

# OFFENDER PROFILING AND EVIDENCE IN COURT

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## ABSTRACT

Offender Profiling has intrigued the public attention and received extensive media exposure recently. There are many different definitions about offender profiling but their mutual point can be summarized as to aid the law courts in terms of making the right decision. Offender profiling was first regularly used by the FBI's Behavioural Science Unit to form the characteristics of criminals. Expert evidence has been used by some countries such as in the US and the UK, but the expert evidence system is still controversial. Furthermore, no systematic research has been conducted into the quality of expert's reports and oral evidence in court. On occasions, poor expert evidence results in a **miscarriage of justice**.

This essay will initially focus on the historical development of offender profiling and give some examples from different countries. Secondly, it will give information about different approaches of profiling. Thirdly, it will examine role of the profilers as an expert in court rooms. Finally, the essay will try to answer whether profiling can be used as evidence in court or not

**Keywords:** Offender profiling, expert evidence, court room, report, characteristics, questioning offenders.

## ÖZET

Suçlu Profili son sureçte halkın dikkatini ve yaygın olarak medyanın ilgisini çekmektedir. Suçlu Profili konusunda bir sürü farklı tanım bulunmaktadır ancak bu tanımların ortak özelliği Suçlu Profili oluşturmanın Mahkemelerin doğru karar almalarını sağlamaya yardımcı olmak şeklinde özetlenebilir. Suçlu profile ilk olarak FBI'nın Davranışsal Bilim Ünitesi tarafından suçluların özelliklerinin oluşturulması amacıyla kullanılmıştır. Bilirkişi tanıklığı Amerika Birleşik Devletleri, İngiltere gibi ülkelerde kullanılmaktadır ancak bilirkişi tanıklığı uygulaması hala tartışmalıdır. Bunun yanında şuna kadar bilirkişinin Mahkemedeki raporu ve sözlü ifadesinin kalitesi hakkında herhangi bir sistematik araştırma uygulanmamıştır. Zaman zaman yeterli olmayan Bilirkişi tanıklığı Adli Hata ile sonuçlanmaktadır.

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Bu makale başlangıç itibariyle Suçlu Profilinın tarihi gelişimine odaklanmış ve bazı ülkelerden örnekler içermektedir. İkinci olarak Suçlu Profili oluşturma konusunda farklı yaklaşımlar hakkında bilgi aktarılmıştır. Üçüncü olarak Bilirkişinin uzman olarak duruşma salonundaki rolü inceleyecelenmiştir. Son olarak ise, Suçlu Profili oluşturmaın Mahkemede kanıt olarak kullanılıp kullanılmayacağına yanıt verilmeye çalışılmıştır.

**Anahtar Kelimeler:** Suçlu profili, bilirkişi tanıklığı, duruşma salonu, rapor, hükümlü soruşturması.

## INTRODUCTION

Offender profiling is the combination of sociological, psychiatric, psychological, and criminological disciplinary knowledge in the analysis of criminal behaviour (Palermo & Kocsis, 2005, p.5). Profiling is generally regarded as “a technique for identifying the major personality and behavioural characteristics of an individual based upon an analysis of the crimes he or she has committed (Bennel, Corey, Taylor & Ecker, 2008, p.143). Alison, Smith & Morgan (2003, p.185) suggest that offender profiling is commonly associated with inferring characteristics of an offender from the actions at a crime scene. Offender profiling is currently used in three phases of the criminal justice process, investigation, apprehension and prosecution (Hicks & Sales, 2006, p.13). Offender profiling is most often used as a last resort (Muller, 2002, p.331). In more recent years, criminal profiling has intrigued the public through such films as *Silence of the Lambs* and TV series such as *Miami*, *Crossing Jordan*, or *Autopsy in the United States* and *Cracker in the United Kingdom* (Bartol & Bartol, 2004, p.74). Offender profiling aims to improve the detection of offenders and the solution of crimes; to assist in targeting offenders for surveillance and interviewing and; to assist in questioning offenders about possible crimes they might have committed (Farrington & Lambert, 2000, p.246). Profiling also aims to assist in the detection of offenders by extrapolating their personal attributes from information available in crimes (Blackburn, 1993, p.310). According to Harrower (1998) the overall aim of profiling is to narrow the field of investigation (Gross, 2010, p.755). Another words, profiling aims to narrow the scope of a suspect pool rather than to identify a single guilty criminal (Torres, Boccaccini & Miller, 2006, p.51). Offender

