

# ***Psychology and Criminal Justice***

## ***Introduction***

This chapter is designed to give the reader a flavour of a few areas in which psychology has been applied to criminal justice. It begins by providing some historical context and showing the development of some applications of psychology to criminal justice. The chapter is broadly split into 3 sections: Pre Trial; Trial; and Post Trial. In most of this chapter, the areas considered assess how psychology has had an influence on the law and how psychologists work within criminal justice settings. Additionally, in the sub-section on limitations to culpability and diversionary schemes, special attention is given to consideration of how the law has changed psychology practice. By the end of this chapter, you should have some basic understanding of the criminal justice areas in which psychologists are working.

## ***Background***

Psychology is the study and application of human behaviour, within and between individuals and groups<sup>1</sup>. Psychologists have been researching and working within criminal justice processes for almost as long as psychology has existed as an academic discipline. The first person generally acknowledged to have written in English specifically about the use of expert evidence in court is Munsterberg (Munsterberg, 1908). He is often credited with much of the establishment of the use of psychology in courts--particularly in America--although he had his detractors (Wigmore, 1909).

Just how useful our evidence is to courts and why courts may not have seemed to “learn” from social scientific evidence are areas that have been considered a little more recently by authors such as Webster (1984) who referred to an apparent dichotomy between psychological norms and language and the needs and expectations of courts. Webster concluded somewhat hopefully, pointing to ways in which each discipline could work to accommodate the other. Subsequent

authors, including Yarmey (2001). and Flowe, Finklea and Ebbesen (2009) point out that there are both limitations to what the courts can expect and to what we can provide in expert testimony.

Despite the limited impact overall, there is some evidence that psychological tools were being adopted quite early in order to bring about justice beyond the confines of the courtroom. By 1916, Terman had revised Binet's and Simon's intelligence test (Binet and Simon, 1905) for use in selecting police and fire officers and was interested in how intelligence may relate to offending behaviour. Similar work was going on in Britain, where for example Goring (1913) was classifying and quantifying offenders. Today, "Forensic Psychologists" in England and Wales are qualified, state registered "practitioner psychologists" (HPC, 2010). There are more psychologists who have applied psychology to criminal justice than there are officially designated Forensic Psychologists and there are both national and international debates as to what constitutes forensic psychology (e.g. Gudjonsson and Haward, 1998 or Morgan, Beer, Fitzgerald, and Mandracchia, 2007). In Britain, a Forensic Psychologist could, for example: evaluate offender behaviour interventions; conduct research for or about charities working within criminal justice; design and implement risk assessments; provide training in interviewing and other professional skills; work to improve investigative processes; support victims; design, deliver and assess treatment; negotiate with hostage takers; advise about terrorist and other policies; and provide expert evidence to courts, tribunals, Royal Commissions or Public Inquiries. Psychological experts may testify in cases ranging from the prosecution of war crimes to an adoption hearing or to a health and safety tribunal. The qualifications needed to provide evidence to courts and tribunals largely revolve around experience and ability to add something of probative value to the hearing (British Psychological Society, 2009).

Working across the field of criminal justice means that psychologists could be involved in almost any of the areas covered within this book. One area, central to many interventions with offenders and their management, is how to assess whether they are dangerous, if so, how dangerous and how likely are they to re-offend? Psychologists have designed, implemented and critiqued the uses of risk assessments (Bonta, Law, and Hanson, 1998; Quinsey, Rice, and Harris, 1995; Sreenivasan, Kirkish,

Garrick, Weinberger, and Phenix, 2000). The merits of different sorts of risk assessment are not only a source of contention, but a good example of how psychological tools may be routinely incorporated into criminal justice practices such as whether to move a prisoner to a different category of establishment or the level of intervention needed with an offender being supervised by probation services.

In attempting to evaluate how criminal justice systems function, psychologists have influenced future directions and processes. For example, research has considered how juries as a whole (e.g. Gastil, Burkhalter, & Black, 2007; Hastie, 1983), and individual jurors (e.g. Findlay, 2001; Hastie, 1993; Matthews, Hancock, & Briggs, 2004) make conviction or acquittal decisions (Levett et al., 2005) (see below). Such research underpinned a number of submissions made to bodies designed to reform jury processes and criminal procedure more widely, such as the Auld Review (2001) or the Runciman Commission (1993). The last background point is that although this chapter is of course centred on criminal justice, expert psychological witnesses in the UK and elsewhere, are more likely to give evidence to the civil than criminal courts (Gudjonsson, 2007).

## ***Applying Psychology to Criminal Justice***

Many psychologists in this country are members of the British Psychological Society (BPS) which has professional standards of conduct. Anybody who wishes to become a “practitioner psychologist” and offer their services to members of the public, needs to be registered with the Health Professions Council (HPC, 2010). This is largely about public protection. In this context, the “public” means almost anyone who is not a psychologist. We owe duties of care to people who could potentially be harmed by our actions. This includes vulnerable adults, children, victims of crime and offenders. In the past few years, there has been increasing recognition of the needs to consider prisoners’ rights and our responsibilities as practitioners when working with them (Birgden and Perlin, 2008; Ward, Gannon and Vess, 2009).

Even when behaving with due ethical rigour, there remains a methodological tension between the desires to assess how processes may work experimentally, and how to make them most applicable to their real world setting (Stephenson, 1992). This tension between controlled, rigorous research and generalisable, ecologically valid research (see chapter 15) has always existed in psychology and there is still debate about where laboratory based research is appropriate and how such findings should be interpreted within the contexts of police practice, court decision making, and the implementation of justice (e.g. Konečni and Ebbesen, 1986). As mentioned in the background section, this has led to pieces questioning just how much “probative value” our research may provide to the courts (e.g. Yarmey, 2001). There are however a number of areas where we can clearly show influence and where we routinely practice.

In the rest of this chapter, some key areas will be highlighted in which psychology is applied to criminal justice. This has been organised in terms of Pre Trial; Trial and Post Trial. However, a number of fields of research and practice would straddle two or all of these areas. For example, a witness or suspect will need to be interviewed (by the police) during the pre-trial, investigative phase and within a court hearing itself (by counsel). The accuracy of their evidence is important to both phases. Similarly, diversions away from the criminal justice system for someone with a mental health problem or who is vulnerable in a different way may happen at any of the stages, pre, during and after a court hearing. Many of these areas have also been the subject of considerable legislative/practice change, but this was beyond the scope of the present chapter.

### ***Pre Trial: Investigative Psychology***

Investigative psychology is the branch of psychology concerned most with the processes and people involved in investigating a crime. This could include: the conduct of **identity parades** (in person or on video); how to interview suspects and witnesses; selection and recruitment of police officers; ways to best detect deception; crime linking; and profiling of offences or offenders. This sub-section will concentrate primarily on advice provided to investigative officers and an exploration of issues

around the gathering of evidence. As already noted, early psychologists helped to select and recruit police officers. After the second world war, there was a search for a possible Fascist personality type and amongst other things, this led to the creation of Adorno's F(ascist) Scale (e.g. Adorno et al. 1950). This was a highly influential measure of personality, centred on how authoritarian a person might be. In the 1960s, there was some effort expended on exploring police officers' personalities and in particular, considering whether they were more likely to score highly on this scale. The F-scale has itself been criticised and Skolnick's work provided an early counter balance (e.g. 1966). He considered police practice and mal-practice in terms of their "occupational grouping" that led them to adopt a "working personality". In building on Skolnick's work and partly as a response to approaches that centred on the individual, sociologists such as Reiner (e.g. 1992, 2000), and Waddington, (e.g. 1999) have further developed the notions of police behaviour as part of a sub-culture; this is still an area for research and policy concern (see chapters 3 and 4). Psychologists have been particularly interested in trying to improve police efficacy, either in terms of challenging police attitudes, or in terms of better investigative practice. One area that has been popularised by books, films and television is that of the predictive profiler. There are at least two main types of profile that can be generated, one seeks to link crimes to a particular offender via personal characteristics, and the other, is about the timing and location of the offences, the geographic profile. There are also differences in approaches adopted by different people conducting profiles, particularly the offender profile and it is to this field that the chapter now turns.

