



## Fox Rothschild Podcast

### The Presumption of Innocence

#### Episode 67: Shattering the Myth of Rational Justice

*Featuring Matt Adams of Fox Rothschild and Adam Benforado*

**Matt:** Welcome back to "The Presumption of Innocence," a podcast brought to you by the White-Collar Criminal Defense and Regulatory Compliance Practice at Fox Rothschild. My guest on today's program is Professor Adam Benforado. He is a professor at law at Drexel University, and he is the New York Times bestselling author of *Unfair: The New Science of Criminal Injustice*.

Professor, welcome to the program.

**Adam:** Thanks so much for having me.

**Matt:** So I have to just go right at the title and give a little bit of a understanding for how you arrived at this pithy title-- *Unfair: The Science of Criminal Injustice*. And based on my read of your work, this should be required reading for every new prosecutor in every prosecutor's office, state and federal, throughout the United States. Because it is a stunning expose of some of the structural frailties of our criminal justice system. And the way that I kind of present it is, you have to understand this stuff before you can fix it. So how did you arrive at this title, *Unfair: The New Science of Criminal Injustice*.

**Adam:** Well, you know, I think actually the origins are kind of my first year of law school. So I had really embraced the broad liberal arts education. I took courses on anthropology. I took courses on psychology, history, economics. And I think one of the things that was really frustrating to me when I got to law school was it seemed like all of this research-based social science was being ignored. We kind of came in and it was like, assume a rational actor, uh, when it comes to contract law. Assume a rational criminal who simply responds to like, you know, if we want to deter burglary, we just increase the sentence, uh, by 10 years. And, uh, voila, we reduce the number of people committing burglary.

**Matt:** The deterrent effect, right?

**Adam:** Yeah. And I was like, wait a second, these aren't real human beings. Like, the law is based on incorrect assumptions about human behavior. And all your models seem to work fine, because you're not actually dealing with human beings. You're dealing with these like hypothetical human beings. And that really led me to start working with this professor, Jon Hanson, who was, running this project on law and mind sciences at Harvard Law School. And I think that shaped the trajectory of my career. I decided, man, instead of just being frustrated, why don't I try to help rebuild a more realistic set of models of human behavior upon which we can kind of create better laws and better legal theories?



And what I find now as a professor is that some people right, are really resistant, to this notion, right? It's like, because they want the kind of pristine, clear vision of the law that doesn't exist. They want, right, cases to just be decided by like, who has the better legal argument. Not by the attractiveness of the witness or biases, a whole host of biases, beyond our conscious awareness or control.

**Matt:** Yeah. And you do a terrific job of injecting a healthy combination of psychology and social science into this effort to break our criminal justice system down to the studs, as I would put it.

**Adam:** Yeah.

**Matt:** And reveal some of its warts. And it's not to simply throw a temper tantrum that the criminal justice system is broken, but --

**Adam:** Right.

**Matt:** --it goes full circle because the last chapter, or the last section of your book, is really dedicated to the structural reforms that you're advocating for. But I want to capture the essence of the book in a paragraph or a couple of sentences from the introduction. If you don't mind, I'll read it for, for our audience. You write:

"Our judicial system is flexible enough to respond to new developments in the mind sciences that reveal flaws in our laws and processes. There are solutions and remedies within our reach. Some of these solutions, like reconceptualizing which behaviors we punish, are grand and ambitious and must be the focus of long-term efforts. But many others directed at police training, rules of procedure, courtroom design and our legal code can be implemented in the near future."

And that's how you really launch this, I would say, systematic deconstruction of the criminal justice system. One of the critics who reviewed your book and gave a resounding review of it, said that it's quote, "enthraling and unsettling in equal measure." And I would concur. And there's probably a reason why you picked that particular quote with your publisher to put on the cover of the book. Because it really does take us in a very, very dark place at times. And you examine some case studies in some of the biggest injustices that have occurred in our criminal justice system.

When I talk about people on death row that have their convictions overturned by DNA evidence. Or in one instance, there's an example in the early part of your book where you talk about somebody who was wrongfully convicted based on a false confession three separate times. Three separate trials, three separate convictions, all in the strength of this wrongfully obtained confession.

And that's the type of stuff that really shocks the conscience. But it happens in everyday America in our criminal justice system.

**Adam:** And I think what is so important to realize is these are only the cases we know about, right? The ones where we have actually put in the most resources going back over things where, you know, fancy law firms have come --because it's a death row case, right --and offered, you know, post-conviction reviews of these facts. Like, a lot of the injustice is totally hidden. No one has even given it a second look.



And so like this case that you just mentioned of Juan Rivera, this involved rape and murder of an 11-year-old girl. This young guy, I think he's about 20 years old, ends up confessing. And what is so remarkable in this case, as you mentioned is, there are three trials. In the third one there is DNA evidence. They finally test, right, the rape kit. And it does not match Juan Rivera. He is convicted nonetheless, because of the power of the confession.

We can't possibly imagine how someone could confess to a rape and murder of a child that they did not commit. And yet we know now that this is a regular feature of our system. And it's a result of conscious choices of how we interrogate subjects, how we conduct eyewitness identifications, the type of evidence that we allow in a trial. Are we going to allow bite mark evidence, blood splatter evidence? How much, actually, scientific review have those forensic techniques been subject to?

And so again, it's horrific. But I think in the horror, one of the things that gives me hope every day is there's a lot of low-hanging fruit. There's a lot of stuff that does not cost a lot of money. It's about actually just admitting the flaws in our system.

**Matt:** Yeah. And people are so hesitant to do that. And I have a couple of examples that I want to talk with you about in a bit. But let's kind of work through the structure of your research.