profiling would only help where the police have problems identifying suspects and organising the information collected (Howitt, 2009, p.257). Cesare Lombroso (1835-1909), is generally thought to have been one of the first criminologists to attempt to formally classify criminals for statistical comparison (Turvey, 1999, p.3). There are various types of profiling such as behavioural, psychological, statistical, geographical, linguistic and graphological (Palermo & Kocsis, 2005, p.124). This essay will initially focus on the historical development of offender profiling and give some examples from different countries. Secondly, it will give information about different approaches of profiling. Thirdly, it will examine role of the profilers as an expert in court rooms. Finally, the essay will try to answer whether profiling can be used as evidence in court or not.

## **I. FBI AND OFFENDER PROFILING**

The creation of offender profiling as we know it today can be attributed to the work of FBI during the 1970's (Ainsworth, 2002, p.143; Devery, 2010, p.392). During the 1960s and 1970s, the increasing trend in serial killing led to the development of a profiling unit at the FBI (Alison et al, 2003, p.185). The term "offender profiling" was first regularly used by members of the FBI's Behavioural Science Unit to describe the process of drawing inferences about a suspect's characteristics from the details of his or her actions in a crime (Canter, 1995, p.343).

Profiling has also been used with some success as an assessment of political figures. During World War II, William Langer, a psychiatrist was asked to profile the personality of Adolf Hitler (Palermo & Kocsis, 2005, p.125; Alison & Canter, 1999, p.24; Newburn, 2007, p.847; Holmes, 1998, p.174). Criminal profilers have received extensive media exposure and attention, and much of it has portrayed profiling as valid and reliable (Paclebar, Myers & Brineman, 2007, p.251). The first widely acknowledged application of psychological profiling in the criminal investigation process can be traced to the almost magical description in 1956 of New York City's Mad Bomber, George Metsky, by a psychiatrist, Dr James A. Brussel (Jackson & Bekerian, 1997, p.3; Newburn, 2007, p.848). Profiling is not suitable for

use in all types of crimes (Horwath, 2009, p.70). Profiling would appear to be more appropriate for certain types of offence than others. Currently, the most common crimes for which it is used are murder and the more serious sexual offences, especially where it appears that there is a series of connected crimes. The FBI believes that property crimes and robberies are not particularly suitable for profiling as such offences are unlikely to reveal many clues about an offender's underlying personality (Ainsworth, 2000, p.105).

## II. APPROACHES OF OFFENDER PROFILING

The different approaches to traditional offender profiling can be broadly categorized into three types: a criminal investigative approach, a clinical practitioner approach, and a scientific statistical approach (Muller, 2000 as cited in Alison, Goodwill, Almond, Heuvel & Winter, 2010, p.116). *The Criminal Investigative Approach* developed by Federal Bureau of Investigation (FBI) agents in the 1970s, presents the first systematic attempt to utilize all available information on a violent offence in combination with considerable investigative knowledge to make inferences about the type of unknown offender (Douglas, Ressler, Burgess & Hartman, 1986 as cited in Alison et al, 2010, p.117). The FBI approach has four main stages, *Data assimilation* is the collation of major sources of information such as police reports, crime scene photographs, witness statements, pathologists' reports, *Crime scene classification*, in this stage FBI profilers distinguish between organised and disorganised crime scenes. *Crime scene reconstruction*, and *Profile generation*. This is the stage at which various hypotheses are generated and brought together in order to build up a picture of the offender (Newburn, 2007, pp.848, 849, Howitt, 2009, p.266). *The Clinical Practitioner Approach*: Individuals using the clinical practitioner approach rely on their practical experience, knowledge and to varying degrees intuition to draw inferences from crime scene information. Clinical profiling approaches appeared to be primarily based on the expertise and knowledge of the individual profiler (Copson, Babcock, Boon & Britton, 1997 as cited in Alison et al, 2010, p.118). This approach looks at offenders from a mental illness point of view and tries to examine crimes and crime

scenes from that perspective (Ebisike, 2008, p.19).

