# Applying Psychology to Criminal Justice

*Edited by*

**David Carson, Rebecca Milne, Francis Pakes, Karen Shalev and Andrea Shawyer**

*Institute of Criminal Justice Studies at the University of Portsmouth, UK*


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# About the Editors

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*psychology of lying and its implications for professional practice*, (Chichester: John Wiley & Sons, 2000) was the first book to incorporate research on both nonverbal and verbal cues to deception.

**Jane Winstone** is a principal lecturer in the Institute of Criminal Justice Studies at the University of Portsmouth. With Francis Pakes she is co-editor of *Community Justice: Issues for Probation and Criminal Justice* (Willan 2005) and co-author of *Psychology and Crime: Understanding and tackling offending behaviour* (Willan, 2007). She is researching the impact of organisations and culture on the management and delivery of community justice and professional training

# Preface

Few things should go together better than psychology and law. Both are concerned with human behaviour: analyzing it, predicting it, understanding it and, sometimes, controlling it. Lawyers may, in the absence of empirical research, have made assumptions about human behaviour; for example that people who know they are dying will tell the truth (an exception to the rule against hearsay evidence). Judges had to make decisions to settle the dispute before them. But now there is research which can inform the law.

However few things are getting together less successfully than psychology and law. The specialist journals, books and conferences tend to be dominated, both in numbers and contribution, by academic psychologists. It can be complained that lawyers are insufficiently welcoming but that would fly in the face of the pragmatic imperatives of law. Both psychologists and lawyers, like all other professionals, need to keep up-to-date with developments in their discipline. Some, particularly the academic members, have a duty (and the licence of academic freedom), to push their ideas into new fields. But, when that is applied to lawyers, it is related to *current* law and practice. There is no economic incentive for practicing lawyers to be interested in psychological research on law unless it helps them to do their job more efficiently or effectively. Perhaps the law ought to be different, because of what the psychological research has revealed. But that is a normative proposition. Lawyers do not need to know about it until, if, the law is changed to make it relevant.

A consequence is that there are limited routes for the application of psychology to law. National differences can be identified reflecting different laws and opportunities. For example psychological reports to inform courts about the capacity of a defendant to stand trial are much more common in the United States of America (USA) and Australia than in the United Kingdom (UK). However government interest in the UK, first in the plight of child and then other vulnerable witnesses, led to a research focus on interviewing skills which has not been replicated, to the same degree, in other countries.

The basic thesis of this book is that more, and more imaginative, avenues for the application of psychology to law, particularly to criminal justice, ought to be found. The editors propose, and the contributors elaborate and exemplify, that there ought to be a proactive focus on the potential for applying psychology in practical contexts. It is no longer, if ever it was, sufficient to be reactive and wait for 'the law' to call for assistance such as through the means of expert scientific evidence in particular, relatively rare, one-off, cases.

We argue that there is a wealth of ways in which psychology can be, and needs to be, applied to law, from informing law reform agencies, through challenging legal concepts, to informing professional standards enforced via the civil law.

The Editors, four psychologists and a lawyer, are all members of the multi-disciplinary Institute of Criminal Justice Studies at the University of Portsmouth. The University also

has, in its psychology department, one of the largest and most prominent groups of forensic and investigative psychologists in the world. In addition to making use of some of our own resources, we have been very fortunate to attract contributions from some of the most imaginative thinkers in psychology and law in the world. We hope that the individual chapters, and our theme of applying psychology in a more devolved manner, will inform and impress our readers. If not, please say so.

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Mardi Gras Day, 20th February, 2007
*Laissez les bons temps roulez.*

CHAPTER 1

# Psychology and Law: A Science to be Applied

**David Carson, Becky Milne, Francis Pakes, Karen Shalev and Andrea Shawyer**
*University of Portsmouth*

'Psychology and Law' has seen a major growth over since the 1960s. Many books have been published. These include conclusions of major research studies into issues of relevance both to psychology and law, such as the prediction of violence from people with a mental disorder (e.g. Monahan *et al*., 2001). They also include reviews of topics that have been widely researched for many years, such as identification evidence (e.g. Wells, 2002) and jury decision making (e.g. Greene *et al*., 2002); topics that have become associated with relatively few researchers, such as confession evidence (e.g. Gudjonsson, 2003); and emerging topics, such as impulsivity (e.g. Webster and Jackson, 1997), offenders' reasoning (e.g. McMurran, 2002; Palmer, 2003), or failure to reason before acting (e.g. Libet, Freeman and Sutherland, 1999) where the implications, for law and practice are still emerging. There are reviews of the field (e.g. Kapardis, 2003), collected works covering a broad range of topics (e.g. Kagehiro and Laufer, 1992), and collections on specific topics, such as interviewing (e.g. Memon and Bull, 1999).

Several journals, dedicated to this ostensibly interdisciplinary domain, have also become established since the 1970s. In North America, *Law and Human Behavior* was founded in 1977, *Behavioral Sciences & the Law* in 1983 and *Psychology, Public Policy, and Law* in 1995. In Europe, *Expert Evidence* was founded in 1992 but, whilst (or possibly because) being the most interdisciplinary of the journals, it folded in 2000. Also in Europe, *Psychology Crime and Law* was founded in 1994 and *Legal and Criminological Psychology* in 1996. *Psychiatry, Psychology and Law*, the journal of the Australian and New Zealand Association of Psychiatry, Psychology and Law, was founded in 1994.

In addition, the interchange of ideas has been fostered through academic conferences. Each of the three main regional learned societies, the American Psychology-Law Society (AP-LS),[1] the European Association of Psychology & Law (EAP&L),[2] and the Australian

[1] http://www.ap-ls.org/.
[2] http://www.law.kuleuven.ac.be/eapl/.

