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Book Note

IN DOUBT: THE PSYCHOLOGY OF THE CRIMINAL JUSTICE PROCESS, by Dan Simon¹

JENNIFER MCKEE

THE PRESUMPTION OF INNOCENCE is a foundational principle of the modern criminal law throughout North America. Formal procedures governing the investigation, prosecution, and adjudication stages aim to ensure that only the truly guilty are convicted, while the innocent go free. Yet, over 250 people have been exonerated by post-conviction DNA testing since the late 1980s² and it is likely that even more innocent people have been wrongfully convicted in cases where DNA evidence was either not available or not preserved.

Increased awareness of wrongful convictions has generated a growing body of literature examining the systemic and procedural failings of the criminal justice process. Dan Simon's book, *In Doubt: The Psychology of the Criminal Justice Process*, provides powerful critiques of common criminal justice procedures using an extensive range of experimental psychology research.

Chapter one proposes the significant importance of understanding how cognitive functions may lead to bias considering that "the criminal justice process is operationalized mostly through people."³ The book is intentionally broad in scope and utilizes case examples largely for illustrative purposes. Simon ultimately seeks to explain just some of the pathological effects of human cognition on the administration of justice, which occur despite the best intentions of legal actors and agencies.

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1. (Cambridge: Harvard University, 2012) 416 pages.
 2. Brandon L Garrett, *Convicting the Innocent: Where Criminal Prosecutions Go Wrong* (Cambridge: Harvard University, 2011) at 5.
 3. *Supra* note 1 at 2.

The following four chapters focus primarily on the criminal investigation stage. Chapter two examines dynamics within investigative procedures that might cause criminal investigators to unwittingly draw erroneous or premature conclusions. One such dynamic is the “inherent tension between an objective inquiry and an adversarial-like endeavor of building a case against the suspect.”⁴

Investigation necessarily requires developing hypotheses to help resolve the uncertainties surrounding crimes. However, a focal hypothesis⁵ developed early on in the investigation is liable to lead to confirmation bias.⁶ An investigator may subconsciously be more disposed to attend to evidence that supports the focal hypothesis while rejecting evidence that contradicts it.⁷ Motivational factors (e.g., public and institutional pressures to solve crimes)⁸ may also support confirmation bias and intensify the biasing influence of another cognitive mechanism, the coherence effect.⁹ This mechanism causes mental grouping of pieces of evidence that individually are ambiguous, but once combined point toward a seemingly logical conclusion. This permits investigators to sort complex arrays of evidentiary information, but may also result in a loss of objectivity.

Chapters three and four examine the biasing effects inherent in the use of witnesses. Studies have repeatedly shown that eyewitness identification is highly influenced by witnessing conditions¹⁰ and are highly susceptible to suggestive information during identification procedures, such as subtle differences in the phrasing of questions from the procedures’ administrators.¹¹ This problem is exacerbated by the lack of procedural congruence amongst law enforcement agencies.¹²

4. *Ibid* at 25.

5. The focal hypothesis refers to the specific hypothesis which that the investigator’s focus, overriding other possible hypotheses. Simon relates the focal hypothesis to the “unwarranted conformity of incoming information to extant beliefs” (*ibid* at 22).

6. *Ibid*.

7. *Ibid* at 23-25.

8. *Ibid* at 26-27. Group influence acts as a motivation factor. Simon reports that “excessive cohesion” amongst members of a group (e.g., police agencies) can result in a pathological state called “groupthink” which can result in poor behaviour by its members and a perceived reduction of moral responsibility (*ibid* at 29).

9. *Ibid* at 33-36. Simon notes, “[t]his psychological phenomenon can be encapsulated by the Gestaltian notion that what goes together, must fit together” (*ibid* at 34).

10. This refers to the specific conditions under which witnesses both view and later recall information.

11. *Ibid* at 40.

12. *Ibid* at 142-43.

Simon reviews the various errors that can occur during the memory processes of encoding, retention, and retrieval, often as a result of memory decay post-encoding.¹³ Where memories are incomplete or missing, witnesses may unconsciously produce false memories that result from either source confusion¹⁴ or from filling in memory gaps with their own schematic knowledge.¹⁵ Thus, witnesses may not be cognizant of the falsity of their own memories.¹⁶

Chapter five examines commonly used police interrogation techniques such as psychological coercion, which has proliferated in North America despite constitutional protections against coerced confessions.¹⁷ Research shows that psychological coercion can result in false confessions of guilt from innocent parties.¹⁸

Chapters six and seven address limitations on the diagnostic capacity¹⁹ of adjudicators and adjudicative procedures.²⁰ Numerous studies establish the biasing influences of unreliable evidence, the courtroom environment, and trial procedures. As per Simon, “errors beget errors.”²¹ Finders of fact rely on the evidence of investigators, which is likely to be rife with bias and erroneous information by the time it reaches the courtroom.²² The adversarial nature of the criminal trial and the procedures that purport to ensure fairness do little to ensure that evidence is presented and analyzed in a truthful manner accounting for the limitations and failings of the investigatory process.

Chapter eight concludes the book with a discussion of the marginalization of factual accuracy in the criminal justice system and the institutionally held denial of its failings. Simon demonstrates that, despite such denial, a vast array of empirical evidence demands procedural reforms in order for the justice system

13. *Ibid* at 55, 66.

14. This occurs when individuals “mistakenly [recall] elements from one event as belonging to another event” (*ibid* at 97).

15. *Ibid* at 99-105. Schematic knowledge refers to an individual’s personal expectation of what is normal or typical.

16. These can occur by spontaneous error or by inducement from external factors such as their interactions with others in the criminal process (*ibid* at 99-101).

17. *Ibid* at 132.

18. *Ibid* at 139-40.

19. This refers to the ability of the legal system and its agents to make factual determinations on the guilt or innocence of a person. It implies the ability to identify the relevant and accurate information from false information.

20. *Ibid* at 144.

21. *Ibid* at 208.

22. *Ibid* at 149, 177.

to live up to its name.²³ Accordingly, Simon's *In Doubt* is highly illuminating for lawyers, adjudicators, or legal academics, and his explanatory approach makes it suitable for those with little or no prior education in the area of psychology.

23. In each chapter, Simon includes recommendations for reforms to improve the transparency and accuracy of criminal investigative and adjudicative procedures, including standardized best-practice procedures premised on a better understanding of the available empirical knowledge.