Frees Man Imprisoned for Half His Life*, N.Y. TIMES, Sept. 21, 2006, at B1.

25. Jonathan Bandler, *Deskovic Sues Police, Medical Examiner, Prosecutors in Wrong Conviction*, J. NEWS (Westchester, N.Y.), Sept. 18, 2007, at 1A.

requires that the bare admission of guilt have been made voluntarily.²⁶ That admission of guilt, while important, is only a part of the interrogation process. The “confession-making” phase may be far more involved.²⁷ Much of the power of a confession derives from the narrative describing how the crime was committed. For a person to confess in a convincing way, he must be able to say more than “I did it.” Police are trained to carefully test the suspect’s knowledge of how the crime occurred by assessing whether the suspect can freely volunteer specific details that only the true culprit could know.²⁸

That confession-making process was corrupted in the cases studied in this Article. This Article examines the substance of the confession statements, how they were litigated at trial, and then on appeal. Just as in Deskovic’s case, in almost all of the cases that resulted in trials, detectives testified that these defendants did far more than say “I did it,” but that they also stated they had “guilty” or “inside” knowledge.²⁹ Only two of the thirty-eight exonerees, Travis Hayes and Freddie Peacock, relayed no specific information concerning the crime. Hayes was still convicted, although DNA testing conducted before trial excluded him and his co-defendant.³⁰ Peacock was mentally disabled and all he could say to the police about the crime was “I did it, I did it.”³¹ The other thirty-six exonerees each reportedly volunteered key details about the crime, including facts that matched the crime scene evidence or scientific evidence or accounts by the victim.³² Detectives further emphasized in twenty-seven cases—or seventy-one percent of the thirty-eight cases with transcripts obtained—that the details confessed were nonpublic or corroborated facts.³³ Detectives sometimes specifically testified that they had assiduously avoided contaminating the confessions by not asking leading questions, but rather allowing the suspects to volunteer crucial facts.³⁴

The nonpublic facts contained in confession statements then became the centerpiece of the State’s case. Although defense counsel moved to exclude almost all of these confessions from the trial, courts found each to be voluntary and admissible, often citing to the apparent reliability of the confessions.³⁵ The

26. Yale Kamisar, *What Is an “Involuntary” Confession? Some Comments on Inbau and Reid’s Criminal Interrogation and Confessions*, 17 RUTGERS L. REV. 728, 732 (1963); Welsh S. White, *What Is an Involuntary Confession Now?*, 50 RUTGERS L. REV. 2001, 2003-04 (1998).

27. LEO, *supra* note 7, at 166.

28. *See infra* Part I.A.

29. *See app.*, *supra* note 8.

30. *See infra* notes 180-82 and accompanying text.

31. *See infra* notes 183 and 184 and accompanying text.

32. *See app.*, *supra* note 8 (listing examples of reported facts in each exonerees’ case); *infra* Part I.B.

33. *See app.*, *supra* note 8 (quoting relevant testimony for each case).

34. *See infra* Part II.C.

35. *See infra* Part III.D.

facts were typically the focus of the State's closing arguments to the jury.³⁶ Even after DNA testing excluded these people, courts sometimes initially denied relief, citing the seeming reliability of these confessions.³⁷ The ironic result is that the public learned about these false confessions in part because of the contaminated facts. These false confessions were so persuasive, detailed and believable that they resulted in convictions which were often repeatedly upheld during appeals and habeas review.³⁸ After years passed, these convicts had no option but to seek the DNA testing finally proving their confessions false.

Why does constitutional criminal procedure fail to regulate the substance of confessions? Beginning in the 1960s, the Supreme Court's Fifth and Fourteenth Amendment jurisprudence shifted. The Court abandoned its decades-long focus on reliability of confessions. Instead, the Court adopted a deferential voluntariness test examining the "totality of the circumstances" of a confession.³⁹ The Court has since acknowledged "litigation over voluntariness tends to end with the finding of a valid waiver."⁴⁰ Almost all of these exonerees moved to suppress their confessions, and courts ruled each confession voluntary. The Court supplemented the voluntariness test with the requirement that police utter the *Miranda* warnings, which if properly provided, as the Court puts it, give police "a virtual ticket of admissibility."⁴¹ All of these exonerees waived their *Miranda* rights. All lacked counsel before confessing. Most were vulnerable juveniles or mentally disabled individuals. Most were subjected to long and sometimes highly coercive interrogations. Nor is it surprising that they failed to obtain relief under the Court's deferential voluntariness inquiry, especially where the confessions were powerfully—though falsely—corroborated.

The Court has noted that "the coercion inherent in custodial interrogation blurs the line between voluntary and involuntary statements, and thus heightens the risk" of constitutional violations.⁴² These false confessions shed light on dangers of coercion during interrogations, but they also provide examples of a different problem in which the line blurred is that between truth and fiction. When custodial interrogations are not recorded in their entirety, one cannot easily discern whether facts were volunteered by the suspect or disclosed by law enforcement. Before they obtained DNA testing and without complete recordings of their interrogations, these exonerees could not prove that they did

36. See *infra* Part II.B-C.; see also app., *supra* note 8 (quoting closing arguments in cases where transcripts were obtained).

37. See *infra* Part III.G.

38. See *infra* Part III.G.

39. *Dickerson v. United States*, 530 U.S. 428, 444 (2000).

40. *Missouri v. Seibert*, 542 U.S. 600, 609 (2004) (plurality opinion) (citing *Berkemer v. McCarty*, 468 U.S. 420, 433 n.20 (1984)).

41. *Id.*

42. *Dickerson*, 530 U.S. at 435.

not volunteer inside knowledge of the crime.

A series of reforms could orient our criminal system towards the substance of confessions. First, constitutional criminal procedure could regulate reliability, though such constitutional change may be unlikely. An understanding of the vulnerability of confessions to contamination can also inform courts reviewing trials postconviction, particularly in cases involving persons vulnerable to suggestion, such as juveniles and mentally disabled individuals whose false confessions are studied here. Second, unless interrogations are recorded in their entirety, courts may not detect contamination of facts, especially when no DNA testing can be performed. In response to some of these false confessions, state legislatures, police departments, and courts have increasingly required videotaping of entire interrogations.⁴³ Third, additional police procedures can safeguard reliability, such as procedures intended to assure against contamination, assess suggestibility, and avoid postadmission coercion.

This Article begins in Part I by describing the study design and methodology as well as characteristics of the false confessions studied. Part II examines the phenomenon of contaminated facts in these trials. Part III explores how criminal procedure challenges were litigated and how contaminated facts frustrated such efforts. The Article concludes in Part IV by discussing reform of interrogation and criminal procedure.

I. CHARACTERISTICS OF DNA EXONEREES' FALSE CONFESSIONS

A. *Study Design*

A confession to a crime can occur in many different contexts outside a police interrogation room. A person who committed a crime might admit guilt to friends, family, police informants, or to law enforcement. Criminal procedure rules, however, typically only apply when a person is interrogated while in custody, or after police have determined and conveyed that a person is no longer free to leave.⁴⁴ Each of the forty exonerees studied was interrogated in a custodial setting.⁴⁵ Each also delivered self-incriminating statements and admissions of guilt to police, though some, like Deskovic, did not confess to all of the charged acts. Many also admitted guilt before police had probable cause and thus before they were formally placed under arrest or considered to be in custody.⁴⁶ A separate group of eight exonerees also reportedly made self-

43. See Richard A. Leo et al., *Bringing Reliability Back In: False Confessions and Legal Safeguards in the Twenty-First Century*, 2006 WIS. L. REV. 479, 486.

44. See *infra* Part III.

45. See *infra* Part III.A. (discussing how exonerees waived their *Miranda* rights when given the warnings as required when interrogated in custody).

46. See *infra* Part III.A. Where, as discussed *infra* Part I.B., the confession was the central evidence that the State relied upon, prior to the confession police often did not have

incriminating statements volunteered to police.⁴⁷ Those noncustodial remarks, though not full admissions to having committed any crime, played important roles at trial and are discussed separately.

People have long falsely confessed not just in cases involving police torture or the “third degree” but also in cases involving psychological techniques commonly used in modern police interrogations. Over the past two decades, scholars, social scientists, and writers have identified at least 250 cases in which they determined that people likely falsely confessed to crimes. New cases are regularly identified.⁴⁸ DNA exonerations, though only a subset of false confessions identified by researchers, provide a unique data set with which to examine how a false confession occurs. These false confessions came to light not because of a challenge to the confession, but due to the independent development of DNA technology allowing the convict to convincingly prove innocence years after the conviction. DNA testing can provide particularly probative evidence of innocence due to the precision of the technology. Indeed, in twenty-five of these exonerees’ cases, postconviction DNA testing not only excluded the exoneree but also inculpated another person. In at least eight of those cases, that person subsequently confessed to the crime.⁴⁹

These forty confessions are atypical in several respects due to their selection through postconviction DNA testing. These forty examples cannot tell us why many criminal suspects falsely confess. Further, there is every reason to think that these cases are unrepresentative even of other false confessions. Few of these cases involved guilty pleas, and one might expect people who confess, even falsely, to plead guilty. These cases proceeded to a trial at which each person was convicted. By definition, since all of these cases involved

probable cause for an arrest.

47. See *infra* Part III.F.

48. See, e.g., LEO, *supra* note 7, at 243 (reviewing literature, and concluding “[s]ince the late 1980s, six studies alone have documented approximately 250 interrogation-induced false confessions”). Those six studies are: ROB WARDEN, CTR. ON WRONGFUL CONVICTIONS, THE ROLE OF FALSE CONFESSIONS IN ILLINOIS WRONGFUL MURDER CONVICTIONS SINCE 1970 (2003), available at <http://www.law.northwestern.edu/wrongfulconvictions/issues/causesandremedies/falseconfessions/FalseConfessionsStudy.html> (identifying twenty-five false confessions in Illinois); Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21, 56-64 (1987) (identifying forty-nine false confessions); Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 894-900 (2004) (identifying 125 false confessions); Garrett, *supra* note 2, at 88 (identifying thirty-one DNA postconviction exonerations involving false confessions); Samuel R. Gross et al., *Exonerations in the United States: 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 544 (2005) (identifying fifty-one false confessions).

49. The twenty-five cases are those of: M. Bradford, R. Cruz, J. Dean, A. Gray, P. Gray, T. Hayes, A. Hernandez, D. A. Kelly, W. Kelly, A. McCray, R. Miller, C. Ochoa, C. Ollins, K. Richardson, Y. Salaam, R. Santana, D. Shelden, A. Taylor, J. Townsend, D. Vasquez, D. Warney, E. Washington, R. Williamson, T. Winslow, K. Wise. Cases involving subsequent confessions of the person inculpated by postconviction DNA testing are those of Cruz, Hernandez, Ochoa, McCray, Richardson, Salaam, Santana, and Wise.

postconviction DNA testing, these false confessions all withstood trial scrutiny. Each also withstood appellate or postconviction scrutiny until the DNA testing was conducted. These cases each had biological evidence later suitable for DNA testing. The study set includes mostly cases involving a rape by a stranger, since in such cases the culprit is likely to leave behind biological evidence, identity can be in doubt, and forensic evidence can be highly probative of the perpetrator's identity. Others who falsely confessed were not convicted, because the problems concerning the confession came to light before trial.⁵⁰ Others successfully challenged their conviction postconviction so they did not need DNA testing. Still others could not benefit from DNA testing, such as where relevant biological evidence was not preserved.

These forty confessions are also unlike the vast majority of confessions for the obvious reason that we now know they are false. False confessions that resulted in convictions upheld on appeal and postconviction might tend not to have clear indicia of coercion or unreliability. After all, courts found these confessions admissible at trial and postconviction, such that years later these innocent people had no option but to seek postconviction DNA testing. These false confessions may have survived judicial scrutiny because they appeared voluntary and reliable. This may distinguish them from other false confessions.

The features that make this set of false confessions unrepresentative also uniquely allow one to critically assess the substance of the confessions. Only in examples of known false confessions can one be confident in retrospect that persons could not before their interrogation have known specific details concerning crimes. That is why exonerees' cases could not be usefully compared to any control group of nonexoneree confessions by presumably guilty individuals. One cannot assess in nonexoneration cases whether the confession was contaminated. Guilty individuals are obviously quite able to volunteer specific details concerning crimes.

In a prior study of exonerees' appeals and habeas proceedings, I described the set of exonerees who falsely confessed and what claims they raised postconviction, but did not analyze the substance of their confessions.⁵¹ Data from criminal appeals and habeas proceedings do not shed light on the problem of contaminated confessions. To assess the substance of these false confessions and what claims were made regarding their content, pretrial materials, trial materials and the confessions themselves were sought for all forty who falsely confessed and obtained for thirty-eight of the forty exonerees.⁵² Those records provided a rich source of material concerning confession statements, how

50. For example, DNA testing conducted before trial has excluded defendants who had falsely confessed. See, e.g., Posting of Steven Drizin to Bluhm Blog, *Another False Confession in New Mexico?*, <http://blog.law.northwestern.edu/bluhm/2009/03/another-false-confession-in-new-mexico.html> (Mar. 8, 2009, 16:02 CST).

51. See Garrett, *supra* note 2, at 94.

52. Law student research assistants initially coded the materials by following a pre-established protocol. I then reviewed, non-blind, their coding and each set of records.

police officers described the interrogation process, how statements were litigated at trial, defense accounts of the interrogations, and any expert review. Characteristics of all forty cases are summarized in the Appendix, which is available online together with relevant portions of these case materials.⁵³

B. *General Characteristics of Exoneree Confessions*

In thirty-eight exonerees' cases, a transcript was obtained, and thus, the study set refers to just those thirty-eight persons. For twenty-seven exonerees, the text of a written confession statement was also obtained. In thirty-five cases, a false confession was introduced at trial.⁵⁴ Three additional defendants pleaded guilty—William Kelly, David Vasquez, and Thomas Winslow—for whom documentation of the confession, including in preliminary hearings, was obtained.⁵⁵ For two others who pleaded guilty—Anthony Gray and Keith Brown—no such materials could be located.⁵⁶ Such cases may be more typical of criminal cases in which the vast majority of those charged plead guilty. Anthony Gray, for example, did make a motion to withdraw his guilty plea, with his attorney stating “he is of below average intelligence and is functionally illiterate.”⁵⁷ Indeed, just as in his confession, during the hearing he “answered negatively to questions posed by the Court, only to answer them positively once the same questions were rephrased.”⁵⁸ Gray's letter to the Judge stated:

I has been in jail for five months on a murder that I did not no any thank about [W]hy I say I was [i]n the house the police say that they has proof to say us three was in that Lady house we was not in her house that day or no where around her house I Lie on them because they Lie on me.⁵⁹

Providing a window into why he pleaded guilty, he explained, “They were

53. *See supra* note 8.

54. All of the forty exonerees listed in the Appendix were convicted at a trial, except M. Bradford, K. Brown, J. Dean, A. Gray, W. Kelly, C. Ochoa, D. Shelden, J. Taylor, J. Townsend, D. Vasquez, and T. Winslow, who had pleaded guilty. For all of the thirty convicted at a trial, trial materials were obtained. Of those eleven who pleaded guilty, six had trial materials because they testified in codefendant's trials or were tried for additional crimes that they did not commit. Townsend was tried for two of the crimes he confessed to, and Bradford, Dean, Ochoa, Taylor, and Shelden testified against others they had implicated. *See* http://www.law.virginia.edu/html/librarysite/garrett_falseconfess.htm.

55. *See id.* at 6, 14-16. For David Vasquez, I obtained materials from motions and hearings conducted before his plea. For William Kelly, postconviction motions to vacate detailed the confession. Thomas Winslow gave videotaped confession statements before his guilty plea, which were provided by the Nebraska Attorney General's Office.

56. Many thanks to Michelle Morris for obtaining the Gray court file, which did not include trial materials, and to Christine Mumma, Director of the North Carolina Center on Actual Innocence, for searching, unsuccessfully, for the Brown materials.

57. Amended Request to Withdraw Guilty Plea at 5, *State v. Gray*, No. C-91-409 (Md. Ct. Spec. App. Feb. 20, 1992).

58. *Id.* at 5-6.

59. Letter from Anthony Gray to Judge Rymer, Defendant's Exhibit 6 at 1, *Gray*, No. C-01-409 (Nov. 25, 1991).

trying to get me the death penalty for something I didn't do Why should I die for something I didn't do?"⁶⁰

These lengthy interrogations often included a range of strategies employed by law enforcement to induce a confession. Many of those strategies were entirely permissible under the U.S. Constitution and recommended by police training on modern psychological interrogation techniques. Unpacking the motive of an innocent person to confess requires a closer examination of what transpired during that interrogation, for which I had incomplete information. Social scientists have developed several categories for causes of false confessions, beginning with Saul Kassin and Lawrence Wrightsman's work.⁶¹ These exonerees' confessions were likely all what Kassin and Wrightsman term "coerced compliant" confessions, referring to those in which the subject complies with law enforcement pressure during the interrogation process.⁶² Many involved the subtype which Richard Leo and Richard Ofshe term a "stress compliant" false confession, in which the stress of the interrogation process, but not necessarily illegal coercion, secure a confession.⁶³ In either

60. *Wrongly Imprisoned Man Finally Free*, ASSOCIATED PRESS, Feb. 9, 1999.

Anthony Gray was sentenced in Calvert County, Maryland, to two concurrent life sentences after pleading guilty in October 1991, to first degree murder and first degree rape. Police officers coaxed a confession out of Gray, who is borderline retarded, by telling him that two other men arrested in connection with the case had told police that Gray was involved. In fact, the co-defendants had neither confessed nor implicated Gray. Later, a defense attorney for one of these other defendants told Gray that all three men would be freed if Gray refused to testify. Gray took the advice and prosecutors abandoned their agreement to recommend a thirty year sentence.

The Innocence Project, Profile of Anthony Gray, <http://www.innocenceproject.org/Content/159.php> (last visited Nov. 23, 2009).

61. See Kassin & Wrightsman, *supra* note 4, at 77-78.

62. *Id.* at 77.

63. Richard J. Ofshe & Richard A. Leo, *The Social Psychology of Police Interrogation: The Theory and Classification of True and False Confessions*, in 16 *STUDIES IN LAW, POLITICS, AND SOCIETY* 189, 211, 238 (Austin Sarat & Susan S. Silbey eds., 1997).

The other type is the voluntary false confession, in which the suspect approaches law enforcement and volunteers involvement in the crime. While three of these exonerees, Jeffrey Deskovic, Eddie Joe Lloyd and Douglas Warney, might appear to be of that type in that they initially approached law enforcement and hoped to assist with the investigation, due to mental illness, fascination with police work, or other special interest in the unsolved crime, none of the three confessed until they were interrogated at length. All were therefore likely interrogation-induced false confessions.

Third, in coerced internalized or persuaded false confessions, the suspect is convinced during the interrogation process that he did in fact do something illegal. One of these cases, that of William Kelly, may have involved such an internalized false confession, and perhaps others as well. In his case, an expert later concluded that as a result of his psychiatric conditions and police persuasion, "Kelly may have actually believed that he killed [the victim] during one of his blackouts, and began to incorporate information provided by the police into his own memory as to what might have happened." Commonwealth's Petition to Vacate Sentence Based Upon After-Discovered Evidence at 5, *Commonwealth v. Kelly*, No. 660 C.D. 1990 (Pa. Ct. Com. Pl. Jan. 8, 1993). Finally, none of these cases were of the type where in fact no crime occurred, yet someone confessed. After all, there had to be crime scene evidence with relevant DNA from which testing could exonerate these defendants.

type of compliant false confession, the suspect confesses chiefly to obtain a gain, such as “being allowed to go home, bringing a lengthy interrogation to an end, or avoiding physical injury.”⁶⁴

Social scientists have long documented how pressure combined with repetition of a crime narrative may cause the suspect to internalize that narrative and repeat it, possibly becoming convinced of his own guilt.⁶⁵ Only recently, however, have actual instances of such false confessions been documented. Pressures brought to bear on these exonerees ranged from threats combined with offers of leniency, to threats of physical force. Many described harrowing interrogations lasting many hours or days. Several described verbal or physical abuse. As will be developed below, twenty-two of the interrogations were recorded, but only partially. Thirteen were audiotaped and nine were videotaped. In fourteen cases, the exonerees had signed a typed confession statement. Copies of twenty-seven of those written or recorded confession statements were obtained.

Seventeen or forty-three percent of the forty DNA exonerees who falsely confessed were mentally ill, mentally retarded, or borderline mentally retarded.⁶⁶ Thirteen or thirty-three percent of those who confessed were juveniles (five in the “Central Park Jogger” case).⁶⁷ In twenty-six of the forty cases—or sixty-five percent—the defendant was either mentally disabled, under eighteen at the time of the offense, or both.⁶⁸ Mentally disabled individuals and juveniles are both groups long known to be vulnerable to coercion and suggestion.⁶⁹ For example, Earl Washington, Jr. and Jerry

64. FRED E. INBAU ET AL., *CRIMINAL INTERROGATION AND CONFESSIONS* 412 (4th ed. 2001).

65. See Daryl J. Bem, *When Saying Is Believing*, *PSYCHOL. TODAY*, June 1967, at 22-25; Kassin & Kiechel, *supra* note 4.