### **Policing and Behavioural Investigative Advice**

The area popularly known as "Offender profiling" should now, at least in England, Wales and Northern Ireland, be more properly considered as part of Behavioural Investigative Advice (Alison et al. 2010a). Considering first the older term of offender profiling, within it, there were largely three different approaches, each from its own tradition and each sceptical of the other. Muller (2000) summarised these three approaches as:

1. Investigative: e.g. the approaches taken by the FBI and built upon years of criminal investigative experience.
2. Clinical: where years of clinical interactions with offenders is built upon.
3. Statistical, scientific: where empirical evidence, from other domains as well as the criminal, underpinned what is essentially a multivariate analytical approach to evidence.

Canter summarised the starting points of the scientific approach in terms of a model or equation from A to C. The basis here is that a profiler would try to predict Characteristics (C) based on observable Actions (A). The main problem is that there are multiple actions to observe, and that they may predict more than one key characteristic, or be unrelated to the characteristics being sought. Even if it is possible to infer Characteristics from the Actions (which may have been themselves implied by evidence, rather than directly observed), then any changes in actions, whether observed or not, could change the way in which Characteristics should be inferred (Canter & Youngs, 2009). Further, there are key assumptions made by most forms of profiler:

- That offender characteristics will be reflected in the offences they commit.
- That there is consistency in the ways in which offenders behave.
- That there is distinctiveness between one set of offender's behaviours and another's.
- Yet, that offenders who are similar to one another will offend in similar ways, the homology assumption.

Unsurprisingly, it has been very hard to test or to demonstrate this model in practice. However, a number of researchers are now using **Smallest Space Analysis** as a way to test these ideas (e.g. Salfati & Canter, 1999 or Youngs, 2004). Both Mokros and Alison (2002) and Woodhams and Toye (2007) failed to find evidence in support of the homology assumption although Mokros and Alison (2002) did find support for consistency of behaviour within offenders.

There was some reluctance to incorporate profiling into routine police work. This was in part, reflected in whether or not police officers had found previous profiles to be useful. Some research

has been conducted to explore this e.g. Jackson, van Koppen & Herbrink (1993) published a small scale study of 20 cases in Netherlands, 6 of which had involved full, completed profiles. Although there were some concerns raised, the police seemed to appreciate being able to discuss the cases, and profiling was viewed positively overall. A larger scale study by Copson (1995) had the title 'Coals to Newcastle'...reflecting the views of a number of the participants in his research. His paper was based on 184 cases of profiling, conducted by 29 profilers (although 88 were by just 2 of the profilers, showing how much they were being relied on). The findings are generally positive but reflect an almost reverse picture to that which would be likely in the popular imagination: The officers indicated that profiles had:

- Identified an offender in 2.7% of cases.
- Assisted in solving the case in 14.1% of cases.
- Opened new lines of enquiry in 16.3% cases.
- Reassured police officers about their judgement in 51.6% cases.

Yet 68.5% of officers said that they would use a profile again and were satisfied overall, with 82.6% of officers indicating that the profile had been useful.

Copson's work indicated that police officers were generally positive about profiles, but that the ways in which they were useful to them, were unclear. In attempting to understand more about their operational utility, Gekoski and Gray (2011) conducted in depth interviews with 10 police officers with experience of profiling. They again gained a mixed picture: The most negative views tended to consider profiling to be fairly accurate, but of little operational usefulness as the profile told police officers what they already knew. Conversely, there was a concern that the importance of a profile may be overestimated, and lead to police abandoning other lines of enquiry. Two cases were identified where a profiler had played a prominent role in encouraging breaches of PACE 1984 during interviewing. Two thirds of the officers said that they would use profiles again, but some officers reported feeling pressurised into using profiles, even when they did not want to. It should be

noted that the interviewees were all experienced officers and would have seen some very high profile miss-handled cases as well as ones where profiles had been useful.

The investigation of Colin Stagg for the murder of Rachel Nickell could be seen as one of the most notorious poorly handled cases in which the profile/profiler exerted inappropriate influence and in which PACE guidelines were breached. Ms Nickell was murdered on Wimbledon Common in 1992, in front of her then 2 year old son, Alex. The pursuit of Colin Stagg as a primary suspect and use of a particularly controversial “honey trap” led to his prosecution being thrown out of court by the judge. The blinkered pursuit of Colin Stagg seriously hampered an investigation that was taken on by other officers before ultimately leading to the conviction of Robert Napper in 2008 (a conviction obtained whilst Napper was already serving a sentence in Broadmoor Special Hospital). Robert Napper had a very difficult childhood, witnessed extreme violence and was victim to a serious sexual assault. He had several years of psychiatric treatment during his adolescence. As an adult, he first came to the Metropolitan Police’s attention in 1986 for a firearms offence. Then in 1989, his mother telephoned them to say that he had confessed to a rape, a call that was not properly followed up. In 2010, the Independent Police Complaints Commission (IPCC) concluded that Napper had been left free on several occasions due to repeated police errors. In that time, he raped multiple women and committed Ms Nickell’s murder. It was only after he left DNA evidence during another attack, in 1993, that he was finally convicted of 2 murders, those of Samantha Bisset and her 4 year old daughter, Jazmine. He was serving the sentence for these crimes when he was eventually convicted of the earlier murder of Rachel Nickell (Cerfontyne, 2010). The IPCC report (prompted by André Hanscombe, Ms Nickell’s partner) concludes that such errors should not occur again due to the significant improvements made between the time of the investigations and when the complaint was made (Cerfontyne *ibid*) but it is still worth reading, not least because we cannot yet tell what the outcomes will be to policing practice of the significant cuts currently being imposed.

One of the shifts made in the last 20 years has been in **ACPO** policy about how to use behavioural science, culminating in formalisation of the use of Behavioural Investigative Advice



(BIA), as the preferred interaction between psychological expert and police investigative teams (see West, 2001). The role of BIA was ratified by ACPO in 1999, and refined further in 2006 (ACPO, 2006). Starting points for controlling the quality of BIA include that advisors must be prepared for annual, independent scrutiny of the advice they give and must provide reasoning for the inferences they make. Behavioural Investigative Advisors (BIAs) are professionally regulated and follow practice guidelines. The Specialist Operational Support<sup>ii</sup> team employs a number of BIAs and if further expertise is needed, there is an approved list of external consultants. There are a number of areas in which BIAs may work and where they can help policing but any one advisor will specialise in a range, not all of these areas. They include: crime scene assessment; profiling (geographic as well as offender characteristics); advice on investigative strategies and communication strategies. Their work can also include advice and training on interviewing.

Chapters 3 and 4 of this book concentrate on police and policing and as such, there is no need to review the antecedents of PACE, 1984. Psychologists have worked closely with police subsequently to understand and improve interviewing of suspects. This has led to the so-called PEACE approaches to interviewing that have been adopted in England and Wales. The stages adopted in PEACE are Planning and preparation of the interview; Engage(ment of) the interviewee and explain(ing) how the interview will work; Account, clarifying and challenging the interviewee; Closure of the interview and Evaluation (Milne & Bull, 2003). PEACE strategies were developed to encourage both accurate recall of events and as much detail as possible. Also, to try to avoid undue pressure being exerted during police interviews/interrogations, not least because such pressure would not necessarily mean that accurate information was obtained. Although it is relatively easy to think of unprofessional pressure being exerted, possibly with some threat of physical force, it is important to note that some witnesses/suspects will be more vulnerable than others to the pressure of being interviewed in itself, possibly even to what would otherwise have been considered harmless interactions. Despite the improvements brought about and protections put in place when interviewing suspects, there continue to be cases where people are convicted on the basis of false confessions. One possibility is

that some people are particularly suggestible. This work has been led by Gisli Gudjonsson, who developed a suggestibility scale in 1984. His work has involved cases such as that of Engin Raghip.

