



Fox Rothschild Podcast

The Presumption of Innocence

Episode 41: The Dynamics of Decision-Making: Psychology and the Criminal Justice System

Featuring Matt Adams of Fox Rothschild and Dan Simon of USC Gould School of Law

Adams: Hi, everyone, and welcome to "The Presumption of Innocence," a podcast brought to you by the White-Collar Criminal Defense & Regulatory Compliance practice at Fox Rothschild.

I'm your host, Matt Adams. And today I have the great fortune of being joined by Dan Simon, the Richard and Maria Crutcher Professor of Law and Psychology at the University of Southern California Gould School of Law.

Professor, it's great to have you. Welcome to the program.

Simon: It's terrific being here. Thank you.

Adams: So, professor, I am sort of enamored a little bit by the way that you have harnessed cognitive science. And really, the ways that cognitive science and highlighting the ways that cognitive science have an adverse impact on our criminal justice system. And I read your book, *In Doubt: The Psychology of the Criminal Justice Process*, and it's chock-full of these blind spots that can result in wrongful convictions.

And we're coming on the heels of having Chris Fabricant on our program, of the Innocence Project, talking a lot about how DNA has really revolutionized the way that we can ferret out wrongful convictions. And I view your life's work as sort of going hand-in-glove in a way from that scientific perspective of making our system fair and better and more accurate.

Before we get into what the cognitive science shows about our criminal justice system, I want to talk to you about why you went into this field. What was it that brought you to dedicate so much of your professional life to studying this intersectionality between psychology and the criminal justice system?

Simon: Well, as to what brought me to this: as I was doing advanced degrees in law that many of your listeners might not be aware, you can do a master's and a Ph.D. equivalent in law after your J.D. and I, was enamored by questions of judicial decision-making. And, I was trying to figure out some aspects of what might explain how judges decide, particularly in certain circumstances where we kind of know where they're going to go and such, and that kind of drew me into psychology. And the



question then became, well, how do people make decisions? And that's a whole huge study of research.

I was interested particularly in what's called multi-attribute decision-making. Think of a judicial opinion. Think of how many moving parts there are. Legal arguments, if you take a brief and you break it into pieces, there's just tons of fragments of arguments, what we call inferences in psychology. And how do judges bring all of that together and take really difficult cases and come up with pretty very strongly determined sort of conclusions?

So that question then expanded into, well, how does the system actually handle the complexity of criminal investigations, criminal adjudication? Again, multiple pieces of evidence, multiple policy considerations, multiple actors playing different roles. And, and the list goes on if you think of the detectives and the witnesses and the prosecutors and the judges and so on.

How does all of that come together? How do people relate to one another? This is one big psychological fest, right? It's so many people making so many decisions based on other forms of human input. So, hence the turn to psychology.

And I'll, I'll just say it's, it's cognitive science, but it's also cognitive psychology. It's also social psychology. It's also decision-making research. Really, there's a rich petri dish there that's exploding with live organisms.

Adams: Well, if that one principal live organism that you mentioned at the center of the criminal justice system is a human and humans are inherently flawed, is your basic hypothesis that our criminal justice system is essentially just as flawed?

Simon: Well, humans are flawed, but humans are also pretty damn good at lots of things. And I was on the margins of a debate that has been going on for decades between economists and psychologists. Are we rational actors, as economists would suggest, or are we these kind of irrational fools, as some psychologists would suggest. And the answer is neither or both.

The point is, we're basically rational. We, you know, we get to work and we represent our clients and we produce podcasts and we go home and hug our kids and have, you know, and for the most part, we're making good decisions. We're adaptive. But, on the margins, we make horrible mistakes. Or we make mistakes that could have horrible ramifications.

So, the criminal justice system has, you know, its internal logic, but unfortunately its mistakes take on... its, I would say sort of a disproportionate role. Because there are lots of structural reasons why people are set up to make more of what we would call the cognitive errors than the cognitive rational choices.

Adams: I want to shift a little bit to your book, *In Doubt: The Psychology of the Criminal Justice System*. It's a fantastic read. It's from the academic perspective that you take in the book. It's very fitting that the footnotes to the cognitive science literature and this psychological and sociological literature really span just about half the book.