66. The 14 mentally retarded or borderline mentally retarded exonerees were: A. Gray, P. Gray, B. Halsey, T. Hayes, D. Jones, F. Peacock, W. Kelly, B. Laughman, E. Lloyd, C. Ollins, L. Rollins, J. Townsend, D. Vasquez, and E. Washington. In addition, A. Taylor, D. Warney, and R. Williamson were diagnosed as mentally ill. Still others may not have been examined by experts or fully diagnosed at the time of trial.

67. See *People v. Wise*, 752 N.Y.S.2d 837, 843 (N.Y. Sup. Ct. 2002). Those juveniles were: M. Bradford, D. Brown, J. Deskovic, P. Gray, N. Hatchett T. Hayes, A. McCray, C. Ollins, K. Richardson, L. Rollins, Y. Salaam, R. Santana, and K. Wise.

68. See Garrett, *supra* note 2, at 89. This is consistent with data from studies of non-DNA false confessions. See, e.g., Gross et al., *supra* note 48, at 545 (“Thirty-three of the exonerated defendants were under eighteen at the time of the crimes for which they were convicted, and fourteen of these innocent juveniles falsely confessed—42%, compared to 13% of older exonerees. Among the youngest of these juvenile exonerees—those aged twelve to fifteen—69% (9/13) confessed to homicides (and one rape) that they did not commit.”); see also Paul G. Cassell, *The Guilty and the “Innocent”: An Examination of Alleged Cases of Wrongful Conviction from False Confessions*, 22 *HARV. J.L. & PUB. POL’Y* 523, 586-87 (1999) (arguing that data concerning false confessions among “certain narrow, mentally limited populations,” suggest the need for special precautions during interrogations of such suspects).

69. See, e.g., Richard J. Bonnie & Thomas Grisso, *Adjudicative Competence and*

Townsend—both mentally disabled—each readily confessed to every crime that police asked them about. Several later explained that they confessed in order to avoid threats of the death penalty. For example, Chris Ochoa reported that a detective threatened him, “You’re going to get the needle. You’re going to get the needle for this. We got you.”⁷⁰

Studies suggest that “police-induced false confessions appear to occur primarily in the more serious cases, especially homicides and other high-profile felonies,” and consistent with those studies, seventy percent of these false confessions involved a murder. Twenty-five of the forty cases were rape-murder cases, three were murder cases, and twelve were rape cases.⁷¹ Thus, while most DNA exonerees were convicted of rape and not murder, the false confessions are concentrated in the murder cases. Confessions were obtained more frequently in murder and rape-murder cases than in rape cases, presumably because in rape cases a victim identification of the attacker obviates the need to secure a confession. Six of these exonerees were sentenced to death.

False confessions can have a multiplying effect, in which additional innocent people are drawn into an investigation. Seventeen of the forty exonerees not only falsely inculpated themselves but also falsely inculpated others, eleven of whom were later also exonerated by postconviction DNA testing. Paula Gray’s testimony in the “Ford Heights Four” case, which implicated Kenneth Adams, Verneal Jimerson, Willie Rainge, and Dennis Williams, is an example. In still other cases, additional innocent people implicated by one suspect’s false confession themselves also falsely confessed. As a result, some of the false confessions studied here occurred in related cases. In the five Central Park Jogger case confessions of Antron McCray, Kevin Richardson, Raymond Santana, Yusef Salaam, and Kharey Wise, each implicated others as the primary assailant. In the “Beatrice Six” cases, four defendants—James Dean, Ada JoAnne Taylor, Debra Shelden, and Thomas Winslow—variously implicated each other as well as two others who did not confess, Kathy Gonzalez and Joseph White. Alejandro Hernandez and Rolando Cruz both reportedly confessed to the same crime. Finally, Marcellius Bradford and Calvin Ollins both confessed and also implicated two others who did not

Youthful Offenders, in YOUTH ON TRIAL 73, 87-88 (Thomas Grisso & Robert G. Schwartz eds., 2000); Morgan Cloud et al., *Words Without Meaning: The Constitution, Confessions, and Mentally Retarded Suspects*, 69 U. CHI. L. REV. 495, 495, 590 (2002); Gisli H. Gudjonsson, *Suggestibility and Compliance Among Alleged False Confessors and Resisters in Criminal Trials*, 31 MED. SCI. & L. 147, 148-49 (1991); Allison D. Redlich, Alicia Summers & Steven Hoover, *Self-Reported False Confessions and False Guilty Pleas Among Offenders with Mental Illness*, 34 LAW & HUM. BEHAV. 79 (2010); Elizabeth S. Scott & Thomas Grisso, *The Evolution of Adolescence: A Developmental Perspective on Juvenile Justice Reform*, 88 J. CRIM. L. & CRIMINOLOGY 137, 156-76 (1997).

70. Trial Transcript at 1006, State v. Danziger, No. 96,470 (Tex. Dist. Ct. Jan. 23, 1990) [hereinafter Danziger Trial Transcript].

71. LEO, *supra* note 7, at 245; see Gross et al., *supra* note 48, at 544.

confess. Thus, forty-three percent—or seventeen—of these forty false confessions occurred in cases involving multiple false confessions.

The confessions were also often the central evidence at trial. Few of the forty exonerees' cases involved eyewitnesses to the crime. Only twelve involved eyewitnesses, six involved jailhouse informants, and seven involved co-defendant testimony, though twenty-one involved some type of forensic evidence. Twenty-four were black, thirteen were white, and three were Hispanic. These forty cases involved convictions in New York (nine) and Illinois (eight), with additional cases in Nebraska (four), Pennsylvania (four), Louisiana (three), Oklahoma (two), Michigan (two), Virginia (two) and one case each in California, Florida, Kansas, Maryland, New Jersey, and North Carolina.

II. CONTAMINATED CONFESSIONS

This Part turns to the substance of exonerees' confession statements and how each was litigated at trial. The overwhelming majority of these forty false confession cases were contaminated. Thirty-six of the thirty-eight cases for which transcripts were obtained had confessions that reportedly included specific details about how the crime occurred. The trials of these exonerees then centered on those facts. At trial, law enforcement testified that the suspect had volunteered specific details about how the crime occurred, typically details corroborated by expert evidence or crime scene evidence. In most, the innocent person did not merely guess or repeat one or two facts. Almost all exonerees were reported to have provided detailed statements that included facts likely to be known only by the culprit. As the prosecutor in Robert Miller's case put it, "He supplied detail after detail after detail after detail. And details that only but the killer could have known."⁷² This Part describes the contamination of these confessions, including the police training concerning leaking and feeding facts; what the crucial facts were like in these cases; how they were described at trial; whether law enforcement admitted to telling the suspect facts; and how the prosecution, defense, and courts handled such statements.

A. *Law Enforcement Practices Concerning Contamination of Confessions*

Police have long been trained not to contaminate a confession by feeding or leaking crucial facts. The leading manual on police interrogations, originally written by Fred Inbau and John Reid, and now in its Fourth Edition, is emphatic on this point. Feeding facts contaminates a confession because if the suspect is told how the crime happened, then the police cannot ever again properly test the suspect's knowledge. The opportunity to obtain volunteered information is

72. Trial Transcript at 1292, *State v. Miller*, CRF-87-963 (Okla. Dist. Ct. May 19, 1988) [hereinafter *Miller Trial Transcript*].

lost. For that reason, when developing the simple admission of guilt into a confession, police are trained to ask open questions, like “What happened next?”⁷³ Leading questions are not to be asked, at least not as to crucial corroborated details concerning the crime. Inbau and Reid call it “highly important” to “let the confessor supply the details of the occurrence”⁷⁴ They explain that during the interrogation “[w]hat should be sought particularly are facts that would only be known by the guilty person”⁷⁵ Not only does this practice make the confession more convincing by avoiding any suggestion or disclosure of facts, but it allows the investigator to later “evaluate the confession in the light of certain known facts.”⁷⁶

Law enforcement has strong practical reasons to test and to safeguard the reliability of a confession. Police are trained to construct a narrative of how the crime occurred, including the motives for committing the crime and a detailed explanation of how it was committed.⁷⁷ During a criminal investigation, law enforcement tests the reliability of its work product to try to build as strong a case as possible. If the suspect truly lacks knowledge of how the crime occurred, the bare admission of culpability will not be very convincing to a jury. Indeed, police have long known that suspects may admit to crimes that they did not commit for a range of reasons, including mental illness, desire for attention, desire to protect loved ones, or others.⁷⁸ The Inbau and Reid manual cautions that “[t]he truthfulness of a confession should be questioned, however, when the suspect is unable to provide any corroboration beyond the statement, ‘I did it.’”⁷⁹

Further, police are trained not to leak facts. Police black out certain key information so that the public does not learn of it during the investigation. Thus, Inbau and Reid advise that, “When developing corroborative information, the investigator must be certain that the details were not somehow

73. INBAU ET AL., *supra* note 64, at 367.

74. *Id.* at 381.

75. *Id.* at 369.

76. *Id.* at 382.

77. See LEO, *supra* note 7, at 168. The construction of such narratives raises important questions not just as to accuracy, but also as to other distortions that they may create, including by employing narratives that undermine other goals of criminal law, like legitimacy. Anne Coughlin has written an important article examining the victim-blaming narratives endorsed by leading training manuals and employed to “minimize” the acts of a suspect during interrogations. Anne M. Coughlin, *Interrogation Stories*, 95 VA. L. REV. 1599 (2009). Coughlin argues that “[v]ictim-blaming is incompatible with the contemporary goals of rape law, and the police should stop feeding those stock stories to accused rapists.” *Id.* at 1660.

78. INBAU ET AL., *supra* note 64, at 414; see also John E. Reid & Assocs. *Motives for False Confessions*, POLICEONE.COM, July 2, 2009, <http://www.policeone.com> (describing causes of false confessions and recommending that investigators tailor their techniques for particular suspects, as well as assess “credibility” of a confession, including by examining the “extent of corroboration between the confession and the crime”).

79. INBAU ET AL., *supra* note 64, at 425.

revealed to the suspect through the questioning process, news media, or the viewing of crime scene photographs.”⁸⁰ Police also know how important it is to document their efforts to keep certain facts confidential, because doing so later enhances the power of the confession in a subsequent prosecution or trial. Inbau and Reid recommend documenting in the case file the facts that are to be kept confidential “so that all investigators are aware of what information will be withheld.”⁸¹ Even more powerful is corroborative evidence that the interrogators did not yet know, termed “independent corroboration.”⁸² Thus, a suspect could be asked where the murder weapon was hidden, and if the weapon is found at that location, the confession is strongly corroborated.⁸³ By carefully avoiding contamination of the confession, the officer can at trial “confidently refute” any defense suggestion that facts had been fed to the suspect.⁸⁴

B. *Corroborated and Nonpublic Facts*

In most of these cases, police did “confidently refute” at trial that they disclosed none of those detailed facts and instead claimed that the telling facts were volunteered. This is what made the confessions particularly powerful. The defendant reportedly freely offered information that only the perpetrator could have known. As police recognize, if the defendant had merely agreed to a series of leading questions by the police, then the confession would not appear particularly believable.

An example of the power of specific corroborated facts is in the cases of Marcellius Bradford and Calvin Ollins, two fourteen-year-old boys who confessed to the rape and murder of a medical student in Chicago, and who inculpated Calvin’s cousin, Larry Ollins, and another boy, Omar Saunders.⁸⁵ All four youths were wrongly convicted and served six-and-a-half to thirteen-and-a-half years before DNA testing exonerated them.⁸⁶ The case revolved around two facts: the existence at the crime scene of a piece of concrete and a bloody footprint on the body of one victim.

Police stopped Larry Ollins on January 24, 1987, near the crime scene.⁸⁷

80. *Id.* at 369.

81. *Id.*

82. *Id.* at 433.

83. *Id.* at 369.

84. *Id.* at 432-33.

85. See Maurice Possley & Steve Mills, *DNA Test Rules Out Roscetti Inmates—Lawyer for Men Plans to Ask Court for Their Freedom*, CHI. TRIB., Nov. 14, 2001, at 1.

86. See The Innocence Project, Profile of Calvin Ollins, <http://www.innocenceproject.org/Content/231.php> (last visited Jan. 11, 2010).

87. Trial Transcript at 20-21, *People v. Ollins*, No. 87-CR-4752 (Ill. Cir. Ct. June 14, 1988) [hereinafter *Ollins Trial Transcript*].

He denied any knowledge of the crime.⁸⁸ Three days later police detained his friend Marcellius Bradford.⁸⁹ Bradford eventually told the detectives that he committed the murder along with Calvin and Larry Ollins, Saunders and others. The next morning, Calvin Ollins delivered his written confession and appeared to volunteer the crucial detail: when asked what Larry did next, he said, “That’s when he hit her with a piece of concrete.”⁹⁰

Police did not take a formal statement from Bradford until two hours after Ollins signed his own statement. A stenographer typed Bradford’s admission. Bradford initially described Larry Ollins hitting the victim in the face with a brick. After making repeated references to a brick, the assistant state’s attorney posed a leading question to correct Bradford. She asked:

Q. Was this brick a piece of concrete from the ground?

A. Yes.⁹¹

All of the references to a brick in the typed statement were then crossed out, replaced with the word “concrete,” and initialed by Bradford.⁹²

Where did that detail regarding the concrete come from? A detective conducting the interrogations claimed that Bradford had first mentioned the concrete the night before. But that seems unlikely because the corrections were made in Bradford’s written statement, which was elicited only after Calvin Ollins gave a statement.

Regardless where it originated, that detail provided crucial evidence against the two fourteen-year-olds. Officers later testified at trial that they had found at the crime scene a piece of concrete, which they took into evidence.⁹³ At trial, the Chicago police crime lab analyst described analyzing stains on the piece of concrete and detecting human blood consistent with the blood type of the victim.⁹⁴

A second crucial detail emerged at trial. The medical examiner who conducted the autopsy described the victim’s “multiple blunt injuries that included the face.”⁹⁵ Similarly, Calvin Ollins volunteered that “they started kicking [the victim].”⁹⁶ The medical examiner described bloody footprints found on the body. The jury saw a photograph of the bloody footprint.⁹⁷

Bradford pleaded guilty and received a twelve-year sentence in exchange

88. *Id.* at 21.

89. *Id.*

90. Statement of Calvin Ollins 7 (Jan. 28, 1987) (on file with author).

91. Statement of Marcellius Bradford 10 (Jan. 28, 1987) (on file with author).

92. *Id.* at 9-10.

93. Indeed, a police medical examiner performed microscopic analysis of hairs found on this piece of concrete, and determined that the hairs were dissimilar to those of the victim. Ollins Trial Transcript, *supra* note 87, at 15, 19 (June 16, 1988).

94. *Id.* at 131-32 (June 15, 1988).

95. *Id.* at 163 (June 16, 1988).

96. Statement of Calvin Ollins, *supra* note 90, at 8.

97. Ollins Trial Transcript, *supra* note 87, at 157, 166 (June 16, 1988).

for his testimony against the others at trial.⁹⁸ At Larry Ollins's trial, Bradford gave a detailed account of the murder, including the kicking. During this trial testimony, Bradford slipped yet again and several times described Larry Ollins picking up a brick. He was again corrected:

Q. Are we talking about a house brick or some other kind of object?

A. Cement out of the ground, like a rock.

Q. Like a chunk of cement?

A. Chunk of cement.⁹⁹

The prosecutor focused the closing statements on how the confessions were fully consistent with the injuries of the victim: "You will see this photograph and it won't be pleasant. But it shows you how this pointed end of the rock where the blood was . . . matches the injury that's on her face."¹⁰⁰ He added, "So, when Marcellius Bradford told you Larry Ollins did that, it fits the evidence. And you know he was telling the truth."¹⁰¹ Then he described the footprints and noted that they are "more evidence to show you that Marcellius Bradford accurately truly described to you what happened that day."¹⁰²

Ofshe and Leo note: "The only time an innocent person will contribute correct information is when he makes an unlucky guess. The likelihood of an unlucky guess diminishes as the number of possible answers to an investigator's questions grows large."¹⁰³ Cases involving unusual, specific, or numerous details raise the most troubling questions. The Bradford confession involving such specific crime scene details suggests a very low likelihood that the teenager could possibly have guessed each of those unusual facts on his own. Indeed, Bradford later claimed police beat him and also that he confessed to avoid a life sentence.¹⁰⁴ DNA testing not only exonerated Bradford, Calvin and Larry Ollins, and Saunders, but after their release, police arrested two others whose DNA did match the crime scene evidence.¹⁰⁵ A *Chicago Tribune* investigation also later found that "the alleged confessions mirrored a scenario that an FBI criminal profiler said he provided before the four teenagers were arrested."¹⁰⁶

In all but two of these exonerees' cases, police claimed that the defendant

98. *Id.* at 92 (June 14, 1988).

99. *Id.* at 116.

100. *Id.* at 69 (June 20, 1988).

101. *Id.* at 70.

102. *Id.* at 72. Other false details may have been disclosed to Bradford, for example, the involvement of a "Daniels," who Bradford mentioned only after Officer Mercurio told Bradford about such a person, after Calvin Ollins had earlier named a "Daniels." *Id.* at 790 (June 16, 1988).

103. Ofshe & Leo, *supra* note 5, at 993.

104. Sharon Cohen, *Jailed at 14, Youth Refused to Surrender Hope*, L.A. TIMES, June 9, 2002, at 1.

105. Maurice Possley, Eric Ferkenhoff & Steve Mills, *Police Arrest 2 in Roscetti Case: Officials Say Tip Led Them to Pair, Who Confessed*, CHI. TRIB., Feb. 8, 2002, § 1, at 1.

106. Possley & Mills, *supra* note 85.

had offered a litany of details that we now know these innocent people could not plausibly have known independently. For example, in Dennis Brown's case, the sergeant who interrogated Brown, testified as follows:

Q. [T]his is a very serious case. You know that.

A. Yes, sir.

Q. You're stating under oath you did not know what the victim had on that night, is that correct? You did not know the color of the couch?

A. No, sir.

Q. You did not know which arm she was grabbed by?

A. No, sir, I did not.

Q. And that the defendant confessed to the rape of Diane Talley, is that correct?

A. Yes.

Q. And he gave you specifics as to that rape?

A. Yes, sir.

...

Q. And he told you about the house?

A. Yes, sir.

Q. And he told you what color the couch was?

A. Yes, sir.

Q. And he told you how he committed the rape?

A. Yes, sir.¹⁰⁷

Thus, the sergeant not only testified that Brown knew details regarding the crime, down to the color of the victim's couch, but that the sergeant himself did not know those crime scene details. The clear implication was not just that the sergeant did not feed those facts, but that it was impossible for him to have fed those facts. Perhaps he was not the person who disclosed those facts to Brown. Given such specific information, it is quite likely, however, that in such cases, law enforcement did disclose those facts at some point during its interviews and interrogations. It is not plausible that the suspect accurately reconstructed the crime out of whole cloth from his own imagination. Nor is it particularly plausible that police improperly but without detection leaked each of the crucial details of the crime to the public, the innocent suspect learned each critical fact through some sort of grapevine, and then the innocent suspect accurately relayed each of those details back to the police during an interrogation.

Douglas Warney's case provides another example of a confession that, according to the police, included a litany of detailed, nonpublic facts concerning the crime, including: that the victim was wearing a nightshirt; that the victim was cooking chicken; that the victim was missing money from his wallet; that the murder weapon was a knife—about twelve inches with a serrated blade—kept in the kitchen; that the victim was stabbed multiple times; that the victim owned a pinky ring and a particular necklace; that a tissue used as a bandage was covered with blood; that there was a pornographic tape in the

107. Trial Transcript at 78-79, *State v. Brown*, No. 128,634 (La. Dist. Ct. Sept. 12, 1985) [hereinafter *Brown Trial Transcript*].

victim's television.¹⁰⁸

The sergeant who interrogated Warney, when questioned about the matter at trial, denied having told Warney during the interrogation that the victim was stabbed over a dozen times. The sergeant stated, however, that after Warney initially claimed to have stabbed the victim only once, "I says, Doug, how many times did you stab him and he had already indicated to me he stabbed him once. He told me then that he had stabbed him more, eight, not more than fifteen."¹⁰⁹ He admitted that when questioning Warney, he knew that there were multiple stab wounds on the victim.¹¹⁰ The Sergeant was emphatic, though, when asked "did you suggest any answers to him," that he did not.¹¹¹

The prosecutor then argued in the closing statements that the reliability of Warney's confession was corroborated by each of these facts:

The Defendant says he's cooking dinner, and he's particular about it, cooking chicken Now, who could possibly know these things if you hadn't been inside that house, inside the kitchen? You heard the Defendant say that he took money. . . . You know the wallet was found upstairs, empty, near the closet You will see photographs of it. . . . You heard the Defendant say that he stabbed [the victim] with a knife taken from the kitchen. Do you recall Mr. Lee's testimony? . . . Regarding the murder weapon, he said that was the knife that they kept in the house. Where did they keep it? They kept it in a drawer under the crockpot where the chicken was cooking. Now, who would know the chicken was cooking? A person who got that knife and used it against [the victim], the killer. The Defendant described the knife as being twelve inches, with ridges. I think Technician Edgett said it was thirteen inches with the serrated blade.¹¹²

Warney had "a history of delusions, an eighth-grade education and advanced AIDS."¹¹³ Years later, after being exonerated by DNA test results that matched another man who subsequently confessed, Warney maintained that the sergeant told him details including "what was cooking in the hot pot."¹¹⁴

In the "Beatrice Six" case, six defendants were charged in a rape and murder of an elderly woman in Beatrice, Nebraska. Of the six, all pleaded guilty except Joseph White, who refused to plead guilty (he had requested an attorney during his interrogation and did not confess). The other defendants all pleaded guilty, and four had confessed. Three testified against White: James Dean, Debra Shelden, and Ada JoAnn Taylor. Each admitted at White's trial

108. 3 Trial Transcript at 563-75, *People v. Warney*, No. 96-0088 (N.Y. Sup. Ct. Feb. 11, 1997) [hereinafter *Warney Trial Transcript*].