**Adam:** Sure.

**Matt:** You broke the book into really manageable segments. Investigation is part one, adjudication, part two, punishment, part three and then you land on reform. After you break it all down, you build up to the part where you actually propose some sweeping-- and some not so sweeping --changes to the criminal justice system to make it better, to make it structurally more fair.

Let's talk about the investigative phase, because I'm most fascinated with that. And this is really a heavy dose of social science and psychology that you presented, Professor, in just a masterful way with lots of case studies. You dedicate the section on investigation into three subchapters about victimization, police and their ability to influence confessions based on the manner and means by which crimes are investigated in our system. And then you go into the neuroscience of the criminal mind and some of what the research tells us about people with predilections towards criminality versus not.

What made you focus on these three discrete areas when honing in on some of the structural flaws to the investigative process of our system of justice. And it's almost like that "Law & Order" episode, the first 30 minutes dedicated to the police who investigate the crimes and then the next is the adjudicative and punishment aspects, which you broke into two separate sections in your book.

**Adam:** Yeah. So what I was going for with this book was to kind of develop in the reader this new critical perspective that I was hoping they would bring to-- you know, if it's a lawyer --that they would bring to their work, if it was someone who's actually in a completely different field, they could look for similar biases. So if you're a doctor, right, you could think about breaking down patient intake. Because they're the same sort of set of cognitive biases at work in every field. And so when I was thinking about criminal law, I thought, let's have each of these chapters focused on a different



core character in any criminal law case. And let's see how this plays out over the normal timeline of a criminal case.

And so I thought, let's start with the victim. Because that's usually where the criminal law timeline begins, with finding someone-- as we have in the first chapter-- lying on the sidewalk, right? And then I thought, well, what's the next step? It's maybe interrogating a suspect. Then I kind of decided we have to have the suspect themselves, what actually causes people to commit crimes. And the design of each chapter is kind of to use real-world examples, to introduce and highlight the social science research and to really attack some of these myths that we have.

And so I start that first chapter with kind of the idea that every victim is the same in the eyes of the law. We treat everyone kind of the same. And I start out with this case where a guy named Jerry goes out of his house-- nice suburb north of Washington, DC --comes out, there's a guy lying on the ground, unable to speak, kind of trying to get up. And he calls 911. Police and first firetruck pulls around. And as soon as the firetruck comes around the corner, the man on the sidewalk vomits and the police or the, uh, the firefighters rather, smell alcohol. And so when, then, the EMTs arrive, they say, Hey, this is just an ETOH right? Shorthand for this is just a drunk guy, a homeless guy. He is going to sleep it off.

**Matt:** And turns out he was anything but just some drunk homeless guy.

**Adam:** It turns out this is an award-winning journalist. You know, something like 500 people come to his funeral. And the truth of what really happened was this guy got jumped by two guys who hit him in the back of the head. This was actually a member of this wealthy neighborhood who had just had a drink with his wife and gone out for a walk after dinner.

**Matt:** And he had a traumatic brain injury that they just passed over because of the fact that --

**Adam:** They totally missed. Because what happens with so many of victims, we quickly sum them up based on what's directly available to us. In this case, right, the vomit. That was the key, salient thing. And all of the emergency responders all thought, well, this is just a drunk guy. I know what this is. Now, we--

**Matt:** You even wrote, even your research even found out that the doctors refused to actually examine him before they cleaned him of the vomit.

**Adam:** Right.

**Matt:** Ridiculous in the sense that, you know, an emergency room doctor should certainly be used to that kind of experience, right? You have people coming in, in all states, but they left this guy sitting in a hallway for like upwards of hours. And all of a sudden he's sitting there suffering from a traumatic brain injury and passes away.

**Adam:** And it's, again, in each of these chapters I want to point out these profound problems, but then also point to solutions. And here there's a very easy one. Which is when we have protocols about how we respond-- if we're emergency responders, if we're the police-- we need to stick to



them, right? So there were clear signs here. You've got to actually assess someone for a brain injury. Don't just assume that you know what's going on based on the color of the person's skin, whether there's alcohol on their breath, whether their clothes are tattered.

Unfortunately, I think we all can be affected by tunnel vision. Indeed, judges, Supreme Court Justices, can have the same tunnel vision when they approach a case. So one of the things I mentioned in the book, right, is Supreme Court Justices often-- and again, I worked for a federal appellate judge, right-- they have an idea of what happened in a case when they read the first sentence of the brief. They have an idea of how this case should come out, often. And unfortunately we know from other social science research that, right, Supreme Court Justices don't go and read every single source and every art. They actually are very selective. They have an idea about how a case, and then they cite to unpublished research on file with the authors, this blog, the things that support the vision that they come in with.

And so this is, I think, a warning sign for everyone in the legal system that, hey, we all have starting assumptions. We all can have tunnel vision. We can all exhibit what scientists call confirmation bias. And that's one of the reasons to have protocols, to avoid that kind of initial framing problem, which can lead you down a bad path.

**Matt:** Yeah. Uniform application, uniform set of standards, no room for interpretation --or, as in the case of this particular crime victim who was misdiagnosed as just a homeless drunk-- that you just uniformly apply the same standards each and every time.

And I think that's really a microcosm for what the criminal justice system is supposed to. And I think at one point in the book you highlight the idea that Lady Justice is supposed to be blind. And the scales of justice are supposed to be weighted by evidence and, and all this other stuff is supposed to be tunnel vision to it. And that's what our system of justice is supposed to be like. But it's far from the case. Because there are 1 examples after examples.

**Adam:** Yeah, but a lesson for lawyers that so many of us.. You know, I've been, I've been a professor for 17 years, and in every, legal, job that you can imagine, you get used to it. You gain expertise, you start to see the patterns and you expect, like this client is just like the last client I came in. And I think the best lawyers, no matter, you know, what particular subfield they are, understands that, yeah, there are similarities between cases, but you've got to make sure that you're not tracking someone saying, this is just the same as this last thing. You actually have to make sure that you really understand the facts and the background of this individual case, and so that you don't jump to wrongful assumptions from the outset.