In a very truly academic sense you have done a review of the existing literature on these issues. And I think there's one piece from the introduction of your book, which in my mind signals how we can use your work to bring reform to the criminal justice system. And if you indulge me, I'll read it.

You write: "While the available psychological literature is neither perfect nor fixed in stone, it offers a wealth of sorely needed insight into the workings of the criminal justice system and it can show the way toward important reforms."

And from there you take, in wonderful fashion, the various segments of the criminal justice process, and you dissect them using this psychological sociological hypothesis that we can improve the criminal justice system by working through the flaws in the human condition. And, you know, I'd love to just explore a few of those with you. One of the chapters in your book explores investigation dynamics. And it explores the very human condition that goes into when investigators set out to find their guy, their subject, their defendant, the person who they believe did the crime.

What is the human condition? What role does the human condition have in that investigative process? Because these are just human beings, like you said, that go home and hug their kids and maybe coach their kids' baseball, softball, lacrosse, whatever the case may be. And we task them with these weighty responsibilities of finding somebody who may be dangerous or may have committed some grave offense.

What does their human condition tell us about the reliability of that work?

Simon: This is a poignant question, of course. And just to go back to where you started this, psychology has the advantage relative to other disciplines. A, it specializes in kind of, you know, diving inside people's heads and trying to figure out what's making them tick. And it has a particular advantage that it can actually go pretty granular if you compare it to, you know, other disciplines, including sociology and history and cultural history and philosophy and the like, which usually work at kind of macro levels, or maybe at meso levels, somewhere in between.

Psychology actually goes pretty damn granular. And that's a huge advantage to what you were mentioning before. We can actually break down tasks and say, well, this is conducive to a correct outcome. This is more likely to bias the result. And that's why this book is very much runs back and forth, as you were suggesting, between the research and what we can take away and actually make the system work better.

Specifically as for the psychology of a, let's say, a police investigator who's showed up on a crime scene and ultimately has to, or is expected at the end of an investigation, to come up with some sort of recommendation. From the system's perspective, there's pretty strong and sort of incentive, whether it's formal or informal, to close the case, so to speak, and refer the case to the prosecution, right? And that's a structural motivation that is built in the way we set up police departments, how we advance. You know, how they, get promoted, how do they accrue social capital, what kind of relationships do they have with their co-detectives and with prosecutors and such. And that can, for example, cause a sort of a strong prior towards closing the case. Not necessarily naming somebody



in particular, but actually closing it, referring it. And that can create what we call confirmation biases, where they're clinging on to a particular hypothesis -- and I'll get back to this in a second -- but also a motivation to actually close the case and refer it.

And motivations and preconceived belief are both known to be very robust sources of cognitive bias, right? And that can be a problem. Now, if you think of it, even if you take those biasing factors away, it's really quite difficult to investigate cases. Unless they're an easy case. Sometimes it's super easy, you know, because we caught the person on video and they're caught red handed. And sometimes it's super difficult and we'll never solve it. But when the cases are kind of difficult and potentially solvable, if you think of it, it's quite a difficult task because it requires a certain kind of bootstrapping, if you think of it, right? You're, as an investigator, you're going to have to decide what evidence to test in order to test hypotheses.

But in order to decide which evidence to test, you need a hypothesis. So you're conjecturing from shreds of ideas and potential thoughts to develop a hypothesis then to test it. And it might confirm or corroborate the hypothesis or it might refute it. This is what's called an abductive reasoning process, which just requires -- and it's probably the best and only way a detective could approach the case-- but it requires conjuring up hypotheses before you really have the evidence to be sure that they're correct and that can introduce --

Adams: You get a theory and you test it.

Simon: Right. And it's inevitable. You have to. Otherwise, how would you know what evidence to test, right? So, it's a difficult task to investigate a, you know, a complex crime or unclear crime scene. But the point is, so detectives can be doing their best at it but it can introduce biases because it necessitates conjuring hypotheses. And if a detective doesn't treat those conjured hypotheses as tentatively as they should, then you kind of get confirmation biases.