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and New Zealand Association of Psychiatry, Psychology and Law (ANZAPP&L)[3] hold annual meetings. Joint conferences have been organized: Dublin (1999), Edinburgh (2003) and Adelaide (2007)[4] although, unfortunately, in 2006 the AP-LS withdrew from the agreement to hold joint meetings every four years. (There had been an international conference, organized outside of these structures, in Swansea, Wales, in 1982 (Müller, Blackman and Chapman, 1984).)

Thus, the area where law and psychology intersect seems to be characterized by academic vibrancy. However, despite all this activity, there are a number of weaknesses in the underpinnings of the literature, which may harm the potential for substantial and appropriate development. This chapter will identify some of these problems and explain how the contributions within this book may begin to address some of them.

## IS IT INTERDISCIPLINARY?

It is difficult to conceive of intellectual domains that should, once paired semantically, be more interdisciplinary than 'psychology and law'. Both psychology and law are, fundamentally, concerned with describing, analysing, understanding, explaining, predicting and, sometimes, shaping human behaviour. Most certainly there are major differences in methods (see below and Clifford, 1995, 2003). There are also differences in starting points that, to some, may seem like insurmountable obstacles. For example, it is said that lawyers assume that, and that many laws – particularly criminal – are predicated upon, offenders have free will, in the sense that they 'choose' to commit their crimes. However, psychologists would emphasize factors indicating that such 'decisions' are constrained or even determined. Lawyers might concede that there were pressures, in individual cases, which could mandate legal defences or mitigation of punishment, but they would insist that offenders, essentially, had an option to act differently. These are the sorts of issues, however, which should be the subject matter of critical debate, within psychology and law, rather than either ignored or sidelined as immutable differences, or excuses for lack of a more interdisciplinary approach.

Many of the alleged incompatibilities between law and psychology, indeed also between law and other behavioural and social sciences (Campbell, 1974), arise from law (like psychology) being an applied discipline (Haney, 1980, 1993; Schuller and Ogloff, 2001). In contrast with psychology, law dichotomizes, is orientated to past events, emphasizes responsibility rather than causation, and particularizes rather than generalizes. Dichotomous distinctions are needed, though, for example both to explain and to justify distinguishing the act of murder from manslaughter by the presence or absence of the defendant's intention. No criminal lawyer would claim that it has proved easy to construct a reliable dichotomy between the 'intentional' and 'unintentional' (e.g. Ormerod, 2005). Dichotomous categories exist because they are needed, in practice. Practicing lawyers need them just as practicing psychologists also need, and impose categories such as having, or not having, 'capacity'.

When we review an area of law, or psychology, we can recognize the impossibility of perfect models but identify, for the purposes of achieving practical improvements such as law reform, better categories. Practicing lawyers look backwards to analyse their clients'

[3] http://www.med.monash.edu.au/psychmed/anzappl/.
[4] http://www.sapmea.asn.au/conventions/psychlaw2007/index.html.

past behaviour. They must do so if they are to represent them appropriately when their clients are charged with a crime. So too must practicing psychologists look back at the behaviour of their clients, if they are to understand them and to devise suitable interventions. Lawyers can also look forward; contracts, a device also popular with psychologists when working with clients, are designed to shape behaviour in the future. So it has been argued that the implications of the alleged methodological differences, between law and psychology, have been exaggerated (Carson, 2003). They arise from the law when it is applied. However, it is as grievous an error to assume that law is limited to that which happens in practice (i.e. to the law in courts), as it would be to assume that psychology is an entirely academic discipline.

Psychology and law could and, at least in terms of the potential for improving the qualities of our laws, legal procedures and legal decision making, should be an interdisciplinary domain. However, at least as represented in the literature, in learned societies and their conferences, overwhelmingly, it is not. Psychology, when it is merely applied to legal issues, is a specialist domain of psychology and hardly 'truly' interdisciplinary.

Overwhelmingly, scholars in the area currently known as 'psychology and law', the authors, journal editors and editorial board members, are psychologists rather than lawyers. Where dually qualified, their orientation is primarily to psychology. Are lawyers not willing to write on psycho-legal topics? Why should anyone complain about the imbalance? Some lawyers do, directly, address such issues. For example, in the United Kingdom (UK), see Heaton-Armstrong, Shepherd and Wolchover (1999) on witness testimony and McEwan (1998, 2003; see also Chapter 6, this volume) on comparative disciplinary perspectives on trial procedures and fact finding. In the USA, many academic psychologists are also qualified in law. Many lawyers, who do not identify themselves with psycho-legal studies, write on issues relevant to psychology and law. Consider, for example, the three-year research project, funded by the UK's Arts and Humanities Research Board, to produce a normative theory of the criminal trial. Most of the authors, in the first volumes of proceedings, are lawyers, with some philosophers (Duff *et al.*, 2004, 2006). It is not a challenge, to the appropriateness or value of philosophy's contribution, to wonder why neither psychology nor any other behavioural science was involved. Academic lawyers have demonstrated a much longer, and more intense, participation with social sciences, such as criminology, sociology and economics, than with psychology. At least in the UK, criminology courses and teachers are often located within law schools and the Socio-Legal Studies Association[5] has a substantial and vibrant membership dominated by lawyers. The development of psychology and law, however, appears to have been significantly different in Australia and New Zealand; the relevant learned society (ANZAPP&L) incorporates psychiatry as well as psychology and law and a higher proportion of both practitioners and lawyers attend their conferences.