**Matt:** Yeah, you round out the section on investigations by talking about sort of the police and the suspect. And let's take them together because they really are the yin and the yang to the investigative phase.

**Adam:** Right.



**Matt:** It's the people doing the investigation and the people being investigated. And the idea that there could be wrongful confessions in our system is something that's lost on laypeople. They just don't get it. Why would anyone ever say they did something, particularly something heinous? Take the Central Park Five, which you address in the book. Why in the world would anyone ever acknowledge their role in a heinous sexual assault and murder?

**Adam:** Yeah.

**Matt:** The framework that you go into and the way that you take the time to unpack the circumstances that develop that involve both the police and the way that victims view police interactions is notable. Because it's not just simply that, you know, the police come in and say, Hey, we got to solve this crime. You did it. I know you did it. Okay. Yes, I did it. You know, that's not the example. It's taking people who are particularly vulnerable and the pressure is placed on the police. This all coalesces into a giant, you know, perfect storm.

**Adam:** So, yeah, exactly. So, you know, just to unpack that a little bit. I think a lot of the problem here is not bad people. You know, certainly we know from history there are some bad police who are looking to railroad people and uh, but a lot of times the people who, are stewards of a system that fails are actually people who are really focused on trying to do the right thing and protecting the public.

And actually that desire to actually protect people, to get the wrong guy, can actually lead to terrible injustice when you have the wrong tools. And I think here the wrong tool that I focus on is the Reid technique --and related approaches-- that were really, I think, designed with the notion that the people who are going to be investigated were usually really, really bad evil people that had to be treated pretty toughly, right? You have to lie to a bad guy, you know, you have to manipulate, you have to do --because you're dealing with like a really heinous individual. And I think it also is based on real trust in the abilities of police officers to detect deceit accurately.

And one of the things I think the social science now tells us is that actually, we're pretty darn bad-- whether we're police officers or members of the general public --at telling when people are untruthful. And I actually test this out, you know, I teach a course called "Law and Mind Sciences." And historically I've always asked my students, I'm like, alright, tell me if I'm lying about what I did last night. And in every class I always lie. And they think that I'm telling the truth. And I think it's about realizing the limitations that we have.

Now, with the Reid technique-- and again related techniques that are used around the country, this is kind of the dominant general approach to interrogations. The way it works is, someone is brought in because we have a reason to think they might've very well done it. We sit down with them. We put them in a highly pressurized scenario, right? It's a dark room, often windowless. The people interrogating often sit very close. It's very ... it's a high-pressure situation. And normally right, the goal of the initial part of the interrogation is to tell is this person telling the truth or not?

Now, once the police, though, have decided that this person they think is lying-- and maybe they're not lying about the crime, but they're lying about something else-- the police know is a real lie,



right? Then their goal in the second part of the Reid technique is to get the person to confess. It's not to gather more information. It's not to test whether maybe this person's lied because they were afraid or they were covering up something else they did, or they were afraid they were going to get caught for cheating on their wife or whatever. The goal is, get that person to confess. And they use these techniques of maximization and minimization, which are roughly equivalent to the good cop, bad cop idea.

And as you point out, there are certain individuals who are highly vulnerable to this. People with low IQs, young people. And you talk about the Central Park Five, right, teenagers are particularly vulnerable. People actually who have a history of significant mental illness and people who are actually people pleasers. Now one of the scariest things is, one of the groups who's particularly vulnerable are actually innocent people. Why would innocent people be more vulnerable to falsely confessing? Well, because they're so certain that it will be revealed, what they know in their hearts to be true, that they're innocent. They're sure that, Hey, I just need to get out of this room where I've been for 24 hours, where, with people yelling at me, I need to relieve this acute distress. And so I'll just say I did it. And I'm sure the police, they're really eager, it's a murder. I'm sure that they will continue to follow up leads. They'll look at other people. They're probably interrogating other people right now. They'll find other eyewitnesses --

**Matt:** The truth will set me free.

**Adam:** Yes. The thing, though, that they do not realize is as soon as you confess, they stop looking for anyone else. They don't interview anyone else because they know. Just like with that Juan Rivera case: They have a certain path to a conviction. If you have confessed, you're done. And so that is the particularly sort of scary thing is we create these systems where no one's trying to get the wrong person. Everyone thinks that they're just doing their job. But it can create really terrible wrongful convictions.

**Matt:** You touch on this in the book, but I want to get your thoughts on this subject. Do you think that the truth-finding function of our system has been replaced with almost like a sports analogy where it's just win or lose? It's the way, as long as we win, it doesn't matter how we get there.

**Adam:** You know, I have many, many friends who are lawyers who are, uh, in the criminal justice system, um, prosecutors, defenders. And I will tell you that I really have lost faith in the adversarial system as the best possible approach. In part because I think, as a lawyer, I know how much having a really good lawyer matters. And having a great legal team matters. And so I think there's a basic injustice. When you're poor, you're not going to have the top, top lawyers unless you happen to be in a jurisdiction that has wonderful public defenders where there are some like that. But in a lot of parts of this country, the funding for public defenders, the number of them, is so low.

I think the other thing that really worries me is how the mindset of the adversarial system does lead to kind of this dehumanization. We start to just see this as like a game that we're playing, not something where, hey, oh my gosh, this is a 20-year-old kid who may or may not have done this. And if we get the wrong person, that means that the real murder and killer of an 11-year-old girl is still out in our community.