In 1985, a police officer was killed during the Broadwater Farm Riots along with somewhere between 30 and 50 other people who were seriously injured. One of the defendants convicted of murder was Engin Raghip, who was convicted solely on the basis of a confession “he had made to the police after several days in detention and many hours of interviewing” (Gudjonsson and Mackeith, 1997). Two years after he was convicted he was re-assessed and found to have “significant intellectual impairment (I.Q. score of 74), and was abnormally suggestible, compliant, and anxious. He was also illiterate and he had been in a disturbed mental state at the time of the police interviews.” (Gudjonsson and Mackeith, 1997, p7). Up to that point, having an IQ of 74 would not have been recognised as necessarily problematic to the courts as the threshold below which someone would be considered vulnerable was 70. His conviction was quashed in 1991 and as part of that appeal, the judge commented on the importance of nuanced, properly conducted psychological reports ruling that IQ performance alone was insufficient as an indicator of vulnerability.

Our concern with effecting justice and with avoiding miss-carriages of justice dates back to the earliest applications of psychology to the courts (see Sporer 1982, 2008). Sporer also points out that legal commentary and practice had identified the importance of properly conducted identification parades and had questioned the credibility of some court witnesses nearly 200 years ago (Henke, 1838 and Mittermaier, 1834 both cited in Sporer, 2008). However, the caution urged in relying on testimony and practical suggestions made, did not change court practices. This may have been because of the limited “probative” value of the material presented (see background above). Another reason why we may not have had much of an impact, is the social scientific practice of disagreeing in public (e.g. in courtrooms) about research findings, thus making it difficult for the non social scientific audience to know how to judge our evidence (Webster, 1984). The field of eyewitness accuracy is a good example of such public spats.

## **Evidence from Eyewitnesses**

Eyewitness memory researchers are generally concerned with providing the criminal justice system with the best advice possible so that the best evidence possible is presented in courts. However, the people involved have differed in terms of their research frame of reference and their preferred means of analyses of data. Whilst a different methodology may sound technical or too inconsequential, the net effect resulted in polar opposite conclusions as to whether an eyewitness giving evidence in court should be generally believed or generally disbelieved, acrimonious differences of opinion about the best advice to give courts (Loftus, 1983, 1993;) or even whether to give advice at all (McCloskey, Egeth, and McKenna, 1986; Egeth, 1993). One distinction that was drawn by Wells in 1978 has been revisited several times by other authors and was eventually helpful in moving the debate forward and in providing useful information for the courts (Deffenbacher, 2008). Wells highlighted the importance of considering estimator and system variables separately. Estimator variables relate to those things which might have an impact on the individual witness him or herself—the estimator. For example, that she had poor vision; or that a weapon had been used which might have meant that his focus was drawn to the weapon, away from the perpetrator. Estimator variables acknowledge differences that explain why some witnesses may be more accurate than others. System variables are those things which might interfere with memories as the witness comes into contact with criminal justice systems. Examples could include a poorly conducted identity parade or inappropriate questioning by a police officer. Research into systems variables has led to improvements in policing and changes in legislation, such as PACE, 1984 and the development of PEACE interviewing (see above). A neat summary, with examples of system and estimator variables is provided by Valentine, 2012 (p271). His examples include:

#### Estimator Variables:

- The conditions at encoding/witnessing the event. For example, how good the light was, how long the incident took.
- How stress inducing the incident was to the witness.

- The age of the witness.
- Differences in ethnicity between the witness and perpetrator(s)

### System Variables

- Where and how an identification is made.
- How foils are selected for use in an identity parade.
- Information provided to witnesses before, during and after an identity parade.

Even when disagreeing as to whether eyewitnesses are in general accurate or in general inaccurate, most researchers are motivated to better facilitate justice from the criminal courts. In Britain, this tied in well with criminal justice priorities after the Devlin committee's findings of 1976. These were supplemented by precedent set within *R v. Turnbull* (1976) in which it was decided that judges would need to provide instructions to jurors about potential problems with eyewitness identification, if the case relied heavily on disputed eyewitness identification evidence. (Valentine *ibid* also summarises the initial guidance from *R v Turnbull*). In the United States, an early key precedent was set within *Neil v Biggers* (1972) and organisations such as the Innocence Project have been influential in highlighting cases where DNA evidence proved that the originally convicted defendant had to have been innocent; mistaken identification by an eyewitness played a role in 72% of their 292 cases between 1989 and 2010 ([www.innocenceproject.org](http://www.innocenceproject.org) and see chapter 15).

For more information on investigative psychology in general, then try Bull, Valentine and Williamson (2009). For BIA or Offender Profiling, a good place to begin would be Alison, Barrett and Almond (2010b), or for more detail, Alison and Rainbow (2011). To find out more about eyewitness evidence, a useful review of system variable research was compiled in the chapter by Fisher and Reardon (2007). More depth, including gaining and using evidence from children, is provided in the book by Lampinen, Neuschatz and Cling (2012). Additionally, there have now been several guidance documents issued in various jurisdictions on how to gain effective eyewitness evidence and how to

use it in courts (e.g. Pike, Brace and Kyman, 2002 and US Department of Justice, 1999). Memory evidence in courts will be covered further in the next section of this chapter.

### **Review Questions**

1. How can we judge whether Behavioural Investigative Advice has been successful?
2. What is the difference between an Estimator and a System variable in relation to eyewitness research?

### ***Trial related Psychology***

There are a number of areas in which psychology has been brought to bear in the study of and reform to court practices. These include: how judges and magistrates make bail decisions and sentencing decisions (e.g. Ebbesen and Konečni, 1985); “narrative theories” of the trial--which consider how stories/testimony are constructed for use in the courts, e.g. lawyers’ briefs and within court hearings, e.g. during examination and cross examination; charge and plea bargaining (see Ashworth and Redmayne, 2010 for both); the effects of gender in the courtroom (see chapter 11, or, McKimmie and Masser, 2010). One area in which there has been both change, but still relatively low conviction rates is in the prosecution of rape. Different reasons have been hypothesized for this but many concern how we view rape and whether we are likely to blame victims for their own victimisation.

Thirty-two years ago, Martha Burt coined the term “rape myth” and developed a scale to measure “rape myth acceptance” (Burt, 1980). This has been used in numerous studies and demonstrated that both men and women concurred with ideas that essentially blamed rape victims. The initial scale included items such as: *A woman who is stuck-up and thinks she is too good to talk to guys on the street deserves to be taught a lesson* (Burt *ibid* p223). As attitudes (for some at least) have shifted in the intervening time, other scales have been developed. Bohner’s AMMSA scale (Acceptance of Modern Myths about Sexual Aggression) includes items such as: *Interpreting*

*harmless gestures as "sexual harassment" is a popular weapon in the battle of the sexes* (e.g. Gerger et al. 2007). More recently, Gray and Temkin (2011) found that barristers in court were still using rape myths, both directly and indirectly and that they seem to play a crucial role in how strong or weak individual cases were seen to be by legal professionals. This is despite acknowledgement of rape myths at work for most of the preceding 25 years and changes to legislation and courts guidance in attempts to try to raise notoriously low conviction rates for rape. More auspiciously, there are areas where psychology has managed to make more significant inroads and the next two sub-sections consider two of the more prominent ones: how to obtain accurate evidence in court and how juries reach a verdict.

### **Memory in Court: How to obtain the most accurate evidence?**

Fairly recently, a report produced by the British Psychological Society (BPS, 2010) summarised research from the past thirty or so years and provided advice on how to judge and use legal evidence based on people's memories in court. This considered the major areas including how memory works, key threats to accuracy of memory and provided advice on matters ranging from the best ways to interview witnesses, through to eliciting evidence from children and vulnerable adult witnesses. There were ten key points helpfully summarised at the start of the report (BPS, 2010, p2):

1. Memories should not be seen as being akin to an audio or video recording. They are based on how people experience events.
2. Other experience will influence how memories are built, stored and recalled as "memory is not only of experienced events but it is also of the knowledge of a person's life...as a general rule memory is more likely to be accurate when it is of the knowledge of a person's life than when it is of specific experienced events."
3. When we remember, we construct memories, synthesising our different experiences and knowledge. This means that memory can be influenced by what is going on at the time of recall as well as what happened at the time of initial encoding. These are directly relevant to

criminal justice where witnessing an initial event, being interviewed, examined and cross-examined about it, are all central to the uses of eyewitness evidence.