Adams: I was struck in your chapter on investigative dynamics. You talk about this pressure, right? The pressure that mounts on an investigative team, particularly the detectives that sort of come in afterward to try to piece it back together with this abductive process that you're talking about where you start with... It's the tail wagging the dog, if you will, right? And you say that the pressure to clear cases is exacerbated by the generally low rate of solving cases through detective work. And you cite to some statistics that only half of serious crimes are reported to the authorities. And only one in five of those cases are cleared by arrest.

That was stark to me. As somebody who works in the criminal justice system, as somebody who represents clients who are being brought through the criminal justice system after this process of abductive reasoning that is undertaken by investigators is complete and it's handed off to a prosecutorial authority, that the idea that the statistics are that low still came as a surprise.

Simon: Right. And I'll say that the statistic of crimes reported to the police about 50% is, I think, very well established. Which really means that half of the crimes are never going to get any sort of societal treatment. And then, of those that do get reported, the clearance rates vary a lot by crime.



So they're higher for homicides. But again, that varies among jurisdictions and race of victims. And, is much lower for, you know, bicycle theft, you know, go report that to the police. But yes, the truth is that we are ultimately adjudicating just to the extent that we adjudicate, if you can call plea bargaining adjudication. But we're actually, at the end of the day, treating just a fraction of the crimes that are actually committed out there.

Adams: In today's world, we have this catchphrase, it's called implicit bias, right? Is this that process where the implicit bias may creep in? Because we are forming this hypothesis, this theory, and then going out and testing it and determining whether we can prove it, the tail wagging the dog. Is that where the implicit bias can creep in?

Simon: I mean, it can. But I wouldn't equate the two concepts. So an implicit bias is more of a stable mindset, and it is often associated with racial bias, though it need not be. And it's, stable, and it will rear its head in various situations, but not necessarily affect the case where you're dealing with suspects or victims who don't raise or aren't associated with an implicit bias.

So, I wouldn't necessarily -- they can coincide, but and exacerbate, you know, one another. But the abductive reasoning kind of source of bias that I was mentioning is much more specific. You're actually building mental models of the particular case at hand.

Now, if the situation is such that an implicit bias might enter, such as, oh, there's a good chance that, you know, one of your working hypotheses that you're going to test has to do with, let's say, a suspect who is of a racial group to whom you have an implicit bias, say, a Black male, then that might skew your abductive reasoning process very much like a motivation would, or a sort of a strong belief that will lead you to a confirmation bias.

Adams: And I'm struck, you know, by what you've put in the book are a series of recommendations to investigators on how to sort of more accurately create a case that is handed off to a prosecutorial authority that may be devoid of some of these things that we're talking about. These, these aspects of the human condition that would creep in and undermine the integrity of that investigation. And one of them was-- and I'm not going to spoil the book, because our listeners should go out and buy it because it's great. But one of them that struck me is that investigative departments should create full recordings of their investigative processes. What do you mean by that? Is that so that we can get into the mind of the investigator? And do you mean an audio and video recording, not just an audio and video recording of the witnesses that they interview, but do you mean the mental process by which they go to a crime scene or the mental process by which they think through the issues before they set out to determine who they interview? What is the recommendation that these recordings be made? What is it fully? Because I can think through that as a defense lawyer and I'd love that. There'll be chock-full of potential Brady material. And I don't think you're going to get a investigative body in this country to ever strive to that level where they've literally recorded everything and made it just open. But what are you recommending there?

Simon: So, the recommendation is to record every interaction with witnesses. And so I share your intuition that it would be improbable to get cops to share their stream of consciousness as they're



going through the case. That would be, I think, way too much to ask. And there'll be lots of confusions that would follow from that.

But, what I'm really going after there is the fact that a lot of the book is about how the police investigation does not set up the adjudicative process in a way that's conducive to actually getting at the factual truth. So, it's the production... and the first half of the book is about the production of evidence, i.e., police investigations. And the second half is, well, what do we do with it, and how do we adjudicate that? Assuming that there is a trial, but some of this applies also to plea bargaining, because the evidence kind of is much of the same, and to some extent, plea bargains are indeed negotiated in the shadow of the trial.

But the point is, and this is where I think it's quite preposterous, that the evidence that we produce in police investigations is, A, subpar. Because we don't necessarily or not always use optimal procedures, investigative procedures. And we know a lot about what are better and worse procedures, again, thanks to a lot of work by lots of psychologists and other investigators.