I think it starts to just feel like, man, I got all these cases and I'm just looking, you know, if you're a prosecutor, you want to keep your win rate up. Especially if you are up for election, there's like a lot of pressure to just win. And there's also a lot of pressure that all lawyers feel to do well in their job and to move on to, to keep the, and like...

That can result in terrible injustice. And so I think, you know, over the course of my career, I have started to think, hey, if truth is the name of the game, we want truth and accuracy, maybe all lawyers should be working toward that. Maybe we should task all these great minds, all the lawyers I know are such smart people. And I sometimes think instead of just trying to win for your side, what if we took all that tremendous set of resources and all worked towards like making the world safer and more fair, making sure that every guilty person got their just desserts. And every innocent person we made sure they never set foot in a prison cell.

**Matt:** Rounding out the section on investigations in the book, you went into the criminal mind. And one of the most fascinating things that I didn't know before I read the book is the case study of Whitey Bulger.

**Adam:** Yeah.

**Matt:** And the idea that he's one of the most notorious gangsters of our time. I think even in the book, you said, after the U.S. killed Osama Bin Laden, he became public enemy number one.

**Adam:** Right.

**Matt:** And he actually had a brother who was an upstanding citizen, a contributor to the greater good, got involved in politics and elected office and public service. And did some constructive things with his life.

And the juxtaposition between these two people with the same genetic code really tested the idea that there is some kind of predisposition towards criminality. And you did such a great job of really going back and looking at the historical underpinnings of some of the most-- I think despicable is the best way to put it-- use of pseudoscience to cast wide nets around whole groups of people based on immutable characteristics like race and things like that, that just, by today's standards are just appalling. And you took a look at those various movements through history juxtaposed against these two brothers who went on these divergent trajectories about their lives.

And what is it about the psychology and the hard sciences, the biology of criminality that we do know versus what we don't know? And how can we learn from it?

**Adam:** Yeah. So, I mean, I think the starting point is we know so little. We know so much more than we did a hundred years ago, but we know so little about the human mind. But the funny thing is, right, the law acts as if we absolutely know everything, right?

**Matt:** Like we've got it all mapped out and there's a book on it. We pick it up and we can go to chapter two and learn about this.



**Adam:** Yeah. And we imagine like the criminal mind, it's like, okay, so yeah, we have actions which are purposeful, intentional. We have reckless actions. We have, negligence. And like, do any of those things track, right, the real human criminal mind? Well, the answer is for thousands, literally thousands of years, we didn't actually do any empirical research on that. We are just starting to try to unpack, like, mental states, trying to understand actually the complex web of sort of factors which, you know, some genetics, some situational, over the course of a person's life that lead an individual onto a criminal pathway.

Now, you know, in the second part of this chapter, I'm really focused on the power of situation. And that's not to say there are not genetic predictors of criminality. There are. It's just that they're very complex and we don't yet understand everything. And so much of how that manifests in the real world has to do with the situations we find ourselves in. Some of those things, right, are environmental things that affect brain development, right? So one of the things, again, that we are just starting to understand is the effect of heavy metals like lead. Indeed, one of really interesting theories is one of the reasons that we saw this real spike in crime sort of in the 1970s-- and why actually we have seen a decrease in crime more recently --is exposure to lead and gasoline. That actually that had an effect on criminality in a whole bunch of young people who were exposed to high levels of lead in their systems, which affected their development of their brain, impulse control and other brain functions.

And that may be behind, right, some of the levels, really high levels. Indeed, there's a new book that just came out that sort of posits that that maybe is behind some of the serial killings that happened in the Pacific Northwest. That it was high lead level exposures that kind of prompted a sort of cluster of serial killers out there. Now, that's just one thing. That's an environmental thing.

Obviously there's many situational things that affect an individual over the course of, particularly their childhoods, that have a role in criminality. But there's also a whole host of things that happen in the moment that can lead all of us. And so, you know where I got started, one of the first articles I wrote, actually was kind of bringing in some of the insights from Stanley Milgram, who, anyone who's listening right now, who took introductory psychology. This was the Yale professor --back before we had IRBs and careful research protocols --who decided to design an experiment bringing people in to the lab and hooking them up to a machine and saying, okay, you're the teacher or you're the learner. And how this particular experiment works is, anytime the learner gets a question wrong, you're going to give them an electrical shock. And you're going to increase the voltage if they continue to get questions wrong. And we're going to see if this increases learning.

Now, unbeknownst to the person brought in, there was no real learner. That was a confederate of the researchers who was placed in another room and was pretending to shout out in pain when they were given an electric shock. And the question Milgram wanted to do --this is in the wake of World War II-- we want to know like how many people would potentially turn up the electric shock all the way to 450 volts-- delivering what may appear to be a lethal shot of electricity to someone-- just because someone in a white lab coat tells them to do so.

And so when they asked, right, members of the general public, I think general members of the general public thought, one out of thousand people. They, I think they asked psychologists, what is



how many people, one out of a hundred, like the number of sadists, essentially, we have in society. What they found in, in this research study was that actually about two out of three people went all the way up to 450 volts. Even when the person in that other room complained of chest pains, when that person actually stopped responding after shouting out in pain.

And I think what that tells us is that even people who believe themselves to be truly good-- not murderers, not people would ever do that-- under the right situational pressures, can participate in pretty awful things. And I think that, you know, again, one of the things with my first-year criminal law students, which I want them to grapple with, right, is the lack maybe of true distinction between them and the people that they might represent, if they go in and be a defender, or the person that they might prosecute if they're a prosecutor, right?

That maybe, actually, that individual is not so different. Simply was exposed to different situational pressures. And I think that feeling of humanity can lead to being a better lawyer, when you don't feel this great division between yourself and your client.