4. Memories for events are incomplete and if someone appears to have forgotten some features of an incident, but remembered others, this should not be seen as problematic by the courts, it should be seen as normal. Indeed, an account that has no gaps and no evidence of forgetting, should be seen as very unusual.
5. Details within memories are not common, and often poor. “As a general rule, a high degree of very specific detail in a long-term memory is unusual.”
6. Just because a memory seems consistent within itself and highly detailed, does not mean it is accurate “**or even that it actually occurred.** In general, the only way to establish the truth of a memory is with independent corroborating evidence.”
7. What we remember depends on how we understand and interpret events, both consciously and non-consciously. “This content can be further modified and changed by subsequent recall.”
8. It is possible to have a memory of a situation or incident that did not actually happen. This may not be an indicator of deliberate deception. It is possible, for example that the apparently remembered event was a blending together of several other events, or maybe was created in response to other stimuli, that make “personal sense for some other reason”, such as family photographs. Such genuine, but inaccurate, memories are often called “confabulations”.
9. When considering “traumatic experiences, childhood events, interview and identification practices, memory in younger children and older adults and other vulnerable groups”, there are special features to memory that are not widely understood. Expert witnesses in these areas will be able to provide advice to courts.
10. “A **memory expert is a person who is recognised by the memory research community to possess knowledge relevant to the particular case.** It is recommended that, in addition to

current requirements, those acting as memory expert witnesses be required to submit their full curriculum vitae to the court as evidence of their expertise.”

The report goes on to work through several areas on which expert evidence could/should be provided. By way of example, the contested research area of confidence and accuracy judgements is summarised thus:

*Witness confidence is not by itself a good indicator of memory accuracy...Telling somebody that they (have) choose(n) the suspect increases confidence both when the identification is accurate and when it is inaccurate. This means that any confidence measure taken after the witness has found out if they have identified the suspect is confounded and should not be used to assess the accuracy of the identification. Most eyewitness experts believe that confidence judgments should be gathered after the witness makes an identification but before they discover the outcome of the parade.*

(BPS, 2010 p30 and p34)

This view synthesises what had initially seemed irreconcilably different starting points. The original contradictory research had indicated both that witnesses’ general levels of confidence were not related to their accuracy, whereas their specific measures of confidence did seem to predict corresponding specific measures of accuracy. This was in part due to differences in methodology (e.g. Smith, Kassin and Ellsworth, 1989) but subsequent research also showed that important differences are related to what other information witnesses are directly given or can infer about their choice of suspect, before, during and after they make their identification. Malloy, Wright and Skagerberg (2012) cite Wells and Bradfield’s, 1998 findings to point out that simply seeing someone go to trial may make you more confident than you otherwise would have been, when you testify.

These findings led to the quotation above, that witness confidence can be a good indicator of how accurate that witness is, but will not always be so. The BPS guidelines’ emphasis on the importance of feedback to the witness that may confirm their choice of suspect reflects at least 2



meta-analyses conducted by Bradfield, Wells and Olson and by Brewer, Keast and Rishworth (both published in 2002) and has been recently reinforced by Dysart, Lawson and Rainey (2011) who provide empirical findings based on which they reaffirm the conclusion that “line-up administrators should take care not to provide any feedback to eyewitnesses”. This conclusion revolves around a concern for the fairest, most appropriate outcome in a court case. In considering how best to maximise this, it is worth returning to the estimator and system variables mentioned above. In particular, how court systems, may be able to protect particularly vulnerable witnesses.

Just as Gudjonsson and colleagues have worked to reduce false confessions, so Davies, Westcott and others’ pursuit of ways to achieve the best evidence and protect vulnerable witnesses in court has led to several changes including most notably, the ability to present evidence in chief via pre-recorded interviews as part of the Criminal Justice Act, 1991 and the introduction of “special measures” to court hearings as part of the Youth Justice and Criminal Evidence Act, 1999. These measures were designed to maximise the accuracy of evidence obtained from young witnesses and have been extended to those who may have been vulnerable through experience of trauma or violence (including potential witness intimidation), sexual violence, those who have a learning difficulty or disability that may make giving evidence difficult or whose capacity to understand the processes may be limited. The key measures are: the use of screens to ensure that the witness (who may be the victim) does not have to face the defendant; the use of pre-recording and of live video links (often CCTV, increasingly likely to be webcams) for evidence, examination and cross examination; giving of evidence in private where the press and public are excluded; the removal of wigs and gowns by the judge and barristers and questioning through trained intermediaries (often Speech and Language Therapists) and uses of communication tools, such as keypads. Westcott and Davies (2012) provide an excellent starting point for considering safeguarding in court and for more depth as to whether they are working in practice, see Davies, (2010). Having considered how best to present evidence, the chapter turns now to how that evidence is used in court, more specifically, to how juries reach a verdict.

## Review Questions

1. Is a more confident eyewitness better than a less confident eyewitness?
2. Why might seeing a suspect come to trial make a witness more confident in their identification of that person?
3. What are 'special measures' in court?

## Jury Decision Making

In the crown court, a jury will reach a verdict and a judge will pass sentence (see chapter 6). Only about 10% of criminal trials are heard in the crown courts (MoJ, 2012a). Yet, much attention has been paid to jury decision making within crown courts as this is where the most complex and serious trials are heard. If you are interested in Magistrates' decision making, then a good starting point would be Ormerod and Adler, 2010. Here the focus is on juries.

Juries meet in secret, are accountable to no-one and must make a decision-- reach a verdict--on the charges brought. They may not reach an alternate verdict (e.g. not guilty of the charge brought but guilty of an alternative charge they have not been given). There have been a number of attempts to amend the jury process. These include:

- The Roskill Commission (1986) which recommended that in complex fraud trials, the jury be replaced with a panel of assessors with financial expertise.
- The Modes of Trial Bill of 1999 failed in the House of Lords in 2000 but elements of it were incorporated into the Criminal Justice Act, 2003.
- The Criminal Justice Act, 2003 limited the rights to a trial by jury and changed who can serve (see part 7 and schedule 33)
- The 2012 White Paper: Swift and Sure Justice... includes proposals concerned with "retaining more cases in the magistrates court" (MoJ, 2012b)

Members of the public are called to jury service randomly, from the electoral roll, although they may have to meet other requirements elsewhere. For example, if hearing a capital case in the USA, they need to be 'death qualified'. This means that they cannot say that they would never reach

a verdict of guilty if it would result in execution of the defendant. Jurors must judge a case on the evidence presented to them in court. They should not pay any attention to, for example, what they have read in the press and should not actively seek out information on the defendant. In January, 2012, Theodora Dallas was herself convicted of contempt of court after she had sat as a member of a jury. During the court hearing, she both sought out information on the defendant, then passed it on to the other members of the jury. This was despite direct warnings from the judge that such activity must not take place. A brief commentary on her case with useful extract from the judge's decision is provided in Rozenberg, 2012.

