

# 1 PSYCHOLEGAL RESEARCH: AN INTRODUCTION

BY DAVID FARRINGTON AND ANDREAS KAPARDIS

## CHAPTER OUTLINE

- Introduction: development of the psycholegal field
- 1 Bridging the gap between psychology and law: why it has taken so long
- 2 Remaining difficulties
- 3 Grounds for optimism
- 4 Conclusions
- 5 The book's structure, focus and aim
- Revision questions
- Additional reading

*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.*

(Carson 2007a: 2)

*The issues are not the relevance of psychology and law to each other but the extent to which the law and legal system should, and are prepared to, embrace psychology and the extent to which psychologists should, and are prepared to, adapt their work to the needs and requirements of the legal system.*

(Carson & Bull 1995a: 4)

*The question ... is how welcome a guest [psychology] really is at the legal table and how much the law is missing out on which could enhance its decision making processes.*

(Freckelton 2005)

## INTRODUCTION: DEVELOPMENT OF THE PSYCHOLEGAL FIELD

The plethora of applications of psychology to law can be differentiated in terms of what have been defined as: (a) *psychology in law*; (b) *psychology and law*; and (c) *psychology of law*. According to Blackburn (1996: 6), *psychology in law* refers to specific applications of psychology within law: such as the reliability of eyewitness testimony, mental state of the defendant, and a parent's suitability for child custody in a divorce case.<sup>1</sup> Psychology in law has been the most commonly used of the aforementioned three differentiations and has been the source of much of the uneasiness in legal psychology (Bartol & Bartol 2004a: 2). *Psychology and law* is used by Blackburn to cover, for example, psycholegal research into offenders,<sup>2</sup> lawyers, magistrates, judges and jurors. Thus therapeutic jurisprudence (TJ) falls within psychology and law. Finally, *psychology of law* is used to refer to psychological research into such issues as why people obey/disobey certain laws,<sup>3</sup> moral development, and public perceptions and attitudes towards various penal sanctions. As far as the term *forensic psychology* is concerned, Blackburn argues, convincingly, that it should only be used to denote the 'direct provision of psychological information to the courts, that is, to psychology in the courts'.<sup>4</sup> While there is no generally accepted definition of *legal psychology*, the following one put forward by Ogloff (2000: 467) is sufficiently broad and parsimonious, as he maintains, to reduce some of the confusion that surrounds this field:

Legal psychology is the scientific study of the effects of law on people; and the effect people have on the law. Legal psychology also includes the application of the study and practice of psychology to legal institutions and people who come into contact with the law.

Psycholegal research involves applying psychology's methodologies and knowledge to studying jurisprudence, substantive law, legal processes and law breaking.<sup>5</sup> Psychology and law became closer in ancient Greece than they were to remain for the next two millennia.<sup>6</sup> Research into, and the practice of, legal psychology thus has a long tradition, exemplified since the beginning of the 20th century by the work of such pioneers as Binet (1905), Gross (1898), Jung (1905), Münsterberg (1908) and Wertheimer (1906). In fact, Münsterberg has been called 'the father of applied psychology'.<sup>7</sup> The reader should note in this context that,

1 See Puckering 2010.

2 Howells 2010; Farrington & Welsh 2010.

3 Wingrove, Korpas & Weisz 2011.

4 See Gudjonsson 1996, 2010; Nicholson & Norwood 2000.

5 Farrington, Hawkins & Lloyd-Bostock 1979b.

6 Haward 1981a.

7 Magner 1991: 121. However, see Landy 1992.

as Ogloff (2000: 461) and Bartol and Bartol (2004a: 9) remind us, a number of well-known psychologists expressed an interest in applying psychology's findings to law as early as the 1890s. More specifically, we should note:

