

Investigative Psychology in the Courtroom: Beyond the Offender Profile

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Abstract

When offender profiles have been presented as evidence in court, although in a few cases they may have been accepted initially, they have invariably been excluded on appeal. But with the evolution of Investigative Psychology as a systematic science with a broader remit than producing 'offender profiles', a framework for contributions to investigations has emerged over the last 20 years that maps out the rich potential range of contribution to the legal process. This considers not only the drawing of inferences about offenders from their actions (profiling), but also examination of testimony and what psychological processes may indicate whether it has been distorted deliberately or accidentally. Further, the decision-making processes, especially as part of the investigation that gave rise to evidence presented are also subject to behavioural scrutiny. This special issue of The Journal of Investigative Psychology and Offender Profiling provides examples of these contributions as a basis for encouraging debate about links between Investigative Psychology and the courtroom. Copyright © 2009 John Wiley & Sons, Ltd.

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THE BROADENING USE OF PSYCHOLOGY IN COURT

The contributions of Investigative Psychology to the courts gains momentum from the growing range of psychological input to many aspects of the legal process, particularly in the US. As Lieberman and Kraus's (2009) extensive review reveals, psychologists increasingly study and comment, for example, on the effects of jury composition, instructions given to the jury, the decision making of juries and individual jurors, the impact of lawyer questioning techniques, trial publicity, judge's admonitions, potential tariffs, and the influence of experts on decisions in court. This is a focus on what goes on in court, rather than

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what comes into the court, that clearly has much to contribute to ensuring an appropriate outcome.

But as the present issue of *JIP-OP* shows, the Investigative Psychology framework does suggest a further set of applications of psychology in court. These elucidate the case brought to the court through the consideration of three components of the process that has led to a person being charged. The Investigative Psychology framework mapped out in detail by Canter and Youngs (2009) identifies these components as:

- The retrieval, assessment and evaluation of the information obtained and available within the enquiry;
- The understanding of variations in criminal action patterns and the inferences about the offender that can be drawn from these; and
- The investigative processes, that is, the detective decision-making processes, investigative actions and strategies.

Many of the psychological findings emerging in relation to each of these aspects will be relevant not just to the effective identification and apprehension of a perpetrator but to the eventual evaluation of that individual's guilt. This structure that has been developed within Investigative Psychology for psychological contributions to investigations also therefore offers a framework for organising more widespread and systematic utilisation of scientific psychology in court. So although 'profiling' is central to these processes it can be seen as only one component and probably the one, as Ebisike (2008) has shown in his detailed review, with which judges are least comfortable.

This framework draws on the notion of an investigative cycle in which the different information, inference, and investigative action components lead onto each other. In this way, the next stage in the progression of an investigation is always contingent on the previous. The potential for the accumulation of errors and distortions through this cyclical process is considerable. Minor misconceptions or biases can become magnified in this way, leading the investigation down entirely mistaken lines. In some cases it will be appropriate for the court to assess the psychological validity of the investigative information, the inferences used, and the investigative actions employed at each stage, through investigative cycles of the enquiry.

Although the potential for the psychological input to the legal process to these different components of the case is now considerable, attempts to adduce these have thus far met resistance mainly because of legal rules of admissibility. For, although experts in jurisprudence have set out extremely comprehensive accounts and explanations of these legal rules and their underlying logic for the social science community (see for example, Freckelton, 2008; Ormerod, 1999), the impasse remains in part because scientific psychologists and lawyers are guided by fundamentally different epistemologies.

DIFFERENCES BETWEEN THE LAW AND PSYCHOLOGY

In his review of the core differences of approach between the two professional disciplines, Canter (2008) identifies six forms that these differences take. The first of these relates to the focus of interest of law as opposed to psychology. The law, he notes, is fundamentally ideographic, being concerned with the individual case in question. Psychology on the other hand, usually works at the nomothetic level, that is their findings take the form of trends across groups or relationships between variables derived from classes of individuals. When

the potential contribution takes this form, the court will always be concerned with the validity and fairness of applying general trends to the individual case upon which they must decide.