If psychology and law is ever to become a genuinely interdisciplinary venture then it is critical that more steps are taken to involve lawyers in both the design and the execution of research studies (King, 1986) and publications. This is not to advocate any legal hegemony, or suggest that the research should be limited to a legal agenda, and certainly not to inhibit appropriate criticism of legal assumptions, systems procedures or rules. Rather, it is to encourage an appreciation of why the law is as it is, after centuries of evolution, and an understanding of the pragmatic constraints it has to address daily. It is to encourage an

[5] http://www.kent.ac.uk/slsa/.

awareness of and research into key legal concepts, for example the processes by which certain behaviour is perceived, processed and maintained as being 'unreasonable'.

Unfortunately expectations and structures have already been established. The absence of many lawyers on a journal's editorial board speaks eloquently both to the readership sought and expected. Even though publishers have economic interests in achieving a broad readership, the implicit message is that it is not really an interdisciplinary topic. Currently, it is as if both lawyers and psychologists are too embarrassed and anxious to make significant overtures to each other outside of the instrumental needs of individual cases, such as for expert evidence. It is understandable that practicing lawyers would (not should) demonstrate limited interest in psychology. They earn their salaries from operating the law and legal system as it is currently. Investing in having their knowledge challenged and changed before it is strictly necessary (such as when legislation is amended) would be economically irrational. However, psychologists, academic and practicing, have no such excuse. Indeed, it is only too likely that many who would describe themselves as interested in 'psychology and law' really understand the phrase as psychology *of* law, as psychology *in* law (Haney, 1980) or 'legal psychology', a division of psychology and not an interdisciplinary topic. Even if research psychologists, employed in academic settings, can justify such non-interdisciplinary specialisms, they will be poorly placed to teach and advise the majority of their students who go on to become practitioner psychologists. They will regularly practice within legal contexts, relating, reacting and reasoning with law and lawyers. Many of those practicing psychologists will be interested in seeking laws and legal structures that are more appropriate for their clients. Unless it is genuinely interdisciplinary, the teaching of psychology and law will (1) handicap those students who wish to practice as psychologists and (2) further delay the day when lawyers must awake to the implications of the research.

Arguably therapeutic jurisprudence (TJ) and restorative justice (RJ) fall within 'psychology and law'. TJ studies demonstrate that laws can have anti-therapeutic effects, and can have consequences that either were unintended or were unnecessarily counter-productive (see generally Wexler and Winick, 1990, 1991, 1996; Winick and Wexler, 2003). Such studies, which regularly call on psychological research, enable their authors to identify and argue for law reform. RJ studies argue that our criminal justice system should focus more on restoring the balances disturbed by crime, particularly in the interests of victims, witnesses and the broader community, rather than on retribution on the offender (Miers, 2001). RJ also frequently involves psychological concepts and processes, for example mediation (Umbreit, 2001) and other processes designed to facilitate change for people involved in the criminal justice system. Despite this affinity, both with psychology and law and with the means they both provide for psychological research and insights to impact on the law and legal processes, both TJ and RJ are not, measured by the contents of the key psychology and law journals, edited collections and conferences, which are considered mainstream psychology and law. Is it coincidental, then, that lawyers are much better represented as authors of TJ research than in psychology and law? Note that many practicing judges, especially in the USA (Winick and Wexler, 2003), Canada (see the National Judicial Institute's report, Goldberg, 2005) and in Australia and New Zealand (e.g. Braithwaite, 1989; Schmid, 2001) have, through problem-solving courts or by developing restorative justice measures, actively demonstrated a vigorous interest and excitement in the possibility of achieving quantitatively and qualitatively greater justice.

Finally, in this critical introduction, consider the relative failure of both law and psychology to address some of the most important issues concerning human behaviour in legal contexts. It is likely that many psychologists, and other behavioural scientists, have – and

indeed prefer – images of 'the law' that are associated with appeal courts determining difficult debates or interrogating scientific witnesses. But law, in terms of the daily practice of the courts and lawyers, is much more mundane. In particular, most court time is spent in determining the facts of past events, not in disputing the law. Few cases require expert witnesses. Indeed, the number of cases that ever proceed to an oral hearing, civil or criminal, are but a small fraction of all the cases in which lawyers are involved. Our legal systems are critically dependent on citizens not pressing their rights to an oral hearing; they rely on people (and include formal and informal measure to encourage them) to drop charges, to plead guilty, to accept an offer of settlement or to be too frightened about the costs of proceeding. Fundamental, within the daily life of our law and legal system, is the problem of proving (or sufficiently persuading judges about) what happened in the disputed past event. Justice, in practice, has little to do with the courts. Mediation, and other forms of alternative dispute resolution, are critical legal developments. Prevention and system analyses are budding perspectives. Yet this is hardly acknowledged, let alone represented in, the burgeoning psychology and law literature.