In assessing jury decisions, a good place to begin would be to consider the validity and reliability of verdicts (see chapter 15 for further consideration of validity and reliability in general). However, there has been very little observation of real juries. This is largely because, since 1981, we cannot even question jurors about their deliberations (Contempt of Court Act, 1981 s8). It has however, been possible to ask them what it's like being a juror, providing no details of the cases are themselves discussed (see Matthews, Hancock and Briggs, 2004). Looking to America, a seminal publication came out in 1966 by Kalven and Zeisel. This was a study of 3,576 trials where they collected judges' views of the evidence presented and the juries' verdicts that were reached. They then compared the judges' with the juries' verdicts. They concluded that although there were clearly "perverse" verdicts, where there was disagreement between judge and jury, when it came to considering the facts of the case, there was little difference between juries and judges, i.e. they could not say why these perverse verdicts were being reached. Subsequently, it has been suggested that the levels of agreement in their data were far from perfect, being 21% above chance (Stephenson, 1992) so maybe there were differences in how judges and juries were viewing the facts of the case. Kalven & Zeisel found legitimate extra-legal or equity factors in acquittals, things that the jurors were taking into account that went beyond just the facts of the case but were allowed. In 1979, Baldwin and McConville published the results of their study based on just over 700 cases in Birmingham and London. They also found that perverse convictions and acquittals appeared fairly

regularly. Thirty-six percent of acquittals were doubted by two or more parties (judge, police, prosecution or defence barristers) with the police doubting 44%, judges 32% and defence lawyers 10%. Baldwin and McConville found little evidence of legitimate extra legal factors and concluded that nearly all perverse acquittals flew in the face of the evidence. When considering perverse convictions (i.e. where it is likely that there was a wrongful conviction) Baldwin and McConville *ibid* found that 10% of convictions were considered perverse by two or more parties and that Black defendants were more likely to be perversely convicted. Importantly, Baldwin and McConville *ibid* go on to conclude that evaluating the efficacy of a jury is a political, not social scientific question. This is because, they argue that your view of the role that a jury should play is inextricably tied up with your view as to whether they are playing that role correctly or not.

Baldwin and McConville's statement seems unarguable, yet it is possible to view them outside a political lens. Earlier, in 1974, McCabe and Purves had examined the reliability of juries' decisions through the use of shadow juries. In their research, they constituted 30 shadow juries who heard the exact same information and sat in the court rooms at Oxford Crown Court. If a jury is a reliable instrument for measuring guilt, then there should be high levels of agreement on verdicts between real and shadow juries. In this case, there was a 43% improvement on guesswork. So although agreement was good, it was not perfect. This might seem to be strong evidence that juries are unreliable, because when presented with the same evidence they came to different verdicts. However, as Tinsley (2000) points out, it may be possible that they came to different verdicts through using the evidence presented in different, but allowable, ways.

Tinsley's study was conducted in New Zealand, where the contempt of court act prohibitions did not apply so she had more access than would be possible here. In general, we should be careful about translating findings from one system to another, but as part of the Commonwealth, the New Zealand system is very similar to ours. Tinsley highlights the idea that there is not necessarily a "right" verdict. This would mean that whether compared to a judge, an independent observer, prosecution, police or defence, as observers of the process, we can never know whether a jury's

verdict is the “true” outcome of a case. Although this sounds similar to Baldwin and McConville’s conclusion it should not be taken to mean that it is impossible to improve on jury decisions, nor should it mean that we cannot conclude anything at all about jury performance or about how individual jurors make individual decisions and come together to reach a verdict as a whole (or fail to do so, in hung juries). The Tinsley paper provides a useful summary of previous work, and the main models offered. Her findings are based on research with 312 jurors from 48 trials. Her paper moves beyond previous research in concluding that jurors are willing and able to make decisions, but the system does/did not necessarily help them to do so. Papers such as hers, led to reforms including, allowing jurors to make notes during the hearings and improve ways by which they can ask questions during the process.

Worth noting in all this, is that in general, the research evidence is that juries tend to do a pretty good job. Even long time campaigners for jury reform, tend to argue on the basis of improving a system that generally works, not replacing it. A good example of this can be seen in Zander, 2005, who builds a central case that the decision to prevent research within the actual jury deliberation room, is the correct one and should not be reversed. Similarly Thompson’s 2010 review for the Ministry of Justice concluded that in the main, juries are fair although again, the system could be improved to help them more, in particular, providing written guidance to jurors, something that Tinsley (2000) had also suggested.

### **Review Questions**

1. Are juries a reliable way to reach a verdict?
2. What are the implications of potentially holding jury based research as being in contempt of court?

### **Limits to Culpability and Roles for Psychology**

This chapter has already considered vulnerable witnesses and measures taken to protect them. There is also the need to consider vulnerable defendants. The early chapters of this book took the reader through the stages of the criminal justice system and introduced notions of who can be held

criminally liable. Great Britain's various ages of criminal responsibility are all younger than the United Nations recommended minimum age of 12 (United Nations, 2007). Although Scotland will now not prosecute children until 12, it still retains a minimum age of criminal responsibility of 8 and it is 10 in the rest of the UK. This is an area in which psychological commentary, neuroscience research and developmental advice have generally been ineffectual. Parliamentary committees and working groups have recommended raising the age of consent but the government has "repeatedly stated that it has no intention to raise the age of criminal responsibility" (Lipscombe 2012, p6).

Psychologists have been somewhat more successful in providing evidence to reviews of how mental health matters, learning difficulties and personal vulnerabilities are dealt with within the criminal justice system. For example changes to the ways in which it is decided if someone is able to enter a plea, safeguarding for vulnerable witnesses and diversions away from criminal justice. Theoretically possible at most points in the system, the Sainsbury's Centre for Mental Health (SCMH) has produced a comprehensive overview of what diversion schemes could really achieve if fully operational (SCMH, 2009). Exceptions to culpability are applicable in cases of: Severe insanity, such as the M'Naghten rules (amended in 1991 Criminal Justice Act); (un)fitness to follow the proceedings; diminished responsibility (under the provisions of the Homicide Act, 1957); and psychiatric evidence can be called to mitigate sentence although this is rarely done and can also be considered as an aggravating factor.

Despite these limits to culpability, the Bromley Briefings repeatedly show that there are people in prison who could and probably should have been diverted at earlier stages. Bromley Briefings bring together multiple different official statistical sources to present snapshots of the prison population. Some examples from the most recent one are salutary (NB they use the most recently available data they can obtain, so some of the figures will be older than the date of publication):

In England and Wales:

- At least 20% of offenders in prison have learning difficulties and 48% have literacy levels at, or below those expected of an 11 year old.

- A third of women and 10% of men have previously had psychiatric admissions before their current sentence in prison.
- Twenty-five per cent of the children in the system had formally assessed additional learning needs and over 80% had been excluded from school.

The briefing goes on to note:

*A learning disability screening tool, the LDSQ, was piloted in four prisons under the auspices of the Department of Health. The results, reported in March 2010, established that it was an effective tool for use in prisons. However the tool has still not been made routinely available. (PRT, 2012 p 49)*

These data move the chapter on from trial, to consider how to manage convicted offenders.

## ***Post Trial Intervention: What Works?***

In this sub-section as indeed throughout this chapter, the examples selected could have been substituted by many others within the wide field of psychology applied to criminal justice. In particular, it is worth noting that this chapter does not deal with general theories as to the aetiology of delinquent behaviour as that work would more usually be considered to be more about offending behaviour and developmental criminology/psychology rather than criminal justice. Another area in which psychologists have been active alongside criminologists and sociologists is in the practical application of the 'What Works?' debate. Increasingly, we are to be found working in multi-agency settings and are finding ways to integrate psychology within service user approaches to multi-disciplinary working. However, before going further, it is important that the reader understands something of the history of the "What Works?" debate.

The phrase "What Works?" was coined by Martinson (1974) in a paper that he published, partly with the intention of arguing against the over-use of imprisonment. He set up the premise of "what works?" largely to knock it down and conclude that nothing works. The paper was an early publication from a large scale project that came out the following year with more nuanced

discussion of the findings (Lipton, Martinson and Wilks, 1975). In conducting the research, the team took a broadly sociological approach and their conclusions can be summarised as being that: rehabilitation programmes weren't working; or, that they may be working but it was unclear whether their methodology had properly evaluated them; or, that the programmes weren't being given the opportunities to work as they were not funded or implemented properly. For many, Martinson's initial 1974 paper provided the opportunity to argue that rehabilitation attempts within criminal justice systems did not work and could not be expected to work. What Martinson had not predicted, was that these views would come from both Right and Left commentators and that far from leading to less use of prisons, he was inadvertently influential in the idea of "locking them up and throwing away the key". For an insightful review of the influence of the "What Works" concept in the subsequent 25 years, see Sarre (2001).