**Matt:** Yeah. And, and that really is a great segue into the second part of the book, which really is that second half hour of the "Law & Order" episode, which is the adjudication process. And you started with the lawyer. You touch on the lawyer, the jury, the eyewitness, the expert, the judge, all the central ingredients that go into the adjudicative process. But you start with the lawyer. And I was fascinated in reading that particular section because one of the things I grapple with as a defense lawyer is what brings prosecutors to commit *Brady* violations.

And it's something that, in my practice and in talking with some folks, held leadership roles in organizations like the New Jersey Association of Criminal Defense Lawyers and, uh, active in the National Association of Criminal Defense Lawyers. And one of the things that we are seeing more and more of empirically is this penchant of prosecutors to hide exculpatory evidence.

**Adam:** Yeah.

**Matt:** And the view that, oh, we don't have to get out in front on providing exculpatory evidence. We can give you a plea offer. We can have an escalating plea program where you get your best offer when you have no evidence, no investigation to look at. And you either have to take it at that moment or risk that it gets a lot worse from there as facts and the case unfolds. We have whole systems in New York, for example, where defense lawyers are shackled at the hands and the feet by virtue of the fact that they don't get discovery until way into the process because prosecutors are simply trusted, simply trusted to do the right thing. And you unpack the human nature that comes into play, where that trust is really questioned, and--

**Adam:** Yeah.

**Matt:** And the social science behind what compels a highly trained, accomplished, educated, smart human being to just say, oh, we don't need that DNA sample. Let's leave it in the box.

**Adam:** Yeah.



**Matt:** And not disclose it to the defense.

**Adam:** Yeah. So, the big takeaway here, I think, from this psychological research is that prosecutorial misconduct is actually often the result of sort of situational pressures. What we might think about as bad orchards rather than bad apples. Um, and that's really hard to wrap our head around, right, because we think about this, it's got to be bad apples. And indeed where the Supreme Court has kind of weighed in, they've gone with a bad apple approach. But I think that really is contested by the social science literature related to dishonesty.

And what we know here is actually, people-- when they're given the opportunity to cheat-- people do act self-interestedly. But they don't do so to the maximum. They don't cheat as much as they could get away with. And why would that possibly be? Because one of the most important things for us cognitively is to feel like we're good people. And so we're willing to cheat, bend the rules a little bit as long as we can maintain that positive self view. And so the amount that, prosecutors-- and I would say, again, defense attorneys, the real focus here is on prosecutors, but I could focus on other areas of being a lawyer related to defense attorneys where there's inclination to bend the rules.

But how much prosecutors are going to bend the rules has to do with how easy it is to justify their behavior, right? Because if you can justify doing something which is breaking the rules, then it becomes okay. And so one of the things that makes prosecutors, I think places them in a really dangerous position, is what the research says is that people are actually more likely to break rules or engage in dishonesty behavior when they're benefiting someone else rather than themselves. Now that's totally counterintuitive, right? But it makes a lot of sense if it's all about justification.

And this makes prosecutors really vulnerable. Because a lot of the people who I know who are prosecutors, they went in, they really have always, they're do-gooders. They're actually kind of the Boy Scout mentality. I'm going to go in, I'm going to protect the public. They're under a lot of pressure from the victim's family. They're under a lot of pressure from their boss. They're under a lot of pressure, right, for their family to move up the career ladder. They're under a lot of pressure from the police officers who worked the case.

So imagine you're in that position and you find out, actually they tested the blood sample. It did not come back as a match to the person that we are planning to try in this case. Think about your ability-- as a prosecutor-- to justify that. Okay, well maybe the forensic analyst messed the case up. Maybe the police officers didn't collect this in the right way. You tend to cast all of the evidence in ways, again, that are confirm what you already believe to be true. This guy that I have here is definitely guilty. And, right, if I turn this over to the other side, what's going to happen? Well, it's not conclusive that this guy is innocent, but in the eyes of that jury, they're going to see it that way. And you know what? I've gone up against this defense attorney. He's a bad guy. He cheats too. I'm just cheating a little bit. Anyone who's played sports knows-- again, thinking back to my not illustrious at all, career playing in sports-- when the other team, like I felt like the other team was cheating in soccer or basketball, I played more dirty. When I felt like the referee wasn't calling as many fouls on the other team as on my team. I felt more justified in those moments breaking the rules.



And I think again, if you can imagine those scenarios where you feel like you're locked in a battle where the other side is an adversarial thing. The other side is getting unfair treatment by the judge. The other side is using underhanded tactics. And you're convinced that you have the right guy, it suddenly starts to feel a lot more okay to bend or break the rule. And I think unfortunately, the way we train lawyers to be able to come up with justifications for absolutely anything makes them all particularly vulnerable to dishonest behavior. Because it's so easy to see the wrong that we're committing as actually a right, as serving justice.

If you are convinced that this is actually the real murderer, it makes sense not to turn over that blood sample. It feels right. It feels like, well, that person might get off, then I have a murderer on the street. And that's really dangerous for all of us.

**Matt:** Or that person has an extensive rap sheet, so they've gotten away with lots of crimes. It doesn't matter if this one, you know, is a little bit of suspect.

**Adam:** I think that's huge. I mean, again, I think back when I was a clerk on the DC Circuit with then-Judge Garland, who was then nominated, by Obama to be a Supreme Court Justice. Everyone on the left was really excited about him becoming a Supreme Court justice. And, you know, again, he's a brilliant, brilliant person. The area that I was worried about? Criminal justice. Because I think very much, you know, he was, he was a career prosecutor. And I think he really thought, his mindset was like, well, this person might not have committed this particular crime, but by the time that you are being prosecuted, you've committed lots and lots of things. And you know that mentality, you know, for better or worse, I think is shared by a lot of prosecutors, which is like, most people get away with it a lot and then they finally get caught and maybe this dude is innocent of this particular crime or this particular thing they're being prosecuted. But they're almost certainly a bad person who ought to be off the street.