However fundamental psychology and law may be, it is a very underdeveloped field. Lawyers, for example, have demonstrated considerable interest in the law of evidence, but that relates to rules restricting who may say what in court, when and how (e.g. see Roberts and Zuckerman, 2004). Legal education provides instruction in the substantive rules governing (e.g. admissibility of a defendant's prior criminal record), not in the processes, logic or science (e.g. statistical tests of probability) of persuasion and proof. Much of the output of psychology and law is relevant or related to evidentiary issues (e.g. the reliability of offender profiles). The expectation is that that scientific evidence will be offered to a court as an expert's opinion, in a particular case. It is not focused on aiding fact finding and proof issues generally, such as required by the police and prosecutors on a daily basis (but see Saks and Thompson, 2003; Wagenaar, Van Koppen and Crombag, 1993). Very important work has been undertaken on how jurors may fill in evidential detail, and make decisions based on the quality of stories (theories about the evidence) presented to them, rather than just on 'the facts' presented to them, as legal theory assumes (e.g. Pennington and Hastie, 1986, 1988, 1991). That has not, however, made a major impact on the law, lawyers or legal practice. As Twining (2003) cajoles, fact finding, analysis, hypothesis generation, persuasion and proof are profoundly, multi- and interdisciplinary subjects, or rather should be! Whilst a number of researchers (mainly lawyers, but for a most important exception see Schum, 1994) have developed research into such processes (e.g. see Anderson, Schum and Twining, 2005; Murphy 2003), limited interest has been demonstrated by psychologists. Both psychologists and lawyers may be criticized, but it would be more productive to identify ways in which richer collaboration could be ensured. To that we turn.

## APPLYING AN ANSWER

'Psychology and law' should become more applied. Greater attention should be paid to where and how it may have an effect. This might appear, initially, to be an appeal to think of the needs and wishes of practitioners, be they psychologists or lawyers. That is not our principal objective; it would be an unintentional – but valuable – by-product of our proposal. We would never, particularly given that we are concerned with such important, albeit often nebulous and contentious issues as 'justice' and 'quality', propose that psychology and law should only have a reactive role. Rather, psychology and law has an enormous potential

to improve the quality of law and legal systems. It must always have a role in challenging assumptions about present practice and identifying alternative laws and procedures that might be demonstrated to be more effective and/or efficient in achieving agreed goals. Rather, we are thinking of the ways in which psychology might be applied in legal contexts.

## Expert Evidence

Faigman and Monahan (2005), endorsing Borgida and Hunt (2003), recently stated: 'The field of psychology and law is inextricably bound to developments in the area of expert evidence' (p. 632). As a simple descriptive statement about a lot of such research, undertaken in North America, it has a ring of truth. However, it discounts a lot of work on emerging topics which is not yet, if ever it will be, admissible as expert evidence in that country. It certainly reflects the importance accorded, in the USA, to a number of Supreme Court decisions (*Daubert* v. *Merrell Dow Pharmaceutical Inc*. 579 US 563 (1993); *General Electric Co* v. *Joiner,* 522 US 136 (1997); *Kumho Tire, Ltd.* v. *Carmichael,* 526 US 137 (1999)), on when expert evidence is admissible (e.g. see Faigman *et al*., 2002a, 2002b, 2002c). It is not accurate with regard to other countries, however. There are significant national differences in the development of psychology and law. There has, for example, been extensive research on juries, in the USA (Greene *et al*., 2002), but not in the UK, where it is largely unlawful. Whilst the initial, major, stimulation for research in interviewing took place in the USA (Geiselman *et al*., 1984), the major research and policy development on interviewing vulnerable witnesses has taken place in the UK, where there was government support (Department of Health and Home Office, 1992). If Faigman and Monahan's statement, above, is read as a normative statement, or as implying a necessary relationship – psychology and law is by definition bound up with expert evidence – then it is simply wrong. There is no restriction on the role or impact of psychology and law. Psychology and law can be, and should be, applied much more widely than as expert evidence.

Expert evidence is just one of the ways in which psychology can be applied to law. It may be considered to involve the ultimate challenge; it is about the status, of both the science and the scientist, and in court involves a pitting of wits and skills. But it is very inefficient. Unless a scheme, such as that advocated by Monahan and Walker (1986) is adopted, it will involve a case-by-case approach. That is expensive; many litigants will be unable to afford the additional cost of expert witnesses. It is slow; judges might have different opinions about the admissibility of the evidence, and juries might be influenced differently, so there is less cause for the parties to settle amongst themselves and not litigate. Judges may not understand the science, as has been demonstrated with regard at least to some topics (Gatowski *et al*., 2001). That should not be too surprising as the evidence is only admissible, as expert evidence, because it is beyond the knowledge and experience of the judge and/or jury. Indeed, in what other context would it be considered appropriate (let alone sensible) to expect individuals, however knowledgeable and competent in other disciplines and areas of life, to understand – remembering that they are also expected to be critical of the scientific evidence, fresh information, and not just accept it on the authority of the witness – without a background and skills in the methodology and related topics on which it is based? (See Peter van Koppen, Chapter 16, this volume.) Chief Justice Rhenquist, in *Daubert* (1993), the leading case on the admissibility of scientific evidence in US Federal courts, albeit as dissentient, doubted the capacity of judges to understand

such concepts as Popper's falsification theory. That theory has been challenged, as not describing how 'science' 'really' develops in practice, in a manual prepared and published to assist federal judges in making decisions about the admissibility of 'scientific evidence' (see Goodstein, 2000).