The second distinction Canter draws attention to relates to the different forms of contribution to knowledge that proponents seek to make within the two traditions. Psychologists focus on identifying the processes that explain behaviour whilst lawyers are interested in explanation in the form of a plausible narrative. Interestingly, psychologists may have much to learn about human behaviour from the narrative approach to its explanation. Studies show that jurors, although perhaps influenced by the presentation of the case in these terms, do indeed draw on plausible stories to make their decisions. Increasingly, narrative explanations are emerging as useful frameworks for understanding different aspects of human behaviour, including most recently, styles of criminal activity (as explored in detail by Canter & Youngs, 2009).

The two traditions also differ in their preferred methodologies for providing answers; the reliance on due process being entrenched within the legal tradition, whilst psychologists rely upon scientific method, in particular the experiment. As a consequence, the outcomes that are sought are not the same; the law seeks a verdict whilst psychologists seek to contribute to knowledge. As Canter (2008) notes, where the psychological processes involved are complex and interdependent, the translation of these into a form that will directly inform a verdict can be highly challenging. In line with this, the courts are concerned with information only to the extent that it represents evidence whilst psychologists as scientists are interested in data; that is any information that contributes to understanding.

One further differences between psychology and law that Canter (2008) lays out is perhaps most fundamental of all, relating as it does to the type of explanation for human action assumed within the different traditions. Whilst psychologists tend to assign the causes to factors beyond the control or out of the hands of the individual, such as their genetics, biology, personality, or upbringing, it is personal agency that is at the very heart of the rationale for a legal system.

Given the extent of these differences, the painfulness of the collaboration between psychology and the courts experienced so far, notably through 'offender profiling' evidence, is unsurprising. Yet if the chasm between these two traditions can be bridged, the potential contributions investigative psychology has to offer the legal system in terms of scientific understanding and findings are considerable.

FORMS OF POTENTIAL CONTRIBUTION

Information

One of the major contributions of psychology to the investigation process has been the application, as well as the specific development, of approaches for the retrieval, general assessment, and improvement of investigative information and the focused evaluation of the veracity of that information. Psychologists have developed procedures for interviewing witnesses, most notably the cognitive interview (Geiselman, Fisher, Mackinnon, & Holland, 1986) that increase the amount of information those witnesses can remember. Extensive studies have examined the range of influences on what eyewitnesses can recall, including those that relate to the personal characteristics of the witness (e.g. age), those that relate to aspects of the event they have witnessed (e.g. weapons being present), those that are to

do with post-event influences (e.g. influence of other witnesses), and those that are produced by the police processes (e.g. the identification procedure) (Wells & Loftus, 2003).

In the policing or legal context, errors in the information, especially from the accused, may often be deliberate. They may be attempts at deception rather than simple deficiencies of memory. Work on the evaluation of the veracity of the information has identified a variety of psychological indicators of deception and truthfulness (usefully reviewed by Vrij, 2008). Specific techniques have been developed for interrogating suspects on the basis of these. The Improving Interpersonal Evaluations for Law Enforcement and National Security (IEE) technique developed by Ekman (2001) is one such technique, which uses scrutiny of the expression of emotion to reveal deception.

An interesting development of this work has been the recognition that sometimes an innocent individual will lie, falsely confessing to a crime he or she did not commit. An emerging contribution of investigative psychology then is the identification of the conditions under which these false confessions may occur (Leo, Costanzo, & Shaked, 2009). This overlaps to some extent with the concerns of those psychologists who study vulnerable witnesses, who have developed the important concept of witness suggestibility (Gudjonsson, 1984). The issues identified here are rather different from those that seem to be relevant to the situation in which a victim lies, making a false allegation of a crime to the police. Techniques such as Statement Validity Analysis (Undeutsch, 1989) focus on the aspects of the account of the crime itself that will distinguish a truthful from a false allegation rather than the general background circumstances that may lead to a false confession.