109. 2 *Warney Transcript*, *supra* note 108, at 117 (Feb. 5, 1997).

110. *Id.* at 119.

111. *Id.* at 113.

112. 3 *Warney Transcript*, *supra* note 108, at 570-71 (Feb. 11, 1997).

113. Jim Dwyer, *Inmate To Be Freed as DNA Tests Upend Murder Confession*, N.Y. TIMES, May 16, 2006, at B1.

114. *Id.*

that police had suggested facts to them and that before speaking to police, they could not remember much of what had occurred the night of the crime. Taylor testified as follows at a deposition, which was read into the record at trial:

Q. Can you actually separate today what you remember from the night this happened and what was suggested to you to help you remember what happened that night?

A. No. It would almost be impossible to separate.

Q. So whatever statements you have made recently, I take it, are not from your memory but from suggestions that have helped you remember?

A. There has been parts from my memory as well as the suggestions.

Q. Tell me what parts you actually remember that you don't have that you didn't have suggested to you.

A. Oh, God.

Q. Is there anything?

A. Not that I can remember offhand. . . .¹¹⁵

At trial Taylor stated that police "somewhat" suggested facts to her, and helped her to remember much, but not "all of the information."¹¹⁶ She explained:

A. Well, I have a tendency [sic] to believe all officers.

Q. And so police officers would furnish you information of the crime and you would believe them, wouldn't you?

A. Somewhat, yes, sir.¹¹⁷

Taylor also admitted that police had showed her a video of the crime scene and gave her the statements of the other defendants to read.¹¹⁸ She also testified that she was diagnosed with a "personality disorder" and had problems with memory, though she noted she did have some mental telepathy capabilities.¹¹⁹

Taylor also admitted that police told her particular facts. She said that police suggested a particularly idiosyncratic fact: an explanation for the presence of a ripped half five-dollar bill at the crime scene. On direct examination, she testified that Joseph White had "a trick that he does with a \$5 bill" where he would rip it in half, and recalled asking him after the murder what he had ripped, and he had said a "five," meaning a five-dollar bill.¹²⁰ When asked to explain the trick, she said, "I've never really understood it. I know he pulls a \$5 bill out and he does something with it and he ends up with a ripped \$5 bill. And he usually tosses part of it away."¹²¹ However, on cross-examination, she admitted that when the deputy sheriff originally asked about the money trick, she told him that Joseph White would make pictures with the money, and finally the deputy had to tell her that he would tear the bill:

115. Trial Transcript at 942, *State v. White*, No. 9316 (Neb. Dist. Ct. Nov. 7, 1989) [hereinafter *White Trial Transcript*].

116. *Id.* at 943.

117. *Id.* at 962.

118. *Id.* at 953-54.

119. *Id.* at 924, 931, 936.

120. *Id.* at 917-18.

121. *Id.* at 918.

“Q. Now, about after the murder, he’s the one who explained to you about the \$5 bill, was he not?”

A. Yes, sir.”¹²²

In several cases, expert evidence corroborated facts in the confession. The primary nonpublic fact highlighted in the confession of Ron Williamson was his reported description of the way the victim had been was killed—by wrapping a cord around her neck to strangle her and stabbing her.¹²³ Strangulation as the means of murder was corroborated by the medical examiner.¹²⁴

Perhaps most powerful, in Lafonso Rollins’s case the prosecutor conducted an unusual “reverse identification.” Rollins was asked to select one of the victims from a series of photographs. The prosecutor testified that Rollins selected the victim’s photo and then initialed that photograph, which was displayed to the jury at trial.¹²⁵ Now that we know Rollins was innocent and was not acquainted with the victim, one wonders if some sort of cue, intended or not, suggested the correct photograph to Rollins.

C. *Denying Disclosing Facts*

In twenty-seven of the thirty-eight cases, the police officers testifying under oath at trial denied that they had disclosed facts to the suspect. Some were asked directly whether they had told the suspect key facts, others themselves noted they had not done so, and others carefully described an interrogation in which the suspect had volunteered each of the relevant facts. The question then arises whether officers were testifying falsely when they claimed that crucial facts were volunteered, where in fact they were disclosed by these police officers. Again, this Article does not reach any conclusions regarding state of mind of officers.¹²⁶ These officers most likely believed they were interrogating a guilty person. Officers may contaminate a confession unintentionally. During a complex interrogation, they might not later recall that as to important subjects they had in fact asked leading questions. A fascinating

122. *Id.* at 959.

123. Trial Transcript at 450, *State v. Williamson*, CRF 87-90 (Okla. Dist. Ct. Apr. 22, 1988) [hereinafter *Williamson Trial Transcript*].

124. *Id.* at 541-42 (Apr. 25, 1988). However, in a possible inconsistency if Williamson meant he stabbed using a knife, the medical examiner also stated that he did not believe the puncture wounds on her body were caused by a knife. *Id.* at 551-52.

125. Trial Transcript at D-169 to -170, *People v. Rollins*, No. 93 CR 6342 (Ill. Cir. Ct. Mar. 2, 1994) [hereinafter *Rollins Trial Transcript*].

126. Nor would state of mind be relevant to the question whether the officers violated exonerates’ constitutional rights. In order to violate the constitutional rights of the defendants, these officers need not have perjured themselves at trial, so long as they knew they had falsely represented to prosecutors that the defendants volunteered nonpublic facts. *See, e.g.*, *Napue v. Illinois*, 360 U.S. 264, 269 (1959); *Devereaux v. Abbey*, 263 F.3d 1070, 1074-76 (9th Cir. 2001).

column by Detective James Trainum describes how he and his colleagues unintentionally secured a false confession.¹²⁷ Trainum explained:

We believed so much in our suspect's guilt that we ignored all evidence to the contrary. To demonstrate the strength of our case, we showed the suspect our evidence, and unintentionally fed her details that she was able to parrot back to us at a later time. Contrary to our operating procedures at the time, my colleagues and I chose to videotape the interrogation. This is what saved me from making a horrible mistake in the long run. It was a classic false confession case and without the video we would never have known.¹²⁸

Similarly, it is possible that officers who did not testify at trial may have disclosed facts without the knowledge of their colleagues, and failed to tell their colleagues what transpired.

The trial of Nathaniel Hatchett included a particularly unequivocal denial that any facts were disclosed to him. The detective testified:

Q. Did you ever supply the Defendant with details, specific details of the offense so that he would be able to recite them back to you when and if he decided to give you a statement about his knowledge and involvement with these crimes?

A. I didn't.

Q. You say you didn't, so I will ask the next question: Did you hear anyone else or see anyone else provide him with the kind of details that he eventually later gave you demonstrating his knowledge and involvement in this crime?

A. No. As a matter of fact,¹²⁹ as lead investigator I was the only one privy to such details at this point.

The case of Earl Washington, Jr. provides another example in which the law enforcement denials that facts were disclosed formed the crucial evidence in the State's case. Washington falsely confessed to a rape and murder in Culpepper, Virginia. He came within nine days of execution and was in prison for eighteen years before finally being exonerated by DNA testing.¹³⁰ A long string of state and federal courts denied his appeals and postconviction petitions, citing to the reliability of his confession. Although he was borderline mentally retarded, the Fourth Circuit emphasized "Washington had supplied without prompting details of the crime that were corroborated by evidence taken from the scene and by the observations of those investigating the [victim's] apartment."¹³¹

127. Jim Trainum, *I Took a False Confession—So Don't Tell Me It Doesn't Happen!*, CA. MAJORITY REP., Sept. 20, 2007, <http://www.camajorityreport.com/index.php?module=articles&func=display&ptid=9&aid=2306> [hereinafter Trainum, *I Took a False Confession*]; see also Jim Trainum, Editorial, *Get It on Tape; A False Confession to Murder Convinced a Cop That a Visual Record Can Help Ensure an Innocent Person Isn't Convicted*, L.A. TIMES, Oct. 24, 2008, at A23.

128. Trainum, *I Took a False Confession*, *supra* note 127.

129. See Motion to Suppress Hearing Transcript at 40, *People v. Hatchett*, 97-1497-FC (Mich. Cir. Ct. Sept. 22, 1997).

130. MARGARET EDDIS, AN EXPENDABLE MAN at xi-xiii (2003).

131. *Washington v. Murray*, 4 F.3d 1285, 1292 (4th Cir. 1993).

Lieutenant Harlan Lee Hart and Special Agent Curtis Reese Wilmore told prosecutors and then testified at trial that Washington identified as his a shirt with a torn pocket that was found in the rear bureau of the victim's bedroom many months after the murder. The typed statement read as follows:

Hart: Did you leave any of your clothing in the apartment?

Washington: My shirt.

Hart: The shirt that has been shown you, it is the one you left in apartment?

Washington: Yes sir.

Wilmore: How do you know it is yours?

Washington: That is the shirt I wore.

Hart: What makes it stand out?

Washington: A patch had been removed from the top of the pocket.

Wilmore: Why did you leave the shirt in the apartment?

Washington: It had blood on it and I didn't want to wear it back out.

Wilmore: Where did you put it when you left?

Washington: Laid it on top of dresser drawer in bedroom.¹³²

This statement was powerful for several reasons. Washington offers in this statement that he left a shirt, yet the police had not made public that a shirt was found at the crime scene. Further, he knew about an identifying characteristic making that shirt unusual: the torn-off patch. He knew precisely where the shirt had been left, in a dresser drawer in the bedroom. Most remarkable, not only did Earl Washington, Jr. know of the existence of this shirt and appear to volunteer where the shirt had been found, but he said that he left it there because it had blood on it. The shirt that the officers showed Washington no longer had blood on it. The stains had been cut from the shirt for forensic analysis.¹³³ Thus, this appeared to be no mere lucky guess. Washington appeared to have detailed knowledge concerning this shirt and this crime scene.

The prosecutor emphasized in closing arguments that the police were not "lying" and "didn't suggest to him" how the crime had been committed, but that Washington knew exactly how the crime had been committed.¹³⁴ The prosecutor ended the closing statements by discussing the shirt and noting that Washington knew "the patch was missing over the left top pocket."¹³⁵ The prosecutor continued, "Now, how does somebody make all that up, unless they were actually there and actually did it? I would submit to you that there can't be any question in your mind about it, the fact that this happened and the fact that Earl Washington Junior did it."¹³⁶

132. Statement of Earl Junior Washington 21 (June 4, 1982) (on file with author) [hereinafter Washington Statement].

133. Trial Transcript at 527-37, 540, 566, *Commonwealth v. Washington* (Va. Cir. Ct. Jan. 19, 1984) [hereinafter Washington Trial Transcript]. Officer Buraker testified that "[w]here these holes were there were reddish stains there at that time. They appeared to be blood stains. . . . At the laboratory these were cut out, these reddish stains . . .". *Id.* at 566.

134. *Id.* at 722-23 (Jan. 20, 1984).

135. *Id.* at 724.

136. *Id.*

Now that we know Earl Washington, Jr. did not commit the crime, but rather another man later identified through a DNA database who has now pleaded guilty, there are limited explanations for how Washington could have uttered those remarks concerning the shirt, together with other details concerning how the crime had been committed.¹³⁷ Either the police offered those facts to him, or the police had actually leaked all of that information to the public and somehow Washington, a mentally retarded farmhand living in the next county, heard it all and carefully incorporated it into his confession. Whether or not the officers intended to misrepresent their interrogation of Washington, they had provided a version of events that is likely false as to crucial details, in a case where Washington was sentenced to death.

This was precisely the issue raised in a civil rights lawsuit brought by Washington after his exoneration. It emerged for the first time during discovery in that civil rights suit that almost ten years after the conviction and near the time that Virginia's Governor was considering a clemency petition based on postconviction DNA testing, Agent Wilmore for the first time expressed doubts concerning the interrogation. He admitted the facts were likely disclosed, telling the Virginia Assistant Attorney General "that he felt like either he or Hart must have mentioned the shirt to Washington . . . and that his testimony in the record did not accurately reflect that the shirt had been first mentioned by the police."¹³⁸ In 2006, a federal jury found that Wilmore had fabricated the confession and violated Washington's constitutional rights by at minimum recklessly and falsely claiming that Washington volunteered crucial nonpublic facts. That jury awarded Earl Washington, Jr. \$2.25 million in compensatory damages.¹³⁹

The Central Park Jogger case also involved a striking detail concerning a shirt. The prosecutor emphasized in closing arguments that Antron McCray knew information that only the jogger's assailant could have known:

You heard in that video Antron McCray was asked about what she was wearing, and he describes she was wearing a white shirt. This is the shirt that [the victim] was wearing.

You saw the photograph of what that shirt looked like. There is no way that you knew that that shirt was white unless you saw it before it became soaked with blood and mud.

I submit to you that Antron McCray describes details and describes them in a way that make you know beyond any doubt, beyond a reasonable doubt, that

137. See Maria Glod, *Va. Inmate Indicted in Killing That Altered DNA Testing Law*, WASH. POST, Aug. 23, 2006, at A1; Assoc. Press, *Tinsley Pleads Guilty to Culpeper Killing*, Apr. 12, 2007.

138. See *Washington v. Wilmore*, 407 F.3d 274, 277 (4th Cir. 2005) (quoting the Assistant Attorney General's memorandum).

139. Jerry Markon, *Wrongfully Jailed Man Wins Suit*, WASH. POST, May 6, 2006, at B1 (describing that jury awarded \$2.25 million after finding that "Wilmore deliberately falsified evidence, which resulted in Washington's conviction and death sentence").

he was present, that he helped other people rape her and that he helped other people beat her and that he left her there to die.¹⁴⁰

Similarly, at Nicholas Yarris's trial, law enforcement emphasized that he had volunteered two crucial facts: (1) that the victim had been raped, and (2) that the victim's car had a brown landau roof.¹⁴¹ A suspect eager to assist law enforcement might have guessed that a female victim had been raped. The striking detail was the unusual brown landau roof. Police testified at trial that "a conscious decision was made not to release any such information and to safeguard any such information about a rape."¹⁴² Police stated: "The same pertains to the Landau roof. This is one of the things we decided to keep confidential in the investigation from the press."¹⁴³

The Barry Laughman trial provides another example, where law enforcement insisted that no facts had been disclosed to Laughman, and explained that disclosing facts would be improper, testifying that "[w]e don't use leading questions. I don't. I don't use leading questions."¹⁴⁴

In the majority of these trials—twenty-two cases—prosecutors emphasized in their closing arguments that the relevant facts were nonpublic or corroborated by crime scene evidence. In those cases, prosecutors emphasized that facts were nonpublic and could only have been known by the perpetrator; in ten exonerees' trials, prosecutors specifically denied that law enforcement had disclosed any facts.

For example, in Bruce Godschalk's case, the prosecution took the position that "[w]ell, if he were guessing, he was guessing pretty darn good."¹⁴⁵ The prosecutor, in an incredulous tone, then told the jury that it was a "mathematically [sic] impossibility" that Mr. Godschalk could have guessed correctly on so many nonpublic facts regarding how the crime was committed.¹⁴⁶ In Robert Miller's case, the prosecutor emphasized that Miller "described the details . . . details that only but the killer could have known."¹⁴⁷ In response to the defense suggestion that he could have guessed such details, the prosecutor exclaimed, "Are you kidding? Are you kidding?"¹⁴⁸ In the Rolando Cruz and Alejandro Hernandez trial, the prosecutor closed by telling the jury that Cruz had told officers that the victim

140. 13 Trial Transcript at 5291-92, *People v. McCray*, No. 4762/89 (N.Y. Sup. Ct. Aug. 8, 1990) [hereinafter *McCray Trial Transcript*].

141. Trial Transcript at 2-114 to -115, *Commonwealth v. Yarris*, No. 690-82 (Pa. Ct. Com. Pl. June 29, 1982) [hereinafter *Yarris Trial Transcript*].

142. *Id.* at 2-115.

143. *Id.*

144. Trial Transcript at 494-95, *Commonwealth v. Laughman*, CC-458-87 (Pa. Ct. Com. Pl. Dec. 14, 1988).

145. Trial Transcript at 22, *Commonwealth v. Godschalk*, No. 934-87 (Pa. Ct. Com. Pl. May 28, 1987) [hereinafter *Godschalk Trial Transcript*].

146. *Id.* at 22-23.

147. Miller Trial Transcript, *supra* note 72, at 1292.

148. *Id.*

“was anally assaulted. There’s no way to know that information. He knows it because he was there.”¹⁴⁹

This Article does not opine on the state of mind of police or prosecutors. Police may have failed to properly recall what transpired during the interrogation, and prosecutors may have relied on what police officers told them had transpired. Inadvertent or not, the contamination of these confessions had grave consequences, including wrongful convictions and additional crimes committed by the actual perpetrators.¹⁵⁰

D. *Recorded False Interrogations*

A surprising number of these false confessions were recorded. Twenty-two of the thirty-eight cases—or fifty-eight percent—had recordings, but only part of the interrogation was recorded. Thirteen were audio recorded and nine had video. Five additional confessions or interrogations were at some point transcribed by a stenographer. These create a record of what transpired during selected portions of the interrogations.

Yet where only part of the interrogation was recorded, we do not know what preceded that recording. Thus, four of the five youths in the Central Park Jogger case had their interrogation videotaped, but this recording followed their lengthy initial interrogations. Similarly, three of the Beatrice Six had statements videotaped, but only after multiple interviews and interrogations by police and others.¹⁵¹ In David Allen Jones’s recorded interrogation, when he did not recall the location of a crime, police reminded him that they had earlier shown him photos of the crime scene, asking “You remember yesterday we showed you that picture” and that it was “by the water fountain” and “you remember that gate we showed you right there,” finally eliciting a response from Jones that was transcribed as “This right here (Untranslatable).”¹⁵²

Steven Drizin notes that it is “not uncommon” for police to conduct an initial interview in which they “use a gamut of techniques” to secure

149. Trial Transcript at 146, *People v. Hernandez*, Nos. 84-CF-361-01-12, 84-CF-362-01-12, 84-CF-363-01-12 (Ill. Cir. Ct. Feb. 20, 1985).

150. Like Washington, other exonerees filed civil rights lawsuits, and some received substantial settlements or verdicts, though most have received no compensation. *See* Garrett, *supra* note 2, at 120-21.

151. The author received copies of videotapes taken of portions of the A. Taylor, D. Sheldon and T. Winslow interrogations. The videos are also available on the LINCOLN JOURNAL-STAR webpage, at <http://www.journalstar.com/app/vmix/media/?section=browse&id=00007011>. *See also* Jason Volentine, *Stolen Lives: The Story of the Beatrice 6 (Part Two)*, LINCOLN J.-STAR Mar. 16, 2009, available at <http://www.1011now.com/news/headlines/41304322.html>; Joe Duggan, *Presumed Guilty, Part Three: The Break*, LINCOLN J.-STAR, May 5, 2009, available at http://www.journalstar.com/special_reports/presumed_guilty/article_21cb7a5e-da01-5f76-8dfd-2fd3b5f32417.html.

152. Transcription of Taped Interview of David Jones at 33, *People v. Jones*, No. BAO71698 (Cal. Super. Ct. Mar. 3, 2005).

admissions, but do not tape that interview, perhaps because jurors might be disturbed by coercive or misleading techniques employed; rather police tape a second interview only once the admissions have been secured.¹⁵³

Where these innocent people did not know the facts of the crime, they needed to be repeatedly walked through the crime, and as a result, suggestion by police was sometimes apparent even in the recorded portions of the interrogation. For example, in the case of Bruce Godschalk, a taped statement was taken only after he had confessed and was placed under arrest.¹⁵⁴ During the suppression hearing and again at trial, the detective read the transcript of the taped statement aloud. In one striking passage, it appeared that Mr. Godschalk volunteered the information about the screen on a kitchen window that the attacker entered as to one of the two rapes he was charged with:

Q. Okay. What window was this? Do you remember? If you remember, you remember. If you don't, you don't. Just say what you remember.