We should also mention the work of Paul Britton in this approach. Britton was trained as a clinical psychologist and his early work involved the treatment of those with behavioural disorders and mental illness. Interestingly he served for a short period of time as a police cadet, although he admits that this gave him little relevant insight or experience in terms of criminal profiling. Britton produced the profile of a killer in case by examining the photographs of the crime scene (Ainsworth, 2001, p.146). *The Scientific Statistical approach* is primarily based on the multivariate analysis of behavioural and other information found at the crime scene to infer offenders' characteristics and psychological processes. The pioneering work of Canter (1995, 2000) and his colleagues aimed to employ an explicit, psychological (i.e. scientific) framework to provide offender characteristics that are directly useful to police investigations (Alison et al, 2010, p.118). Statistical profiling uses statistical techniques such as smallest space analysis in order to plot the relationship between crime scene characteristics on a diagram or plot (Howitt, 2009, p.276). In this approach, it is more important that the profiler has sound statistical skills than experience in criminal investigation (Pakes & Winstone, 2007, p.28). A major obstruction when considering the admissibility of Offender Profiling evidence is whether it is sufficiently reliable enough to be regarded as an area of expertise (Freckelton, 2008, p.85). Kieley (2006) states that many important dispositive questions arise from the necessary presence of forensic experts in criminal trials: One of them is who qualifies as an expert? (Kieley, 2006, p.10).

### III. THE ROLE OF EXPERT IN JUSTICE SYSTEM

An expert can be defined as a person who possesses an extensive skill or knowledge in a particular field (Gudjonsson & Copson, 1997, p.61). The British Psychological Society (BPS) publication, *Psychologists Expert Witnesses: Guidelines and Procedures for England and Wales* (2007) defines an expert witness "as a person who through special training, study or oral experience, is able to furnish the Court, tribunal or

oral hearing with scientific or technical information which is likely to be outside the experience and knowledge of judge, magistrate, convenor or jury” (Clifford, 2012, pp.288, 289). Legal systems have utilized expert witnesses for approximately 700 years (Bank & Packer, 2007, p.443). The role of the expert is “to provide the judge and jury with information and opinions that the average jury member could not deduce from the evidence” (Blau, 1998, p.112). Expert witnesses have been permitted to give expert evidence on a myriad of subjects (Freckelton & Selby, 2009, p.25). An expert witness must be competent, that is to say a genuine expert, otherwise the expert’s evidence would not be worth receiving in a criminal trial (Roberts & Zuckerman, 2010, p.493). Attempts have been made in a number of countries to adduce evidence in the courts that, because of the characteristics of a person, it is either more or less likely that he or she committed a criminal offence (Freckelton, 2008, p.79). Furthermore, whether a witness is an expert in his/her field is a question of fact for the judge (Kapardis, 2010, p.231).

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Thus in many cases, judges are reluctant to allow expert testimony on eyewitness identification fearing that the trial may turn into a battle of the experts (Roesch, Zaph & Hart, 2010, p.139). Profiling evidence has been accepted in courts in the U.S. in both the trial and sentencing phases, but other jurisdictions have been more cautious in their acceptance. For example, courts in the UK and Australia have been reluctant to introduce profilers as experts, even though profiling has been given some exposure in courts operating at the lower end of the justice system (Petherick, 2006, p.67). The admittance of expert testimony is often crucial to success in both civil and criminal trials. Yet, the very attribute that makes expert testimony most useful to the legal system, namely that it brings evidence and information to bear that is beyond the knowledge of the average jury or judge, also made it increasingly controversial (Krauss, Cessar & Strother, 2009, p.2). It remains unclear whether sound, relevant expert testimony is aiding legal decision makers in making better decisions or if overly persuasive but inaccurate expert testimony is confusing and misleading judges and jurors (Krauss et al, 2009, p.2). However; Palermo and Kocsis