And second, we don't have a record of the work that was done. And so what that really means is that by the time it gets to trial or to a plea bargain, a cop or a prosecutor -- or a defense attorney, for that matter -- can wave their hands and say, oh, no, this is not what the witness said. Or, we won't know what about the police investigation could have contributed to mistakes.

Now, I make an important distinction in the beginning of the book between what are called spontaneous errors -- that is, we are all human and therefore fallible and make mistakes and we make memory errors, you and I Matt, every day. We forget where we left the keys and whatnot. You know, we're introduced to somebody and we forget their name within two seconds and whatnot, right? Those are spontaneous errors. They're always going to be around and we're going to have to deal with them. And sometimes they're going to mess up criminal investigations.

But the much more troubling category of errors is what can be called induced errors. That is, the witness made a mistaken statement because of the way the lineup was constructed, or the question in the interview was phrased. All the atmospherics in the interrogation room or some threat and stuff. And that one should really bother us because the investigative process is all about discovering truth. But what we don't appreciate enough is that it also creates facts. And when it creates the facts, it's a problem. Because what we're getting at the end is the product of the hypothesis of the detective rather than the actual genuine statement from the witness. Which could have been different or it could have been, I don't remember, but that's important.

But when they're ultimately, the witness is producing a putative memory that was actually suggested to them in the course of an interview, that's throwing the case off.

Adams: The old garbage in, garbage out paradigm, right?

Simon: It's not just garbage in, garbage out. It's inculcation in, inculcation out. It's not random errors.



Adams: Professor, when I read your book, I really place it into three chunks. And I think you may have designed it that way because you just highlighted it for us, I think, in some of your comments. The first phase is really about creating the evidence that goes into a criminal trial. The middle part is really about the types of evidence that are created, sort of going down the rabbit hole of each of the broad types of evidence. And then the third part is about the trial.

And we've been talking a lot about the investigative phase, and the ways that psychological research highlights some of the flaws in that investigative process. Let's talk about the ways that psychological research highlights some of the flaws in the types of evidence that are used ultimately at the criminal trial. And I'll note for our audience, your book breaks this into chapters about eyewitness identification, eyewitness memory and interrogations. And, broadly speaking, I think many in our audience would say that they've heard one or two things about this idea of a mistaken eyewitness account. And that eyewitness accounts are subject to the same frailties as the investigative process, the same limitations on human cognition and psychology and sociology.

What about eyewitness identifications, as somebody who studies the flaws in our criminal justice system, what troubles you the most about the use of eyewitness identifications? What keeps you up at night?

Simon: What keeps me up at night is that there is a significant discontinuity between the accuracy of eyewitnesses and the extent to which they're believed by third parties. That could be the detective, the prosecutor, defense attorney, jurors and such. And the bottom line is that the latter is pretty high. There's a lot of trust in witnesses.

The accuracy of witnesses varies a lot. And just to give you just a taste of it: there's a very good study that gives four different groups of witnesses four different versions of the same video clip, under conditions that are more or less conducive to be remembered, i.e., it's shorter, they're distracted versus it's longer and they're not distracted, right? And the point here is that the rates of accuracy vary tremendously in this study from 14% accuracy on the low end to 86% the high end. So...

Adams: That's a pretty big spread.

Simon: Yeah, that's, that's quite a spread. And the point is that when the witness is testifying at trial, the juror or the fact finder or anybody, or the you know, the judge or the prosecutor, they don't really know whether that witness is more in the 14% range or the 86% range. And they might treat them pretty much the same. And that's that discontinuity that really bothers me.

What bothers me more, and that's more to do with the practicalities of it -- and I'll say that the most sort of classic fear with lineups, that an innocent person gets put into the lineup, gets picked by mistake, and therefore becomes the suspect and then spends 20 years in prison. That really doesn't happen that much. What does happen -- and again, it's hard to quantify this, but -- is that the person who the police suspected who may be innocent gets picked by the eyewitness not because the eyewitness actually identifies that suspect, but because there was something about the lineup that guided the witness to do that.