A. Kitchen window.

Q. Okay. You're saying it was the kitchen window?

A. Yeah.

Q. Okay. How do you remember entering the window? Was the window open or closed?

A. Closed, with a screen on it.

Q. And how did you get through the screen?

A. Pulling it.

Q. You pulled the screen?

A. Yeah.¹⁵⁵

He added, “[A]m I putting words in your mouth,” and Godschalk answered, “No.”¹⁵⁶ The detective also described that he spoke to Godschalk for quite some time before turning on the tape, during this time Godschalk volunteered a series of specific facts, and before turning on the tape Godschalk was crying.¹⁵⁷

When he described the conversations before the recording was made, the detective admitted he disclosed the fact concerning the window. He reported asking Godschalk how he entered the apartment, and Godschalk said, “Through the window.”¹⁵⁸ He then reported asking Godschalk, “Was there a screen on the window?”¹⁵⁹ He then asked Godschalk, “What did you do with that?” and reported that Godschalk answered, “I removed it.”¹⁶⁰ This is a very different sequence than in the recording, in which Godschalk volunteered without

153. Maura Dolan & Evelyn Larrubia, *Telling Police What They Want To Hear, Even if It's False*, L.A. TIMES, Oct. 30, 2004, at A1.

154. See Godschalk Trial Transcript, *supra* note 145, at 86 (May 26, 1987).

155. *Id.* at 121 (May 27, 1987).

156. *Id.* at 131.

157. *Id.* at 143-44.

158. *Id.* at 70 (May 26, 1987).

159. *Id.* at 71.

160. *Id.*

prompting to have entered a window, specifically a kitchen window, and having entered the window by pulling a screen.

Godschalk testified on the stand that detectives had initially told him all of the telling facts that he reportedly volunteered.¹⁶¹ However, the detective denied disclosing any such facts. Indeed, he described that Godschalk had volunteered additional nonpublic facts, such as the fact that the victim had a tampon, before the recording was made.¹⁶² Similarly, as to the second rape, the detective stated that Godschalk had admitted before being taped a series of facts that the detective was clear had not been made public, including very unusual facts, such as that a pillow from the victim's son's bedroom was used during the assault.¹⁶³

In Nicholas Yarris's case, law enforcement emphasized that the two crucial facts he volunteered, concerning the rape and that the victim's car had a brown landau roof, were offered in additional conversation that was not part of the normal statement, and therefore were not on the tape or transcribed, and indeed, were part of a conversation during which no notes were taken.¹⁶⁴

In the case of David Vasquez, just as in David Allen Jones's case, even in the portion of the interrogation that was recorded, leading questions were asked about key issues. In that case, the crucial nonpublic information contained in the confession was the type of cord used to bind the victim and to hang her. The police determined "that the bindings used to secure [the victim's] hands had been cut from the venetian blinds in the sunroom. The noose employed for her execution had been cut from a length of rope wrapped around a carpet in her basement."¹⁶⁵ It was obvious from the recording of the interrogation that Vasquez had no idea what was used to bind and murder the victim:

Det. 1: Did she tell you to tie her hands behind her back?

Vasquez: Ah, if she did, I did.

Det. 2: Whatcha use?

Vasquez: The ropes?

Det. 2: No, not the ropes. Whatcha use?

Vasquez: Only my belt.

Det. 2: No, not your belt . . . Remember being out in the sunroom, the room that sits out to the back of the house? . . . and what did you cut down? To use?

Vasquez: That, uh, clothesline?

Det. 2: No, it wasn't a clothesline, it was something like a clothesline. What was it? By the window? Think about the Venetian blinds, David. Remember cutting the Venetian blind cords?

Vasquez: Ah, it's the same as rope?

161. *Id.* at 129.

162. *Id.* at 85, 144 (May 27, 1987).

163. *Id.* at 78-80 (May 26, 1987).

164. Yarris Trial Transcript, *supra* note 141, at 2-133 to -135.

165. Memorandum in Opposition to Defendant's Motion to Suppress Statements at 1-2, *Commonwealth v. Vasquez*, C-22,213 to -22,216, C-22,763 (Va. Cir. Ct. Oct. 1984) [hereinafter *Vasquez Opposition Memorandum*].

Det. 2: Yeah.

Det. 1: Okay, now tell us how it went, David—tell us how you did it.

Vasquez: She told me to grab the knife, and, and, stab her, that's all.

Det. 2: (voice raised) David, no, David.

Vasquez: If it did happen, and I did it, and my fingerprints were on it . . .

Det. 2: (slamming his hand on the table and yelling) You hung her!

Vasquez: What?

Det. 2: You hung her!

Vasquez: Okay, so I hung her.¹⁶⁶

During Thomas Winslow's videotaped confession, the Deputy Sheriff repeatedly suggested information to him, such as the way that one would reach the victim's apartment, asking "Did you go up some stairs or down the stairs?" When Winslow responded after a sigh and a long pause that he was not sure, the Deputy Sheriff stated, "let me help you refresh your memory a little bit."¹⁶⁷ When Winslow still claimed not to know anything more, the Deputy Sheriff shut off the video for fifty minutes to give Winslow time to "think about it" and speak to his attorney; upon resuming the video, Winslow claimed to remember more, including entering the victim's apartment along with the other co-defendants.¹⁶⁸

Chris Ochoa has since his exoneration described blatant abuse of recording, in which the Austin Police Department detective asked Ochoa leading questions concerning how the crime occurred, but none of that questioning was on the tape. According to Ochoa's recounting, the detective would stop the tape each time that Ochoa "came to a detail" and "it was wrong." The officers would "get mad," and show him photographs of the crime scene and the autopsy or tell him the answers, and then "start it, stop it, till they got the details. It took a long time."¹⁶⁹ But at Richard Danziger's trial, when asked, "Did anyone in the Police Department tell you the facts of this crime so that you could make these statements?" he had answered, "No, they did not."¹⁷⁰ Similarly, in Jerry Frank Townsend's case, the detectives' tape recorder was turned on and off frequently during days of interrogations. Richard Ofshe reviewed the taped statements years later and concluded that it

166. Am. Civil Liberties Union, *Mentally Retarded Death Row Exonerations*, <http://www.aclu.org/capital/mentalretardation/10435pub20031209.html> (last visited Nov. 15, 2009); see also Dana Priest, *At Each Step, Justice Faltered for VA Man*, WASH. POST, July 16, 1989, at A1.

167. See Volentine, *supra* note 151.

168. See Videotape: Interrogation of Thomas Winslow by Burt Searcey of the Gage County Sheriff's Office (Mar. 14, 1989) (on file with author), available at <http://www.journalstar.com/app/vmix/media/?section=video&id=7001609>; see also Duggan, *supra* note 150. As noted *supra* note 152, the interrogation videos are available for viewing on the LINCOLN JOURNAL-STAR webpage.

169. LEO, *supra* note 7, at 261; see also Diane Jennings, *A Shaken System*, DALLAS MORNING NEWS, Feb. 24, 2008, at A1 ("An Austin Police Department review later found 'strong indications that investigators supplied Ochoa with information . . .").

170. Danziger Trial Transcript, *supra* note 70, at 1046.

was “painfully and embarrassingly obvious that these police detectives stop the tape for the purpose of prepping him on what to say.”¹⁷¹

The other interrogations were not recorded, in some cases despite a police department practice of doing so. In Dennis Brown’s case, for example, police testified that they normally recorded interrogations, but they “chose not to turn it on” in that case because the defendant just started talking.¹⁷² In Ron Williamson’s case, his initial statement following a polygraph examination was videotaped, and he emphatically protested his innocence. That tape was not provided to defense counsel, and in granting Williamson’s habeas petition years later, the federal district court emphasized that it called into question why the officer “videotaped the denial but did not videotape the alleged confession.”¹⁷³

E. *Mistaken Facts*

In a few cases, police may have inadvertently suggested mistaken facts due to their incomplete knowledge about the crime scene evidence, which turned out to be inaccurate based on later information in the case. These mistakes provide insight into the limitations of officers’ abilities to construct a confession narrative, particularly with a suspect who may have no knowledge of the crime. For example, recall how Bruce Godschalk initially described entering the kitchen window of one victim’s apartment. However, that apartment had no kitchen windows. The detective claimed that Godschalk later changed this statement to say he had entered through a spare bedroom.¹⁷⁴

In Earl Washington, Jr.’s case, the typed confession included this interchange:

Hart: Did you remove any of her clothing?

Washington: Yes sir.

Hart: What clothing?

Washington: The halter top.¹⁷⁵

That statement was problematic, where the inventory of the clothing from the crime scene included no halter top, but rather a sundress. Further, it was not the sort of term that would be expected from Washington’s limited vocabulary. It emerged in civil discovery years later that an initial police report reported that the victim was “[n]ude except for a halter top.” The officers may have inadvertently placed in Washington’s mouth words that they had mistakenly thought accurately reflected the crime scene evidence.¹⁷⁶

171. Amy Driscoll, *Taped Confessions So Flawed They’re ‘Worthless,’ Expert Says*, MIAMI HERALD, June 15, 2001 at 33A.

172. Brown Trial Transcript, *supra* note 107, at 97.

173. Williamson v. Reynolds, 904 F. Supp. 1529, 1565 (E.D. Okla. 1995).

174. See Godschalk Trial Transcript, *supra* note 145, at 71-72 (May 26, 1987).

175. See Washington Statement, *supra* note 132, at 5.

176. See EDDS, *supra* note 130, at 255.

In some cases, the exoneree now denies ever having even repeated back some of the statements that law enforcement attributed during the interrogation. Lowery, in his civil suit, alleged he repeated certain facts that officers had disclosed to him, but that the officers in their testimony at trial, fabricated still additional facts which he did not even utter.¹⁷⁷ Similarly, in the Central Park Jogger case, Yusef Salaam denies having uttered the inculpatory remarks reflected in the police report prepared after the interrogation.¹⁷⁸

F. *Guessed or Public Facts*

A compliant or willing suspect could have guessed some details concerning these crimes, such as very general features of a rape or a murder. However, very specific details corroborated by other evidence were provided in all but two of these cases. In that of Travis Hayes, there was no allegation that he had provided any nonpublic facts concerning the incident. The crime was a convenience store robbery that occurred in the open with a number of witnesses. Hayes was seventeen years old and interrogated from 11 p.m. until after 5 a.m. the next day.¹⁷⁹ His taped interrogation offered few details, and chiefly inculpated codefendant Ryan Mathews as the shooter. Hayes claimed not to know anything about what happened in the convenience store, and that as merely the getaway driver, he “didn’t see a gun or anything else like that.”¹⁸⁰ DNA testing at the time of trial on the mask worn by the shooter excluded both Hayes and Mathews, but they were both convicted.¹⁸¹ In the second case, that of Freddie Peacock, the defendant was mentally disabled and could tell the police only, “I did it, I did it. I raped a girl. I did it.”¹⁸² The detective

177. Those facts included: “a. driving up and parking by the side of a house in Ogden; b. the house was white; c. the house was on a corner; d. entering by using his hand to tear open the screen door and reaching inside and lifting the latch to the screen door; e. picking up a silver table knife, a dinner knife; f. walking down a hallway (or in Malugani’s testimony a living room area); g. being frightened that the woman would wake up and see him, so jumping on the bed; h. striking the victim with the handle of the knife in the head several times; i. describing that he “screwed” the victim; j. leaving the same door that he entered.” Complaint at 16-17, *Lowery v. County of Riley*, No. 04-3101-GTV (Kan. D. Ct. Mar. 25, 2004).

178. See *McCray v. City of New York*, Nos. 03 Civ. 9685(DAB), 03 Civ. 9974(DAB), 03 Civ. 10080(DAB), 2007 WL 4352748, at *4 (S.D.N.Y. Dec. 11, 2007) (“Plaintiff Salaam submits only that it is alleged, presumably by Defendants, that he made an inculpatory unsigned statement.”).

179. Trial Transcript at 217, 231, *State v. Hayes*, No. 97-3780, (La. Dist. Ct. Dec. 2, 1998) [hereinafter *Hayes Trial Transcript*].

180. *Id.* at 64. Steven Drizin called the confession “the most naked, uncorroborated false confession I’ve ever seen.” Michael Perlstein, *A Forgotten Man: Prosecutors Refuse to Reconsider Inmate’s Case Despite Evidence Supporting His Claim*, TIMES-PICAYUNE, Oct. 10, 2004, at O1.

181. See *The Innocence Project*, *supra* note 2.

182. See Trial Transcript at 270, *People v. Freddie Peacock*, #989-76 (NY Sup. Ct. Dec. 13, 1976) [hereinafter *Peacock Trial Transcript*].

acknowledged that Peacock “couldn’t recall the details” regarding how the crime took place, although he tried during the interrogation to supply him with details, including the identity of the victim.¹⁸³

In only one of these cases is there any suggestion after the fact that the suspect learned of a crucial nonpublic fact in the community because police had leaked information. In the Eddie Joe Lloyd case, a series of facts were likely disclosed to him. However, Lloyd later claimed he had known of one particular striking fact—that the killer left a green bottle at the crime scene. The prosecutor emphasized that the crime scene

area was secured, no one else was allowed in and it wasn’t until sometime later when Officer Degalan and the evidence technician, Officer Babcock, went inside that garage and ended up moving the body that the bottle fell out. That was the first time they knew about it, and as Officer Degalan indicated that was not a publicized matter. . . . Aside from [those officers,] the only other person who would have known about that was the killer, Mr. Lloyd.¹⁸⁴

After being exonerated by postconviction DNA testing, Lloyd said he had “overheard someone at a party store mention a bottle, a detail that had not been released to the public but may have been known to those in the search party.” Whether that occurred or not, Lloyd described that detectives told him a series of other facts during three interviews conducted while he was involuntarily committed at a mental hospital. The detective “‘provided me with quite a bit of information about the case,’ Mr. Lloyd recalled. ‘He said, “What kind of jeans was she wearing?” I said, “I don’t know.” He said, “What kind do you think?” I said, “Jordache.” He said, ‘No, Gloria Vanderbilt.’” Lloyd stated that the detective “‘guided him through a sketch of the garage, among other details. ‘The emphasis was on, “You want to help us, right?’” he said. ‘I said, “Sure, I want to help any way I can.’””¹⁸⁵

During Robert Miller’s trial, the defense did not claim that facts were disclosed, but that the defendant, when recounting his “dreams” or “visions” for the most part relayed incorrect facts totally inconsistent with the crime scene, and happened to be correct with regard to some because of his familiarity with the neighborhood and neighborhood rumors, and his knowledge of public facts.¹⁸⁶ Yet as the prosecutor emphasized in closing, Miller had in other respects confessed with great specificity, providing a series of corroborated and “intricate” details that would not have been made public by law enforcement.¹⁸⁷ The inconsistent information may have been truly volunteered, but the corroborated details in contrast may have been disclosed

183. See *id.* at 276-78.

184. 3 Trial Transcript at 40-41, *People v. Lloyd*, No. 85-00376 (Mich. Rec. Ct. May 2, 1985) [hereinafter *Lloyd Trial Transcript*].

185. See Jodi Wilgoren, *Confession Had His Signature; DNA Did Not*, N.Y. TIMES, Aug. 26, 2002, at A1.

186. See *Miller Trial Transcript*, *supra* note 73, at 1267-72.

187. *Id.* at 1289-92.

and the interrogation contaminated.

G. *Crime Scene Visits*

In fourteen of the thirty-eight cases—or thirty-eight percent—police brought the exonerees to the crime scene. The visits allowed police to test the knowledge of how the crime occurred and to gather facts. The visits could also provide a chance to review with the exoneree how the crime occurred. They could also be used to disclose facts. For example, Ronald Jones testified that police used a crime scene visit as an occasion to tell him how the crime occurred, stating that a detective “was telling me blood stains on the floor and different clothing that was found inside of the abandoned building,” and that the victim “was killed with a knife, and she was stabbed, three or four times.”¹⁸⁸ Debra Shelden noted at Joseph White’s trial that she changed her mind about certain facts in her account after being shown the crime scene, or, as she put it, “[w]hen I had the tour of the apartment building. When I went on the ride with the cops.”¹⁸⁹ Such visits were not recorded. Crime scene visits occurred in the Central Park Jogger case, in which all five youths were brought to the scene, as well as in the Paula Gray, David Allen Jones, Ronald Jones, William Kelly, John Kogut, Robert Miller, Debra Shelden, Jerry Townsend, and Earl Washington, Jr. cases. Each reportedly identified features of the crime scenes that were nonpublic and corroborated by the investigation.

Earl Washington, Jr. led police to locations all around Culpepper, Virginia, having had no idea where the victim was murdered.¹⁹⁰ Even after being driven right in front of the victim’s building several times, he did not identify it. When the police then asked him to point to her building once in the apartment complex he pointed to “the exact opposite end” of the complex, and it was only when the officer pointed to her apartment and asked if that was it, he finally “said that it was.”¹⁹¹ In other exonerees’ cases, police did not describe such uncertainty, so it remains quite questionable how absent police prompting, innocent suspects could have described on their own what transpired at these crime scenes.

H. *Inconsistencies and Lack of Fit*

The Inbau and Reid treatise cautions that “[m]any investigators have the impression that once a confession has been obtained, the investigation is ended, but seldom, if ever, is this true” where a confession must be substantiated by

188. Trial Transcript at 122, 157, *People v. Jones*, No. 85-12246 (Ill. Cir. Ct. 1989) [hereinafter *Jones Trial Transcript*].

189. White Trial Transcript, *supra* note 115, at 787 (Nov. 3, 1989).

190. Washington Trial Transcript, *supra* note 133, at 622-24.

191. *Id.* at 625.

other evidence to be convincing at trial.¹⁹² In these cases, police often ceased their investigation once they obtained a confession, and, in doing so, they not only failed to substantiate the confession but failed to investigate glaring inconsistencies between the confession and crime scene evidence.

The vast majority of these exonerees made statements in their interrogations that were contradicted by crime scene evidence, victim accounts, or other evidence known to police during their investigation. In Deskovic's case, for example, an inquiry later conducted by the District Attorney's office concluded:

[A]ll investigation ceased after police obtained Deskovic's purported confession. The prosecution apparently did little or nothing to corroborate the theories it employed to square the scientific evidence with Deskovic's guilt. There is no evidence, for example, that much was done to locate the "boyfriend" who was the supposed source of semen or even to document [the victim's] movements in the 24 hours before her death.¹⁹³

In Deskovic's case the problem of the source of the semen was particularly glaring because, although the state's theory was that he raped and murdered the victim alone, the DNA results at the time of trial excluded him.¹⁹⁴ Indeed, eight of these exonerees were excluded by DNA testing conducted at the time of their trial and seven of them were exonerated after postconviction testing not only excluded them but inculpated another person.¹⁹⁵

In LaFonso Rollins's case, exculpatory forensic evidence was concealed—apparently because he had confessed. The crime lab technician had found that serology from the rape kit excluded Rollins and had asked his supervisors to send the kit to the FBI for DNA testing, but as he later testified in a deposition, "his request was refused because police said Rollins confessed."¹⁹⁶ In the Beatrice Six case, all of the suspects who confessed had been excluded by conventional serology testing. Moreover, a botched serological test also excluded a suspect who was not pursued, but who years later was identified by DNA testing as the actual perpetrator.¹⁹⁷

Crucial to assessing the reliability of the postadmission narrative provided during an interrogation is analysis of what suspects say when they are *not* prompted by law enforcement. An innocent person, without prompting, should not be able to volunteer specific crime information. While these innocent

192. Inbau et al., *supra* note 64, at 390.

193. See Deskovic Report, *supra* note 10, at 5.

194. See *id.* at 2.

195. The eight are: J. Deskovic, N. Hatchett, T. Hayes, A. McCray, K. Richardson, R. Santana, Y. Salaam, and K. Wise. All of them were exonerated after postconviction testing inculpated another person except in the case of N. Hatchett. See Brandon L. Garrett, *Claiming Innocence*, 92 MINN. L. REV. 1629, 1660 (2008).

196. Maurice Possley, *Lab Didn't Bother with DNA*, CHI. TRIB., Aug. 25, 2006, § 1, at 1.

197. See Jason Volentine, *Stolen Lives: The Story of the Beatrice Six (Part Three)*, 1011NOW.COM, Mar. 17, 2009, <http://www.1011now.com/home/headlines/41402917.html>.

suspects had specific facts disclosed to them, most were at times asked to volunteer information, and because they were innocent, they got those facts wrong. As Richard Ofshe and Richard Leo have developed, “the reliability of a confession statement can usually be objectively determined by evaluating the fit between a post-admission narrative and the crime facts.”¹⁹⁸

In at least twenty-eight of these thirty-eight cases—or seventy-four percent—the exoneree supplied facts during the interrogation that were inconsistent with the known facts in the case.¹⁹⁹ In those cases, there were indicia of unreliability at the time of the investigation. Prosecutors then had to explain these inconsistencies to the jury by downplaying them and emphasizing instead the powerful nonpublic facts that each had supposedly volunteered.

Earl Washington, Jr.’s case provides a classic example of a lack of fit. Police later described two stages of the interrogation. In the initial stage, whenever he was not asked a leading question, he got the answers wrong. He told police that the victim was black when she was white.²⁰⁰ He described stabbing the victim a few times when she was stabbed dozens of times. He described the victim as short when she was tall. He said he “didn’t see” anyone else in the apartment, when the victim’s two children were there.²⁰¹ It was clear he knew nothing about the crime but, ever compliant, would agree with whatever was posed to him. The prosecution, as described, instead emphasized how in the second stage of the interrogation, Washington reportedly volunteered that he left his shirt at the crime scene, which we now know he never volunteered.