Monahan and Walker (1986; see also Walker and Monahan, 1987, 1988) proposed that scientific evidence could be recognized, by the courts, in a scheme analogous to legal precedent. Decisions, about the admissibility of different forms of expert evidence made by one court, would be treated as binding on all other courts which would be bound by an interpretation of the law made by that court. In this way, admissibility decisions could be overturned by courts higher in the court hierarchy but, otherwise, there would be much more certainty, predictability and consistency, which are critical if lawyers are to advise their clients to settle rather than to litigate their disputes. Such approaches have not been adopted, however. If they were, there is a risk that they might promote 'divisiveness.' Lawyers are skilled and practised in distinguishing legal precedents. They identify ways in which their case may be argued to be legally different from prior, precedent, interpretations of the law. The same skills might be applied to scientific evidence. For example, excellent research might inform experts' predictions of the dangerousness of a mentally disordered person (Monahan *et al*., 2001), but what if a judge decides that the authority for that opinion is distinguishable because the individual before the court has never lived in any of the three areas (let alone the country) where the empirical work for that research was undertaken? It is not suggested that that would be a sound distinction. Rather, the 'pragmatic imperative', for lawyers, would be to find reasons for distinguishing, that is categorically rejecting, the science. Even if nobody can say, because it involves an inference from actuarial data, that the research applies equally to people outside the test sites, it still has relative value. Law has been criticized for dichotomizing, for example distinguishing concepts into mutually exclusive categories such as admissible or inadmissible, whilst science has been commended for recognizing degrees, that behaviour is relative, not simply reasonable or unreasonable (Campbell, 1974). The point is that scientific evidence may deserve to have a powerful effect upon judicial decision making, even if not overwhelming and determinative of the issue. Courts can cope with factual evidence which is of different degrees of relevance, reliability and credibility. The same is possible for opinion, expert, evidence.

## Legislation

A much more efficient, and potentially effective, method for applying psychology to law is legislation. Psychological knowledge can be incorporated into legislation in a variety of ways. Instead of utilizing psychological expertise to decide whether Mr X, a unique individual, had capacity to perform legal act Y, when the expert witness could be pressed to concede that he or she cannot be sure about X, because his or her science is based on research conducted on other people, legislation could incorporate general insights and research from psychology. Instead of behavioural scientists seeking to have it both ways – to be entitled to give scientific evidence but not to be asked inappropriate questions which go beyond the general knowledge that they have developed – legislation provides a forum for lawyers and psychologists to meet and formulate the best laws possible.

Psychologists may object that law making is political. Legislators may, for example, wish to pass laws to punish certain mentally disordered offenders whom they consider

blameworthy, when the science demonstrates that those individuals lacked understanding or control over their conduct. This must be acknowledged. It does not follow, however, that any science or discipline must accede to democratically elected ignorance. For example, judges, in the UK, have found themselves deciding that diabetes (*Hennessy* [1989] 2 All ER 9) and epilepsy (*Sullivan,* [1984] 1 AC 156) are 'diseases of the mind' (because they affect the operation of the brain) for the purposes of the common law defence of insanity under the *McNaghten Rules* ((1843) 10 Clark & Fin 200). It does not follow that those judges approved of the legal position they developed. Rather, they need informed legislation to replace the outdated common law. Hopefully, behavioural science may engage with law, on such topics, and over time develop better, more informed, humane and just laws. It is a dialectical process; it involves paradigm shifts (Kuhn, 1962). Just as new science can challenge old science, requiring a restatement of contemporary knowledge, so better psychologically informed laws can replace less informed former rules. Judgements should be made on efficiency and efficacy of the law reform process, not on 'snapshots' of the law at any one time. Pragmatic considerations must be taken into account. Law reform, especially if extensive research and consultation is involved, is time consuming. There is limited time for parliamentary debate. However, law reform proposals on relatively non-contentious topics, which have clearly been through a process involving informed and rigorous debate with relevant disciplines, will require less parliamentary time.

Psychology associations, and psychologists interested in law, should pay more attention to law reform agencies, submitting evidence-based proposals for law reform. However, those agencies should also be much more welcoming. For example, in the UK, although established by the *Law Commission Act 1965* to keep the law under review and undertake specific projects (such as the capacity of individuals to make legal decisions, leading to the *Mental Capacity Act 2005*), all of the Commissioners are lawyers. Other disciplines have much to offer, including alternative assumptions and perspectives, and skills in scientific research methods that do not form part of the educational background of lawyers. However, the psychology associations need to be proactive, not just reacting to invitations to respond to consultation papers. Without people from different disciplinary backgrounds such law reform bodies cannot know what they do not know, and so cannot know when to ask for special advice. In addition, there is the 'problem' that lawyers have been 'getting on with it' for centuries; they have taken things for granted, often not even articulating their assumptions as in a 'fireside musing' (Meehl, 1989), because it has been pragmatically necessary. For example, judges and jurors are regularly expected to retain and work on more data, at the same time, than the research on information overload suggests is either possible or desirable (Kahneman and Tversky, 1972, 1973, 1984). That a law or practice has been 'good enough' for several centuries may tell us quite a bit about how easily we have been satisfied in the past; it cannot justify continuing not to make use of current knowledge, provided attention is paid to the pragmatic issues involved in securing change.

## Legal Criteria

A problem, with psychology and law taking the legislative route, is the pragmatic 'requirement' for legislation to be explicit, preferably adopting mutually exclusive categories. For example, the criminal law, of many jurisdictions, makes a critical distinction between those who 'intended' the harm that was caused and those that merely foresaw it (e.g. Ormerod,

2005). Without denying the possibility that the distinction may be dismissed as entirely tendentious, for example because action precedes thought (Libet, Freeman and Sutherland, 1999), in legal experience the distinction usually works. However, a form of intermediate category has been recognized, and treated as part of 'intention' at least for liability purposes, where there was extensive prior knowledge of the probability of the outcome and a willingness, if not a desire, for it to occur (*R*. v. *Nedrick,* [1986] 3 All ER 1, as amended by *R*. v. *Woolin,* [1998] 4 All ER 1). The law, particularly criminal law as it is concerned with liberty of the individual, needs exclusive categories to justify differential labels and responses (e.g. murder or manslaughter) and treatment (e.g. mandatory life or a discretionary sentence). The Law Commission for England and Wales (2005, 2006), for example, has suggested a reform in the law so that an intention to kill would constitute first-degree murder, with mandatory life imprisonment, whilst an intention to cause serious injury would be second-degree murder, where there would be sentencing discretion for the trial judge. Current behavioural science, however, may suggest that that is inappropriate on particular topics. Psychologists, and others, might feel it is inappropriate to support any particular formulation of a dichotomous test.