- Cattell's 1895 article in *Science*, which was concerned with how accurately one could recall information;
- Freud's 1906 lectures to judges in Vienna on the merits of psychology for law in establishing facts;
- Watson's 1913 view that judges could utilise psychological findings;
- the development in 1917 of the first modern polygraph by William Marston and, in the same year, the use by Louis Terman of psychological tests to screen law enforcement personnel;
- the employment in 1918, by the State of New Jersey, of the first full-time correctional psychologist; and
- the first US psychologist testifying as an expert in a courtroom in 1921.<sup>8</sup>

Also, Paynter's 1920 and Burt's 1925 research into trademark and trade name infringements, which was presented in court; Hutchins and Slesinger's 1928 published work on psychology and evidence law; and, finally, the Russian psychologist Luria's 1932 work on the affect in newly arrested criminals, before being interrogated by police, in order to differentiate the guilty from the innocent.

Regarding publications in law and psychology, the following appeared in the early part of the 20th century: the establishment in 1903 in Germany by Louis William Stern with the first journal concerned with the psychology of testimony (*Betrage zur Psychollogie der Aussage*); Brown's 1926 *Legal Psychology: Psychology Applied to the Trial of Cases, to Crime and its Treatment, and to Mental States and Processes*; Hutchins and Slesinger's 1929 article on 'legal psychology' in the *Psychological Review*; McCarty's 1929 *Psychology for the Lawyer*; and Cairns' 1935 *Law and the Social Sciences*. Even though well-known psychologists expressed an interest in applying psychology's findings to law as early as the 1890s, the truth is that the psycholegal field really began to expand in the 1960s.

The psycholegal field has been expanding at an impressive rate since the mid-1960s, especially in North America, since the late 1970s in the United Kingdom, and in Australia since the early 1980s. In fact, on both sides of the Atlantic, research and teaching in legal psychology has grown enormously since the mid-1970s. More recently, the field of psychology and law has also been expanding both in Europe, especially in the Netherlands, Sweden, Germany, Iceland and Spain, as well as in Japan. As the chapters in this volume show, since the 1960s psychology and law has evolved into a single applied discipline and an often-cited example of success in applied psychology. Ogloff

8 In the case of *State v Driver* (1921) 88 W.Va 479 107 SE 189.

(2001: 4) argued that ‘Despite its long history, though, the legal psychology movement has had limited impact on the law, and until recently, it was focused primarily in North America.’ However, the contents of this book attest to the fact that the legal psychology movement has had more than ‘limited impact on law’ on both sides of the Atlantic and, in contrast to Ogloff’s assertion, it has not been mainly focused in North America. In this context, Haney (1993) pointed to psycholegal researchers having tackled some very crucial questions in society<sup>9</sup> and, *inter alia*, been instrumental in: improving the ways eyewitnesses are interviewed by law-enforcement personnel; the adoption of a more critical approach to the issue of forensic hypnosis evidence in the courts; psychologists contributing to improving the legal status and rights of children; and, finally, generally making jury selection fairer. Furthermore, the impact of legal psychology has not just been one way. Finally, as far as the impact on students of teaching them psychology and law is concerned, it has been found that such a course improves students’ knowledge of psycholegal topics in the legal system.<sup>10</sup>

Despite the early publications in legal psychology mentioned above, and while most lawyers would be familiar with forensic psychology, traditionally dominated by psychiatrists, it was not until the 1960s and 1970s that lawyers in the United States came to acknowledge and appreciate psychology’s contribution to their work.<sup>11</sup> Since the 1970s a significant number of psycholegal textbooks have appeared in the United States,<sup>12</sup> in England,<sup>13</sup> and some have been written by legal psychologists on continental Europe. In addition, following Tapp’s 1976 first review of psychology and law in the *Annual Review of Psychology*, relevant journals have been published, such as *Law and Human Behavior*, which was first published in 1977 as the official publication of the

9 See Monahan & Walker 2011 on the application of social science to American law over a quarter of a century.

10 Laub, Bornstein & Maeder 2010.

11 See Toch 1961 and Gordon 1975, cited in Diamond 1992.

12 Sales 1977; Tapp & Levine 1977; Saks & Hastie 1978; Loftus 1979; Kerr & Bray 1982; Konečni & Ebbesen 1982a; Wells & Loftus 1984; Hans & Vidmar 1986; Cutler & Penrod 1995; Wrightsman 1999.