Earl Washington, Jr. had, in fact, confessed to four additional crimes; he confessed to every crime he was asked about, but in the other cases the victims were not deceased and told police he was not the assailant, or the confessions were deemed totally inconsistent with how the crimes occurred.²⁰² Similarly, Jerry Frank Townsend confessed to “numerous” unsolved murders, most in Florida, and six of which he was charged with.²⁰³

Byron Halsey was also highly compliant with police interrogators. Halsey made multiple incorrect guesses as to the manner in which a gruesome rape and murder of two children occurred. When asked how he put nails into one victim’s head, the officer recounted, “His initial response was crowbar. He

198. See Ofshe & Leo, *supra* note 5, at 1119.

199. In other cases, the law enforcement account of the interrogation does not describe any statements made inconsistent with the crime, but absent a complete recording of the interrogation, one cannot be confident what transpired.

200. Washington Trial Transcript, *supra* note 133, at 596.

201. *Id.* at 618.

202. See, e.g., Eric M. Freedman, *Earl Washington’s Ordeal*, 29 HOFSTRA L. REV. 1089, 1091-92 (2001).

203. Ardy Friedberg & Jason T. Smith, *Townsend Released*, SUN-SENTINEL (Ft. Lauderdale, Fla.), June 16, 2001, at 1A; Paula McMahan & Ardy Friedberg, *Evidence Could Free Inmate*, SUN-SENTINEL (Ft. Lauderdale, Fla.), May 8, 2001, at 1B.

grinned at us.” A lieutenant then “said to him, ‘Now, Byron, you want to give us a truthful statement? You know, a crowbar, is that the truth?’ Then he came up and he said, ‘Hammer.’ He grinned again. . . . Then he mentioned chair. He grinned again.”²⁰⁴ The perpetrator actually used a brick to put nails into the victim’s forehead. Following that interchange, the officer recalled that “he finally did tell us what he used to drive the nails into [the victim’s] head.” The prosecutor asked, “Any time was it suggested to the defendant what the answer should be?” and the officer answered, “No.”²⁰⁵ The final admission that he “used the brick” was important at trial: “The significance of the device used was that the state ran a laboratory analysis on the brick. A substance found on the head of the nails removed from [the victim] was consistent with the components of the brick.”²⁰⁶

The prosecution in closings not only denied that any facts were disclosed, but, noting inconsistencies, argued that misstatements regarding the crimewere all part of a strategy by Halsey: “You know why, ladies and gentlemen, because he thinks he’s just given a sworn statement that’s going to let him off.”²⁰⁷ The prosecutor added, “he’s trying to mislead . . . he’s trying to lie his way out of this in that confession in which he is so contrite, and he’s so penitent.”²⁰⁸

Robert Miller’s case also involved striking inconsistencies in a long, partially taped interrogation, including where he claimed “one of the victim’s [sic] was only a little older than himself. She was eighty-three at the time of her death and Miller was twenty-eight.”²⁰⁹ The prosecutor explained in closings that the defense attorney:

[T]alked about all of the inconsistencies that Robert Miller injected into those 13 hours. And he did. He threw in a lot of garbage. Let me ask you a question. The fact that he threw in a lot of garbage, does that explain how he knew all those other little details? He knew those details. He knew the intricate details. How did he know them? . . . [I]f you listened carefully, these detectives never once suggested an answer to him.²¹⁰

In cases in which the exoneree inculpated others, inconsistencies often arose concerning which person committed which acts. For example, Chris Ochoa admitted in Richard Danziger’s trial that he lied about facts inconsistent with his later accounts of the crime, particularly whether he or Danziger was the shooter.²¹¹

204. Trial Transcript at 114-15, *State v. Halsey*, Nos. 63-01-86, 210-02-87 (N.J. Super. Ct. Mar. 7, 1988) [hereinafter *Halsey Trial Transcript*].

205. *Id.* at 115.

206. *State v. Halsey*, 748 A.2d 634, 637 (N.J. Super. Ct. App. Div. 2000).

207. *Halsey Trial Transcript*, *supra* note 204, at 112-13.

208. *Id.* at 119.

209. The Innocence Project, *supra* note 2.

210. Miller Trial Transcript, *supra* note 72, at 1289.

211. Danziger Trial Transcript, *supra* note 70, at 1006-09.

The Central Park Jogger case was replete with inconsistent statements by the five youths convicted; the District Attorney later agreed that their accounts differed on the details of “virtually every major aspect of the crime.”²¹² Those

major details included information regarding who initiated the attack, who knocked [the victim] down, who held her, who undressed her, who struck her, who penetrated her, what weapons were used during the attack, the location of the attack, the time of the attack, and when in the sequence of events the attack took place.²¹³

Their “statements were also inconsistent with facts of the crime,” and “contradicted the physical evidence.”²¹⁴ As in the other exonerees’ cases, however, those inconsistencies did not prevent a conviction at trial.

I. *Litigating Contamination of Confessions at Trial*

Although many of these false confessions betrayed indicia of unreliability at the time of trial, the issue was rarely litigated because courts conduct very limited reliability review. The Supreme Court’s early voluntariness jurisprudence focused on the question of reliability, including whether police demanded that a suspect conform to their account of how a crime occurred.²¹⁵ By the 1960s, the Court’s voluntariness jurisprudence focused instead on the formal question whether police pressure overwhelmed the suspect’s will, even in cases where the confession appeared grossly unreliable. The Court has stated that “the circumstance of probable truth or falsity . . . is not a permissible standard” under the Due Process Clause, and the proper question instead is whether the confession was “freely self-determined.”²¹⁶

Due to the Court’s rejection of the consideration of “probable reliability” of a confession,²¹⁷ even grossly unreliable confessions may be admitted if found not to have been the product of affirmative police coercion. In *Colorado v. Connelly*, a case in which the schizophrenic defendant thought he was hearing the “voice of God” during his interrogation (he was later medicated for six months before found competent to stand trial for murder),²¹⁸ the Court found that where no overt police pressure was applied to him, there was no “essential link between coercive activity of the State, on the one hand, and a resulting confession by a defendant, on the other.”²¹⁹ The Court summarized

212. *McCray v. City of New York*, Nos. 03 Civ. 9685(DAB), 03 Civ. 9974(DAB), 03 Civ. 10080(DAB), 2007 WL 4352748, at *5 (S.D.N.Y. Dec. 11, 2007) (quoting district attorney’s affirmation regarding 2002 motion to vacate convictions).

213. *Id.* (citing plaintiffs’ complaints).

214. *Id.*

215. *Culombe v. Connecticut*, 367 U.S. 568 (1961); Stephen J. Schulhofer, *Confessions and the Court*, 79 MICH. L. REV. 865, 867 (1981); White, *supra* note 26, at 2012-13.

216. *Rogers v. Richmond*, 365 U.S. 534, 543-44 (1961).

217. *Id.* at 544.

218. 479 U.S. 157, 161 (1986); *id.* at 175 (Brennan, J., dissenting).

219. *Id.* at 165.

the turn in its jurisprudence, stating that though a confession statement “might be proved to be quite unreliable . . . this is a matter to be governed by the evidentiary laws of the forum, . . . not by the Due Process Clause of the Fourteenth Amendment.”²²⁰

Looking beyond federal constitutional law, state corpus delicti and corroboration rules require some evidence that the confession is reliable. As one court explains, “There should always be something more than a mere naked confession of one accused, to justify a verdict of guilty.”²²¹ Similarly, the common law corpus delicti requirement seeks to avoid the danger “that an accused may confess to an *imaginary* crime rather than a *real* crime.”²²²

However, courts often require only very thin corroboration, such as some evidence of an injury caused by a crime.²²³ For example, the court’s jury instruction in Bruce Godschalk’s case merely informed the jury that in order to consider the confession they must “find that a crime was in fact committed” based on any evidence “apart from the statement itself,” and that “[t]he other evidence need not tend to show that the crime was committed by the defendant, only that a crime was committed.”²²⁴ Similarly, in the Central Park Jogger case, the appellate court found Antron McCray’s confession sufficiently corroborated based simply on “evidence that a rape was committed, even if it did not establish defendant’s identity.”²²⁵ A handful of states and federal courts exclude confessions if there is no indicia of any reliability, based on a “trustworthiness” standard. That standard requires some independent corroborating evidence supporting the confession, but scant evidence satisfies the test. Though courts look at whether the defendant offered facts corroborated by the investigation, they also look generally to the circumstances of the confession and whether it appeared voluntary.²²⁶ Thus, no courts currently conduct a full examination of a confession’s reliability.

Seventeen of the thirty exonerees who falsely confessed and were convicted at trial testified at trial recanting their confession and asserting their innocence. Many asserted that police had fed them details concerning the crime. For example, John Kogut testified, “Nothing was asked of me. Everything was told to me.”²²⁷ The others may have failed to testify fearing the prejudicial introduction of prior criminal convictions, or because their lawyers

220. *Id.* at 167.

221. *People v. Robson*, 80 P.3d 912, 913 (Colo. App. 2003) (quoting *Dougherty v. People*, 1 Colo. 514, 524 (1872)).

222. *People v. Rooks*, 243 N.Y.S.2d 301, 311 (N.Y. Sup. Ct. 1963).

223. *See* Leo et al., *supra* note 43, at 510-11.

224. Godschalk Trial Transcript, *supra* note 145, at 236-37 (May 27, 1982).

225. *People v. McCray*, 604 N.Y.S.2d 93, 95 (N.Y. App. Div. 1993).

226. *See* Leo et al., *supra* note 43, at 508 (citing case law); *see also, e.g.*, *State v. Mauchley*, 67 P.3d 477, 488 (Utah 2003).

227. Trial Transcript at 824, *People v. Kogut*, No. 61029 (N.Y. Sup. Ct. May 13, 1986) [hereinafter Kogut Trial Transcript].

did not think their recantation would be compelling.²²⁸

One third of these defendants—ten—had their attorneys argue at trial that the confession was contaminated, at least in the materials obtained which sometimes omitted pretrial motions. They typically had little evidence to support an allegation that facts had been disclosed. For example, Eddie Joe Lloyd's lawyer did not maintain his client's innocence in his closing arguments and conceded that the confession left him "bewildered."²²⁹ Attorneys typically did not focus on reliability, as no legal theory typically supported relief for an unreliable confession, but rather on criminal procedure claims concerning the voluntariness of the statements and whether the defendant had the capacity to understand *Miranda* warnings or to be tried. As will be developed below, while gross unreliability typically lacks any legal remedy, courts often emphasized apparent reliability in denying motions to suppress the seeming reliability of these confessions. The next Part turns to those criminal procedure rules.

III. FALSE CONFESSIONS AND CONSTITUTIONAL CRIMINAL PROCEDURE

This Part turns from the substance of false confessions to criminal procedure. At trial, almost all exonerees' defense attorneys tried to suppress the confessions as coerced or involuntary. Perhaps in part because these confessions were bolstered by contaminated facts, despite indicia of involuntariness in many of these cases, courts ruled each of these confessions voluntary and admissible. This Part explores the reasons courts provided when finding these confessions voluntary under the Fifth Amendment and examining the evidence of coercion presented by exonerees and disputed by the State. The last Subparts describe how these exonerees fared during appeals and then discusses eight exonerees' cases in which inculpatory statements were volunteered outside the custodial setting.

A. *Miranda* Warnings

The Court's *Miranda* protections are intended to avoid difficult voluntariness questions by providing notice in the interrogation room of certain rights. All of these exonerees waived their rights under *Miranda v. Arizona*.²³⁰ Scholars have concluded that the vast majority of all suspects similarly waive their rights; these innocent suspects acted no differently than the typical suspect.²³¹ Not one of these thirty-eight exonerees obtained an attorney before

228. John H. Blume, *The Dilemma of the Criminal Defendant with a Prior Record—Lessons from the Wrongfully Convicted*, 5 J. EMPIRICAL LEGAL STUD. 477 (2008).

229. 3 Lloyd Trial Transcript, *supra* note 184, at 37.

230. 384 U.S. 436 (1966).

231. Richard A. Leo, *Inside the Interrogation Room*, 86 J. CRIM. L. & CRIMINOLOGY 266, 276 (1996) (presenting results of study of 122 interrogations and finding that seventy-eight percent involved *Miranda* waivers); *see also* Steven D. Clymer, *Are Police Free To*

or during their interrogation.²³² Twenty-two exonerees had signed waiver forms and ten waived their rights on video. Many had been interrogated or provided admissions of wrongdoing before law enforcement considered them to be in custody and before any *Miranda* warnings were provided. In many of those cases, law enforcement used a “question-first” gambit, by eliciting admissions and then subsequently providing the warnings.²³³ The Supreme Court has approved such an approach, though only if the circumstances present “a genuine choice whether to follow up on the earlier admission.”²³⁴

Although the *Miranda* warnings did not benefit any of these innocent suspects, the waiver of those rights impeded later efforts to challenge their false confessions. Illustrating the dispositive role that provision of *Miranda* warnings can play, in David Vasquez’s case, there was a partially recorded interrogation in which outright feeding of facts was apparent from the recording. The Court excluded initial statements elicited through use of “good guy/bad guy methods of interrogation and the careful use of factual misstatements of the evidence.” However, despite the audio recording of quite egregious feeding of facts quoted earlier, the Court found the follow-up interrogation admissible, chiefly relying on the delivery of *Miranda* warnings with no “application of any duress or force” and also based “on the conflicting evidence given by the psychiatrists.”²³⁵

Perhaps most remarkable of the rulings concerning *Miranda* warnings was at the trial of Eddie Joe Lloyd. Just the location of the interrogation should have been glaring evidence of his mental illness and suggestibility. Lloyd had been interviewed while he was involuntarily committed in a mental hospital, with a preliminary diagnosis of bipolar affective disorder.²³⁶ The trial court still ruled his statements voluntary, noting “[a]fter he is advised of his rights, it doesn’t

Disregard Miranda?, 112 YALE L.J. 447, 502-12 (2002); Richard A. Leo, *Questioning the Relevance of Miranda in the Twenty-First Century*, 99 MICH. L. REV. 1000, 1009-10 (2001); Louis Michael Seidman, *Brown and Miranda*, 80 CAL. L. REV. 673, 745 (1992) (noting the Court excluded confessions more often pre-*Miranda*).

232. Several defendants in the Beatrice Six case, while interrogated initially absent their attorneys, later made videotaped confession statements with their attorneys present.

233. The *Yarris* and *Godschalk* cases discussed *supra* in notes 141 and 145 are examples.

234. *Missouri v. Seibert*, 542 U.S. 600, 615-16 (2004); *see also id.* at 610-11 n.2 (“Most police manuals do not advocate the question-first tactic, because they understand that *Oregon v. Elstad*, 470 U.S. 298 (1985), involved an officer’s good-faith failure to warn.”); *Oregon v. Elstad*, 470 U.S. 298, 318 (1985) (holding that even if an initial confession was obtained improperly, such as without *Miranda* warnings, a subsequent second confession after properly administered warnings is admissible); *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977) (“*Miranda* warnings are required only where there has been such a restriction on a person’s freedom as to render him ‘in custody.’”).

235. Memorandum from Judge William L. Winston on Commonwealth v. Vasquez, Nos. C-22213-22216, C22763 (Va. Cir. Ct. Jan. 25, 1985) [hereinafter Vasquez Winston Memorandum].

236. 3 Lloyd Trial Transcript, *supra* note 184, at 20.

make a difference what form [the interrogation] takes.”²³⁷ This use of *Miranda* to short-circuit a meaningful inquiry into the voluntariness of a confession supports scholarship questioning whether *Miranda* remains relevant and, indeed, whether its influence can be harmful.²³⁸

B. *Indicia of Involuntariness*

The Supreme Court’s voluntariness standard examines the “totality of all the . . . circumstances” surrounding the confession to assess whether the confession was coerced, focusing on “the characteristics of the accused and the details of the interrogation.”²³⁹ The prosecution has the burden to show that no undue coercion was applied to the suspect.²⁴⁰ The Court has explained that the “ultimate test” focuses on the question of whether the confession is “the product of an essentially free and unconstrained choice by its maker . . . If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process.”²⁴¹ Trial courts conduct pretrial hearings to examine the question of whether the confession was voluntary and should be admitted. All of these false confessions were admitted, and the trial court rulings themselves will be discussed next. It should not be surprising that they were admitted, as the voluntariness standard is forgiving and vague.²⁴²

Although courts admitted these exonerees’ confessions, perhaps properly, many of these confessions raised significant indicia of involuntariness at the time. The Court has identified several indicia of involuntariness.²⁴³ One set of factors related to whether the suspect was vulnerable to coercion. Thus, one factor the Court has long taken into account is “the youth of the accused.”²⁴⁴

237. *Id.* at 78-79 (May 1, 1985).

238. *See, e.g.*, Paul G. Cassell, *Miranda’s Social Costs: An Empirical Reassessment*, 90 NW. U. L. REV. 387, 498 (1996) (arguing that “the undeniable tragedy of the *Miranda* decision is that it has blocked the search for superior approaches to custodial interrogation”); Kassin et al. *Police-Induced Confessions: Risk Factors and Recommendations*, *supra* note 3, at 59-60 (“Whatever the mechanism, it is clear that *Miranda* warnings may not adequately protect the citizens who need it most—those accused of crimes they did not commit.”).

239. *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973); *see also* *Arizona v. Fulminante*, 499 U.S. 279 (1991); Steven Penney, *Theories of Confession Admissibility: A Historical View*, 25 AM. J. CRIM. L. 309, 314-20, 353 (1998) (“The task of the Court is to identify the circumstances in which the defendant’s will is in fact overborne. Unfortunately, there is no litmus test for determining this question. In each case the relevant factors must be weighed anew.”).

240. *Brown v. Illinois*, 422 U.S. 590, 604 (1975) (“[T]he burden of showing admissibility rests, of course, on the prosecution.”).

241. *Culombe v. Connecticut*, 367 U.S. 568, 602 (1961).

242. *See, e.g.*, Schulhofer, *supra* note 215, at 869.

243. *Gallegos v. Colorado*, 370 U.S. 49, 52-53 (1962); *see also* Schulhofer, *supra* note 215, at 875.

244. *Schneckloth*, 412 U.S. at 226.

Almost one-third—or thirteen—of these forty exonerees who confessed were juveniles.

A second factor the Court developed was “low intelligence” of the accused.²⁴⁵ Forty-three percent or seventeen of the forty who falsely confessed were mentally disabled, many obviously so, but as discussed below, few had experts to develop the issue. Others had clear emotional problems.

A third factor is “the lack of any advice to the accused of his constitutional rights.”²⁴⁶ As noted, none obtained counsel prior to initially confessing. A fourth factor is the “length of detention” together with “the repeated and prolonged nature of the questioning.”²⁴⁷ Inbau et al. note that “[t]he most common circumstance supporting a claim of duress is the length of an interrogation.”²⁴⁸ Most of these exonerees endured quite lengthy interrogations. Typically, John Kogut was told “you’re not going anywhere until we get the truth.”²⁴⁹ Only four were interrogated for less than three hours: Freddie Peacock, Lafonso Rollins and David Vasquez, all of whom were mentally disabled, and Yusef Salaam, a juvenile whose interrogation was halted by the arrival of a family friend and Assistant U.S. Attorney (unlike those of the other four youths in the Central Park Jogger case, who were interrogated for many hours).²⁵⁰ The other exonerees were interrogated for far longer, typically involving multiple interrogations over a period of days, or interrogations lasting for more than a day with interruptions only for meals and sleep. Jerry Townsend was interrogated for thirty to forty hours over the course of a week.²⁵¹ Just the recorded portions of Robert Miller’s interrogation lasted thirteen to fifteen hours.²⁵²

An additional factor includes “use of physical punishment such as the deprivation of food or sleep.”²⁵³ In several cases, exonerees alleged that police used physical force, although we often do not know whether these allegations were accurate. Bradford later claimed that police beat him. Dennis Brown claimed that the officer first unbuckled his gun belt then “put a knife on me.”²⁵⁴ Ronald Jones testified at trial that the detective handcuffed him to the wall and hit him in the head several times with a long black object because

245. *Id.*

246. *Id.*

247. *Id.*

248. INBAU ET AL., *supra* note 64, at 422.

249. Kogut Trial Transcript, *supra* note 227, at 824.

250. Peacock Trial Transcript, *supra* note 183, at 268-71; Rollins Trial Transcript, *supra* note 125, at D-164, -179; Tracy Connor, Barbara Ross & Alice McQuillan, *48 Hours: Twisting Trail to Teens’ Confessions*, N.Y. DAILY NEWS, Oct. 20, 2002, at 8; Dana Priest, *supra* note 166, at A1.

251. Trial Transcript at 2160, *State v. Townsend*, No. 79-7217 (Fla. Cir. Ct. July 16, 1980) [hereinafter *Townsend Trial Transcript*].

252. Miller Trial Transcript, *supra* note 72, at 1016, 1039 (May 17, 1998).

253. *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973).

254. *See Brown Trial Transcript*, *supra* note 107, at 175.