An alternative, to specifying dichotomous tests, is to identify relevant legal criteria that should be considered. These can inform and guide decision making by judges and juries. An example is provided by identification evidence. In *R*. v. *Turnbull* ([1977] QB 224) Lord Widgery, then Chief Justice, laid down a number of factors which trial judges should ensure that juries consider when assessing identification evidence. These include: the length of time over which the observation took place; how far away the incident observed took place was; and the lighting conditions at the time (see pp. 228–230). The Court, as Roberts and Zuckerman (2004, p. 494) stress:

> . . . disavowed technical legal formulae and emphasised the substance of the warnings to the jury. The factors identified . . . combine common sense assumptions, the accumulated wisdom of forensic experience, and pioneering behavioural science research . . .

gleaned from an official Committee of Inquiry chaired by a senior lawyer (Devlin, 1976). This proved to be an exceptionally important development. The provenance of the criteria, in a Court of Appeal decision, necessarily commends them to all practicing lawyers. There are few more effective ways of ensuring that lawyers will learn about them! But there are dangers. First, note how they are considered to involve 'common sense' and 'accumulated wisdom.' These are labels that can be attached to almost anything that is perceived to be sensible and to have a history. They are not tests that can reliably be applied to identify criteria relevant to other legal tests, such as consent, capacity and freedom of choice. One person's common sense can be another's prejudice or ignorance; for example, that group decisions are always more moderate than those of individuals. Errors can accumulate as easily as wisdom. Evidence, not mere ascription of reassuring labels, is desirable. Second, no provision is made for automatic updating as fuller and better research findings become available.

Nevertheless the *Turnbull* case provides an excellent example of how psychological research might identify criteria relevant for determining legal tests. One approach would be to specify a procedure that identifies relevant considerations. This could be exceptionally important if the valuable research on predicting dangerousness, or risk, is to be utilized. Statute (Chapter 989, Virginia Acts of Assembly, § 37.1–70.4), in Virginia (USA), requires clinicians considering the continued detention of patients considered to be dangerous, who

might be expected to prefer clinical tests and judgement) to have regard to an identified actuarial test (Monahan, 2004). This is important on many levels, not least because of the superior record of actuarial tests (Monahan *et al*., 2001). It also allows for the actuarial test to be substituted as new knowledge is developed, without the time and other resource expensive requirements of new legislation.

This approach could be used in legislation or through case law precedents. A 'sort of' statutory example exists in recent reforms to the law of rape in England and Wales. A core issue, in the offence, is the victim's absence of consent and the offender's belief, or otherwise, in the existence of that consent. The legislation is a response to a concern that offenders were committing the act but then maintaining that they believed that the victim was consenting. Given that belief is an 'inner' state of mind without explicit, 'externally' verifiable, referents, there has been concern that it is too easy to claim a belief in the 'victim's' consent, especially as that belief did not have to be reasonable. Now section 75 of the *Sexual Offences Act 2003* lists criteria that determine whether consent, or belief in it, existed: violence, threat of violence, detention, being asleep or unconscious, being unable to communicate because of a physical disability, and non-consensual taking of a stupefying drug. Surely the behavioural sciences could have offered a richer list of factors relating to the nature of consent, such as including the differentials in power and understanding?

An opportunity exists for using this approach in relation to the extensive research on interviewing, which has developed in recent years. Just as Lord Widgery, in *Turnbull* (above), identified the features of identification evidence that make it more or less reliable, so another judge could identify the features of an interview, particularly those leading to a confession of responsibility, which make the evidence more or less reliable. It may be objected that the factors, identified in *Turnbull*, were more concrete, tangible, such as lighting and distance, whereas the items likely to be listed, in relation to interviews, would be more qualitative, such as nature and order of the questions asked, degree of oppressiveness in the interview room. It is not the consonance with 'common sense', that is so important but that which has been tested, and its reliability.

## Codes

Legal 'technology' is relatively limited. Statues are expensive to enact. Those who draft the legislation (who can have their handiwork spoilt by legislators) are required to predict difficulties in order to prevent as many as possible problems of interpretation. Every additional or alternative qualification adds to the number of potential interpretation problems. This makes it difficult to fit many statutes within a parliamentary timetable and does not put a premium on comprehensibility. It is not possible to simply declare an objective – the object of this Act is to proscribe dishonesty – or just to identify certain values. Our adherence to the 'rule of law' (although it involves improperly reifying 'law'), requires demonstrable clarity and applicability to individuals and facts if people are, in particular, to be punished. Legislation has to be about minimum standards; it has to specify the standards necessary for acts to be criminal or to create civil liability. Whilst it can, and does, contain sections that provide interpretations of key words and phrases, it cannot, realistically, include mission statements (fortunately), the articulation of best practices or statements of ideals.

Codes of practice, however, can. These have developed as an adjunct to legislation. They cover a wide range of topics, for example in England and Wales, from road safety (the

*Highway Code*), through industry (codes on employer and employee relations), to mental health. The *Mental Health Act Code* provides much greater practical detail on how patients should be treated than the *Mental Health Act 1983*, and the many sets of regulations made under it, ever could. The enforceability of a code depends on what is specified in the authorizing legislation. An Act may just authorize a government minister to have a code prepared and published. It could specify that any court or tribunal, hearing any dispute arising under the legislation, is to take the code into consideration. It could specify that any court or tribunal is to enforce the code. However, critically, codes are not subject to the same constraints as legislation. They can, for example state objectives and identify best practices in order to guide decisions. They can map out ways to better services or standards, and encourage movement towards them, without imposing liability. They can reflect and stimulate professional standards. They can be written and approved quickly without parliamentary debate. Alternatively, if participation and 'ownership' is important, a specified range of different people with immediate knowledge of the area, rather than members of the legislature, can be consulted about what the code should state. The Act which provides for the code can – but need not – specify who is to be consulted and it can require endorsement by a simple vote in parliament, but it is very much easier, cheaper and quicker to draft, or redraft, a code than to get a new statute enacted.

