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# Why Innocent People Confess

It's not a breakdown of American justice. It's American justice working as designed.

By Michael Kinsley | Posted Thursday, Dec. 12, 2002, at 12:09 PM ET



DNA evidence unavailable at the time has now proven conclusively that five teenage boys sent to prison 12 years ago for raping and almost killing a young woman jogger in New York's Central Park were not guilty of that crime (whatever else they may have been up to that evening). What's most shocking is that the boys' convictions were not the result of perjured testimony by racist cops, or manufactured evidence, or jurors addled by some prosecutor's demagogic brilliance. The

convictions were based almost entirely on the boys' own confessions. Why would anyone confess to a crime he didn't commit?

DNA testing, which can identify a person indisputably (or indisputably rule that person out) based on a single strand of hair or tiny scrap of skin, has taught us that there are people in prison, including some on death row, who are not just undeserving of their punishment for some legal or political or psychological reason, but plain-and-simple, Perry-Mason not guilty. The Innocence Project at Cardozo Law School, led by Barry Scheck and Peter Neufeld, has achieved a steady stream of murder-conviction reversals. As intended, this has given many people pause about an irreversible sanction like the death penalty.

Advertisement The emphasis on capital crimes is misleading in a couple of ways, though. Crimes like murder and rape are amenable to reversal by DNA testing, but there is no reason to assume that wrongful convictions are more common in DNA-friendly crimes than in others. In fact, there is good reason to assume the opposite. Murder and rape convictions, especially those with a prospect of capital punishment, generally follow a



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full-dress trial with all its elaborate rights and protections for the defendant. A false confession under these circumstances is highly unusual and highly suggestive that something improper went on at the police station. Even a true confession, for that matter, is a good indication that someone had a lousy lawyer.

But for every one criminal conviction that comes after a trial, 19 other cases are settled by plea bargain. And when, as part of a plea bargain, innocent people confess to a crime they did not commit, that isn't a breakdown of the system. It is the system working exactly as it is supposed to. If you're the suspect, sometimes this means agreeing with the prosecutor that you will confess to jaywalking when you're really guilty of armed robbery. Sometimes, though, it means confessing to armed robbery when you're not guilty of anything at all.

In 1978 Professor John Langbein, now of Yale Law School, wrote a dazzling and soon-famous article in the *Public Interest* called "Torture and Plea Bargaining." Langbein compared the modern American system of plea bargaining to the system of extracting confessions by torture in medieval Europe. In both cases, the controversial practice arose not because standards of justice were too low, but because they were too high. In medieval Europe, a conviction for murder required either two eyewitnesses or a confession by the perpetrator. This made it almost impossible to punish the crime of murder, which was an intolerable situation. So, torture developed as a way to extract the necessary confessions.

Plea bargaining evolved the same way, Langbein explained. As our official system of justice became larded with more and more protections for the accused, actually going through the process of catching, prosecuting, and convicting a criminal the official way became impossibly burdensome. So, the government offered the accused a deal: You get a lighter sentence if you save us the trouble of a trial. Or, to put it in a more sinister way: You get a heavier sentence if you insist on asserting your constitutional rights to a trial, to confront your accusers, to privacy from searches without probable cause, to avoid incriminating yourself, etc.

Essentially, 95 percent of American criminal defendants are tried under a system entirely different from the one we learn about in school and argue about in politics (liberals celebrating its noble protections, conservatives bemoaning its coddling of criminals). In this real American justice system, your constitutional rights are worth, at most, a few years off your sentence.

Plea bargaining might also be thought of as an insurance policy. Insurance is a way of trading the risk of a large bad outcome (your house burns down and you're out \$100,000) for the

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certainty of a smaller bad outcome (a bill arrives and you're out \$850). Plea bargaining is a way of trading the risk of 20-years-to-life for the certainty of five-seven. But by creating this choice, and ratcheting up the odds to make it nearly irresistible, American justice virtually guarantees that innocent people are being punished.

The five mistaken Central Park jogger convictions weren't officially plea bargains, but unofficial offers of lighter sentences are among the more pleasant theories about how American justice got these teenagers to fabricate confessions. Then in prison, four of the five got stung by the parole system, which is like plea bargaining, Round 2. Their time behind bars was extended because they "declined to accept responsibility" for the rape they didn't commit, as reported in the *New York Times*. Constitutional protections like the right against self-incrimination don't apply to parole hearings, either. You don't have to confess, but extra years of prison are the price if you don't.

1

as he warned it would be.  
Michael Kinsley | November 4, 2008  
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*Illustration by Robert Neubecker.*

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"...an irreversible sanction like the death penalty."

Any custodial penalty is "irreversible". It's not like someone wrongly sentenced to 20 years can be made younger when the mistake is discovered.

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