Jones refused to confess to the murder.²⁵⁵ According to Jones, a second officer then entered the room, “was surprised” at “the treatment” “and told him, he said no, don’t hit him, because he might bruise.”²⁵⁶ That officer proceeded to hit him in the “midsection with his fist” when he would not admit his involvement in a homicide.²⁵⁷ Both officers denied at trial that they had struck Jones.²⁵⁸

Paula Gray was kept at hotels and interrogated by police officers for three days as a “protected custody witness” regarding a double murder investigation.²⁵⁹ During her custody she made a statement inculcating herself and three other innocent people, in a case that became known as the “Ford Heights Four” case. During Gray’s testimony at trial, she was asked, “Did they emphasize what would happen if you did not tell this story?” and answered, “That they would kill me.”²⁶⁰ Law enforcement denied engaging in any such conduct in each of these cases. Absent any complete recording, we do not know for sure what transpired.

The demeanor of the defendant during the interrogation may shed light on whether the confession was voluntary. The State admitted that David Vasquez gave a statement that “[a]t times” was “virtually incomprehensible.”²⁶¹ Byron Halsey, who had a “sixth-grade education and severe learning disabilities,”²⁶² gave a statement that the detective admitted was at times full of “jibberish [sic]” in which Halsey was “saying one syllable words, free flowing like a water fall [sic]” and at other times appeared to be in a “trance” state in which he “just stopped and looked out into blankness.”²⁶³

Seven exonerees described their involvement as something that came to them in a dream. Rolando Cruz, James Dean, Steven Linscott, Robert Miller, Debra Shelden, David Vasquez and Ron Williamson all gave so-called “dream” statements.²⁶⁴ At Joseph White’s trial, James Dean expressed confidence that

255. Jones Trial Transcript, *supra* note 188, at 1092-93.

256. *Id.* at 1094.

257. *Id.*

258. *Id.* at 1142, 1151, 1160 (July 14, 1989).

259. Trial Transcript at 2089, 2234-37, *People v. Gray*, No. 78 C4865 (Ill. Cir. Ct. Oct. 16, 1978) [hereinafter Paula Gray Trial Transcript].

260. *Id.* at 2237.

261. Vasquez Opposition Memorandum, *supra* note 165, at 3.

262. Press Release, The Innocence Project, After 19 Years in Prison for One of the Most Heinous Crimes in NJ History, Byron Halsey Is Proven Innocent Through DNA (May 15, 2007), available at <http://www.innocenceproject.org/Content/583.php>.

263. Halsey Trial Transcript, *supra* note 204, at 92, 95-96.

264. See sources cited *supra* note 187 and *infra* notes 283 and 345; see also Memorandum in Support of Motion to Suppress at 22, *Commonwealth v. Vasquez*, C-22213-22216 (Va. Cir. Ct. Nov. 1984) [hereinafter Vasquez Support Memorandum] (the defendant was in “an almost hypnotic state” and “began to relate things that had happened to him in a dream”); JOHN GRISHAM, *THE INNOCENT MAN* 127 (2006) (quoting police report in the Williamson case, in which Williamson reportedly states “Okay, I had a dream about killing [the victim], was on her, had a cord around her neck, stabbed her, frequently, pulled

at least he could “pretty much” tell the difference between his dreams and reality, while Debra Sheldon agreed that “everything” she had testified about had come to her in a dream.²⁶⁵

Most of these exonerees signed written statements containing boilerplate language stating they had been treated well and mirroring the considerations in the Supreme Court’s voluntariness standard. Thus, Lafonso Rollins signed a statement stating “he has been treated well” by the prosecutor and the police: “Lafonso Rollins states he has eaten pizza and a sandwich and has had coffee and cola to drink while he has been at the police station. Lafonso Rollins states that he has has [sic] not been threatened in any way, nor has he been made any promises for this statement.”²⁶⁶ Similarly, Bruce Godschalk was asked on tape by the detectives, “How have we treated you?” and he answered, “Very well.”²⁶⁷

C. Use of Deceptive Techniques

Where the voluntariness standard does not prohibit any particular psychological techniques, police regularly employ a series of strategies to place pressure to confess on unwilling suspects.²⁶⁸ These interrogations feature the use of techniques to both threaten negative consequences for not confessing and to reward the confession. Some officers use “Mutt and Jeff” or “Good Cop Bad Cop” techniques. For example, in David Vasquez’s case, the recordings showed he was variously treated strictly and then told by others “we are the ones that can help you.”²⁶⁹ Several cases involved allegations of threats of conviction or the death penalty combined with offers of leniency should the suspect confess. Ochoa testified that the officer’s interrogation “scared the heck, scared the living daylights out of me.”²⁷⁰ He also testified that the officer threatened him with the death penalty and said, “You’re going to get the needle. You’re going to get the needle for this. We got you.”²⁷¹

The Supreme Court has also held that police misrepresentations, such as that another suspect confessed, do not necessarily render a confession involuntary.²⁷² Techniques such as the “false evidence ploy,” which have been

the rope tight around her neck”).

265. White Trial Transcript, *supra* note 115, at 795, 851.

266. Rollins Trial Transcript, *supra* note 125, at D-182.

267. Godschalk Trial Transcript, *supra* note 145, at 126-27 (May 26, 1987). At his trial, Godschalk was asked about that statement and replied “I don’t know about very well, but I said okay.” *Id.* at 127.

268. See INBAU ET AL., *supra* note 64, at 209-397 (presenting the “Reid nine steps of interrogation”).

269. Vasquez Support Memorandum, *supra* note 264, at 16.

270. Danziger Trial Transcript, *supra* note 70, at 1005.

271. *Id.* at 1006. Ochoa pleaded guilty in part to avoid the death penalty, receiving life in prison. *Id.* at 967.

272. See *Frazier v. Cupp*, 394 U.S. 731, 739 (1969); INBAU ET AL., *supra* note 64, at

shown to increase the risk of a false confession, were used in several of these exonerees' interrogations.²⁷³ For example, in the Robert Miller case, the detective described the interrogation as follows:

Q. You told him you had an eye witness that saw him leaving Mrs. Cutler's house and had in fact shown pictures—a picture lineup, one of which a picture was Robert, to this witness, and this witness identified Robert's picture; is that right?

A. Yes.

Q. And that was in fact not true.

A. That's correct.

Q. You were stretching the truth, shall we say, to try to once again elicit information from him; is that right? That was one of your techniques.

A. Well, I don't know if I could say elicit information. All I could gather—was trying to gather the truth at that point.

...

Q. Once again, you were telling him information hoping that he would throw his hands up and say, okay, you've got me, I did it. That was pretty much your plan; is that right?

A. Yes.²⁷⁴

Other exonerees were told—falsely—that forensic evidence connected them to the crime. David Vasquez confessed after he was told that his fingerprints were found at the scene.²⁷⁵ Similarly, in the Central Park Jogger case, Yusef Salaam reportedly confessed after he was told, “We have fingerprints on the jogger's pants. They're satin, they're a very smooth surface . . . I'm just going to compare your prints to the prints we have on the pants, and if they match up, you don't have to tell me anything. Because you're going down for rape.”²⁷⁶

Polygraph machines were used as part of efforts to secure confessions in at least seven of these cases. Eddie Lowery was told that he failed a polygraph, as were James Dean, Jeffrey Deskovic, Byron Halsey, Travis Hayes, John Kogut, and Debra Shelden.²⁷⁷ Indeed, the court permitted the polygraph results

486-87 (noting the Court has approved deceptive techniques, but counseling against their use when they could be “apt to make an innocent person confess”); Laurie Magid, *Deceptive Police Interrogation Practices: How Far Is Too Far?*, 99 MICH. L. REV. 1168, 1169 (2001).

273. See Kassin et al., *Police-Induced Confessions*, *supra* note 3, manuscript at 15 (surveying studies and concluding, “Over the years, across a range of subdisciplines, basic research has revealed that misinformation renders people vulnerable to manipulation”).

274. Miller Trial Transcript, *supra* note 72, at 1020-22.

275. Vasquez Opposition Memorandum, *supra* note 165, at 3.

276. Sydney H. Schanberg, *A Journey Through the Tangled Case of the Central Park Jogger*, VILLAGE VOICE, Nov. 20, 2002, at 36, 38.

277. See *Lowery v. County of Riley*, 522 F.3d 1086, 1089-90 (10th Cir. 2008) (describing polygraph examination of Lowery); *People v. Kogut*, 805 N.Y.S.2d 789, 790-92 (Sup. Ct. 2005) (describing polygraph examination of Kogut); Joe Duggan, *Pressure On to Cut a Deal*, LINCOLN J. STAR, May 7, 2009, at A1, A8 (declaring that, “Initially [James Dean] said he had no involvement in the crime. But he got scared after he failed his polygraph test” and Debra Shelden passed a polygraph test during which she implicated

concerning Halsey to be introduced at his trial.²⁷⁸ Deskovic was interrogated during his polygraph exam, which was conducted, as an officer explained, to “Get the confession,” and he was then interrogated further after being told he had failed the polygraph test.²⁷⁹ Scholars have contended that while polygraphs may not be a reliable means to test the truthfulness of a suspect, they can be used to exert pressure on a suspect and secure admissions.²⁸⁰ In these cases, telling innocent suspects that they failed a polygraph may have played a role in their false confessions.

D. *Trial Rulings on Suppression of Confessions*

Almost all of these exonerees’ defense attorneys moved to have the inculpatory statements suppressed, and in each case the confession was ruled admissible. At least twenty-eight of these exonerees challenged their confessions pretrial. For thirteen exonerees a copy of the suppression hearing was obtained.²⁸¹ The only exonerees who we know did *not* challenge their confession at trial were nine who pleaded guilty and had no trial, and one, Rolando Cruz, who was convicted at trial. Cruz’s defense attorneys apparently did not challenge his alleged statements regarding a “vision” of the crime because they were noncustodial and also because the defense theory was that police had made those statements up.²⁸² (The defense may have been right; at Cruz’s third trial, an officer testified that his prior testimony corroborating his colleague’s recounting of the “vision statement” was false.²⁸³) Pretrial suppression hearings are not always transcribed. For two cases the available records were not clear whether the exonerees moved to have statements suppressed.²⁸⁴ In sum, of those twenty-nine exonerees who went to trial and

herself and others in a murder); Email from David Park, The Innocence Project New Orleans, to author (Jan. 18, 2010, 11:27:00 EST) (on file with author) (confirming that Travis Hayes received a polygraph examination between interrogation sessions).

278. *State v. Halsey*, 748 A.2d 634, 635 (N.J. Super. Ct. App. Div. 2000).

279. Deskovic Trial Transcript, *supra* note 9, at 1034, 1181-86 (Nov. 29-30, 1990); *see also* Deskovic Report, *supra* note 10, at 14-15. Ron Williamson was given polygraph tests twice with inconclusive results, but they preceded his alleged admissions. *See* GRISHAM, *supra* note 264, at 74.

280. *See, e.g., LEO*, *supra* note 7, at 85-89 (describing the evolution in the use of polygraphs).

281. Four exonerees who pleaded guilty did not move to suppress their confessions. A fifth, David Vasquez, moved to suppress his confession before pleading guilty and I obtained motion papers, but the hearing transcript was not in the court file.

282. According to Steven Drizin of the Center on Wrongful Convictions, there was no motion to suppress Cruz’s confession because the defense theory was not that the noncustodial confession never happened, but rather that it was a dream statement made up by the police.

283. *See* SCOTT TUROW, *ULTIMATE PUNISHMENT: A LAWYER’S REFLECTIONS ON DEALING WITH THE DEATH PENALTY* 45 (2003).

284. Those cases are those of L. Rollins and R. Miller.

whose available records indicate whether a pretrial challenge to the admission of the confession was made, twenty-eight of them—or ninety-seven percent—made such a challenge, and all were unsuccessful.

The rulings provide insight into the role of judicial review. In some cases, a court's ruling can be explained by the lack of any indicia of coercion in the record. Research suggests that innocent individuals may falsely confess voluntarily during police interrogations because they believe that "truth and justice will prevail" later even if they falsely admit their guilt.²⁸⁵ For example, Eddie Lowery described a long interrogation with verbal pressure and threats, but no physical threats, no congenital susceptibility to suggestion, nor other extreme psychological pressure placed upon him. He testified at trial that "after I was crying and everything and really just couldn't—couldn't handle myself or anything, you know, and finally they wanted to hear a confession and everything so I just made up a confession and told them."²⁸⁶ The court concluded:

He was not coerced into staying under the circumstances and looking at the totality of the case and all of the facts and circumstances this Court would find that the admissions given by this defendant were voluntarily made and were not a result of coercion, duress or unfairness on the part of the officers conducting the interrogation.²⁸⁷

In Douglas Warney's case, though he alleged coercion, the court relied heavily on how he initially approached police volunteering knowledge about the crime, noting: "This was information that he volunteered to submit himself to present, and he followed through on that"²⁸⁸

Though the Supreme Court has ruled out reliance on reliability as an independent reason to exclude a confession, judges noted the perceived reliability when admitting these confessions and finding them to be voluntary. In the Godschalk case, the court emphasized when ruling that the confession would be admissible that Mr. Godschalk "had given information to the detectives which was not released to the general public."²⁸⁹

Similarly, in the trial of Paula Gray, the court ruled that where *Miranda*

285. Kassin, *On the Psychology of Confessions*, *supra* note 4, at 215, 224 (surveying research).

286. Trial Transcript at 257, *State v. Lowery*, No. 81CR 575 (Kan. Dist. Ct. Jan. 6, 1982).

287. Transcript of Defendant's Motion to Suppress Confession at 117, *Lowery*, No. 81CR 575 (Nov. 12, 1981).

288. Transcript of Suppression Hearing at 6, *People v. Warney*, No. 96-0088 (N.Y. Sup. Ct. Feb. 11, 1997).

289. Transcript of Suppression Hearing at 154, *Commonwealth v. Godschalk*, No. 934-87 (Pa. Ct. Com. Pl. May 27, 1987). The judge also believed that Godschalk was not in custody for *Miranda* purposes (stating he voluntarily accompanied the police, was free to leave when he wanted, and the door was not locked) and found that Godschalk knowingly, intelligently, and voluntarily waived his rights when they were given and denied the motion to suppress his confession statement. *Id.* at 156.

warnings had been properly given once she was in custody, and where “[n]o force, threats or prohibited conduct in police procedures in [the court’s] judgment occurred in the Homewood Police Department,” the confession was voluntary.²⁹⁰ The court noted, “[I]ncidentally, the defendant testified with skill, with knowledge, explicitly, extremely clear, made her points well and all it means to me is whether she’s in twelfth grade or whatever her educational level is she’s a very intelligent person. That’s my judgment and those are my findings and my decision.”²⁹¹

Ron Williamson’s trial counsel raised the issue of voluntariness midtrial, but the court reviewed law enforcement testimony and ruled the statement voluntary, stating, “Based on the evidence presented, I find that the burden of the State has been met, and that the statement was voluntarily given for the purpose of being received into evidence and considered by the jury.”²⁹²

In only a few of these trials was the jury charge transcribed and obtained. A typical instruction provided in Bruce Godschalk’s case explained that the voluntariness inquiry involves an assessment of “all facts and circumstances surrounding” the confession.²⁹³ In Jeffrey Deskovic’s case, the jury was instructed to consider whether the confession statements “are true or false in whole or in part.”²⁹⁴ The judge explained that the jury should examine not just voluntariness, but reliability, asking: “Are the facts of the statement or statements consistent with or inconsistent with the facts as presented by witnesses? Is the Defendant’s statement or statements probable or improbable? Did the Defendant have any motive or did he lack any motive for giving a false statement or statements?”²⁹⁵

One of these exonerees, Nathaniel Hatchett, had a bench trial, at the conclusion of which the judge as fact finder explained the reasons supporting the conviction. Though the victim in that case had been raped by a single stranger-assailant, and DNA testing of rape kit evidence at the time of the trial excluded Hatchett, the judge explained that “in light of the overwhelming evidence that the Court has . . . the Court does not find that the laboratory analysis is a fact which would lead to a verdict of acquittal.”²⁹⁶ The judge

290. Paula Gray Trial Transcript, *supra* note 259, at 1313-14 (Oct. 4, 1978).

291. *Id.* at 1314. In contrast, when the issue on appeal was whether codefendant Dennis Williams’s attorney adequately impeached Paula Gray’s competency, the Supreme Court of Illinois instead concluded that her mental limitations were obvious to the jury: “[T]he cold record on appeal amply demonstrates Gray’s limitations as a witness. Gray’s testimony is replete with instances of forgetfulness, feigned or honest, her mental dullness and impeachment, all of which the jury evaluated firsthand.” *People v. Williams*, 588 N.E.2d 983, 1009 (Ill. 1991).

292. Williamson Trial Transcript, *supra* note 123, at 465, 475.

293. Godschalk Trial Transcript, *supra* note 145, at 238-39 (May 29, 1987).

294. Deskovic Trial Transcript, *supra* note 9, at 1599 (Dec. 5, 1990).

295. *Id.*

296. Trial Transcript at 280, *People v. Hatchett*, 97-1497-FC (Mich. Cir. Ct. Mar. 6, 1998).

emphasized that despite that powerful DNA evidence,

[I]n this case there is an abundance of corroboration for the statements made by Mr. Hatchett to the police after his arrest, about what happened during the assault on [the victim] as well as what happened afterwards with the property, the keys, his punching of the ignition and the Court finds the statements, therefore, to be of overwhelming importance in determining the outcome of the trial.²⁹⁷

E. *Use of Experts*

Based on materials obtained, only four exonerees had trial or pretrial testimony from experts, such as psychologists or psychiatrists, concerning their confessions. These exonerees were David Allen Jones, Jerry Townsend, David Vasquez and Earl Washington, Jr. In Vasquez's case, the hearing transcripts are not in the court file; the court merely held that there was "conflicting evidence given by the psychiatrists at the evidentiary hearing."²⁹⁸ David Allen Jones retained a clinic psychologist who testified that he found Jones "mentally retarded."²⁹⁹ In other cases, only the prosecutor retained an expert.³⁰⁰

At Jerry Townsend's suppression hearing, there was a lopsided battle of the experts. What was surprising, given a typical lack of defense resources, was that this contest was weighted in the defense's favor. The defense called seven different clinical psychologists and psychiatrists as experts. These doctors agreed that Townsend could not readily understand the *Miranda* warnings or knowingly waive his rights, lacked capacity to be tried, and did not confess voluntarily.³⁰¹

Dr. Jethro W. Toomer described that Townsend was retarded with an I.Q. of fifty-nine to sixty-one and the mental development of a six- to nine-year-old.³⁰² The expert further testified that he is "easily led" and "highly suggestible."³⁰³ Dr. Frank Loeffler explained that Townsend not only lacked capacity and had a mental age of a seven- to nine-year-old, but that he "confabulates almost all the time," engaging in "unconscious making up of

297. *Id.* at 276-77.

298. Vasquez Winston Memorandum, *supra* note 235, at 3.

299. Return to People's Petition for Writ of Habeas Corpus at 25, *In re* David Allen Jones, No. BA071698 (Cal. Super. Ct. June 17, 2004).

300. The Deskovic case discussed next is an example, as is the case of Calvin Ollins. *See* *People v. Ollins*, 606 N.E.2d 192, 197 (Ill. App. Ct. 1992).

301. Townsend Trial Transcript, *supra* note 251, at 13, 45, 74, 98, 109, 140, 179 (Apr. 25, 1980). Those doctors were: Anastasio M. Castiello, M.D., *id.* at 8; Jethro W. Toomer, Ph.D., *id.* at 38; Frank Loeffler, Ph.D., *id.* at 68; Mario E. Martinez, M.D., *id.* at 97; Richard N. Carrera, Ph.D., *id.* at 107; David Nathanson, Ph.D., *id.* at 133; and Norman Reichenberg, Ph.D., *id.* at 170.

302. *Id.* at 42-43, 50.

303. *Id.* at 14, 46, 57.

material to fill in for what one doesn't know," like a person who is "senile."³⁰⁴ Dr. Mario Martinez added that Townsend speaks like a "madman" and, in medical terms, "is intellectually limited and functioning at a psychotic level."³⁰⁵

The outgunned prosecution called only one expert witness, who only had a masters degree in psychology (not a doctorate).³⁰⁶ That witness measured Townsend's "social adaptive" ability to be that of a nineteen-year-old, despite his IQ being "significantly below" average.³⁰⁷ He testified that Townsend would understand his *Miranda* rights.³⁰⁸ The State also called one of the detectives that interrogated Townsend, who gave his lay opinion that Townsend had a "very severe speech impediment," but had "street smarts" and "made it clear that he understood his rights."³⁰⁹ The prosecutor then elicited lengthy testimony concerning the "specific facts" that Townsend reportedly knew about how the crimes were committed: "he can remember specific details of each particular crime which we have been able to, of course, corroborate."³¹⁰ Indeed, in examining defense experts the prosecutor made the point that Townsend could not have been led if he volunteered facts that only the culprit could have known.³¹¹

In the end, the judge found this battery of defense expert testimony to be "testimony of convenience" and found that "the credibility of it is rather low and the believability of it just as low, so that I had to really look elsewhere for my decision."³¹² The judge never cited what that other source of authority was, but simply ruled: "I find that Mr. Townsend was sufficiently societally, if I may use that word, and functionally intelligent to know—to know his *Miranda* rights and to significantly and sufficiently waive them"³¹³ The judge added that, after all, Townsend "had so much knowledge of street parlance."³¹⁴ He found it a closer question whether Townsend was deluded and confessed involuntarily, but denied relief, noting, "You know, it would be good if all confessions were perfect."³¹⁵ The judge explained, "I have yet to see a perfect confession, but I've not been in the criminal area that long. . . . I find that the confession even with [the promises and inducements] was voluntarily made and

304. *Id.* at 79-80.