This is another way in which psychological research can be applied to law. It may not be as dramatic, or as closely associated with status, as providing expert evidence in a trial court, but it can be much more effective, in so many more cases. The compatibility problems (see discussion above), between law and psychology, can be reduced to a minimum where codes are the medium for applying psychology to law.

## Practice Statements

A similar approach, to codes, is practice statements. The classic example, in the UK, is the *Memorandum of Good Practice for Video Recorded Interviews with Child Witnesses for Criminal Proceedings* (1992) drafted by a psychologist (Professor Ray Bull) and a lawyer (Professor Diane Birch) for two government departments, the Home Office (concerned with policing and related issues) and Department of Health (also concerned with social work issues). This both described and justified, with supporting research, a fresh approach to interviewing child victims of sexual and other violent offences. It led to very different, and it can hardly be disputed better, ways of interviewing these victims. Then, building on this foundation, the government established an '*Action for Justice*' programme to implement its '*Speaking up for Justice*' report (1998), which expanded on and replaced the *Memorandum of Good Practice* with *Achieving Best Evidence in Criminal Proceedings: Guidance for Vulnerable or Intimidated Witnesses, Including Children* (Home Office, Lord Chancellor's Department, Crown Prosecution Service and Department of Health, 2002). This, research based, work included legislative changes in Part 2 of the *Youth Justice and Criminal Evidence Act 1999*, which provide a range of special measures to support vulnerable witnesses through the courts. This is a paradigm of collaboration between psychology and law.

Practice statements can provide guidance on better ways of organizing services and undertaking a range of tasks. In the UK, the *Police Reform Act 2002* empowered the Secretary of State, for the Home Office, to publish codes of practice, as well as to prescribe practices and procedures, after consultation with relevant organizations. In this way, a hierarchy of

'practice statements' has been developed. Codes must be followed; but breach is not, per se, unlawful (e.g. *Code of Practice on the National Intelligence Model* (Appendix 1) (National Centre for Policing Excellence (NCPE), 2005a). Guidance (e.g. *Guidance on Investigating Domestic Violence* (NCPE, 2004) should be adopted by all police forces. Advice (e.g. *Core Investigative Doctrine* NCPE, (2005b)), however, is discretionary. These documents disseminate and advance best practices. Especially given the opportunities to see developments in research incorporated into professional policing practice, this approach offers behavioural scientists and lawyers so many opportunities to make a major difference – if they are open and willing to seize them.

## Professional Practice Statements

This suggestion may appear very similar, and it certainly is related, to the discussion of practice statements, above. It is also, significantly, different. Note that breach of a code of practice does not, necessarily, constitute a breach of the law, civil or criminal. Any statement of good practice is liable to be seized on by a lawyer as an indication of a standard which, if breached, ought to lead to civil liability in the law of negligence. Even if the standard does not create liability, in litigation, its existence may cause concern. Considerable expense can be caused in dealing with claims of negligence, even if they never reach court. Some professionals can become so anxious about being sued that they avoid making decisions in the mistaken belief that that will prevent them from being liable. They are wrong because there can be liability for omissions as well as commissions (Rogers, 2006). (They are partly 'correct' in the sense that victims of failures to act professionally are less likely to realize they could sue than victims of commissions.)

To be liable in the law of negligence, at least in England and Wales, five conditions must be satisfied. The person responsible for causing the loss must have owed the person injured a duty of care. The standard of care, which applies to that duty of care, must have been broken. That breach must have actually caused the loss, which was reasonably foreseeable, and which was of a kind that the law compensates (Montgomery, 2003; Rogers, 2006). In practice, the most important of those requirements is the standard of care. Notably – and what makes this heading different from 'practice statements' discussed above – the standard of care does *not* have to involve best practice, even usual practice. If a responsible body of professional colleagues would support the standard concerned, in a particular case, then it is not breached (*Bolam* v. *Friern HMC* [1957] 2 All ER 118). That standard of care permits a great deal of variety. Whilst the House of Lords (which is also the UK's Supreme Court) has emphasized that professional organizations cannot be allowed artificially to lower standards in order to escape liability (*Bolitho v. City & Hackney HA* [1997] 4 All ER 771), their current standard practices will usually be adopted by the courts. The problem is that those standards are often inexplicit, particularly where several disciplines and professions are involved. The recommendation is that acceptable professional practice protocols are articulated to discourage inappropriate litigation. If an individual has made a decision, or otherwise acted in a manner consistent with such a professional protocol, then the standard of care will not have been broken. Fear of litigation, being blamed and losing motivation, leading to evasion of responsibilities can, in this manner, be discouraged.

It may be objected that such a device will deter progress because it only articulates basic standards. Many would protest that professionals should be encouraged to adopt best practices, not baseline standards, but that involves a misunderstanding. Articulating

the standard of care is not incompatible with encouraging higher standards, especially when and where they are achievable with resources available. Any baseline statement of professional standards can only be provisional; it would need to be reviewed regularly. The courts expect to see standards rise as new knowledge, technology, practices, and so on become available, thereby stating that professional standards should be seen as part of an educational or learning circle where standards are improved over time. They can also be used to defend services against slippage in standards. If standards slip, or are not sustained, then there could be legal liability for any resulting loss. Managers and employers might be reminded of this if they should fail to support standards, such as by reducing resources inappropriately.