It is becoming apparent that many of the psychological findings that have underpinned these considerations of the information available to investigations will be relevant to the court's evaluation of the evidence with which it is presented. Potentially, there is scope for the direct utilisation of techniques for detecting deception or for identifying false allegations and confessions in court. It seems likely at present, though, that any attempts to determine deceit in any definitive way would be subject to many of the criticisms levelled at offender profiling evidence. These include the need to make confident statements about specific cases from general principles, but also the more crucial legal matter that the courts wish to retain the decision on guilt or innocence rather than handing that decision over to any expert (known in jurisprudence as the 'ultimate issue' rule).

As Ormerod (1999) pointed out, in an adversarial legal process it seems more likely that psychology will find its way into court on behalf of the defence more readily than for the prosecution. Therefore a more realistic role for psychology at present may be the application of the understandings of how information retrieval can be enhanced to comment on possible deficiencies in the particular interviewing procedures used in the investigation. This is, of course, broadly the format in which the psychology of eyewitness testimony has been permitted into courts, albeit sporadically. Kassin, Tubb, Hosch, and Memon's (2001) review of the eyewitness findings judged to be sufficiently well established to be used in court is a useful first step towards the systematic integration of this science into the legal system. Kebbell and Perfect's study (in this special issue) of the impact of a 'social interview' scenario, typical of police investigations, on the well established confidence-accuracy relationship, does however warn us that the real world application of such findings can be more complex than laboratory based studies would suggest.

Interestingly, as Wagstaff (2009) notes, the courts have tended to take a dim view of investigative hypnosis as an information retrieval technique. There is a clear message for psychologists in the history of investigative hypnosis in court that he outlines. The

'special properties' implied within certain psychological phenomena, that may make these phenomena particularly interesting topics for research, will tend to make the courts very wary. These phenomena will be rejected as a whole such that the basic, uncontested psychological findings that are integral to them can be thrown out because they are presented as part of an unacceptable framework, rather than because of their inherent merits.

Offending action patterns and inferences

The second and most well developed area of psychological contribution to investigations has come from studies of detailed patterns of criminal behaviour that have allowed the modelling of criminal action. So for example, multidimensional scaling analysis of the detailed content analysis of rape victim statements has allowed investigative psychologists to provide a template of criminal action in rape, revealing a set of behaviours common to most offences alongside variations in psychological emphases to the attacks, such as the focus on hostility, control, pseudo-intimacy, criminality, or sexuality (Canter & Heritage, 1990). Most recently these models have identified style differences that can be related to Narrative Action Systems (Canter & Youngs, 2009) showing that different forms of burglary, murder, or robbery can be explained in terms of the role the offender is acting out that relates to his/her underlying life story.

Such models provide the basis for a whole range of contributions to the investigative process. By providing templates of the key variations in rape behaviour they draw attention to the salient features, amongst the many diverse features of any given offence, showing which aspects the investigators should focus on. As well as informing the investigative process, these sorts of formal understandings also have a contribution to make to a court's psychological conceptualisation of the criminal action pattern under consideration. For example, as Ebisike (2008) discusses, evidence drawing on known patterns of rapists' actions have been allowed into lower courts 'to disabuse the jury of common misconceptions about conduct of a rapist' (p. 79). However, on appeal, the evidence was disallowed.

A step beyond the patterns of criminal actions is to make inferences about the likely offender, which is typically what is meant by 'offender profiling'. These are inferences in the form of perpetrator characteristics. In its most direct form, this is applied to the assessment of how likely it is that the individual charged is responsible for the offence in question through consideration of the correspondence or not of the characteristics of the defendant with those of the perpetrator that are inferred from the particular criminal actions.

This potential led to a number of attempts to adduce 'offender profiling' evidence into court. Freckleton (2008) summarising the legal problems that have arisen in these attempts, outlines six major admissibility issues (p. 80):

- The status of profiling as an area of expertise, defined by such features as reliability.
- The use that can be made of propensity evidence and character evidence.
- Whether the probative value of profiling evidence exceeds its prejudicial effect.
- Whether profiling evidence is to be classified as precluded evidence of speculation.
- Whether profiling evidence is 'oath helping' or impermissibly self-serving.
- Whether profiling evidence unacceptably trespasses on the ultimate issue rule.