305. *Id.* at 104.

306. The State apparently also introduced into the record "transcriptions" of expert evaluations they had conducted. *Id.* at 100.

307. *Id.* at 395-96 (May 8, 1980).

308. *Id.* at 398-99.

309. *Id.* at 491, 493, 502 (May 9, 1980).

310. *Id.* at 495-98.

311. *Id.* at 23 (Apr. 25, 1980).

312. *Id.* at 515 (May 9, 1980).

313. *Id.* at 515-16.

314. *Id.* at 516.

315. *Id.* at 517.

that if you took those to the point where you said to yourself, well, would he or would he have not gone forward had those statements not been made, I come to the conclusion that he would have.”³¹⁶

Townsend called the same experts at trial. The jury heard that he was “borderline retarded,” and exhibited patterns “consistent with the presence of brain damage” and “psychosis,” such that his memory would be totally “confused.”³¹⁷ Experts described again that Townsend was easily led and could falsely confess and that he could not distinguish right from wrong.³¹⁸ The State argued that Townsend’s actions indicated the work of a methodical serial killer. Townsend was convicted.³¹⁹ He served twenty-two years in prison before a Fort Lauderdale police reinvestigation ultimately led to DNA testing that cleared him and inculpated serial killer Eddie Lee Mosley (the DNA testing also linked Mosley to a murder for which Frank Lee Smith was falsely convicted).³²⁰

Earl Washington, Jr.’s counsel never requested funding for an expert and thus had no independent evidence to counter the evaluation of the state’s psychiatrist who readily concluded that Washington understood his *Miranda* rights.³²¹ However, the court had only asked that he be evaluated for his “present status” and capacity to stand trial. The psychiatrist did not examine his mental capacity at the time of the murder or interrogation, or whether his mental retardation could have impacted the voluntariness of his confession.³²² Thus, “A judge ruled that the statement was admissible after hearing from a state mental health expert that a man with an IQ of sixty-nine was competent to waive his rights to a lawyer during initial questioning—even though Washington still doesn’t know what the words ‘waive’ and ‘provided’ mean.”³²³

Other exonerees, had they obtained experts, might have presented evidence that they lacked capacity or otherwise were susceptible to coercion or suggestion. In the Central Park Jogger case, lawyers for defendants McCray and Salaam sought to introduce experts to testify regarding the suggestibility and vulnerability of their juvenile clients, but the court denied their requests and no experts were permitted to testify.³²⁴ In the Deskovic case, the district

316. *Id.*

317. *Id.* at 3539-42 (July 24, 1980).

318. *Id.* at 3399-3401, 3484, 3544-45.

319. *Id.* at 3958-59 (July 29, 1980).

320. See The Innocence Project, Profile of Jerry Townsend, <http://www.innocenceproject.org/Content/274.php> (last visited Nov. 20, 2009).

321. Washington Trial Transcript, *supra* note 133, at 124-25.

322. *Id.* at 12-13. Washington’s attorney later stated that he believed that the court would have denied any request for funding for an expert. Brooke Masters, *Missteps on Road to Injustice*, WASH. POST, Dec. 1, 2000, at A1, available at <http://www.deathpenaltyinfo.org/node/649>.

323. Masters, *supra* note 322.

324. See Trial Transcript at 3-6, 39, *People v. McCray*, No. 4762/89 (N.Y. Sup. Ct.

attorney's inquiry found that "the defense did not attempt to introduce psychiatric evidence that might have persuaded jurors that Deskovic was particularly vulnerable to the police tactics employed against him and that those tactics induced a false confession. In the absence of such evidence, the defense attack on the statements seemed scattershot and unfocused."³²⁵ Ron Williamson's lawyer decided not to raise the issue of his competency, despite "an actual judicial determination of his incompetency in the same district court in an unrelated case two and one-half years earlier," and despite Williamson having received treatment for many years due to "behavior indicative of schizophrenia, Bipolar Disorder, Borderline Personality Disorder, and Paranoid Personality Disorder"³²⁶ Williamson's habeas petition was granted in part because the federal court found his trial lawyer ineffective for failing to investigate his mental illness and its relevance to both his competency to stand trial and the voluntariness of his confession.³²⁷

Byron Halsey's defense lawyer, while moving to suppress the confession, did not raise an insanity defense after initially giving notice that they would, due to Halsey's objection that he was not guilty. The Judge made a record of this, stating, "And it is your decision based on—based on consultation with us that you've told us you didn't kill the children, therefore, you didn't want us to produce any evidence of any mental condition or anything like that in this case?" Halsey said, "Yes." Halsey's lawyer then asked him again if it was his choice, and Halsey said, "Yes. I ain't crazy. . . . I didn't do it."³²⁸

Travis Hayes's attorney did seek to introduce an expert, Dr. Salcedo, to present evidence that Hayes was mentally retarded, that he "had the diminished capacity, and he had the mental condition that would make him more susceptible to extensive interrogation, to being able to say things that were suggested to him, instead of things that were true," but the court rejected the motion, apparently finding that such expert testimony would be irrelevant.³²⁹

Also remarkable was the role of a psychologist in the Beatrice Six case who repeatedly spoke to the suspects following their arrest at the jail. He was also a deputy employed by the police department.³³⁰ Debra Shelden agreed at Joseph White's trial that this psychologist had not just been treating her, but

June 25, 1990) (denying request to permit psychiatric testimony, finding their reports unduly "speculative" as to the factors that could have caused defendants to have made involuntary and false confessions). Other exonerees may have introduced expert reports but not expert testimony, perhaps just for purposes of sentencing. As noted, it is also possible that others introduced expert reports or evidence at preliminary hearings that were not transcribed or obtained from available records.

325. See DESKOVIC REPORT, *supra* note 10, at 7.

326. Williamson v. Reynolds, 904 F. Supp. 1529, 1536 (E.D. Okla. 1995).

327. *Id.* at 1545.

328. Halsey Trial Transcript, *supra* note 263, at 57-58.

329. Hayes Trial Transcript, *supra* note 179, at 99-102.

330. See Paul Hammel, *Psychologist Had Dual Role in Confessions of Beatrice 6*, OMAHA WORLD-HERALD, Nov. 29, 2008, at A1.

had been working with her on her memory, because she could not remember anything about the crime. When asked, in regards to the dreams from which she derived much of her account, the psychologist “helped you with your memory regarding those dreams, did he not?,” she answered, “Yes.”³³¹

F. *Inculpatory Statement Cases*

Eight additional exonerees reportedly volunteered inculpatory information to police before any custodial interrogation began. Such volunteered statements typically lack any criminal procedure protection if not made while the suspect was deemed to be in custody.³³² Yet many were quite damaging at trial, precisely for the same reason that the false confessions were. That is, law enforcement claimed that the exoneree had freely volunteered nonpublic information concerning the crime; indeed, they could compellingly point out that the suspect was not in custody and was not being formally interrogated, and yet had disclosed involvement in the crime. Now that we know that these people were innocent, there is reason to doubt those assertions by law enforcement.

Five of those eight exonerees reportedly offered police details in their incriminating statements that were corroborated by crime scene evidence and/or were nonpublic facts in the investigation. For example, in Richard Danziger’s trial, the officer testified that he had stated that the victim “had been shot in the back of the head with a .22 caliber weapon.”³³³ Very powerful because of the unusual wardrobe choice was Marvin Mitchell’s reported admission that he wore pink pants, where the victim said her attacker was wearing “pinkish pants.”³³⁴

In Walter Snyder’s case, the detective testified that he

went to Mr. Snyder’s place of employment, asked [if] he would come down and talk to me for a few minutes in reference to a burglary. At no time did I mention this was burglary—rape. A pretext, as I wanted to get him to talk to me about a burglary. I brought him into headquarters and said I had information he committed a break in, not mentioning a specific address.³³⁵

The detective testified that Snyder had indicated knowledge both that a rape had occurred and of the address, stating “I didn’t rape that girl across the street.”³³⁶ He suggested to Snyder that the victim made advances on him.

331. White Trial Transcript, *supra* note 115, at 791-92.

332. *Oregon v. Elstad*, 470 U.S. 298, 311-14 (1985).

333. Danziger Trial Transcript, *supra* note 70, at 423.

334. Innocence Project Profile of Marvin Mitchell, <http://www.innocenceproject.org/Content/221.php> (last visited Nov. 20, 2009).

335. Joint Appendix at 80, *Commonwealth v. Snyder*, No. 0300-87-4 (Va. Ct. App. June 24, 1986).

336. *Id.*

According to the detective, Snyder had replied, “no, she raped me.”³³⁷ However, Snyder testified that his remark was expressed as a denial and not an admission. After the detective asked him to “[s]ay she came on to you,” Snyder testified that he had responded incredulously, “What, she raped me?”³³⁸ In contrast, the detective testified at trial that Snyder’s statement was not an expression of surprise, but should instead be understood as an admission.

These inculpatory statement cases show how the problem of contamination can extend beyond the interrogation room, highlighting the importance not only of recording complete interrogations, but of adopting other reforms to ensure that law enforcement assiduously avoid contamination.

G. *Postconviction Review of False Confessions*

The contamination of these confessions foreclosed appellate and postconviction relief. As developed in the “Judging Innocence” study, DNA exonerees “who falsely confessed did not always raise constitutional claims challenging the[] confession[], at least as reported in written decisions.”³³⁹ Seven of the twenty-two exonerees who falsely confessed and had written decisions during appeals or postconviction raised Fifth Amendment claims that their confession was involuntary, and three more alleged that their confession was obtained in violation of *Miranda*. Ten raised constitutional claims directly challenging their confession. None who brought claims regarding *Miranda* or coercion received any relief. Three others raised state law or indirect constitutional claims, and one of them received a reversal on a *Strickland* claim related to failure to challenge the confession at trial.³⁴⁰ The others, after having failed to exclude the confessions at trial, may have failed to challenge voluntariness on appeal and postconviction.

When denying relief, courts emphasized in thirteen exonerees’ cases the apparent reliability of these confessions. The courts often also cited to the “overwhelming” nature of the evidence against them and describing in detail the nonpublic and “fully corroborative” facts they each reportedly volunteered.³⁴¹ For example, a court denied Jeff Deskovic’s appeal stating,

337. *Id.* at 90.

338. *Id.* at 104.

339. *See* Garrett, *supra* note 2, at 90.

340. T. Hayes raised a Sixth Amendment claim that he should have been permitted to challenge his competence and his confession using expert testimony at trial; R. Williamson raised an ineffective assistance of counsel claim relating to failure to challenge his competency and confession; and Y. Salaam raised a state evidence law claim relating to maintaining interrogation of a juvenile after objecting parents were present.

341. The exonerees are: James Dean, Jeff Deskovic, Bruce Godschalk, Byron Halsey, Alejandro Hernandez, Nathaniel Hatchett, Steven Linscott, Freddie Peacock, Yusef Salaam, Jerry Townsend, Douglas Warney, Earl Washington, Jr., and Ron Williamson. *See* Washington v. Murray, 4 F.3d 1285, 1292 (4th Cir. 1993) (stating that Washington “had confessed to the crime not in a general manner, but as one who was familiar with the

“There was overwhelming evidence of the defendant’s guilt in the form of the defendant’s own multiple inculpatory statements, as corroborated by such physical evidence as the victim’s autopsy findings.”³⁴² The Illinois Supreme Court stated that Alejandro Hernandez “did not present an argument which convinces us that he learned the details of the crime contained in his ‘vision’ from law enforcement officers, unlike the defendant in *People v. Linscott*, (1985).”³⁴³ The citation to the prior Illinois Appellate Court decision in Steven Linscott’s case is doubly ironic in retrospect. Linscott was also years later exonerated by postconviction DNA testing.³⁴⁴

Even after obtaining DNA testing, exonerees faced obstacles where courts or other actors relied on the seeming reliability of their confessions. For example, Earl Washington, Jr. was granted clemency but denied a pardon in 1994 even after DNA testing excluded him.³⁴⁵ In some states, postconviction

minutiae of its execution”); *Godschalk v. Montgomery County Dist. Attorney’s Office*, 177 F. Supp. 2d 366, 367 (E.D. Pa. 2001) (quoting unpublished state court decision finding “plaintiff’s conviction ‘rests largely on his own confession which contains details of the rapes which were not available to the public’” (citation omitted)); *Townsend v. State*, 420 So. 2d 615, 617 (Fla. Dist. Ct. App. 1982) (“Townsend confessed to all of the collateral crimes as well as those for which he was charged, and he took the police to the scene and corroborated facts known to the police which only the killer would know.”); *People v. Hatchett*, No. 211131, 2000 WL 33419396, at *1 (Mich. Ct. App. May 19, 2000) (stating that “the prosecution presented overwhelming evidence” and “Officer Williams and Detective Van Sice testified that defendant’s statement included information that only the perpetrator of the crimes would know,” facts “fully corroborative” of the victim’s account); *State v. Dean*, 464 N.W.2d 782, 789 (Neb. 1991) (“[T]he presentence investigation contained numerous statements made by the defendant to law enforcement officers. Those statements were corroborated not only by the physical evidence found at the crime scene and the scientific examination of that evidence, but also by interviews with other people involved or intimately familiar with some details of the crimes against the deceased as heretofore related.”); *State v. Halsey*, 748 A.2d 634, 636-38 (N.J. Super. Ct. App. Div. 2000) (citing to “overwhelming” evidence of his guilt and describing each of the facts he supposedly volunteered in his confession); *People v. Peacock*, 417 N.Y.S.2d 339 (App. Div. 1979) (denying relief citing to “strong evidence of guilt, including defendant’s confession”); *People v. Warney*, 750 N.Y.S.2d 731, 732-33 (App. Div. 2002) (“Defendant confessed to the crime and gave accurate descriptions of many details of the crime scene.”); *People v. Salaam*, 590 N.Y.S.2d 195, 196 (App. Div. 1992) (“Details of this statement were corroborated overwhelmingly by substantial physical evidence.”); *Williamson v. State*, 812 P.2d 384, 396 (Okla. Crim. App. 1991) (“[T]he Appellant made certain admissions, in addition to a confession, which were corroborated by the extrinsic evidence.”).

342. *People v. Deskovic*, 607 N.Y.S.2d 957, 958 (N.Y. App. Div. 1994).

343. *People v. Cruz*, 521 N.E.2d 18, 25 (Ill. 1988) (citation omitted).

344. This was not due to the Illinois Supreme Court’s recognition of any flaw in Linscott’s confession. The Hernandez decision cited the Illinois Appellate Court that had found Linscott’s “dream” confession so patently unreliable that they found insufficient evidence to support his confession. However, the Illinois Supreme Court had then reversed, stating that Linscott “voluntarily came forward with an account of a ‘dream’ that contained many unusual details which correlated with the actual murder.” *People v. Linscott*, 500 N.E.2d 420, 424 (Ill. 1986).

345. See Virginia Governor L. Douglas Wilder’s Executive Clemency Offer to Earl Washington, Jr. (Jan. 14, 1994), *excerpts reprinted in Gov. Wilder’s Executive Clemency*

rules bar access to DNA testing or to a vacatur because courts rule that a confession is such strong evidence of guilt that a showing of innocence would be futile.³⁴⁶ For example, Byron Halsey was denied access to DNA testing in 2000, with the New Jersey court extensively recounting the confession statements and citing to the “overwhelming” evidence of his guilt.³⁴⁷

The experience of these exonerees who falsely confessed suggests that our postconviction system should not refuse to examine convictions simply because there was a confession. Courts should not uncritically rely on undocumented assertions that a suspect volunteered “inside information” about a crime.

IV. SUBSTANTIVE REGULATION OF CONFESSIONS

This Article concludes by discussing ways to reorient our criminal system towards regulating the substance of confessions. The Subparts that follow discuss possible reforms centered in trial courts, police departments, and postconviction courts. Whether the evidence from this small group of exonerated individuals supports the adoption of such wholesale reforms is beyond the scope of this Article. However, the false confessions studied suggest a worrisome problem, and it is worth considering solutions. Indeed, even before DNA testing brought false confessions to light, scholars had recommended adopting reforms such as recording entire interrogations. Now that DNA testing has provided powerful examples of false confessions, police departments, courts, and legislatures have begun to enact legislation in response. This Article suggests that, to the extent that such efforts are intended to prevent false confessions of the sort examined here, reforms enacted to date may be incomplete, due to the insidious nature of confession contamination.

A. *Substantive Judicial Review of Confessions*

First, constitutional criminal procedure could regulate reliability. As discussed, current constitutional criminal procedure fails to consider reliability, despite early Supreme Court cases that had focused on reliability. One way to understand the evolution of the Court’s jurisprudence is in the context of its move away from a concern with torture and physical abuse towards regulating modern psychological interrogation. The concern with the possible unreliability of coerced confessions has ancient roots. Dating back to Roman and then medieval law approving torture in certain capital cases, jurists adhered to strict

Offer (1/14/94), FRONTLINE, <http://www.pbs.org/wgbh/pages/frontline/shows/case/cases/washingtonclem.html>.

346. See, e.g., *Commonwealth v. Young*, 873 A.2d 720 (Pa. Super. Ct. 2005). Further, a confession may be access to testing in certain states that specify that testing be limited to those for whom “identity” was an issue at trial. See Garrett, *supra* note 195, at 1680-81 (listing states with such statutes).

347. *State v. Halsey*, 748 A.2d 634, 636 (N.J. Super. Ct. App. Div. 2000).

rules prohibiting suggestive questioning where the “examining magistrate was supposed to elicit evidence, not supply it.”³⁴⁸ Torture was to be used to assess whether the suspect knew crime details that “no innocent person can know,” and authorities would seek to verify accuracy of those facts.³⁴⁹

The Supreme Court, in its early decisions applying the Due Process Clause to police interrogations, was concerned with physical torture, lynch mobs, and the “third degree.” By the 1950s and 1960s, during a time of transition as police adopted modern psychological interrogation techniques, the Court highlighted concerns of reliability, noting in its decisions the suggestibility of certain defendants.³⁵⁰ However, the concern with reliability gradually dissipated. The apogee of the Court’s promotion of voluntariness at the expense of reliability was its decision in *Colorado v. Connelly*. There the Court acknowledged that the confession of a chronic schizophrenic who believed he was hearing the “voice of God” during his interrogation “might be proved to be quite unreliable.”³⁵¹ Because police applied no undue pressure during the confession, the patent unreliability of the confession statements was not of constitutional concern. Criminal procedure regulates solely the provision of *Miranda* warnings at the outset of a custodial interrogation and the voluntariness of admissions of guilt. Having found the admission of guilt voluntary, a court does not assess the formation of a confession narrative, no matter how tainted or unreliable.

This constitutional jurisprudence does not recognize that abuse of psychological interrogation methods can generate false confessions through the use of suggestive questioning or disclosure of facts. As discussed, unlike the Court, police training recognizes the dangers of confession contamination and bars the use of leading questions as to crime scene facts. Further, social science research dating back decades has shown that not only can psychological pressure induce confessions, but that innocent suspects may internalize and repeat a crime narrative.³⁵² The examples discussed here provide new evidence that defendants may be wrongly convicted based on contaminated confessions.

This perverse gap in our constitutional criminal procedure is potentially quite harmful, as the contamination of the substance of these exonerees’ confessions suggests. In these false confession cases, contamination went undetected for years until DNA testing independently proved innocence. It is unknown how often such contamination occurs in cases in which no DNA testing exonerates because interrogations are not routinely recorded so as to document any disclosure of key facts.

This Article contends that our existing criminal procedure not only ignores

348. JOHN H. LANGBEIN, TORTURE AND THE LAW OF PROOF 15 (1977).

349. *Id.* at 5.

350. *See, e.g.,* *Culombe v. Connecticut*, 367 U.S. 568, 625 (1961).

351. 479 U.S. 157, 161, 167 (1986).

352. *See supra* note 66.

glaring evidence of unreliability, but it also reinforces dangers of contamination by crediting assertions of “inside knowledge” without assessing whether those facts were truly volunteered and ignoring the risk that those facts could have been disclosed. Courts routinely, as discussed in the last Subpart, emphasize that there was not coercion by focusing on the apparent reliability of confession statements. Such reasoning may ignore that the apparent reliability could be the product of the very coercion that the defendant challenges. Courts credit evidence of reliability without asking whether that evidence is sound. In so doing, courts in effect excuse procedurally unconstitutional coercion by crediting the false substantive product of that coercion.