And that's -- I'm hearkening back to what I mentioned before -- that would be an induced error. Not a random error. And when the police's suspect gets picked, which can be erroneous, but it gets picked because of a suggestion that's the worst. Because in the previous example, when it's an innocent person, randomly picked, usually that's not the suspect. Then the police will just say, oh, crap, you know, it's a dud. And, you know, let the guy go. Because they never suspected that person and they should be putting the fillers.

Adams: And it's Brady that they picked the wrong guy.

Simon: Right. And again, it's not as though the police are necessarily committing misconduct, which in this case would be pretty grave misconduct. But it's all the small, imperceptible, unintentional stuff that can easily guide a witness to pick out the suspect when they're not sure. Now, again, if they're absolutely sure, it won't happen. But in most cases it's quite conducive to suggestion, what we recall. That's the problem. Because once the suspect is being picked out, the police high five one another and they think the case is closed.

Adams: And like you did with the investigative phase in the section on some of the problems with eyewitness identification, you set forth a lengthy list in your book of suggested steps that could be taken to improve the accuracy of identifications. And also, the transparency of the process used to elicit them.

And I'll touch on one for a moment and it's number one on the list. And by the way, this book should be mandatory reading for law enforcement officers across the country because of just the fact that these lists are common sense, pragmatic ways that really, the presumption of innocence and due process could be preserved in our system. If, but nothing else, they took away these lists and put them up in every police station, every law enforcement agency in the country, I think we would have a better, fairer system. But, number one on the list about eyewitness identification strikes me. Because it says, "to the extent possible construction of composites should be avoided."

And how frequently do we see composite sketches of suspects in a whole host of criminal investigations? We see it nearly every day. Do they really work?

Simon: So, I think you might be better positioned to answer the question of the frequency. I don't know the frequency of it.

The psychology of it is that the mere construction -- and there are different techniques of how to do it and such -- but at least the classic ones where you've got 19 noses to pick from and then, you know, 20 eyebrows and then you know, 40 different sets of eyes and you put them together. That's usually not good. A, it's not particularly accurate. And studies have shown that they're pretty inaccurate because our impression of faces and our memory of faces is done holistically, not piecemeal.

So if, usually you'll see someone in the street, you recognize, I don't know if some friend from high school or something, it's going to be a gestalt feeling. You're not going to go eyebrows, check. Ears, check. Eyes, check. Must be Susie from, you know, math class.



So, it's not particularly accurate. And the research also shows that the more you jumble it -- and what you're doing when you're composing a lineup, you're comparing between your memory, the image that is held in your memory, to the pieces in front of you. You're going back and forth and you're messing with that memory. So, yeah, it's, pretty complicated and probably not very useful and possibly also error-inducing kind of process.

I will point out, if I may, two sort of important structural recommendations here. One is, and this applies to eyewitness identification and pretty much to the whole book. The two principles for reform should be follow best practices. And we have best practices. We have them in how to conduct lineups, how to interview witnesses, how to conduct interrogations. And that's not necessarily kind of hammer the person, threaten, accuse and beat them, you know, beat the confession out of them. There are much more nuanced and smart ways of doing it. And the second is, and we kind of mentioned this before, is make the whole process as transparent as possible. Videotape the lineup. Videotape the interview. Videotape the interrogation. That way, we can see what the witness said at the beginning, who introduced the critical memories, how much pressure we can assume was going on.

And it's also good for cops. It's also good for training and for their quality control. It also takes away frivolous Miranda violation claims, right? Why are we guessing so much as to what really transpired when we don't really believe the actors? Sometimes we got to question the cops, whether they're being honest about how they conducted it. And oftentimes we're doubting the defendants and the suspects. Why are we dealing with all of this uncertainty that can be solved? And with today's technology, I mean, you know, we're taping, you know, every time you want to return a t-shirt to the Gap, your call is going to be recorded. So it's beneath us to tape an interrogation that can lead to a murder conviction?

Adams: I think some of what I can distill down some of the recommendations in your book would be sort of akin to what you would see in a hospital drama when they have a bad outcome, a bad medical outcome. There's a culture in medicine where the doctors sit around in a big room. And they review everything that happened in laborious detail and they understand that this went wrong here, and this is what we have to do next time. And this patient had this condition. And going into the whole thing there's this expectation, you sign the informed consent and it says, hey, we might kill you, but we might also save your life when we do this procedure. But who knows? Science is quirky like that.

