# *Psychology and the Legal Process:* Is Science and Law an Impossible Marriage?*

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In this article I want to introduce some new and possibly controversial ideas concerning the relationship between law and science. It would be convenient if I could enter the ongoing debate between the believers and the sceptics on one side or the other. My book, *Psychology In and Out of Court*[1] is certainly written from the perspective of a sceptical lawyer who remains to be convinced that the work of legal or forensic psychologists provides unqualified benefits for the law and the legal profession. Likewise, *Children's Welfare and the Law,*[2] a book I wrote with Judith Trowell (a child psychiatrist from the Tavistock Clinic in London) with its subtitle, *The Limits of Legal Intervention*, casts doubt over the value of law in handling the subtleties and complexities of child development and the relations between children and their care-givers. These two books together could be seen as condemning any joint enterprises between psychologists and lawyers, or psychiatrists and lawyers to certain failure — a conclusion that would upset many people, particularly those with a vested interest in promoting and maintaining interdisciplinary work.

Before we jump to this conclusion, I believe that we need to identify different levels of analysis and debate. For a social scientist like myself to declare that there are fundamental incompatibilities between law and science does not mean that all psychologists should cease immediately to undertake any forensic work, or that the courts should forthwith reject out of hand any evidence offered by psychological experts. Nor does it mean that new technologies, such as video films, genetic identification techniques or the content analysis of confessions should be steadfastly ignored by lawyers. There may be argument over the validity or reliability of some of the conclusions drawn from expert evidence and over the way the new technologies should be used, but there is no controversy over their potential utility for the practice of law. The issue that I want to tackle is at a different level of analysis.

Let me start off by saying that anyone who believes that there is one and only one version of "the truth" or historical "reality" and that this is the one produced by the verdict or the finding of fact at the end of a court hearing, is in the privileged position of being able to shut their mind to any doubts or uncertainty. There is nothing that I can usefully say to them, except perhaps to ask how they explain the kind of situation that has been occurring with depressing frequency in Britain, where it turns out that evidence was falsified or witnesses did not come forward or were ignored by the prosecution. In these situations we seem to have two versions of "the truth", at least until an appeal is successful, the one official version which declares the defendant guilty, and the other unofficial, although it is believed by many millions of people. To those who accept that our access to reality is re-

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1 King, M, *Psychology In and Out of Court* (1986).

2 King, M and Trowell, J, *Children's Welfare and the Law: The Limits of Legal Intervention* (1992).

stricted, not only by the limits of our senses, but also by what information is available at the time and what aspects of that information is brought to and selected by us for our attention, I can take matters further.

To progress from this position we need to turn our attention to law and science as social systems with different functions and different modes of operation within the same society. The versions of reality produced by the legal system, as we have seen in erroneous conviction cases, have to conform to the processes and procedures of the law.[3] An innocent person who is wrongly convicted does not become "unconvicted" in the eyes of the law just because a clever journalist discovers that the police cooked the evidence. There has to be an appeal or a retrial before the finding of guilt can be reversed, before the legal truth can be changed to conform to what millions of people now believe to be the truth.

Science has its own procedures which it deploys to determine its version of "reality" and decide what is accepted in our society as factually true or untrue. These procedures are not the same as law's. They may rely, for example, on the results of experiments exceeding the threshold of what could be expected by chance occurrence, or they might analyse data in a tried and tested manner to obtain results which are acceptable for publication in a scientific journal. The courts cannot and do not decide between the validity of rival scientific theories, neither are legal decisions testable in laboratories.

The two systems not only serve very different functions in society, but they also see the same events in very different ways. When a murder takes place, for instance, the law will be concerned with evidence that will be admissible to the courts and allow the courts to reach a legal verdict of guilty or not guilty. A scientist, say a psychologist (but not a forensic psychologist) might be interested in analysing the case to discover possible motives for the murder, not as evidence of guilt, but to add to the store of knowledge about human behaviour. Similarly, a pathologist might be interested in discovering the causes of death — once again not for forensic reasons, but, for example, in pursuit of an interest in the effects of toxins on the human body. To take matters a stage further, law's procedures, rules of evidence, processes and traditions can all be seen to serve one overriding objective, distinguishing the legal from the illegal, the lawful from the unlawful.[4] This does not mean that judges and lawyers do not do other things. They may, for example, engage in mediation, or reprimand incompetent advocates, but when making legal judgments, they are acting as instruments of the law. Scientific processes, on the other hand, serve the objective of distinguishing what is true from what is false. Unlike legal procedures, they do not have to be fair or conform with rules of natural justice. Although rules and procedures do exist in science, these are not the same, nor of the same variety as legal rules and procedures. Scientists may from time to time break the rules or discover new procedures without necessarily invalidating the truth of the results. All depends on how convincing this new account of the truth is to the scientific community.