13 Clifford & Bull 1978; Farrington, Hawkins & Lloyd-Bostock 1979a; Haward 1981b; Lloyd-Bostock 1981a, 1981b, 1984, 1988; Lloyd-Bostock & Clifford 1983; King 1986; Pennington & Lloyd-Bostock 1987; McEwan 1988, 2003; Hollin 1989; Milne & Bull 1999; Vrij 2000; Westcott, Davies & Bull 2002; Howitt 2002; Memon, Vrij & Bull 2003; Adler 2004; Carson et al. 2007c; Brown & Campbell 2010; Towl & Crighton 2010.

American Psychology-Law Society (APLS) (founded in 1968) and is nowadays the journal of the American Psychological Association's Division of Psychology and Law. Other journals are: *Behavioural Sciences and the Law*; *Expert Evidence*; *Law and Psychology Review*; *Criminal Behaviour and Mental Health*. New psycholegal journals have continued to be published. The first issue of *Psychology, Crime and Law* was published in 1994 and of *Legal and Criminological Psychology*, and *Psychology, Public Policy, and Law* in 1996 in the United Kingdom and the United States respectively. Let us next take a closer look at the development of psychology and law in the United Kingdom.

### The development of psychology and law in the United Kingdom<sup>14</sup>

Combined with a wish by the British Psychological Society (BPS) to establish a Division of Criminological and Legal Psychology (DCLP) in order to be able to influence government policy, and a desire by prison psychologists for a standardised training course leading to a recognised BPS qualification, legal research conducted in isolated fashion in the 1970s by a small number of pioneering UK psychologists provided the seed and the impetus for the enormous development of psychology and law in the country. Those psychologists included: Lionel Haward of the University of Surrey, who was appearing a great deal in court as an expert witness, and contributing enormously to the acceptance by the courts of psychological evidence; Phil Sealy of the London School of Economics, who was carrying out research on jury decision-making; Ray Bull and Brian Clifford of North East London Polytechnic, who were advancing knowledge about eyewitness testimony and voice recognition; Geoffrey Stephenson of the University of Kent at Canterbury, who was studying identification evidence; Graham Davies, John Shepherd and Haydn Ellis of Aberdeen University, who were researching face recognition; and Ian Berg of Leeds University, Nigel Lemon of Sunderland Polytechnic and Andreas Kapardis of Cambridge University, who were investigating sentencing by magistrates. Criminological and legal psychologists wanted to come together: they had many interests in common, they needed a forum for discussion of research, methodology, assessment and treatment and, finally, there was strength in numbers.

A steering committee was set up in 1975 to found the DCLP, and it included John Freeman, a lecturer in Law at King's College London (who was qualified in both law and psychology), Tony Black (a psychologist in a secure hospital), Stephanie Braithwaite (a prison psychologist) and David Farrington (a criminological psychologist from Cambridge University). The proposal to

14 For this section, I am grateful to David Farrington for contributing invaluable material, drawing on his own personal experience as one of the pioneers who had the vision, took the initiative and put in the effort to establish psychology and law in the United Kingdom.

create the DCLP was approved by the BPS in 1976 and the DCLP was officially founded at a historic scientific meeting at King's College London in 1977. It was renamed Division of Forensic Psychology in 1999. In 1980, the DCLP decided to publish a series of monographs called 'Issues in Criminological and Legal Psychology', with David Farrington as general editor for the first five monographs, which were published between 1981 and 1983. Three of these monographs, all edited by Joanna Shapland of Oxford University, were extremely important in advancing psychology and law in the United Kingdom on: *Lawyers and Psychologists: The Way Forward*; *Lawyers and Psychologists – Gathering and Giving Evidence*; and *Decision Making in the Legal System*.