As Freckleton notes, a number of Canadian cases have provided some of the most informative reasoning on profiling evidence that he maintains will be drawn upon in other

jurisdictions. He cites as particularly notable the Supreme Court decision in *R v Mohan*. The case centred on a paediatrician accused of sexually assaulting a number of his young teenage female patients. The accused attempted to adduce a psychiatrist's evidence that three distinct groups of offenders with particular psychosexual profiles could be delineated as potentially responsible for such assaults. In this case the psychiatrist's view was that the accused did not have the characteristics identified for any of these groups, and indeed that across the series of offences, the assaults actually fitted the behavioural profile of more than one of the groups.

The court's view was that this expert's 'profiling' evidence should not be admitted because there was no standard behavioural profile of sexual assaults that was sufficiently distinctive to allow the characteristics of the offender to be reliably inferred. Unless the reliability of a profile could be unequivocally established, such evidence should not be allowed because it could not be attested that 'any value it may have had would not be outweighed by its potential for misleading or diverting the jury' (quoted in Freckelton, 2008, p. 424).

The legal barriers and problems exemplified here, encountered in attempts to present profiling around the world, are a product of both the underlying difference in the paradigms and cultures of the legal system and scientific psychology that Canter (2008) set out, but also of the early stages in scientific development on which most 'profiling' evidence draws. As Investigative Psychology develops as a science, it is clear that there will be an increasing number of cases in which it will be used, provided its practitioners make serious attempts to bridge the chasm between psychology and the law.

Ormerod writing in 1999 reviewed a number of possible situations in which the emerging investigative psychology findings could be accepted into court. The first was the situation in which the investigative psychologist understands that criminal style is accepted as a part of similar fact evidence. These are arguments about the distinct style of offending, which can be shown to go beyond base rates and thus enable inferences about the other offences an offender is likely to have committed. This interestingly can include patterns in the spatial behaviour of offenders, drawing on ideas from Geographical Offender Profiling.

Ormerod recognised that behavioural scientists could be drawn upon to support or deny identity through understanding how similar or different the patterns of behaviour within two offences were. Such evidence has been allowed in a few cases, sometimes under the guise of 'signature analysis' as described by Keppel (1995). Although Risinger and Loop's (2002) very thorough debunking of signature evidence in court, offered by ex-FBI agents, shows just how far the science needs to develop before it will be widely acceptable.

A further scenario is one in which it has been established that one of two defendants must be guilty of a given crime. Here, Ormerod argues a profile adduced by one of the defendants indicating that he or she was less likely to have committed the offence may be deemed acceptable.

Freckelton (2008) also draws attention to a further possible legal application of the broad offence modelling and inference area of investigative psychology, beyond the offender profile. This arises from the recognition of the distinction between the behavioural analysis of the crime scene and 'offender profiling'. As Freckleton (2008) notes, the analysis of the crime scene, that indicates what it shows and how it relates to other crime scenes does often meet legal requirements for admissibility. This is contrasted with profiling evidence, which the courts appear to understand as attempts to provide expertise on 'Why an offence was committed in a particular manner and, more particularly about who is more

likely to have committed the offence' (p. 72). Certainly, irrespective of the legal arguments, the current stage of development of the science means that there is more support for this form of contribution.

Beyond this, the models and conceptualisations of criminal action developed are also instructive to the court to the extent that they draw attention to the misconceptions or stereotypes of jurors, as highlighted in the authoritative review of Perlin, Birgden, and Gledhill in 2009. The role for these empirical points of comparison is further underlined in Lieberman and Kraus's study (2009) showing some of the complexities involved in predicting when these stereotypical views will manifest.

Investigative processes

The third area of psychological contribution to investigations has been to investigate strategies, that is, the detective decisions and investigative strategies; the actions that move forward the enquiry. Here studies are beginning to examine issues such as the points of maximum risk of error in the decision making, Senior Investigating Officers' narrative assumptions in response to differing crime scene conditions, and the most effective interviewing strategies for different types of offender (see Canter & Youngs, 2009; Williamson, 2006). Issues relating to the effective organisation and representation of information have been explored (Canter & Youngs, 2003) and the tasks and conceptual bases of preliminary decision support the tools specified (Canter & Youngs, 2008). Investigative psychologists have provided commentary to legal cases on the appropriateness of investigative strategies, particularly, allegations of entrapment.