(2005) stated that “we are obviously in favour of criminal profiling when in expert hands” (Palermo & Kocsis, 2005, p.121). The credibility of expert testimony depends on the credibility of everything done before testifying (Bank & Packer, 2007, p.443). Expert testimony may occur in a variety of pre-trial hearings, during both civil and criminal trials or delinquency proceedings or during sentencing or disposition hearings. In each of these contexts, the role of the expert witness is to help the judge or the jury in making decisions on matters that are beyond the knowledge of the typical layperson (Bartol & Bartol, 2004, p.263). Daubert (1993) listed four factors which are deemed necessary in testing the validity of expert evidence: falsifiability, error rate, peer review and general acceptance (Memon, Vrij & Bull, 2003, p.170).

### **A. Critics about Expert Evidence**

Expert evidence sometimes may be poor. No systematic research has been conducted into the quality of expert’s reports and oral evidence in court. On occasions, poor expert evidence results in a miscarriage of justice. There are a number of reasons for poor expert evidence. As far as psychology is concerned, Gudjonsson (1993) lists the main reasons under the following headings; lack of knowledge, skill and experience, lack of preparation - thoroughness, inappropriate use of psychological tests or misinterpretation of results, and eagerness to please the referral agent (Gudjonsson & Copson, 1997, pp.65-66). Ormerod and Sturman (2005) state that in light of recent miscarriages of justice arising from the misuse of expert evidence (e.g. the evidence relating to Sudden Infant Deaths in Cannings (2004) and ear prints in Dallagher (2002) the English courts will be especially vigilant against experts with inadequate expertise (Ormerod & Sturman, 2005, p.179). Also an expert witness may have an unwarranted influence on the jury because of their status is an area for concern for the judiciary (Ormerod & Sturman, 2007, p.179). A court may be unwilling to allow testimony from a profiler as it has the potential to be speculative and overly prejudicial in the mind of jurors (Paclebar et al, 2007, p.250).

Criminal cases in the UK are referred to the expert by either the defence or prosecution rather than by the court. In respect to offender profiling, cases are almost always referred by the police. The expert may feel under pressure to seek and report findings which are favourable to the instructing side (Gudjonsson & Copson, 1997, p.66). If the findings are not favourable, the expert may be asked to alter the report to make it more favourable. This is common practice when experts prepare reports for the defence and it can mislead the court. Lord Taylor (1994) makes the point that some experts are far too eager to please the referral agent and they may as a result deliberately give a misleading opinion to the court, or to the police in cases of offender profiling (Gudjonsson & Copson, 1997, p.66). Courts world-wide are divided as to the appropriate standard for evaluating the admissibility of such testimony. Some courts have chosen to restrict greatly the amount of expert testimony that reaches the ears of the jury or fact-finders. Adversarial systems, like that of the US rely on cross-examination and competing experts to educate the judge and jury about the weakness of expert testimony (Krauss et al, 2009, p.3). In the 1990s, the US was the first country to enact substantial changes in its expert evidentiary admissibility practices (Krauss et al, 2009, p.4). Earlier guidance about the use of experts in the courts came from a case in 1923 (Frye v. United States) (Campbell, 2010, p.766). Frye test is still used in states such as New York to judge the admissibility of expert testimony (Fulero, 2004, p.251). However many courts have abandoned the Frye approach (Sekula & Hinton, 2006, p.288). Profiling does have the potential to serve as useful and important evidence in certain trials. However, as in other fields that fall under the title of expert evidence, it must be subject to rules of admissibility (Petherick, 2006, p.74). Some 70 years later in 1993, the Daubert Rule proposed that the admissibility of evidence should be based on its scientific reliability and validity (Petheric, 2006, p.75; Arrigo & Shipley, 2005, p.38).