And it's sort of countercultural to what we see in a criminal investigation a lot of times. Because you beat this drum in your book, which is that there needs to be less of an emphasis on the negatives of being wrong. And almost to get to the point where law enforcement in this country needs to be comfortable being wrong and learning from being wrong in the same way that, I mean, how many scientific breakthroughs have we discovered in the field of medicine because somebody was wrong and then acknowledged it and learned from it? And it wasn't punitive. Yeah, they had their informed consent. The person may have unfortunately succumb to whatever condition. But the next person might not.



And do you think we can ever get to a place like that, based on your study, where this quest for being right overcomes accuracy and truth? Or sets it aside, almost?

Simon: Right. No, no, that's a very powerful thought.

I think a few things are playing out here and they're kind of compounding one another. One is in general, the whole idea of criminal punishment it's something that is quite inimical to our sort of post-Enlightenment ideals of human rights and liberal democracy. Where we're here to, you know, help people flourish and be happy and such. Effectively, you know, we throw them into prison for most of their lives and kind of ruin their lives and for others.

So, there's this deep discomfort that underlies all of this. And you see it a lot even philosophers who try to give us the justifications for punishment are pretty much scrambling to come up with justifications. Which, frankly, I find quite unsatisfactory, but that's a separate issue.

So there's that kind of unease. And when we find that we're perpetrating this harm on innocent people, we get super uncomfortable. And it's a bit like, you know, you see corporations when they get caught with some sort of violation, some of them will just duck and hide and deny and, you know. And others will say, you know, they'll beat their chest and go for a mea culpa.

Unfortunately, our system goes more for the former. And a lot of that has to do with its adversarial nature of the legal procedure. As you know much better than I do, the system is this sort of balance, it's an imbalance, between these very strong prosecutorial punitive forces and pretty strong defense-oriented kinds of forces. And nobody likes to concede defeat or to concede error.

We don't have that in medicine. In medicine, pretty much everybody's on the same page. We gotta get it right. We're here to not cause harm. We're here to bring health. And if we make mistakes, then we can improve the health that we deliver.

But that's not the way it's framed. And you see it when prosecutors dig in their back heels to protect prosecutions or convictions that turned out to be mistaken. And sometimes it will go to unbelievable lengths. Now, part of it is they honestly believe that the person's guilty and they think that the DNA was cockamamie or they can't trust, I don't know, the defense attorney who brought the claim. But part of it is that's how they conceive their role. They're there to dig in, right? So, this adversarial entrenchment is not conducive to truth finding, neither in the courtroom, nor in the plea negotiation, nor post-conviction. And not after, evidence, you know, shows up of innocence.

And it's quite stark that even other adversarial jurisdictions like Canada and the UK actually take exonerations very seriously. They usually follow -- there are fewer false convictions than we do exonerations. They usually follow up with some serious kind of royal commission of inquiry, and there is much more of a mea culpa. Here, it's oftentimes the prosecutors will, you know, go home denying that it was a mistake forever, right? And despite, like, very clear, obvious evidence of innocence.



So we've got a problem. Our version of adversarialism is a bit toxic. And it's not conducive to a kind of system that I think, you know, that stands up to its ideals of the principle of legality and the presumption of innocence and the like. It's much more a product of warfare and whoever wins the latest battle is, you know, the winner of the day.

Adams: It's stark and profound at the same time.

I would be remiss if I didn't highlight the section of your book entitled, quote, "Just Admit It, You're Guilty." And it's, naturally enough, the chapters on coerced confession. And the idea that the style and the manner and the means of interrogation are far more important than what comes out of the interrogatee's mouth.

And I think our country's seen a lot of this. We've seen some really high-profile examples where, at the end of the day, someone will just say what you want them to hear, or what a investigator wants them to hear, to end the ordeal. There's a human nature to it. We've also got examples, like the Central Park Five, of situations where children have been coerced because they don't have the cognitive ability to reason on the same level as the adults that are interrogating them.

And up till about 25 years ago, we even allowed hypnotically refreshed confessions in the state of New Jersey. It was only about 25 years ago that the New Jersey Supreme Court determined that those were unconstitutional, as remarkably wild as that may seem to many in our audience. So, when it comes to interrogating suspects, what has your research shown there?