There is still a long way to go in the development of this area of the discipline. However, as understanding of the potential problems in the processes of investigation builds, this knowledge will be available to the courts to challenge the decisions, strategies, and approaches that will lead to the charge under examination. We have yet to see any scientifically based scrutiny in court of the substantive implications of the detailed investigative processes in the way that we have seen the mechanisms and procedures that underpin DNA profiling or other forensic processes scrutinised.

Rather more developed is the understanding of the decision making of jurors and juries in court. Research has indicated that whilst jurors' basic rationality in their decision making is moderated by a variety of factors from prior knowledge to media accounts, they tend to be unaware of these influences on their reasoning (e.g. Finkel & Sales, 1997; Vidmar, 2002). Research in this area highlights a number of issues in jury decision making that seem applicable to detective decision making. It shows how jurors rely on story based explanations that go beyond the immediate facts available to them in evaluating the evidence and deciding upon a verdict (Pennington & Hastie, 1992). It draws attention to the range of prejudices that influence people's understanding of crimes (Vidmar 2002, 2003), and importantly, differences in the conditions under which these may apply (Wiener, Arnot, Winter, & Redmond, 2006).

Studies of mathematical models of juror decision making have clarified the ways in which evidence is combined to come to a decision (e.g. Moore & Gump, 1995). Examinations of well-established social psychological models of processing in response to persuasion in the court context have thrown up a range of interesting findings such as differences in the cues to which people will attend depending on the complexity of the testimony (e.g. Cooper, Bennett, & Sukel, 1996). Unquestionably, many of the findings and concepts that psychologists have found useful in understanding how ordinary people decide what

has happened in a crime will prove relevant to the understanding of the processes police go through in investigating a crime.

CONCLUSION

From the perspective of an investigative psychologist, there would seem to be great potential of giving guidance to the courts that is derived from a formal understanding of criminal action patterns, witness' memory limitations, indications of human deceit, or potential investigative errors. But for such guidance to be accepted, the differences between scientific and legal processes need to be appreciated. A legal verdict is not a scientific assessment of guilt or a mathematical weighting of the evidence but the expression of the ordinary person's view. If investigative psychologists want their science to inform the decisions made in court, the lessons from the legal experiences with 'offender profiling' evidence are clear. They need to develop their science to acceptable standards and to find ways of presenting the results of research that accommodate the traditions and paradigms of the court. This special issue is one step in that direction.

REFERENCES

- Canter, D. (2008). In the kingdom of the blind. In D. Canter, & R. Zukauskienė (Eds.), *Psychology and law: Bridging the gap* (pp. 1–23). Aldershot, UK: Ashgate.
- Canter, D., & Heritage, R. (1990). A multivariate model of sexual offense behaviour: Developments in offender profiling. *Journal of Forensic Psychiatry*, 1, 185–212.
- Canter, D., & Youngs, D. (2003). Beyond offender profiling: The need for an investigative psychology. In D. Carson, & R. Bull (Eds.), *Handbook of psychology in legal contexts* (pp. 171–205). Chichester, UK: Wiley.
- Canter, D., & Youngs, D. (2008). An interactive offender profiling system. In S. Chainey, & L. Thompson (Eds.), *Crime mapping case studies* (pp. 154–162). Chichester, UK: Wiley.
- Canter, D., & Youngs, D. (2009). *Investigative psychology: Offender profiling and the analysis of criminal action*. Chichester, UK: Wiley.
- Cooper, J., Bennett, E. A., & Sukel, H. L. (1996). Complex scientific testimony: How do jurors make decisions? *Law & Human Behavior*, 20, 379–394.
- Ebiske, N. (2008). *Offender profiling in the courtroom: The use and abuse of expert witness testimony*. London: Praeger.
- Ekman, P. (2001). *Telling lies*. New York: Norton.
- Finkel, N. J., & Sales, B. D. (1997). Commonsense justice: Old roots, germinant ground, and new shoots. *Psychology, Public Policy, and Law*, 3, 227–241.
- Freckelton, I. (2008). Profiling evidence in the courts. In D. Canter, & R. Zukauskienė (Eds.), *Psychology and law: Bridging the gap* (pp. 79–102). Aldershot, UK: Ashgate.
- Geiselman, R. E., Fisher, R. P., Mackinnon, D., & Holland, H. (1986). Enhancement of eyewitness memory with the cognitive interview. *American Journal of Psychology*, 99, 385–401.
- Gudjonsson, G. H. (1984). A new scale of interrogative suggestibility. *Personality and Individual Differences*, 5, 303–314.
- Kassin, S. M., Tubbs, V. A., Hosch, H. M., & Memon, A. (2001). On the 'general acceptance' of eyewitness testimony research: A new survey of the experts. *American Psychologist*, 56(5), 405–416.
- Keppel, R. D. (1995). Signature murders: A report of several related cases. *Journal of Forensic Sciences*, 40, 670–674.
- Leo, R., Costanzo, M., & Shaked, N. (2009). Psychological and cultural aspects of interrogations and false confessions: Using research to inform legal decision making. In D. Kraus, & J.