**Matt:** Yeah. And, your research and your book also highlighted something that was almost intuitive, but at the time, the way it was presented, it's backed up by social science, is that we view our cognitive perception is dramatically different for sins of omission versus sins of commission, and --

**Adam:** Totally.

**Matt:** So many ways exist for lawyers to overstep that ethical line by sins of omission versus necessarily commission. Which, based on their education and their experience and their relative stature and status, the commission stuff is hard to swallow, but the omission is at times easier to justify.

**Adam:** And that goes back to what you were just talking about. Which is, the system is set up in a bad way, right? It does not make sense to hand all the evidence over to the prosecutor and say, you have to turn this over to the defense. That's setting us up for a bad situation. I think, again, I believe in third-party independent crime labs, which share the evidence directly with both the prosecutors and the defenders.



I think when you're giving it to a person, you're saying, turn this over, or you have to disclose this thing, that feels like an omission. It doesn't feel so bad to do that. And we can come up with, right, plausible explanations for, I just forgot to do it. Even the fact that we can come up with that lie to ourselves makes it feel not so bad when we actually do it.

**Matt:** Your expose of the adjudicative side of criminal justice was not limited to the lawyers on the defense and the prosecution.

**Adam:** No, everyone's fair game here.

**Matt:** Everyone's fair game. You went after the jury, the eyewitness, the expert, the judge.

Walk us through those other components of the adjudicative process, what their frailties are, so that we can build towards the ultimate crescendo, which is to talk about how we reform this thing if it's so flawed.

**Adam:** Yeah. So, you know, thinking about jurors, right? Our system has great, great faith in the lay juror. At the same time, you know, historically, lots of judges have expressed worry. They've kind of tried to take things away from juries. But we empower, right, the lay juror. There's no requirements. You just have to be 18 years old, not a felon. You know, the requirements are very, very low. And we give jurors this tremendous power. And the way we deal with bias is basically by asking people, are you biased? Is there any reason why you would be more or less likely to believe a police officer? Now, I've never actually been chosen for a jury, but I've gone through the voir dire process before the attorneys, realize that they don't want a criminal law professor, who wrote a book called *Unfair*, on the jury.

One of the things that has just always shocked me is we imagine that our biases are like subject to introspection and control. I've been, you know, in a voir dire process where, you know, a bunch of the jurors in the pool raise their hand when it's like-- it's filled, downtown Philadelphia-- are you more likely or less likely to believe a police officer just because they're police officer? A bunch of people raise their hand. And you know how the judges deal with it? They're like, okay, so let me explain to you what happened.

**Matt:** Do you really mean it? Or are you just trying to get outta here?

**Adam:** Yeah. Or, or you realize like, yeah, you might come in feeling that way. You just have to flip that switch. Just turn it off. That lifetime of experience. Just flip the switch. Your dad was a police officer. Your uncle was. Like, just flip that switch. You have experienced racism from police officers for your entire life? Just turn that switch off.

Now, what do we know about real human beings? They don't have these switches. Indeed, judges, right, who are told like, disregard that information that you just learned, can't do it. Jurors can't do it. We also know, right, that people's backgrounds and experiences shape not only right, how they view the law, but also how they view the facts.



And so I discussed this famous Supreme Court case from a few years ago, *Scott v. Harris*, which involved a police chase outside of Atlanta, Georgia. And in this particular case, right, there was actually a videotape of the chase itself. And I think what was really surprising, to, I think, law professors was, a group of researchers actually decided to share this videotape to a broad cross section of Americans after the Supreme Court put it on the Supreme Court website in support of their vision of no reasonable juror could possibly see this as anything but a super dangerous chase. And what they found was, discreet subgroups of citizens watching this footage saw very different things in terms of how risky the drivers' behavior was, who was at fault for the eventual accident, which caused the suspect to be paralyzed from the neck down. And I think, you know, that the takeaway there is that we all think about ourselves as objective, as seeing the world as it actually is. But we all see the world through tinted lenses.

And what are the implications for lawyers? Well, your instincts are right. The people on the jury really do matter. If you pick the people with the right set of tinted lenses, you've made your job easier right out of the gate.

Now, I would say, right, in the book we're always looking at sort of factors in control of legal actors-- like lawyers and police officers-- and factors that actually are kind of ones that are just out in the environment. So, you know, the background, the fact that backgrounds and experiences shape perceptions, that's out in the world. The question is, how is the legal system going to either control for those biases or exacerbate them? And I think, unfortunately, right, the way we conduct voir dire, the way we are increasingly in high profile cases bringing in trial consultants, that's a way to further bias things.

Now the next chapters-- and I'll kind of just highlight these, and we can obviously go into any depth if you're interested-- this, the next chapter is about the eyewitness. And here, right, we think that the common assumption is when someone comes in and says, that's the guy who did it, we can feel pretty confident in that. And one of the unfortunate things is that it's not that simple. The research we now have is that if in exactly after a crime happens, someone comes forward and says, I'm 100% certain. I know it's that guy. That's a pretty good sign it's the real person. But that's really rare.

What often happens is, right, we have someone who is not so sure who we end up actually bringing maybe down to the station two weeks later to look at a photo array. Maybe we do a line, a live lineup a week later. And then nine months later we have the person doing in-court identification. In a scenario like that, where we have multiple identification procedures proceeding over a period of months, there's really no way to tell whether that in-court identification, the person is remembering the person who committed that initial crime or whether they're remembering the person from the photo array or the live lineup.