A landmark UK conference in 1977 on psychology and law that was sponsored by the Social Science Research Council (SSRC), Centre for Socio-Legal Studies at Oxford University, and organised by Keith Hawkins, Sally Lloyd-Bostock and David Farrington, brought together many of the leading UK researchers on psychology and law. In 1978, following this conference, the SSRC Law and Psychology Seminar Group was established (it lasted until 1983, when the SSRC stopped the funding). This seminar group organised further meetings in Oxford that led to edited publications. These meetings were also important in bringing together leading psychologists and lawyers. The topics included eyewitness testimony, police interrogation and confessions, psychological evidence in court, pre-trial publicity, and the psychological impact of crime on victims.

Another important development for the international visibility of UK research on psychology and law was the publication in 1981 of a special issue of the leading US journal *Law and Human Behavior* on British research (see Farrington & Bull 1981). This included an experimental simulation of the sentencing of magistrates by Andreas Kapardis and David Farrington, an experiment on the training of magistrates by Rod Bond and Nigel Lemon, research on jury decision-making by Phil Sealy, and research on eyewitness testimony by Ray Bull, Brian Clifford, Graham Davies, John Shepherd and Haydn Ellis. All these developments meant that research on psychology and law in the United Kingdom exploded into life between 1977 and 1983, and these developments really laid the foundations for psychology and law research in the United Kingdom since then. Annual conferences at the Oxford Centre formed the basis for Farrington, Hawkins and Lloyd-Bostock's 1979a *Psychology, Law and Legal Processes* and Lloyd-Bostock's 1981a *Psychology In Legal Contexts: Applications and Limitations*, and these 'established a European focus for collaboration between the two disciplines, attracting scholars from many different countries' (Stephenson 1995: 133) and paved the way for the more recent annual European Association of Psychology and Law (EAPL) Conferences.

Psychological associations outside the United Kingdom also set up relevant divisions: for example, in the United States in 1981 and in Germany in 1984. In 1981 the American Psychological Association (APA) founded Psychology

and Law as its 41st Division. A significant development in the United States was the inclusion in 1994 of law and psychology in the *Annual Survey of American Law*. It was not until 2001, however, that the APA recognised forensic psychology as a specialty, despite the fact that the *Specialty Guidelines for Forensic Psychologists* was published in 1991 by the American Academy of Forensic Psychology and the American Psychology-Law Society (AP-LS). Besides a spate of international conferences on legal psychology that has been held in the United Kingdom and on continental Europe, there now exist both undergraduate and postgraduate programs in legal psychology. Finally, a number of universities on both sides of the Atlantic have recognised the importance of legal psychology by dedicating chairs to the subject in psychology departments and law schools.

Interestingly, it was in 1922 that William Marston, known for his pioneering work on the polygraph and his empirical research into the jury system, was appointed Professor of Legal Psychology. The reader should note in this context that the development of psychology and law appears to have been significantly different in Australia and New Zealand, where the relevant learned society (Australia and New Zealand Association of Psychiatry, Psychology and Law [ANZAPPL]) incorporates psychiatry as well as psychology and law and a higher proportion of both practitioners and lawyers attend their conferences.

### The development of psychology and law in Europe and internationally

The first European psychology society with relevance to legal psychology was the European Association of Experimental Social Psychology, founded in 1966. Geoffrey Stephenson was a leading light in this society,<sup>15</sup> and he encouraged some sessions on legal psychology, for example at the East-West meeting in Bologna, Italy in 1980. However, psychology and law in Europe began in earnest with the first European Conference on Psychology and Law in Maastricht, The Netherlands in 1988. At the second such conference, in Nuremberg, Germany in 1990 (hosted by Friedrich Lösel), it was resolved to found the European Association of Psychology and Law (EAPL), and this was officially founded at the third such conference, in Oxford, United Kingdom in 1992. The EAPL, and its house journal *Psychology, Crime and Law*, founded in 1994, have proved to be extremely important in advancing psychology and law in Europe.