More recently, there has been a less negative tone that has been reinforced by legislation and has led to punishment via community payback and prison sentences that have a clear rehabilitative as well as deterrent intention (see chapters 6, 8, 9 & 10). If the intentions of punishment, and imprisonment are complex, then how much more complicated it becomes to implement those intentions when prisoners are themselves varied people who can arrive at prison with many unmet health, education and welfare needs as well as their convictions. Prisoners often have complex histories of trauma, abuse, substance misuse and victimisation. They may well suffer from mental illness or have learning difficulties (as mentioned above). Their histories and on-going challenges are frequently hidden from others or they may not even acknowledge them to themselves. Burnett (2010) writes of the "plight" of the prisoner who returns to society and highlights that the period immediately following release is one of particular challenge where offenders are more likely to overdose (accidentally or deliberately), to take their own lives, breach licence or to re-offend and be re-incarcerated. Such rapid re-imprisonment has long been acknowledged, as the "revolving door" problem; in particular, when people seem to move from one short term sentence forward into another. This rapid cycle of incarceration, release and re-incarceration would point to the



importance of intervening to prevent reoffending with offenders during very short sentences, particularly for first time sentence servers. Yet, most adult, prisons based programmes are offered to long term sentence servers, where concerns over the repeat “life course persistent” offenders (e.g. Moffitt, 2006) have predominated.

Where interventions are offered, their theoretical framing has been influenced directly by psychologists working with offenders and by those conducting research into their impact. Interventions are most likely to be around a model of Risk, Needs and Responsivity or RNR (Andrews and Bonta, 2006). The popularity and prevalence of this approach is demonstrated by the Canadian government’s public safety web-pages which also provide a neat definition, shown below:

***Risk principle:*** Match the level of service to the offender's risk to re-offend.

***Need principle:*** Assess criminogenic needs and target them in treatment.

***Responsivity principle:*** Maximize the offender's ability to learn from a rehabilitative intervention by providing cognitive behavioural treatment and tailoring the intervention to the learning style, motivation, abilities and strengths of the offender. (Public Safety Canada, 2007).

The above emphasis placed on risk assessment and mitigation of such risks was the same in HM Prison Service, as was the routine use of programmes/interventions underpinned by Cognitive Behavioural principles. If we consider them in more detail, then the first place to begin, is with how to assess (and manage) risk.

As mentioned already in this chapter, psychologists have been deeply involved in risk assessment. There are 2 broad approaches to risk assessment, the clinical and actuarial. Clinical risk assessment, like clinical profiling, is based on the clinician’s observations that are grounded in his/her practice and training. Actuarial risk assessment is more scientific in that it is grounded in statistical likelihoods, grounded in empirical evidence. In each case, multiple sources of information are used to predict risk levels. These sources are typically referred to as being either static--where

they can't be changed by an intervention (e.g. someone's previous convictions or age at first offence), or dynamic—factors that can, in theory at least, be changed (e.g. attitudes towards crime, employment status, or whether someone is impulsive). This means that both clinical and actuarial risk assessments may draw on similar or overlapping sources of information. Which is better, under which circumstances is itself debated, but there is increasing recognition that whilst actuarial risk assessment is useful for prediction of likely events, clinical assessments may be more useful for the management and evaluation of risk in the prevention of otherwise predictable outcomes (e.g. Douglas, Cox and Webster, 1999). Thus, actuarial risk assessment tools may be useful for initial categorisation of offenders, but clinical measures, may be more useful for determining how they are responding to their sentence. A very useful introduction to the various risk assessments and how they are used is provided by Hatcher (2012). Hatcher goes on to consider how prisons and probation services act on the principle of “responsivity”, where interventions should be offered in ways to facilitate learning, and should respond to offenders' needs. There are multiple programmes that have been accredited for use with offenders and even more that are unaccredited but offered anyway, usually through third party providers. These programmes too, can be accredited and are increasingly able to satisfy the criteria required by NOMS. These criteria are based on the premise that:

*clearly defined and structured programmes using particularly, but not exclusively, cognitive-behavioural techniques can significantly reduce re-offending. The meta-analytic reviews do not suggest that there is any single, outstanding approach that is, by itself, guaranteed to work as a means of reducing re-offending. (MoJ, 2012c p7).*

This statement summarises the view that interventions broadly based on RNR can be more effective than no intervention at all, something borne out in several meta-analyses (e.g. Bonta and Andrews, 2010 or Lösel and Schmucker, 2005). However, authors such as Porporino (2010) have pointed out that it is not totally clear *how* the programmes work and we do not know whether they

work for all groups of offenders, raising questions about their equity in implementation. Additionally, although they show improved rates of desistance from crime (between 10-30%, Lösel, 2010), they are far from showing total desistance. Although a zero recidivism rate is Utopian, this does not mean that alternatives to RNR should not be considered. Additionally, RNR has been criticised for not finding ways to encourage engagement with programmes and for high attrition rates. One way of putting it has been that RNR is necessary but not sufficient (Ward and Maruna, 2007). RNR has been criticised for requiring prisoners to change their lives through means such as avoiding situations or places likely to trigger undesirable behaviours. The most prevalent alternative that has been offered is to move towards a strengths reinforcing model, rather than a trigger avoidance one.

Authors such as Maruna (2001) have started to have some policy influence in promoting their stance that prisoners need to concentrate on change through their strengths rather than avoiding risks. In 2007, Ward and Maruna developed much of their work around what had come to be known as the Good Lives Model and it is this model that has led to the expansion of accreditation criteria within NOMS. The starting points of the good lives model are that:

*...offenders, like the rest of us, actively seek to satisfy their life values through whatever means available to them. The GLM's dual attention to an offender's internal values and life priorities and external factors such as resources and opportunities give it practical utility in desistance-oriented interventions (Ward, nd)*

Within this model, criminal behaviour is seen as arising from maladaptive means being adopted by offenders to satisfy life goals that may themselves be legitimate and interventions under the GLM are seen as providing the offender with the means to:

*add to an individual's repertoire of personal functioning, rather than an activity that simply removes a problem, or is devoted to managing problems, as if a lifetime of restricting one's activity is the only way to avoid offending (ibid)*

In trying to implement the GLM, within probation or prisons, the first step will be to work with each offender to identify her or his targets, assessing how s/he would envisage a good life. Deeper understanding of specific goals or “primary goods” would involve prioritising them and working out, with the offender, what snags, or blockages there might be before s/he can attain those primary goods. Intervention would then be tailored to address both the criminogenic (risk) needs and the good lives needs. Governments have mainly followed the RNR approach but there is growing acknowledgement that the focus on resilience through avoidance rather than through building strengths, brings limitations.

Strengths based approaches, such as the GLM, fit well into post-release programmes of resettlement as they allow space to consider “social exchange” and “individual value” (Burnett, 2010) and so are popular within probation. Another approach gaining currency is that of Therapeutic Jurisprudence (TJ). TJ is the “study of the role of the law as a therapeutic agent” (Wexler, 1999). Within this theory, the law is seen as a social process that exerts influence over people’s behaviours with consequences for individual and societal well-being, both psychological and emotional. An example of TJ in practice would be the increasing use of motivational interviewing within probation services. The idea here is that the probation officer does not just find out what has brought an offender to their present state, nor where they would like to be at the end of their sentence, but it helps them to actively engage within the rehabilitative programme that is being proposed. How best to motivate them, will depend on how ready they are to change and tools used here, have been adapted from the clinical setting (e.g. see Birgden, 2004).

Other impacts that have been felt on the system include the introduction of dedicated drugs courts (in 2004) and specialist domestic violence courts (in 2005). At the time of writing, a pilot scheme of the Domestic Violence Protection Order (DVPO) has just closed and the evaluation will be available in 2013. Put simply, they are an order for up to 28 days for which time a perpetrator is not allowed to make contact with the victim-survivor. Provision for DVPOs was made in S24-33 of the Crime and Security Act, 2010. They are an Emergency Protection Order and fit in with the ruling of

the European Court of Human Rights in the 2010 Opuz case where the Court ruled that due diligence obliges states to protect women from violence in cases where they know or should have known about serious risks to those women. This order is a good example of how civil justice can be used in a therapeutic way intended to bring about a reduction in criminal incidents. They add to existing procedures, such as anti-molestation orders as they should provide immediate protection, whereas an injunction can take weeks to gain from the courts. Also, they can be used in cases where the police would previously have taken “no further action” after the CPS decided that there was insufficient evidence for a criminal prosecution.