Courts could instead question indicia of reliability absent assurances that law enforcement did not disclose those key facts. They could assess whether crucial facts were actually volunteered by the suspect. Such a hearing could be readily conducted if police produce a complete record of the interrogation, as discussed in the next Subpart. Such an approach is consonant with the Court’s focus on reliability outside the interrogation context, particularly in decisions such as *Daubert* that focus on judges as “gatekeepers charged with the responsibility of excluding unreliable evidence.”³⁵³ Such an approach also reflects the Court’s approach towards eyewitness identifications, recognizing dangers of suggestion and contamination of memory and requiring courts to evaluate reliability prior to admitting the identification in court.³⁵⁴

A turn from the criminal procedure focus on voluntariness to evaluation of the reliability of the substance of the confession narrative has already begun, in part in response to these false confession cases. Social scientists and legal scholars have recommended that courts evaluate the reliability of entire interrogations rather than simply focus on the voluntariness of the custodial admission of guilt.³⁵⁵ Richard Leo and Richard Ofshe have proposed that courts conduct such hearings and that “the reliability of a suspect’s confession can be evaluated by analyzing the fit (or lack thereof) between the descriptions in his postadmission narrative and the crime facts.”³⁵⁶ As discussed, in most of these exonerees’ cases there was a lack of fit and non-volunteered details were inconsistent with crime scene evidence. Richard Leo, Steven A. Drizin, Peter J. Neufeld, Bradley R. Hall, and Amy Vatner proposed mechanisms for conducting such hearings, including allocation of burdens of proof in order to efficiently marshal the evidence and to assess reliability.³⁵⁷ Judicial hearings

353. See Leo et al., *supra* note 43, at 487.

354. *Manson v. Brathwaite*, 432 U.S. 98, 119 (1977). The *Manson* inquiry has other deficiencies, however, including that eyewitness certainty provides evidence of reliability; for a discussion of those issues, see Garrett, *supra* note 2, at 80-81.

355. See, e.g., Richard A. Leo & Kimberly D. Richman, *Mandate the Electronic Recording of Police Interrogations*, 6 CRIMINOLOGY & PUB. POL’Y 791 (2007).

356. Leo et al., *supra* note 43, at 520.

357. See *id.* at 531-35 (detailing “tripartite” test for assessment of recorded interrogations).

examining reliability might have brought to light inconsistencies in many of these false confessions.

Further, courts could ensure that experts evaluate individuals that possess indicia of suggestibility, such as juveniles and mentally disabled individuals. Few courts, as described, appointed experts in these exonerees' cases. When courts evaluate eyewitness identifications and assess whether the eyewitnesses' account was corrupted by police suggestion, they have elicited testimony by experts who have long conducted social science research on eyewitness memory. Some courts permit such experts to testify to the jury on the problem of eyewitness misidentifications or have instructed the jury on such dangers.³⁵⁸ Similar approaches can be used in cases raising indicia of suspect suggestibility and dangers of confession contamination. Jury instructions can more clearly identify the danger that facts may be disclosed to a suggestible suspect. Experts can educate the jury on the risks of confession contamination, particularly in cases involving vulnerable individuals like juveniles and the mentally disabled. A recorded interrogation can provide a clear record that such experts can interpret. Such social science expert testimony regarding confessions is increasingly common.³⁵⁹

Finally, an understanding of the vulnerability of confessions to contamination can inform courts reviewing trials postconviction, particularly in cases involving persons vulnerable to suggestion, such as the juveniles and mentally disabled exonerees studied here. Courts may be particularly suspicious of confessions raising such indicia of suggestion, particularly where the interrogation involved deception, threats, or lengthy questioning. The experience of these exonerees who falsely confessed suggests that our postconviction system should not refuse to examine convictions simply because there was a confession. Courts should credit "inside knowledge" offered during interrogations only if police have a record of the entire interrogation.

Some cases will not be suited for reliability review. Some cases involve thin confession statements that are not reliable but are also not unreliable either. Examples include cases in which the suspect confesses to no facts, but merely says he did it, like exoneree Travis Hayes. Confessions involving suspects who are acquainted with the victim or the crime-scene cannot be as easily evaluated for reliability. Take the example of a defendant claiming to have falsely confessed but who was the first to discover the body of the victim. Even if innocent, the suspect would have certain knowledge of the crime scene.

358. JOHN MONAHAN & LAURENS WALKER, *SOCIAL SCIENCE IN LAW* 567-605 (6th ed. 2006).

359. See LEO, *supra* note 7, at 314-15. For a study suggesting that such expert testimony can affect mock-juror decisionmaking, see Iris Blandon-Gitlin, Kathryn Sperry & Richard A. Leo, *Jurors Believe Interrogation Tactics Are Not Likely to Elicit False Confessions: Will Expert Witness Testimony Inform Them Otherwise?*, 16 *PSYCHOL., CRIME & L.* (forthcoming 2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1420206.

However, police investigators are trained to examine the scene and uncover additional information not obvious to an untrained observer but which the culprit would have known. Nevertheless, reliability review will likely prove most valuable in cases involving stranger-perpetrators.

The Supreme Court is unlikely to reverse a many-decades-long turn in its jurisprudence away from reliability towards voluntariness. Courts have not been conducting such pretrial reliability hearings, and states have not yet adopted such criminal procedure reforms. On the other hand, courts do increasingly permit expert testimony, and perhaps the experiences of these exonerees will influence approaches to postconviction review.

B. *Recording Entire Interrogations*

One reason courts may not have previously focused on reliability is that assessing reliability poses great difficulties. Absent a recording of the interrogation, courts were faced with a swearing contest between the defendant alleging coercion and law enforcement denying coercion. A robust reliability review faces a second order problem illuminated by these false confessions. As these exonerees' cases show, to the extent that facts are disclosed to the suspect, the confessions appear uncannily reliable. The courts that ruled in these exonerees' cases thought that the exonerees had uttered information that only the culprit could have known. Had the courts conducted a reliability review, they likely would have found these false confessions reliable.

A complete interrogation record enables meaningful reliability review and could help to prevent the problem of confession contamination. Commentators have advocated that the problem has a "clear solution."³⁶⁰ Police should be required to "record the entire interrogation so that the trial judge can determine whether police contamination has occurred" and the judge can then "analyze whether the suspect could have gained knowledge of key details from facts released to the public by the media."³⁶¹ If police disclose facts during a recorded interrogation, then any contamination of the confession is documented. As Richard Ofshe explains, "Tape recording will prevent police from doing the extraordinary things that need to be done to cause an innocent person to falsely confess."³⁶² Recording can also help to prevent unintentional contamination, as in the case Detective James Trainum described.

Ten jurisdictions now require videotaping of at least some interrogations by statute, and in seven additional states, supreme courts have either required or encouraged electronic recording of interrogations.³⁶³ An increasing number of

360. See Leo et al., *supra* note 43, at 523; see also Steven A. Drizin & Beth A. Colgan, *Let the Cameras Roll: Mandatory Videotaping of Interrogations Is the Solution to Illinois' Problem of False Confessions*, 32 LOY. U. CHI. L.J. 337, 339-41 (2001).

361. Leo et al., *supra* note 43, at 523.

362. See Dolan & Larrubia, *supra* note 153.

363. See D.C. CODE § 5-116.01 (2009) (requiring police to record all custodial

police departments voluntarily record interrogations and have reported positive experiences doing so.³⁶⁴

Additional resources invested in improving the interrogation process may benefit all sides. False negatives, or accurate confessions excluded by courts, may be more common than false confessions. Indeed, recording entire interrogations has been touted by policing professionals because it helps police to show that a confession was voluntary. The Inbau and Reid treatise advocates recording interrogations because it also helps police to counter false recantations by suspects.³⁶⁵ Scholars have suggested that recording may raise new questions, such as issues of observer bias based on the angle of the camera.³⁶⁶ Some speculate that the presence of cameras may discourage true

investigations); 725 ILL. COMP. STAT. ANN. 5/103-2.1 (West 2009) (requiring police to record interrogations in all homicide cases); ME. REV. STAT. ANN. tit. 25, § 2803-B (2009) (mandating recording “interviews of suspects in serious crimes”); MD. CODE ANN., CRIM. PROC. § 2-402 (2009) (requiring that law enforcement make “reasonable efforts” to record certain felony interrogations “whenever possible”); N.C. GEN. STAT. § 15A-211 (2009) (requiring complete electronic recording of custodial interrogations in homicide cases); TEX. CODE CRIM. PROC. ANN. art. 38.22, § 3 (Vernon 2007) (rendering unrecorded oral statements inadmissible, but only if the statement does not contain “assertions of facts or circumstances that are found to be true”); WIS. STAT. ANN. §§ 968.073, 972.115 (West 2009) (requiring recording of felony interrogations and permitting jury instruction if interrogation not recorded); 2009 Mont. Laws (West), H.B. 534 (to be codified at MONT. CODE ANN. § 46-4); 2009 Or. Laws ch. 488 (West) (to be codified at OR. REV. STAT. § 165.540); IND. R. EVID. 617 (requiring that in order to be admissible entire interrogations in felony criminal prosecutions must be recorded); *Stephan v. State*, 711 P.2d 1156, 1158 (Alaska 1985) (“[A]n unexcused failure to electronically record a custodial interrogation conducted in a place of detention violates a suspect’s right to due process”); *State v. Hajtic*, 724 N.W.2d 449, 456 (Iowa 2006) (“[E]lectronic recording, particularly videotaping, of custodial interrogations should be encouraged, and we take this opportunity to do so.”); *Commonwealth v. DiGiambattista*, 813 N.E.2d 516, 535 (Mass. 2004) (allowing defense to point out failure to record interrogation and calling unrecorded admissions “less reliable”); *State v. Scales*, 518 N.W.2d 587, 592 (Minn. 1994) (“[A]ll questioning shall be electronically recorded where feasible and must be recorded when questioning occurs at a place of detention.”); *State v. Barnett*, 789 A.2d 629 (N.H. 2001); *State v. Cook*, 847 A.2d 530, 547 (N.J. 2004) (“[W]e will establish a committee to study and make recommendations on the use of electronic recordation of custodial interrogations.”); *In re Jerrell C.J.*, 699 N.W.2d 110, 123 (Wis. 2005) (“[W]e exercise our supervisory power to require that all custodial interrogation of juveniles in future cases be electronically recorded where feasible, and without exception when questioning occurs at a place of detention.”).

364. A recent survey of 631 police investigators found that eighty-one percent believed that interrogations should be recorded. See Kassin et al., *Police Interviewing and Interrogation*, *supra* note 3, at 385, 393.

365. See INBAU ET AL., *supra* note 64, at 393-97 (noting “some clear benefits of videotaping”). However, the treatise does object to mandatory electronic recording requirements. *Id.* at 395-97.

366. See, e.g., Saul M. Kassin & Gisli H. Gudjonsson, *The Psychology of Confessions: A Review of the Literature and Issues*, 5 PSYCHOL. SCI. IN PUB. INT. 33, 61 (2004) (discussing remedies such as an “equal focus” camera angle); Celeste J. Snyder et al., *Videotaped Interrogations and Confessions: Does a Dual-Camera Approach Yield Unbiased and Accurate Evaluations?*, 27 BEHAV. SCI. & L. 451 (2009); G. Daniel Lassiter et al., *Criminal Confessions on Videotape: Does Camera Perspective Bias Their Perceived Veracity?*, 7

confessions and introduce costly false negatives.³⁶⁷ Studies and surveys of police departments that record interrogations suggest otherwise, where police can record surreptitiously, and where police have found that “they were able to get more incriminating information from suspects on tape than they were in traditional interrogations.”³⁶⁸ Thus, most commentators view videotaping as advantageous to law enforcement, capable of “rendering confessions more convincing, . . . assisting prosecutors in negotiating more acceptable plea bargains . . . and helping in securing convictions.”³⁶⁹

Further study may shed light on the efficacy of recording requirements, particularly as police departments increasingly record interrogations voluntarily. One way that scholars and police departments could further study the effect of recording on the problem of contamination of confessions would be to study sets of recorded interrogations to examine whether disclosure of facts is apparent from the recordings.

C. *Interrogation Reforms*

Additional police procedures can safeguard reliability, such as procedures intended to assure against contamination, assess suggestibility, and avoid coercion postadmission. Police practices are a crucial piece of any reform effort. Inbau and Reid have long recommended that police assiduously avoid disclosing key facts to suspects. However, even if a confession is videotaped in its entirety, if crucial facts are disclosed, courts may not suppress the confession statement. The state legislation just described does not require courts, in conducting a reliability review, to exclude recorded interrogations that display extensive feeding of facts. It is most critical that the police in the first instance safeguard the reliability of the entire interrogation.

CURRENT RES. IN SOC. PSYCHOL. 1, 7 (2001).

367. Lawrence Rosenthal, *Against Orthodoxy: Miranda Is Not Prophylactic and the Constitution Is Not Perfect*, 10 CHAP. L. REV. 579, 606-07 (2007) (questioning whether videotaping can curb abuses, particularly tactics courts condone).

368. See THOMAS P. SULLIVAN & NW. UNIV. SCH. OF LAW CTR. ON WRONGFUL CONVICTIONS, POLICE EXPERIENCES WITH RECORDING CUSTODIAL INTERROGATIONS 22 (2004) (presenting results of a survey of over two hundred police departments); see also LEO, *supra* note 7, at 296 (“Electronic recording is the most important and compelling policy reform available for the problems of American police interrogation.” (citation omitted)); CAROLE F. WILLIS ET AL., THE TAPE-RECORDING OF POLICE INTERVIEWS WITH SUSPECTS: A SECOND INTERIM REPORT 34-35, 73-74 (1988) (reviewing the recording requirement in Great Britain); Thomas P. Sullivan & Andrew W. Vail, *The Consequences of Law Enforcement Officials’ Failure to Record Custodial Interviews as Required by Law*, 99 J. CRIM. L. & CRIMINOLOGY 215, 220-21, 228-34 (2009) (listing police departments that record custodial interrogations and citing to the enthusiasm of “hundreds of law enforcement officers” interviewed); Nadia Soree, Comment, *When the Innocent Speak: False Confessions, Constitutional Safeguards, and the Role of Expert Testimony*, 32 AM. J. CRIM. L. 191, 258-61 (2005) (reviewing literature recommending mandatory videotaping).

369. See Cassell, *supra* note 238, at 489.

First, police could ensure that all interrogations are recorded in their entirety, as departments increasingly do. Such recordings should include both the suspect and detectives so that any nonverbal cues can be observed. Videotaping policies could be bolstered by clear policies and training regarding the nondisclosure of key investigative facts. Such facts should be documented in the investigative file, and as Inbau and Reid recommend, a record should be made that they were not disclosed to the public, including the press, suspects, and witnesses.

Second, additional procedures can structure the interrogation itself to assure that key facts are not disclosed. For example, police can initially use as an interrogator a detective who was not involved in the investigation, in effect adopting a “double blind” technique. Following that “double blind” portion of the interrogation, the lead detective who is familiar with the case could then test the suspect’s knowledge of key crime scene facts. Other “double blind” tests could be employed, such as reverse identifications like the one conducted in Lafonso Rollins’ case, but conducted in a double blind fashion to avoid the risk of suggestion.

Third, police can analyze and test the fit between the suspect’s narrative and crime scene facts. They can do this not only by examining whether the suspect volunteers key crime scene facts, but also by asking leading questions regarding facts inconsistent with how the crime occurred. Police should be sure to investigate each of the facts offered in the confession to test whether they are corroborated by crime scene evidence. If courts conduct reliability review, police would have a strong incentive to assess reliability in the first instance.

Fourth, police could modify current psychological interrogation techniques to focus not on disclosure of facts but on treatment of populations vulnerable to suggestion and coercion. Police can regulate the interrogations of suggestible and vulnerable individuals, such as juveniles or mentally disabled individuals. Fred Inbau has recommended adoption of “special protection” during such interrogations.³⁷⁰ Police can be trained to identify such individuals or they may retain experts. Police departments have adopted model policies for interrogating mentally handicapped or mentally ill individuals and for children and juveniles.³⁷¹ All departments should do so.

Techniques such as the use of fabrications and deception, while permitted under some circumstances by the Supreme Court, may be particularly problematic when dealing with such vulnerable individuals.³⁷² Lengthy interrogations may similarly be barred when dealing with such vulnerable suspects; some have suggested formally limiting the time permitted for such

370. Fred E. Inbau, *Miranda’s Immunization of Low Intelligence Offenders*, 24 PROSECUTOR: J. NAT’L DISTRICT ATT’YS ASS’N, Spring 1991, at 9, 9-10.

371. See LEO, *supra* note 7, at 312-14.

372. Commentators have called for barring deception in all interrogations. See Miriam S. Gohara, *A Lie for a Lie: False Confessions and the Case for Reconsidering the Legality of Deceptive Interrogation Techniques*, 33 FORDHAM URB. L.J. 791 (2006).

interrogations.³⁷³ Indeed, police may simply require as a matter of sound policy that such vulnerable individuals retain an attorney before being interrogated to ensure that inadvertent pressure does not secure a grossly unreliable or false account.³⁷⁴ More radical, some scholars have recommended that police could abandon the use of certain psychological techniques and conduct a hearing in which a judicial officer questions the suspect, at least in cases involving vulnerable individuals.³⁷⁵

As Richard Leo points out, “There is no single law, policy reform, or panacea that will solve all the problems associated with police interrogation and confession evidence in America.”³⁷⁶ The fundamentally adversarial nature of the investigative process may create incentives for law enforcement to bolster confession evidence through disclosure of facts to compliant suspects. Even a mandatory recording regime can be circumvented, perhaps with ease. If contamination typically occurs unintentionally, then an electronic record will provide a very useful protection. On the other hand, if police do occasionally depart from training and procedure, and try to disclose key facts to a suspect, then they may also try to circumvent a requirement that custodial interrogations be recorded. After all, police may have contact with a suspect outside of the interrogation room, in police vehicles, hallways, and detention cells. There was some suggestion in several exonerees’ cases that disclosures took place during crime scene visits. One scholar proposes extending recording requirements to apply to noncustodial questioning.³⁷⁷ Further, as in the case of David Vasquez, even if a recording shows that key facts were fed, that record might not prevent a conviction, even a wrongful conviction. Vasquez pleaded guilty after the court denied the motion to suppress the confession, perhaps assuming that the jury would not understand the significance of the confession contamination.

Not only do we not know how often confession contamination occurs, but due to its insidious nature, reforms may not completely eradicate the problem. However, reforms can effectively discourage contamination, particularly by documenting interrogations so that a record exists if facts are disclosed. Electronic recordings will make the task of reviewing interrogations easier than

373. Welsh S. White, *False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions*, 32 HARV. C.R.-C.L. L. REV. 105, 145 (1997) (“[T]he police should be allowed to interrogate a suspect for no more than five hours.”).

374. Some scholars have recommended that all suspects be provided with an attorney prior to interrogation. See, e.g., Charles J. Ogletree, *Are Confessions Really Good for the Soul?: A Proposal to Mirandize Miranda*, 100 HARV. L. REV. 1826, 1842 (1987).

375. See Albert W. Alschuler, *A Peculiar Privilege in Historical Perspective: The Right to Remain Silent*, 94 MICH. L. REV. 2625, 2669 (1996).

376. LEO, *supra* note 7, at 305; see also GUDJONSSON, *supra* note 7, at 537 (noting cases where even though the suspect had no knowledge about the offenses and the confession was therefore “unconvincing,” defendants were “still convicted on the basis of their confession”).

377. See, e.g., Lisa Lewis, *Rethinking Miranda: Truth, Lies, and Videotape*, 43 GONZ. L. REV. 199, 200, 237-38 (2007).

ever before, but courts would also need to assess reliability, both at trial and postconviction, while police adhere to policies designed to prevent contamination of confessions. So long as criminal cases rely on confession evidence as proof of guilt, the criminal justice system will need to adopt precautions against contamination.

CONCLUSION

Decades ago, commentators and courts doubted whether false confessions existed. Postconviction DNA testing has definitively proved that suspects do falsely confess, with tragic wrongful convictions as a result. The set of DNA exonerations provide a unique opportunity to study how false confessions can be constructed. This Article found that all but two of these exoneree confession narratives appeared reliable and corroborated by crime scene evidence. Police and prosecutors then reported at trial that defendants had volunteered crime details and therefore possessed “inside knowledge” of the crime. The contamination of these confessions remained undetected, perhaps explaining why for so long it was believed that a false confession could not occur.

Due to the contamination of exonerees’ confessions, the criminal justice system could not later untangle what transpired. Though many of these confessions displayed indicia of gross unreliability, the confessions all passed muster at trial and postconviction. Indeed, DNA testing excluded eight of these exonerees at the time of trial, but the confession of guilt was powerful enough to overcome the DNA evidence of innocence. Courts denied relief to some even after they obtained postconviction DNA testing. These false confessions withstood scrutiny precisely because they were bolstered by detailed facts that we now know must have been disclosed. Courts uniformly emphasized that these confessions contained admissions that only the true murderer or rapist could have known. Selective recording of many of these interrogations typically only cemented the contamination, where recording occurred after facts had already been disclosed to the innocent suspect.

Criminal procedure rules regulating confessions can be reoriented towards reliability. Our existing constitutional criminal procedure rules not only fail to examine confession reliability, but they can reward contamination by discounting evidence of coercion based on apparent evidence of reliability. Increasing numbers of local police departments and states have adopted one crucial reform: videotaping entire interrogations. Contaminated false confessions can be inexpensively discouraged by requiring recording of entire interrogations. At a minimum, revelation of the contamination of these false confessions supports further study and experimentation with reforms designed to regulate the substance of confessions. Additional reforms could focus on judicial review of confession reliability, use of experts at trial, and restructuring police practices. Confession contamination is a highly insidious problem about which little has previously been known. However, a renewed focus on the

reliability and transparency of the interrogation process may improve the accuracy of confessions and safeguard the integrity of the criminal process.