We could obviously take these differences between law and science much further, but let us stop here and ask what happens when the two systems, disciplines, discourses (call them what you will) encounter one another. Clearly, at the practical level cooperation be-

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3 Stephenson, G M, *The Psychology of Criminal Justice* (1992).

4 Luhmann, N, "Law as a Social System" (1992) 83(1–2) *Northwestern U LR* at 136, Luhmann, N, "Operational Closure and Structural Coupling" (1992) *Cardozo LR* 1419 and Teubner, G, *Law as an Autopoietic Society* (1992).

tween lawyers and scientists is both possible, and, for the effective functioning of the courts and society, desirable. In terms of the different kinds of "understanding", the different selections from reality, and the different social identities of these two items, what do such encounters involve?

Let us take an example from family law. Two parents are divorcing and each seeks custody of the child. Because of the complexity of the case and the bitterness of the feelings involved the court calls upon a child psychiatrist to give an opinion as to which of the two parents is better able to meet the child's needs. "Hardly an example of law and science", you may say. But any child psychiatrist worth his or her salt in investigating the case and providing the court with a firm recommendation, will draw upon knowledge about scientific child development as well as his or her clinical experience in the often indirect ways that children express their fears, desires and needs. If not strictly scientific, then at least medico-scientific.

What the child psychiatrist is being asked to do, however, is certainly not a scientific or even a clinical task. At best it involves a level of speculation about future uncertainties and imponderables, which are hardly scientific. At worst, it presents the psychiatrist an opportunity to engage, whether consciously or unconsciously, in promoting his or her biases to the status of expertise or "medical evidence".

Just in case you think that I am merely betraying my own cynical attitude towards expert evidence, this is how a psychiatrist from the Tavistock Clinic, London expressed her feelings about giving evidence:

> I feel very anxious, particularly about the fact that most of our evidence, in my view, is not hard evidence, it's soft evidence, it's a matter of opinion and however hard I try to be as certain as I can as a human being that what I am saying is in the best interests of the children and the families concerned, I find the whole idea of having to make definitive statements of this kind particularly difficult.[5]

This is not to suggest that there is any objective way of reaching such difficult decisions. The courts inevitably take into account prevailing social values concerning, for example, gender roles and children's needs. What worries many people, including many lawyers, is the way that these values may find their way into the reports of people who are treated by the courts as scientific experts and have to be dealt with in law as if they had medical or scientific validity. What is particularly worrying from this perspective is that the court's use of psychiatrists and psychologists has increased dramatically since sexual abuse became an issue in child protection and child custody cases. Anyone who thinks that determining whether a child has been abused sexually and identifying the abuser is simply a matter of getting an expert to interview the child, preferably with the use of video and anatomically correct dolls, should read chapter five of *Children's Welfare and the Law*. They would then discover how much speculation and interpretation is involved in such decisions.

If we were to go on from here and look in detail at the various uses of psychological knowledge in court settings we would probably reach the conclusion that what is going on is not a relationship between law and science, between two different disciplines, social

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5 Above n2 at 92. See also King, M, "Children and the Legal Process: the View From a Mental Health Clinic" (1991) 4 *JSWL* at 269.

systems or ways of understanding the world, but a relationship between two groups of professionals, lawyers and psychologists, the one legitimating the activities of the other.

This is not to suggest that such a symbiotic relationship is necessarily a bad thing. But it can be very confusing to an outsider, who might be led to expect that scientific evidence should be scientific, or that psychological evidence should be psychological in some objective or absolute way. It may also lead to deep disappointments among both lawyers and psychologists who seek to merge the two systems of knowledge to create a new discipline of legal psychology or law and psychology.

As an example of what I mean, let me return to the issue of child protection decisions. Psychological knowledge about children's development, and in particular about the causes and effects of the many and varied experiences that children may encounter during their childhood, is a huge field involving not only many different specialist areas but also different theories and different schools of thought from the psychoanalytical to the behaviouristic. Yet the courts see and use only a tiny fraction of this knowledge. Why is this? The answer is simply that most of it cannot easily be used to assist the court in determining legal decisions, such as which parent is better for the child, has the child been abused, what should be done now. Take the example of family systems theory, which in a nutshell looks at the many different relationships in the child's life and the part the child plays symbolically within this network of relationships in order to understand family dysfunctioning and its effect on the child. Family systems theorists have enormous difficulty fitting their way of seeing things into a legal framework, in answering legal questions. This is a particular problem for systemic theorists, as the court and the lawyers may also be seen as part of this network of relationships. It may, thus, construct a very different image of law from that which lawyers and judges are accustomed to.