## **B. Examples about Expert Evidence Cases**

There are some examples for expert evidence cases that took place in the US and in the UK (Petherick, 2006, p.74). The case that well illustrates



the many pitfalls of profiling testimony is in *State v. Haynes* (52). Richard Haynes was convicted of murder by the Common Pleas Court in Ohio. On appeal, the assignment of error concerning the admission of testimony of Robert Walter (a prison psychologist) as an expert in criminal profiling was evaluated. The state argued that this testimony showed that the crime was not a homophobic murder done out of panic after an unsolicited homosexual encounter but rather an anger retaliatory killing committed purposely after a cooling off period. Following Evidence Rule 402, stating that all relevant evidence was admissible, except as otherwise provided, the court of appeals addressed the reasons for exclusion of this testimony (Meyer, 2007, p.214). In the UK one of the most famous cases was *R. V. Stagg*. In this case the police had used an undercover operation to gather information about Colin Stagg, who was a suspect in the killing of Rachel Nickell. His correspondence with a policewoman had revealed that he shared a supposed rare sexual deviancy with the killer of Nickell and that his psychological profile conformed insofar with the psychological profile that had been prepared of the killer. The Central Criminal Court refused to admit such evidence. The profiling evidence offered by the prosecution was also rejected, and Justice Ognall made general damning statements about the use of profiling evidence (Meyer, 2007, p.234). In the United Kingdom, the most substantial analysis on the admissibility of psychological profiling evidence took place in *R. V. Gilfoyle* in 2001 (Meyer, 2007, p.237). In the case of *R v Gilfoyle* (2001) evidence presented by Professor David Canter that the deceased had committed suicide was declined. Since Canter had no previous experience in evaluating suicidality and there was no identifiable way for the court to test the reliability of his evidence it was ruled inadmissible (Freckelton, 2008, p.88). The court of Appeal ruled that Canter's opinion was inadmissible as a matter of law for numerous reasons, including that there was no identifiable way to test the reliability of his testimony (Meyer, 2007, p.236).

In many trials Judges may choose to exclude evidence because of this to try and avoid a debate between conflicting experts, which would distract the jury and waste time rather than assisting the court (Ormerod, 1999,

p.229). For expert evidence to be accepted it must supply the court with information which is likely to be outside the experience and knowledge of the trial of fact (Boyle, McCrimmon & Martin, 1999, p.621). The most significant of the decisions is the Supreme Court decision of R v Mohan [1994] arguably Canada's most important decision in relation to the admissibility of expert evidence. The accused was a paediatrician who was charged with a number of sexual assaults upon female patients aged between 13 and 16. The accused sought unsuccessfully at trial to call evidence from a psychiatrist that the perpetrator of the offences alleged to have been committed would be part of a limited and unusual group of individuals and that the accused did not fall within the class because he did not possess the characteristics belonging to members of the group (Freckelton, 2008, p.90).

## CONCLUSION

To conclude, as it is stated above Offender Profiling has intrigued the public attention and received extensive media exposure recently. There are many different definitions about offender profiling but their mutual point can be summarized as to aid the law courts in terms of making the right decision. Offender profiling was first regularly used by the FBI's Behavioural Science Unit to form the characteristics of criminals. Expert evidence has been used by some countries such as in the US and the UK, but the expert evidence system is still controversial. Expert evidence may be poor sometimes. It may happen due to lack of skill, knowledge and experience of the experts and it may mislead the courts. Furthermore, no systematic research has been conducted into the quality of expert's reports and oral evidence in court. On occasions, poor expert evidence results in a miscarriage of justice. Also as Lord Taylor (1994) stated some experts are far too eager to please the referral agent and they may give misleading opinion to the court.

When we look at some cases in the US and in the UK we have seen some expert evidences that were not accepted by the law courts due to some reasons. To illustrate, in the US Haynes case and in the UK R. V.

Stagg and R. V. Gilfoyle cases. In R. V. Gilfoyle case the expert was Professor David Canter. Even though Canter is accepted as one of the most prominent academicians in forming profiling in the UK, his expertise was not accepted by the law court. The author suggests that there should be a standard training for all experts regardless of looking their professional titles. These cases can be assessed as the iceberg of the problem. We are aware of sudden infant deaths in Cannings that took place in 2004 and ear prints in Dallagher (2002) what about the others? Briefly, even though forming profiling has made progress recently there are still some deficiencies. Thus, according to the author, profiling should not be used as criminal evidence in courts under these conditions.

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