Each of these broad approaches could be drawn on, or even be seen as directly influencing sentencing and imprisonment over the past 2 decades along with other highly influential shifts such as the move towards restorative justice (see chapter 7). Lastly, in bringing together the current practice, research and policy positions, a *Desistance Theory Factsheet*, was prepared by Maruna and the Rehabilitation Services Group of NOMS which is led by psychologists (RSG, 2010). This provided useful guidance on what programmes should aim to achieve and the external links they need to attain their aims. These moves do much to address the criminogenic needs of offenders and should help to prevent further re-offending, if they continue. There is however another area in which therapeutic jurisprudence has made some headway and it is in the increased recognition of forensic mental health needs. The next sub-section considers forensic mental health and concentrates on offenders classified as being both serious and having a severe personality disorder.

### **Review Questions**

1. Is it possible to satisfy the life goals of an offender and the recidivism goals of a criminal justice system?
2. Can researchers be blamed if their findings are used in ways that are different from those they initially envisioned?

### **Forensic Mental Health**

Forensic mental health is where the courts, clinical practice and public protection intersect. This means that a wide variety of professionals work in this field, from both health and criminal justice systems and they both have to be open to high levels of scrutiny and accountability. As psychologists, this domain is also one where more than one specialism is relevant. For example, an assessment may be needed about whether to transfer an incarcerated person from a prison to a special hospital (the most secure place for detaining high risk offenders with a mental disorder). This decision is clearly related to the implementation of justice, and has clear psychological components. Although a forensic psychologist can comment about the person's criminogenic needs and likely risk of reoffending, advice about her or his mental health will probably come from a clinical psychologist or a psychiatrist, not a forensic psychologist. Increasingly though, forensic psychologists are gaining additional training to be able to make some mental health assessments to help supplement the well established cadre of clinical psychologists with forensic training.

There are a number of key Acts that set the legislative context for this work and similarly, there are some core psychiatric practices that pertain. The key diagnostic tools include the Diagnostic and Statistical Manual of the APA (now going into its 5<sup>th</sup> edition); the ICD-10 Classification of Mental and Behavioural Disorders, of the World Health Organisation and the (American) National Institute of Mental Health has also devised the DISC: Diagnostic Interview Schedule for Children. Relevant legislation includes, the Mental Health Acts of 1983 and 2007, the Mental Capacity Act, 2005, and relevant sections in more general criminal justice legislation. For example, the Powers of Criminal Courts (Sentencing) Act 2000 provides for longer than commensurate sentences in cases of violence or sexual offences. Also, serious offenders with a mental disorder may be the subject of a Multi-agency public protection arrangement (MAPPA). Lastly, the Bradley review of 2009, has led to systematic re-organisation of how offenders with mental illness or limited mental capacity are managed.

An important question to ask is also, what is the extent of the problem? Unfortunately, it is very hard to find up to date statistics on the mental health of our offender population as a whole,

aside from data on special hospital admissions. The last major survey of prisoners was conducted fifteen years ago (Singleton, Meltzer and Gatward, 1997) and they found that 9/10 prisoners met the threshold for at least one mental health diagnosis, with 20% presenting with 2 or more possible diagnoses. In 2008, there were also nearly 4000 patients detained in the high secure estate of Broadmoor, Ashworth and Rampton hospitals. That is, serious offenders with a mental disorder who have a restriction order imposed on them as well (MoJ, 2010). An excellent starting point to read about forensic mental health and the work done within the full range of community and restricted settings would be Fisher, Ginty and Sandhu (2012). There are several types of intellectual difficulty or mental disorder that are considered there including, Mental Illness; Personality Disorder and limited Mental Capacity. The chapter here, will focus on the most serious such category, that of the Dangerous and Severe Personality Disorder. It is chosen in part because this is not a clinical definition, but a legislative label, within which, psychologists and psychiatrists currently work.

### **Dangerous and Severe Personality Disorder**

Dangerous and Severe Personality Disorder (DSPD):

*might be seen as an attempt to quantify a distinction between the general category of mentally disordered offenders and a more extreme subgroup whose disorder is manifested in the kinds of extreme violence and sexual aggression that have caused most public concern (Perkins and Bishopp, 2003).*

To be in this group, an individual must demonstrate a high level of personality disorder, be more likely than not to offend seriously (cause serious physical or psychological harm with significant effects on the victim(s)) and, crucially, there must be a functional link between those two (Bell et al., 2003). DSPD is not a psychological or psychiatric diagnosis. It is a policy inspired, legal label that describes the few offenders “who suffer from a severe personality disorder and because of their disorder, also pose a significant risk of serious harm to others” (Bell et al., 2003). See APA, (2012) for the most recently proposed diagnostic criteria for personality disorder.

The DSPD policies were partially, a response to what was seen as poor psychiatric management of “psychopathic” offenders. Unsurprisingly, DSPD was given a mixed reception by psychologists when it was first implemented. How to manage DSPD offenders and whether they are treatable at all are questions touching on fundamentals of psychiatry and psychology. On one side of the treatment debate, some of the newly labelled DSPD offenders would previously have been seen as being untreatable, precisely because of the personality disorder for which they were now deemed to be in need of treatment. The severe personality disorder also meant that they were less likely to engage in the treatment process itself, and concomitantly more likely to be excluded from treatment for non-compliance (Howells, Krishan and Daffern, 2007). Personality disorders have often been seen as “manageable” rather than “treatable”. This means that although people can learn to cope with their symptoms, they are less likely to “recover” in the ways that they might from an illness. Within the DSPD pilots, specialised regimes were created on dedicated units in three prisons and one special hospital, reflecting the difficulties posed by whether they should be managed, or treated.

Given the initial challenges, it should be reassuring to note that a considerable programme of evaluation and research was implemented alongside the DSPD pilot. At the outset, a **systematic review** of possible treatments that could have been implemented was conducted. This pointed out that there was not a research base that considered personality disorder alongside dangerousness to others and concluded that “reliable evidence of long-term effectiveness is extremely limited” Warren et al. 2003, p 6. They suggested that **therapeutic communities** may be helpful whereas pharmacological interventions were unlikely to be useful. There were also human rights implications to consider mainly due to balancing a DSPD offender’s treatment needs against the needs for public protection (Tyrer et al. 2010). Additionally, the intensive nature of the interventions subsequently designed were very costly to implement, with Tyrer et al. (2007) reporting an extra £3,500 per 6 months per offender in comparison to holding them in prisons of similar security. The lack of consistency in how the pilots were implemented, significant challenges posed for staff (Trebilcock



and Weaver, 2010) and shifts in policies as fundamental as how to define the criteria for DSPD inclusion on a unit, meant that in 2011, Burns et al. could “not say whether DSPD units ‘work’ or not” and were still urging the need for a long term assessment of recidivism. Barrett and Byford, meanwhile (e.g. 2012) estimated that it cost £2 million for each serious offence that would have otherwise occurred and recommended implementing the programme in a less intensive, less costly way. This is broadly what the government is in the process of doing and, partly as a result of feedback on the way Personality Disordered offenders were being managed (DoH, 2011), has now abolished the IPP (Indeterminate for Public Protection) sentence within the Legal Aid, Sentencing and Punishment of Offenders Act, 2012.

### **Review Questions**

1. Why do some people with clear mental health needs serve sentences in prison even though there are opportunities to divert them to alternative services?
2. How can we balance public protection against treatment needs?

### ***Concluding Remarks***

Forensic psychologists are likely to be involved in areas as diverse as behavioural investigative advice to writing or implementing policies on serious group offending. There are increasing roles for other kinds of psychologists within forensic settings as well. Within this chapter, as well as considering forensic psychology, the scope was broadened to encompass how other areas of psychology are applied to criminal justice. Psychologists' impact has been mixed although as the discipline has become more credible, our influence may have increased somewhat. Historically, the advice of early psychological writers did not seem to have changed court practices. There are some good sources of information on the history of psychology in general (Leahey, 2004) and forensic psychology in particular (e.g. Ogloff, 2002 or Sporer, 2008).