My colleague, Christine Piper and I managed to upset quite a few people when we described the use made of psychological knowledge by the courts as enslavement.[6] This was not, as some critics believed, to suggest that psychological experts are in any way enslaved, they are paid far too well for that! What it was describing, rather, was the way in which psychological knowledge was reconstructed within law to answer legal questions and to conform to law's notions of what is and what is not acceptable evidence. In the same book we also gave what we saw as the reconstruction and the use by the legal system of only certain selected aspects of psychology as psychology-within-law.[7]

To the question: can one have "law-within-psychology", an enslaved discourse, the answer is yes. I have already touched upon the way that the courts and legal system may be used within family systems theory. One could also look at the way in which in experimental psychology manipulations reconstruct the legal process, the presentation of evidence, jury deliberations, eyewitness evidence, in ways which are amenable to its procedures — the controlled conditions of the experiment and numerical analysis. This is not to deny the value of such experiments to psychology or that the results may in turn be reconstructed by law in practical ways. The point that I want to make is rather that what is reproduced within the experimental setting is a selection. It reduces and simplifies the complexities of

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6 King, M and Piper, C, *How the Law Thinks About Children* (1990).

7 King, M, "Child Welfare Within the Law: The Emergence of a Hybrid Discourse" (1991) 18(3) *JL Soc* 303.

the legal world so that experimental methods and statistical tests may be applied to what appear to be legal issues.

The accumulation of this "law-within-psychology" knowledge leads inevitably to claims by some psychologists that the legal system is unscientific and woefully ignorant of important "facts" about the way that people behave and to demands for changing the legal rules and for psychologists to give evidence as experts in every case involving eyewitness or children's evidence.[8] Some of these claims and proposals for improving the efficiency of the legal system by introducing new forms of evidence or excluding errors may be of important practical value to lawyers. Unfortunately, however, many of the more general criticisms that psychologists make about the law are based upon the fallacious belief that there is only one kind of truth and reality, which is that produced by science. They fail to realise much of what law reconstructs as reality has to be selected not only from scientific "facts", but from the values, beliefs, implicit understandings, shared assumptions that exist in society at any one time. Experimental psychologists, for example, are particularly bad at dealing with the problem of people who deliberately lie. Much of the legal process is concerned with just this problem of distinguishing truth-tellers from deceivers and if you analyse the methods by which these distinctions are made in law, you will find that they involve making extremely complex judgments about people, their motives and their behaviour.

These claims and demands give me less concern than the attempt by law to place what it calls "scientific evidence" or "medical evidence" from experts on a pedestal beyond challenge and beyond reproach. This is a problem, as we have seen recently in the IRA trials in Britain, where apparently "hard" scientific evidence on the traces left by explosives survived the techniques of cross-examination and resulted in wrongful conviction. It is much more of a problem in children's cases where the courts are able effectively to use welfare officers, legal psychologists and psychiatrists as "experts" to legitimate what are often highly speculative accounts of what is likely to be in the best interests of the child. This not only places enormous power in the hands of the experts, but because law is not accountable for the consequences of its decisions, they remain legal, even if they prove to be disastrous for the child. It also enables this power to be exercised without responsibility for the results it may bring. In my view these decisions are much better taken outside the legal system.

Let me end by reiterating my belief that the marriage between law and science is not just improbable, it is impossible, at least in any way that will merge the two into one happy and prosperous union. At the intellectual level of knowledge, meaning and understanding, despite the best intentioned efforts to bring these two parties together, they will inevitably remain apart, for each sees the world in different ways. Each constructs external reality according to different procedures, and the different codes lawful/unlawful, scientifically true/scientifically false. Law is part of external reality for science, just as science is for law. This, I hasten to add, does not mean that psychologists and lawyers should not get together to solve practical problems and to legitimate one another's activities. This has to do with cooperation between professions and not with the merging of law and science. All I ask is that those lawyers and psychologists who engage in such cooperative ventures do not delude themselves as to their nature.

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8 Davies, G, "Children on Trial? Psychology, Videotechnology and the Law" (1991) 30(3) *Howard J* 177 and Spencer, J and Flin, R, *The Evidence of Children: The Law and the Psychology* (1990).