But we treat it as when that person on the stands says, I'm 100% certain, yes, it's the person sitting at the defense table. We feel very, very certain and jurors feel very certain they've had found the right guy. Um, and so, you know, one of the takeaways of this chapter is that we really ought to be better scientists here. Some of the common practices that we use, like multiple identification procedures, procedures where the police officer conducting the lineup knows which person is the suspect and



who the innocent fillers are, that's bad science, right? Double-blind procedures are the standard. And so I think this is an area where there's a lot of low-hanging fruit to make this system better.

**Matt:** Yeah. We've had Chris Fabricant from the Innocence Project on --

**Adam:** Oh yeah.

**Matt:** -- the program and others who 've written books on junk science and the bite mark analysis and things of that variety that have injected themselves into our criminal justice system over the years and resulted in horrific, horrific miscarriages of justice.

And I 'm struck by the fact that we talk about these things in an academic way, right, like we're doing right now. But it takes so much to move the needle, right? And I commend you. At this point in our interview, we've talked about enough of the frailties of substance, of the criminal justice system to realize how, this is why we have the ability for a professor to study, to critique things, line it all up and fill up a book with it. And maybe only 10% of it gets fixed. But it brings us to a more perfect place. It brings us to a more reformed and just society. And it's really no-holds bar the way that you have done it. And in certain places in our world, there's authoritarian regimes that would prevent this kind of critique and self-analysis of the sovereign that controls all of this.

**Adam:** Yeah.

**Matt:** But this is why American academic freedom is great.

**Adam:** That's really interesting. You know, in conversations about this book and sort of my work, that actually does not come up very often, that conversation. But you're exactly right. I really strongly believe we need people talking about the problems in our system. I love America. And for me, it's about fulfilling the promise of America. It's about the founding ideals of justice and accuracy and truth, and having the courage to look at things that are not working.

Now I, you know, I still think there are plenty of people-- and probably people listening --who think, this is exactly what's wrong with academia, right? We need professors who are just teaching the criminal law, not critiquing it. And I think, again, that's exactly what academic freedom is for. We need people, actually, who have incentives to look in the dark places, to write books that aren't fair, how everything works great, but books that are called Unfair.

I think that actually it's really important for first-year students to have those experiences too. Because I think there's so many incentives later on to just go through the motions. To think everything's just fine. And I think, you know, again, I see a big part of my role is to bring that critical eye. I don't want any of my students or people listening or readers-- you don't have to agree with me, but I want you to be pushed a little bit, to consider your own preconceptions, your own assumptions that you bring to your job. And to decide also, how you want to use this research. Because certainly a person reading the book or listening could decide, now I have the keys to manipulate things further. And I'm not here to give you your ethics. I want you to, though, to think about the choice that you have about the direction of your career as a lawyer.



**Matt:** In part three of the book, you go into punishment. And you talk about sort of the classic paradigm of what punishment is supposed to be about. Do we rehabilitate people or do we deter people? That first lecture, criminal law, first year, bright-eyed, I'm going to be a lawyer. That kind of broad stroke policy debate about are we a retributive society or we are a rehabilitative society, are we a combination of both? And the way that we bring people into the criminal law debate with that framework, how does our system of punishment in this country get it wrong and how do we get it right?

**Adam:** So the first chapter of this section is really looking at, you know, why we punish. Are the reasons that we think we punish the actual reasons that we punish? And you know, this actually draws from some of the empirical research that I've done with Jeff Goodwin, who's a cognitive psychologist over at Penn.

And one of the things that we got really interested in was whether we are the rational punishers that we believe ourselves to be, right? Are we individuals who are like really focused on, you know, we're not really guided by just payback or kind of these base notions, but like, we're kind of like high-level-thinker punishers.

And what our research has suggested is, actually no, we're not necessarily. And I think in doing this research, one of the most fascinating dives that I did was actually into the historical research examples from our past in which we actually punished --not human beings, but animals who had committed crimes, who had killed children or other things-- in ways that really did not depart very much from, our, uh, means of punishing. You know, we using the common gallows in the town square to kill a pig, which had been used, you know, the previous week to kill a human being who had been accused of murder. I think what that suggested is that actually we are subject to, you know, forces beyond our conscious awareness or control when it comes to what's driving us to punish.

Now, unfortunately, right, it's not simply that we don't always understand what's driving us to punish. It's also that our punishments themselves don't serve the goals that we set out for them. So we imagine, right, it must be only the worst of the worst people who get the death penalty. Nope, that is not true. In the research that we've done, it's not the worst of the worst. It's predicted by other factors. We assume that, you know, one of the most horrific things I think about, uh, you know, our contemporary correctional system is our acceptance of sexual assault and brutality in our prisons. And I think that's largely justified in the American public by the notion that, you know, these awful, worst of the worst people are the ones who are suffering sexual assault in our prisons. So somehow they deserve it, right? These are rapist, multiple murderer, crime gang leader, those are the people. Nope. It's often the people who are locked up for the lowest level offenses. It's the youngest, the physically small, people who are gay or transgender, the most vulnerable members of the prison population, who are the ones who are subject to the worst mistreatment.

And I think this forces us to really reckon with not being the people that we think we are. And, you know, this pushes into the the final kind of chapters focused on reform, of thinking about, like, what would it take to rebuild the system to be the one that would make us actually feel good about ourselves, which would feel like we were actually following through on our ideals.



**Matt:** Is it attainable or is this mostly pie-in-the-sky? Is this something that there is a will to acknowledge at least some of this stuff that you're exposing exists in our criminal justice system and actually do something about it? Or are we so entrenched that it's impossible and it's going to take some kind more seismic shift to get reform?

**Adam:** Well, I think it's about, again, thinking about things that are easily accomplishable today and things that are long-term goals.