Following a suggestion made at the EAPL conference in Siena, Italy in 1996 by British academic David Carson, a very successful conference was held at Trinity College, Dublin, jointly organised by AP-LS and EAPL. The conference was attended by over 600 delegates from 27 countries, and produced two excellent books, namely *Psychology in the Courts: International Advances in*

15 He was President from 1984 to 1987.



*Knowledge* by Roesch, Corrado and Dempster (2001) and *Sex and Violence* by Farrington, Hollin and McMurran (2001). The second joint meeting of the AP-LS, the EAPL and the ANZAPPL was held in Scotland in 2003 and the third one was held in Adelaide, South Australia in 2007. Unfortunately, in 2006 the AP-LS withdrew from the agreement with the EAPL and the ANZAPPL to hold annual meetings every four years.

## 1 BRIDGING THE GAP BETWEEN PSYCHOLOGY AND LAW: WHY IT HAS TAKEN SO LONG

With its emphasis on law in a social context, sociological jurisprudence created a climate within law which has been conducive for the development of legal psychology.

The development of sociological jurisprudence, with its emphasis on studying the social contexts that give rise to and are influenced by law, posed a challenge to the ‘black-letter’ approach to studying law which had been the linchpin of the legal system in North America. Sociological jurisprudence provided conditions within law that were favourable to the development of legal psychology, as did subsequent movements in law such as ‘legal realism’ (Schlegel 1970).

In his 1908 book, *On the Witness Stand*, Münsterberg was critical of the legal profession in the United States for not appreciating the relevance of psychology to its work. However, Münsterberg was overselling psychology and his claims were not taken seriously by the legal profession. In addition, according to Cairns (1935), there was opposition from within the discipline of psychology by such scholars as Professor Edward Titchener of Cornell University. Not surprisingly, therefore, ‘the initial foray into law and psychology...did not generate enough momentum to sustain itself’ (Ogloff 2000: 462).

The rather unfortunate legacy left by Ebbinghaus (1885) and his black-box approach to experimental memory research – best exemplified by his use of nonsense syllables – contributed to the state of knowledge in psychology at the time and was one significant factor that affected the success of Münsterberg’s attempt. Fortunately, the dominance of the black-box paradigm in experimental psychology came to an end with the publication in 1967 of Neisser’s futuristic *Cognitive Psychology* book. In the ensuing six decades, while behaviourism (on the one hand) and the experimental psychologists’ practice (on the other) of treating as ‘separate and separable’ perception, memory, thinking, problem solving and language permeated and limited psychological research greatly, the early interest in psycholegal research fizzled out. As Ogloff (2000: 463) points out, the continuing development of legal psychology after the 1930s was prevented not only by forces within psychology but also by a ‘conservative backlash in law which limited the progressive scholars in the field...The demise of legal realism had a chilling effect on legal psychology.’

By the late 1960s, as psychology matured as a discipline and, among other developments, social psychology blossomed in the United States, the experimental method came to be applied to problems not traditionally the



concern of psychologists: understanding deception and its detection; jury decision-making; the accuracy of eyewitness testimony; and sentencing decision-making. While most of the early psycholegal researchers with a strong interest in social psychology focused on juries in criminal cases, those with an affinity to clinical psychology concerned themselves with the insanity defence and psychopathy, and cognitive psychologists examined eyewitness testimony. These same areas continue to be of interest to psycholegal researchers today, but the questions being asked are more intricate and the methods used to answer them are more sophisticated.

The somewhat narrow focus of psycholegal research caused enough concern to Saks (1986) for him to remind such researchers that ‘the law does not live by eyewitness testimony alone’, and for Diamond to urge them ‘to explore under-represented areas of the legal landscape’ (1992: vi). Ogloff (2001), Carson and Bull (1995a) and Carson et al. (2007a, 2007b, 2007c) have urged legal psychologists to broaden their research interests to include more areas of law, including negligence law, contract, administrative law, antitrust law, civil procedure, corporate law, environmental law, patent law and family law. They have argued that psychology and law should become more applied, and have urged psychologists to also carry out research into expert evidence (see Chapter 7), legislation, criteria relevant for determining legal tests<sup>16</sup> and practice statements. In fact, the *Memorandum of Good Practice for Video Recorded Interviews With Child Witnesses for Criminal Proceedings* (Jack & Yeo 1992), drafted by a psychologist (Professor Ray Bull) and a lawyer (Professor Dianne Birch) is a ‘paradigm of collaboration between psychology and law’ (Carson et al. 2007a: 11).<sup>17</sup> Other areas suggested as fields for research are professional practice statements, training manuals and justice systems (for example, therapeutic jurisprudence).