The first part of this chapter, showed how applications of cognitive and social psychology have helped the courts to use evidence from witnesses better, considered ways in which police investigative techniques have been improved and highlighted what can go wrong when too much faith is placed in advice provided to investigators. Within the trial section, the chapter presented material on how memory evidence can be used in courts, how juries make decisions, some of the limits to culpability and how best to protect vulnerable witnesses. Post-trial, the chapter considered interventions with offenders; diversion away from prisons and what happens when the law creates psychological labels. In the cases of investigation and eyewitness evidence, the impetus behind that work was miscarriages of justice. With DSPD, the tension between public protection and treatment needs led to serious concerns about psychologists' positions both as therapeutic providers and agents of the state.

In evaluating "What Works", the impact of justice systems, and interventions, we have seen significant progress being made in how we measure and determine "success". However, we have also gone from an era of unprecedented spending on correctional interventions to austerity and cut backs. This has meant that increasingly, we work within broader teams that assess the financial and social costs and benefits of a project as well as whether it meets its ostensible intervention aims. An interesting development in health and criminal justice is the increasing presence of "third party" or non-governmental providers of services. Another, is the change to how service provision is being commissioned. For example, it is not uncommon to see consortia arrangements for the management and supervision of offenders. These may be brokered by one particular agency or organisation and are likely to involve both nationally and locally relevant partners. The policy of *Payment by Results* is already having some impact on the ways in which people assess interventions and who provides them. If criminal justice and community agents are to work in partnership, then either side should be able to approach the other for support and should be open to alternative viewpoints. Partnerships may be skewed by commissioning arrangements or by failing to consider a sufficient diversity of opinion and experience.

Every author has to make decisions about what to include in a chapter. In trying to provide some depth of coverage in a few areas, one has necessarily ignored others. This is not to imply that other areas are not as important. In particular, if this has piqued your interest in forensic psychology, then you may wish to find out about some of the following areas: violence against women and girls; anti-radicalisation and counter radicalisation; sentencing decision making; narrative theories of the trial; suggestibility, interviewing and false confessions. The additional readings suggested will be good places to explore these topics as well as those that were more deeply discussed within this chapter.

### ***Definitions:***

- Identity Parades are the main way in which a witness is asked to make a formal identification of a suspect or suspects. Until 2006, Identity Parades in England and Wales tended to rely on the selection of the suspect from a live line up comprising the suspect and a number of foils. In order to make the process fairer, to be less intimidating to witnesses and to enable it to be conducted away from the police station, live line ups are rarely held now. Instead, 2 ICT systems are in widespread use in British police forces as ways of obtaining video identification: VIPER (Video Identification Parade Electronic Recording) and PROMAT (Profile Matching). Thus an identification parade, can be both a live line up or, more commonly now, a video based presentation.
- Almond et al. (2005) define Smallest Space Analysis (SSA-I) as “a non-metric multidimensional scaling procedure...which examines the relationship each variable has to every other variable.”p3
- ACPO is the Association of Chief Police Officers of England, Wales and Northern Ireland.
- A meta-analysis is a systematic, statistical way to review diverse studies on the same topic. Authors will typically standardise how concepts are defined across a field and reanalyse

combined data. It is essentially a re-analysis bringing together multiple previous analyses.

See Crombie and Davies, 2009.

- Systematic reviews can be conducted in more than one way but are intended to be rigorous assessments of existing research about a topic that utilises meaningful statistical tests of data and thereby evaluates them bringing the “**same level of rigour to reviewing research evidence** as should (have) be(en) used in **producing that research evidence** in the first place” (Hemingway & Brereton, 2009 p1, Emphasis in the original).
- The Association of Therapeutic Communities describe them as “psychologically informed planned environments“ <http://www.therapeuticcommunities.org/what-is-a-tc-mainmenu-94> (Accessed 26th June, 2012).

## ***Questions for Discussion***

Question 1) What steps would you take to best ensure that witnesses in court give evidence most likely to lead to a just and fair verdict?

Question 2) Should juries be more accountable?

Question 3) Is there is an acceptable level of recidivism?

Exercise 1) This is based on one of David Webb’s exercises [www.all-about-forensic-psychology.com](http://www.all-about-forensic-psychology.com)

Define forensic psychology. Now do it without using any of these ideas: serial killers; psychopaths; *CSI* or *Wire in the Blood*.

Exercise 2) Prepare material for a written response to a government consultation drawing on the appropriate psychological research. Examples could include: management of personality disorder in offenders; ways to assess the utility of behavioural advice; or how best to support prisoners with learning difficulties.

## ***Additional Readings***

- Adler, J. R. and Gray, J. M. (Eds.) (2010). *Forensic Psychology, Concepts, Debates and Practice* 2nd Edition. Abingdon: Willan. This is a book aimed more at postgraduate students or anyone who wants a bit more depth of coverage and covers criminological and well as legal psychology.
- Brown, J. M. and Campbell, E. A. (2010). *The Cambridge Handbook of Forensic Psychology*. Cambridge, Cambridge University Press. A comprehensive, yet introductory text, great for someone new to the field of forensic psychology.
- Carson, D.; Milne, R.; Pakes, F; Shalev K. and Shawyer, A. (Eds.) (2007). *Applying Psychology to Criminal Justice*. Chichester: Wiley. This is another book that has depth of content and this time, concentrates solely on the criminal justice aspects of forensic psychology.
- Davies, G. M. and Beech, A. R. (2012). *Forensic Psychology: Crime, Justice, Law, Interventions*. 2nd Edition. Chichester: BPS Blackwell (John Wiley and Sons). This is an introductory book that is approved by the BPS as a good starting point for someone training in forensic psychology. The format is similar to this book.
- Kapardis, A. (2010). 3rd Ed. *Psychology and Law: A critical introduction*. Cambridge: Cambridge University Press. Possibly not as comprehensive as Carson et al. but a good alternative and particularly strong on judicial and jury decision making.

## ***Web Links***

- All about forensic psychology [www.all-about-forensic-psychology.com](http://www.all-about-forensic-psychology.com) This is not the most intuitive website to navigate but there is considerable relevant information and a handy “book of the month” section.

- psyblog moderated by Jeremy Dean, currently a researcher and Ph.D student in psychology, with a background in law <http://www.spring.org.uk/2007/11/10-piercing-insights-into-human-nature.php> for his top ten social psychology experiments.
- <http://crimepsychblog.com/> Although this is not being updated at the time of this chapter being written, it is still a really useful resource, with excellent archive and you can follow the moderator on twitter.
- Karen Franklin's "in the news blog" is really useful but note that her blog's training section pertains to the USA not Britain. <http://forensicpsychologist.blogspot.co.uk/> or <http://www.karenfranklin.com/resources/mpr/>
- Professional bodies: the British Psychological Society and European Association of Psychology and Law provide useful information for anyone who wants to learn more about becoming a psychologist or keeping up to date with conferences, etc. [www.bps.org.uk](http://www.bps.org.uk) or <http://www.eapl.eu/>

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<sup>i</sup> My definition of psychology is as brief as possible and reflects what I perceive to be its core matter.

However, there are much more detailed assessments of the nature of the discipline and generalised accessible descriptions of how it is practised. A useful starting point might be found here:

<http://www.medicalnewstoday.com/articles/154874.php> and the British Psychological Society website is a good place for more information.

<sup>ii</sup> The Specialist Operational Support team, was part of the Serious Crime Agency, at the time of writing, having been transferred there from the National Police Improvement Agency and will be part of the National Crime Agency, when established. (See [http://www.npia.police.uk/en/docs/HO\\_Future\\_of\\_the\\_NPIA\\_Commons\\_-\\_2011\\_12\\_15\\_1.pdf](http://www.npia.police.uk/en/docs/HO_Future_of_the_NPIA_Commons_-_2011_12_15_1.pdf) and <http://www.homeoffice.gov.uk/crime/nca/> )