Simon: So, it's fascinating. Again, it's just bursting with psychology. Just think of that interrogation room. Just, you know, the people, their, fears, their beliefs, their power, their whatever. It's just on steroids.

Once again, there's an interesting discontinuity here between the prospect of error and in this case -- meaning that someone utters a false confession or a statement that is interpreted to have been, you know, incriminating and such. And they, for the most part, do that. It's more of an induced error than a spontaneous when people usually don't spontaneously incriminate themselves falsely.

It is true that lots of interrogations, actually, the suspect enters the room wanting or deciding to confess, and they do. I think it's to the tune of about 20%. But we're talking about the ones where they do not do so voluntarily. And you're talking about people, including people of full cognitive and mental competence and capacities, who come in pretty, you know, determined that they are innocent or that they are not going to confess. And hours later, after they've started off with waiving their Miranda rights, right? Because why, you know, I don't need a lawyer, I'm, I'm innocent, or I'm strong enough to, you know, rebuff these people. And hours later, they do sign a confession that just sends them down the river. At that point, they're not the same person. They're a shell of a human being. And the question is what happened between those two points. That is what I would call an induced error.

And so, the point is, people can be induced against their will or against their preliminary decision to confess. Which might be a true confession. It might be a false confession. We're interested mostly in



the false confessions. The discontinuity here is that people do falsely confess. Yet the rest of the world, including, you know, my late parents and lots of my friends and family, say, no, there's no such thing as a false confession. Nobody would confess to a crime they did not commit. It's just --

Adams: It happens all the time.

Simon: And that's the point. And, come Thanksgiving, I urge you to ask the people around the table, and I think you're going to get the same, the same kind of responses.

So that's a problem, especially when it comes to the third party's view of the false confession. That you, as a defendant or their lawyer, are claiming that this was a coerced confession. And this is sort of a threshold disbelief. No, nobody does that. And that makes it really hard, especially when jurors or judges and prosecutors are making decisions.

What's really interesting is that the dynamic that gets created in the most common type of interrogations conducted by police forces throughout the U.S., there are some exceptions, but they're very harsh, very accusatory. They deplete people of their resources. They're done in an isolated place. People feel threatened. There are always incentives to confess. There are disincentives not to confess. People are confused after many hours. They're deprived of sleep. They might be hungry. They might be deprived of, drugs or alcohol or who knows what.

They're a shell of a human being at that point. And yet we take that statement that they signed, or some statement that they made verbally and we kind of hitch a whole case onto that.

There are other ways of doing it. And many Europeans do it differently. Among the high-security investigative authorities like the CIA and the FBI, there is a growing record. They've got some very interesting research going on there. And they can show that there are ways of obtaining confessions without sort of hammering the defendant. And, it's not just a question of being more humane and sensitive, you also get more information and more accurate information that way.

So, unfortunately we're stuck with a pretty brutal and pretty primitive way of just lambasting people and forcing them into kind of twisting their arms mentally into signing the confessions.

Adams: The final portion of the book that really is worth all of our audience read hones in on the trial process. And in today's society, less and less cases go to trial. And when we have high-profile acquittals, I often celebrate them. And others may sometimes revile at the fact that there's somebody they claimed was guilty being acquitted. But I often like to celebrate those as the moments when our system worked. Worked at its peak. Because the whole system is designed around making sure that nobody innocent, at least at a high level, should be convicted. We all know that that fails frequently. But when you talk about the fact-finding process at trial and the trial's fact-finding mechanisms, that to me was the most enlightening part of the book. And the way that the psychology of the trial process plays out. It's, to those of us who engage in it as a career, it's really theatrical. But we also are reminded of many situations in our history.



In my very own office, I have a little artist rendition of Bobby Seale, one of the Chicago Seven, bound and gagged at council table. And it's just a reminder. It sits on my shelf. And it's a reminder of what happens when due process fails. When we have suggestion in the courtroom, like putting a defendant in an orange jumpsuit and binding and gagging them. Thankfully, I don't think that would happen in 2024. That was 1969 and it was a different place.

But when it comes to your study of the trial process and the way that this fact-finding mission plays out at trial, what institutional flaws do you see as the greatest impediment to actual true fact-finding?