I think for a lot of the smaller scale things-- changing our eyewitness identification procedures, moving to cognitive interviews, bringing in conviction integrity units that go back over old cases and look for the type of mistakes that I discuss in the book-- all of those things are already happening, and they're things that, you know, all it takes is looking at how a neighboring jurisdiction is doing things, how that reform has gone. I think all of that stuff is not only possible, it's already happening in certain areas. And, you know, you don't actually have to go over and look at a Norwegian prison. You can actually just look at the experiment in, you know, neighboring state. Now the big stuff is much harder. I don't see it as pie-in-the-sky though. I see this as something that is likely to happen as a result of changing technologies. So, I personally think AI is going to have a huge impact, and not simply on, you know, potentially changing legal academia, but I think changing how we conduct, sort of our criminal justice system.

And you can see the opportunities going back to where we started in our conversation with protocols for victim assessment. To the extent that you have, right, sort of automated AI there at the scene when we come across a victim, coaching and directing the individuals who are conducting the checks to do certain things and look for certain things. That's a way to solve that problem.

But we can also think about AI later on assessing our forensic evidence, looking for things that human beings-- based on their existing assumptions --are not looking for. Making decisions about recidivism risk. I think all of this stuff is coming in the very near future. And even some of the things that seem really, you know, sci-fi, I don't think are outside, you know, in 50 years.

Is it possible that, right, the guilt phase, not the sentencing phase, will be augmented or largely directed by AI rather than a jury. I don't think that's outside the realm of possibility. If we think AI is going to revolutionize all these other industries, why would it not affect something as important as this? I, I think that may be where the reform happens. Not because right, we consciously make this choice of this direction, but because AI is now exploding in this largely unregulated manner. The choice may ultimately be made for us. That could result in more injustice or less. I think I take in the book the future of pulling back on humans as being the primary stewards of our system, I see that as a good process. But it's not a guarantee that it will be better. There's always the possibility that more automated AI processes will introduce new and worse injustice as well.

**Matt:** We've been talking with Professor Adam Benforado. His book is *Unfair: The New Science of Criminal Injustice*.

I would represent to our audience that, Professor, you have laid the criminal justice system threadbare. It is a striking expose on some of the structural deficiencies and other failures of the



American criminal justice system. But it is not just an academic exercise. I think our audience really needs to take away what you really well placed at the very opening pages of the book.

You wrote your introduction examining some arcane criminal practices hundreds of years ago in France where they were expelling demons by dunking people in water and then cleansing them of the criminality that they engaged in. And you pointed out how ridiculous that seems to everyone today. But I think everyone can universally agree that when we look at the history of crime and punishment in our world, there's just some ridiculous, almost comical by today's standards, examples of just lunacy going on in the criminal justice system. And as you posit some of the central questions of your book, right at the outset, like, "Are we willing to look into the deep recesses of our brains as we seek to root out our own fairness, even if it means learning things about ourselves that we wish were not true and transforming practices that have been around for centuries?"

I think you nail it. Because right there is the central question. Right there is, okay, but when you look at the evolution of criminal justice systems throughout the world, shouldn't we in 200, 300, 400 years from now-- I mean, we'll be long gone, but the next iteration of whatever the podcast is, you know, it probably will be some robots, AI robots talking, but, but-- but won't they be saying, you know, I can't believe that bite mark analysis was once a thing in the United States, or, I can't believe that *Brady* violations actually existed, that this system is structured around a prosecutor with skin in the game being the one who discloses the evidence to the defendant. Is that the hope?

**Adam:** Yeah, I mean, you know, I think that my goal in this introduction is about perspective shifting, right? It's so easy to look back at 12th century France and be like, oh my gosh, this is comedy. You dropped someone in a vat of water and if they floated, that's how you're told if they're innocent? And again, my proposition is in 900 years, people are going to look back at our system and be just as appalled. Again, I think it's not just going to be on the minutiae, right, like how we conducted-- I think it's going to be on the big picture things, of like your criminal justice system was basically you wait for bad things to happen and then you try to get into the person's brain and then you lock that person in a box at taxpayer expense for 40 years in a nine by seven cell.

Like, that's how you address like, the problem of people injuring or being dishonest toward one another? I think they're going to be like, why did you spend so little money on, you know, pre-K and you know, prenatal health? Like, that's how you address crime in society. You prevent it from ever happening. I think that's going to be, I mean, that's so hard for us to think about, right? Because we don't have that perspective. We're in the weeds right now. But my goal-- with my students, with the people who read my work --is to try to encourage that kind of perspective change. Because then you really start to see all of the stuff that you could change today.

**Matt:** Yeah. And you posit a couple of hypotheticals, right? Right on the opening pages of the book, you say, "Do we care that the path through our system is greased for some and tarred for others, owing to the cognitive biases of police officers, jurors and judges? Does it matter if certain people are disadvantaged from the outset simply because of the structure of their brain or the shape of their face?"



This is an eye-opening examination of some of the deficiencies. As I said at the outset, it should be required reading, not just for prosecutors, for any lawyer who has any desire to interact with the criminal justice system. I guess we can keep the contract lawyers and the, you know, commercial lawyers out of this. But if you're working in the criminal justice system, you need to read this book. Because while some of it may not be solved in our lifetime, I think putting it in one, easy-to-read collection of examples and stories backed up by science is remarkable. And I commend you, professor, for putting this together.

It is no wonder it was a *New York Times* bestseller, but it's also no wonder that it's just in talking through some of what's presented in our interview today, it's really just sparked in an immense amount of activity when it comes to how we can be better, how our system can change, and how we can get to a place...

We always talk about this sort of evolution in politics. They say it's a more perfect union. Well, we need a more perfect criminal justice system, and I think one of the starting places is this dramatic compendium of examples that you've put together. I can't thank you enough for joining us today on "The Presumption of Innocence."

That's all the time we have. Until next time, I'm your host Matt Adams. We'll see you then. Take care.