It might also be objected that not all professions involved with criminal justice services owe a duty of care to those they may injure. If they do not owe a duty of care then the question of a standard of care does not arise. In England and Wales, police investigators (*Brooks v. Commissioner of Police for the Metropolis and Others* ([2005] 2 All ER 489) and professionals involved in enforcing child protection legislation (*JD v. East Berkshire Community Health NHS Trust and Others* ([2005] 2 FLR 284), will rarely owe a duty of care, despite a decision of the European Court of Human Rights (EHCR) (*Osman* v. *UK* (2000) 29 EHRR 245). The ECHR only objected to a blanket prohibition on suing, not to making it a rarity (Hoyano, 1999). However, these obstacles to suing are most unusual. There is no such restriction on suing in, for example, Canada (i.e. *Jane Doe* v. *Metropolitan Police of Toronto* (1998) 160 DLD (4th) 697), France, Germany or South Africa (Hoyano, 1999). It is also unnecessary as investigators would rarely be liable. The standard of care, which would apply to such investigators, would be relatively low because of all the countervailing duties, for example to children possibly at risk, which the investigators would have to take into account. Social workers, for example, have to consider the harm that may befall a child if they do not remove it from potentially violent parents. They also have to consider harm that would be caused by removing the child. It may be lesser harm, but its likelihood is higher. Hence, there is an important role for articulating statements about baseline standards, particularly if this rule, at least in England and Wales, was replaced. Law has a particular contribution to make in terms of the clarity of the statement and ensuring it is consistent with case law, whilst psychology has a particular contribution in relation to system (see below) and learning factors.

## 'Training Manuals'

In essence, the documents on interviewing vulnerable witnesses, discussed above (Home Office *et al*., 2002), provides guidance on how to perform an important psycho-legal skill, how to interview people in order to obtain the best (quantity and quality) evidence feasible. There is a potential for the application of psychology to law and the criminal justice system in the production of training manuals in a broader sense. For example, many disciplines and professions are concerned with undertaking risk assessment and risk management, and yet relatively limited attention has been paid to the psychological problems that risk decision makers can have with making risk decisions. Quality risk decisions require the availability of sufficient, relevant and accurate information, even though, by virtue of it being a risk decision, it will be incomplete. How should risk decision makers cope with the information overload, avoid inappropriate heuristics and manage information of very different natures (including value judgements)? It may be at a polar extreme from the drama of being

cross-examined on scientific evidence given in court, but designing and writing quality training materials and programmes could have a much more profound value.

Indeed this could involve topics traditionally not included in academic psychology and law. For example, contracts are very important to practitioners, whether lawyers, psychologists (clinical, forensic, educational and others), probation officers, psychiatrists and so on. The professional can negotiate an agreement, contract, with another, for example with a client. They are a paradigm means of achieving change, with the additional benefits of reflecting the independence, competence and choice of both parties (Carson, 1999). Indeed, Bonnie and Monahan (2005), key members of the MacArthur Research Network on Mental Health and the Law, have advocated the potential of contract as a means of ensuring community treatment of people with mental illnesses. However, many contracts, between providers of professional services and their clients, are not binding in law. A key requirement, of a contract not under seal, is that both parties provide the other with a benefit, known as consideration. The relative or absolute value of this consideration is not legally relevant, provided it exists. Psychologists and others, employed by health, education, or other national or local government agencies, however, provide a service to their clients because they are employed, by others, to do so. Their clients do not provide them with consideration – outside of a private, contractual, relationship. That clients pay taxes, which in part go towards those professionals' salaries, does not constitute consideration. Hence, as they are not contracts, the courts cannot enforce them.

Perhaps this should be changed; perhaps the rights and obligations of clients would be enhanced if based more on individually negotiated contracts than on broad, impersonal, legislation (Carson, 1999). The reality is that 'contracts', as a tool for organizing behavioural change and managing 'legitimate' expectations, are very popular with practitioners. Their legal unenforceability does not appear to be much of a deterrent. In fact, the unenforceability of such contracts, with all the associated costs, complexity and confusion, may be an advantage. Nevertheless, training manuals designed to help people write contracts to realize their objectives, could only be valuable. Manuals on mediation and different forms of dispute resolution could be appropriate. It is submitted that these are key areas where psychology and law could productively interact.

## Justice Systems

In recent decades a number of alternative models of justice have emerged, for example (as mentioned above) therapeutic jurisprudence (TJ), restorative justice (RJ) and preventive law perspectives. These have spawned a very substantial literature, which can only be hinted at here.[6] In essence, TJ demonstrates that laws can have therapeutic or anti-therapeutic effects and argues that, provided basic civil rights are not impugned, laws should have pro-therapeutic effects. Thus if, as has been argued, allowing clients to negotiate and to contract with their clinicians over their medication leads to them maintaining their treatment regime for longer, then the law should make this possible (Winick, 1997). TJ provides a very neat basis for utilizing psychological research to support law reform. It is both descriptive, in the sense that it depends on analysis of the effects of the law, and normative in providing policy guidance. It is relevant both to academic and to practitioner psychologists, and it can be used preventively, to avoid many legal problems during a life cycle (Patry *et al*., 1998).

[6] See: http://www.law.arizona.edu/depts/upr-intj/ and http://www.voma.org/bibliography.shtml.