Simon: So, I will just for a second repeat something I mentioned before. One of the biggest problems in how the trial unfolds and its ability to get to the truth is the quality of the evidence that we give it, we produce. Because the trial feeds off the investigation. And if you're using substandard procedures, if you're not taping, if you're cutting corners, if you're suggesting all kinds of pieces of evidence, then it doesn't matter what you do a trial because we're feeding off, you know, soiled fruit, right?

It's also important for us to speak about why we don't have enough and what does that mean? Because the fact that we plea bargain so many cases means that lots of the police investigations never get vetted. Which also means that detectives know that there is a very high probability that whatever they do will never get inspected. Which means, given their other incentives and pressures and whatnot, it can lead them to cut corners. And that's really what I'm worried about. Again, creating sort of bad evidence.

So I think our adversarial system -- and you, Matt, might not like this -- is just too toxic. It goes to too great lengths. I think that, when we bring in experts to the extent that we allow them in, we're getting in people who don't perceive themselves as experts. They perceive themselves as witnesses for this side or the other. Which means that judges and jurors are kind of faced with a, at best, with a cacophony of expert evidence. Sometimes it's only one-sided and it's kind of biased. These are not good sort of conditions for reaching level-headed decisions on some very seriously intricate, you know, questions.

I think cross-examination, again, it serves lots of purposes, but it also distorts how witnesses come off. And, it, you know, allows all kinds of other biases.

There are lots of structural things that are, you know, you kind of understand their historic origin, but we must understand that they are A, imperfect mechanisms and I think we tend to glorify them too much. Like jury deliberation and high burdens and such. And they are unfortunately also susceptible to distortion and abuse, especially in the kind of toxic environment that the adversarial system sort of bears.

Adams: One of your observations that occupies only a couple of pages on the chapter on fact-finding at a trial, but it's near and dear to me because it's really the role of the trial lawyer, right? It's the art of courtroom persuasion. And you write, "There is a danger that factual inferences will be



overpowered by the narrative force of a case and by the narrative skills of the witnesses and attorneys who deliver it."

We're taught day one of law school in, as you begin to think about advocacy and the way to mesh facts to law, primacy and recency and the art of developing narratives to surround evidence. And in your book, you appear to be saying that, you know, on one hand, those narratives can be powerful. But when they're harnessed, for example, by a prosecutor, they could overshadow weaknesses in that prosecutor's case. Is that what I'm gathering?

Simon: Yes. I think, you know, you and I, and the hypothetical prosecutor are all looking at this material from different angles. I'm an accuracy guy. So, as such, I would like the process to reach accurate outcomes. Now, I've got lots of issues with how much we punish and all kinds of issues on the far ends of, on the outer boundaries of our discussion right now. But as far as the extent to which the criminal process is intended to, you know, discern truthful facts and reach correct conclusions, then for me, you being a great orator and being an asset to your clients for me is a problem. Because I'm here not to defend or to prosecute I'm to reach accurate outcomes. And the more we rely on these what are called heuristic mechanisms of persuasion such as a good story, right? A charismatic defense attorney, right? The more influence that these factors have, it's great for the client, but it's not necessarily great for the truth-finding process.

And yes, it's true for defense attorneys and for prosecutors. So yeah, if you come at it from sort of an accuracy inspired position, I would prefer -- and the European versions are, for the most part, much tamer than ours and rely less. They're not pure, and I don't want to make them sound idyllic, but, but they're different and they're much less reliant on these kind of features of the adjudicative process.

Adams: Well, Professor Simon, it has been just an absolute pleasure speaking with you today. The book once again is called *In Doubt: The Psychology of the Criminal Justice Process*. You really have harnessed lots and lots of research to present a raw and unadulterated look, critical look, I might add, at the criminal justice system and how we could improve it.

And while some of what is contained in the book may not be attainable, as we've kind of acknowledged throughout our conversation today, because the practical restraints on the system might prevent it. There are definitely a lot of pieces that could be taken and put into action to create a system where the presumption of innocence and due process carries stronger weight and protect the lives and liberty of individuals who come in contact with the justice system. Professor, I can't thank you enough for joining us on "The Presumption of Innocence." Until next time. I'm your host, Matt Adams. We'll see you then. Take care.