Why, then, has it taken so long for the field of psychology and law to develop when, as some authors would argue,<sup>18</sup> psychologists and lawyers do have a lot of common ground, when human behaviour is the very purpose of both psychology and law and when both disciplines focus on the individual? Also, why is it that the domain of psychology and law is not yet interdisciplinary?

Psychology and law have a great deal in common but they also differ in a number of significant ways. Furthermore, conflict is endemic to the relationship between the two disciplines.

16 For an example, see the case of *R v Turnbull* ([1977] QB 224) in which Lord Widgery, then Chief Justice, laid down a number of factors which trial judges should ensure that juries consider when assessing identification evidence.

17 It was replaced in 2002 by *Achieving Best Evidence in Criminal Proceedings* (Home Office), and was last updated in 2011. See Chapters 3 and 4.

18 For example, Saks & Hastie 1978; Farrington, Hawkins & Lloyd-Bostock 1979b; Yarmey 1979; Lloyd-Bostock 1981a, 1981b, 1988; Diamond 1992; Lösel 1992.

Haward (1981a: 16) pointed out that the law lags behind contemporary social thinking ‘while psychology tends to anticipate it’. Also, while the law relies on assumptions about human behaviour and psychologists concern themselves with understanding and predicting behaviour, both psychology and law accept that human behaviour is not random. More specifically, research in psychology relates to various aspects of law in practice. Compared to law, psychology is, chronologically speaking, entering its adulthood, and given a number of important differences between the two disciplines, it comes as no surprise that tension and conflict between them persists.<sup>19</sup> Bridging the gap between the two disciplines on both sides of the Atlantic, in Australia, New Zealand and Canada, as well as, for example, in Germany, Spain, Italy, The Netherlands and Sweden, has not been easy. Admittedly, ‘Different psychologists have different ideas about what psychology should be about’ (Legge 1975: 5), and ‘Law, like happiness, poverty and good music, is different things to different people’ (Chisholm & Nettheim 1992: 1). The simple fact is that there are significant differences in approach between psychology and law. In fact, psychologists and lawyers are characterised by different objectives and the use of different reasonings. This point is well illustrated by eight issues which are a source of conflict between the two disciplines, namely:

- the law stresses conservatism; psychology stresses creativity;
- the law is authoritative; psychology is empirical;
- the law relies on adversarial process; psychology relies on experimentation;
- the law is prescriptive; psychology is descriptive;
- the law is idiographic; psychology is nomothetic;
- the law emphasises certainty; psychology is probabilistic;
- the law is reactive; psychology is proactive; and
- the law is operational; psychology is academic.<sup>20</sup>

It can be seen that the two disciplines operate with different models of man. The law, whether civil or criminal, generally assumes free will and emphasises individual responsibility in contrast to the tendency of a number of psychological theories to highlight ‘unconscious and uncontrollable forces operating to determine aspects of individuals’ behaviour’ (King 1986: 76). In addition, ‘The psychologists’ information is inherently statistical, the legal system’s task is clinical and diagnostic’ (Doyle 1989: 125–6). As Clifford (1995: 13) has put it: ‘the two disciplines appear to diverge at the level of value, basic premises, their models, their approaches, their criteria of explanation and their methods’. Some authors have argued, however, that the implications of the

19 See Marshall 1969; Carson & Bull 1995b; Diamond 1992: viii; McEwan 2003.

20 Taken from Ogloff & Finkelman 1999: 13–15.