- Lieberman (Eds.), *Psychological expertise in court: Psychology in the courtroom*. Aldershot, UK: Ashgate.
- Lieberman, J. D., & Krauss, D. A. (2009). The Effects of Labelling, Expert Testimony, and Information Processing Mode, on Juror Decisions in SVP Civil Commitment Trials. *Journal of Investigative Psychology and Offender Profiling*, 6(1), 25–41.
- Moore, P. J., & Gump, B. B. (1995). Information integration in juror decision making. *Journal of Applied Social Psychology*, 25, 2158–2179.
- Ormerod, D. (1999). Criminal profiling: Trial by judge and jury not criminal psychologist. In D. Canter, & L. Alison (Eds.), *Profiling in policy and practice* (pp. 207–261). Aldershot, UK: Ashgate.
- Pennington, N., & Hastie, R. (1992). Explaining the evidence: Tests of the story model for juror decision making. *Journal of Personality and Social Psychology*, 62, 189–206.
- Perlin, M. L., Birgden, A., & Gledhill, K. (2009). 'The Witness Who Saw/He Left Doubt': A Comparative Consideration of Expert Testimony in Mental Disability Law Cases in Common and Civil Law Systems. *Journal of Investigative Psychology and Offender Profiling*, 6(1), 59–88.
- Risinger, D. M., and Loop, J. L. (2002) Three Card Monte, Monty Hall, Modus Operandi and 'Offender Profiling': Some lessons of modern cognitive science for the law of evidence. *Cardozo Law Review*, 24, 193–285.
- Undeutsch, U. (1989). The development of statement reality analysis. In J. C. Yuille (Ed.), *Credibility assessment* (pp. 101–119). Dordrecht, The Netherlands: Elsevier.
- Vidmar, N. (2002). Case studies of pre- and midtrial prejudice in criminal and civil litigation. *Law & Human Behavior*, 26, 73–105.
- Vidmar, N. (2003). When all of us are victims: Juror prejudice and 'terrorist' trials. *Chicago-Kent Law Review*, 78, 1143–1178.
- Vrij, A. (2008). *Detecting lies and deceit: Pitfalls and opportunities*. Chichester, UK: Wiley.
- Wagstaff, G. F. (2009). Is there a future for Investigative Hypnosis. *Journal of Investigative Psychology and Offender Profiling*, 6(1), 43–57.
- Wells, G. L., & Loftus, E. F. (2003). Eyewitness memory for people and events. In A. Goldstein (Ed.), *Comprehensive handbook of psychology*, 11, *Forensic psychology* (pp. 149–160). New York: John Wiley and Sons.
- Wiener, R. L., Arnot, L., Winter, R., & Redmond, B. (2006). Generic prejudice in the law: Sexual assault and homicide. *Basic & Applied Social Psychology*, 28, 145–155.
- Williamson, T. (Ed.) (2006). *Investigative Interviewing*. Cullompton: Willan.

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