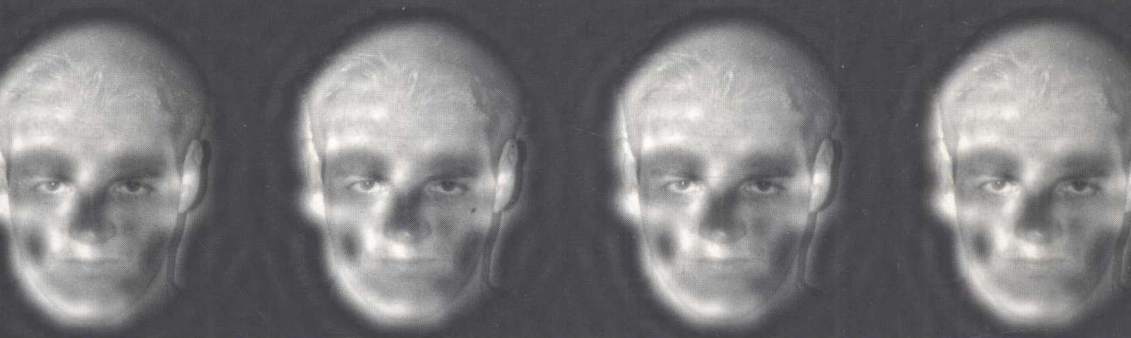


# CRIMINAL JUSTICE, MENTAL HEALTH and the POLITICS OF RISK



Nicola Gray

Judith Laing

Lesley Noaks

# **CRIMINAL JUSTICE, MENTAL HEALTH AND THE POLITICS OF RISK**

Edited by

**Nicola S Gray, MSc, BSc, PhD**

Senior Lecturer in Forensic Psychology,  
Cardiff University and Consultant Clinical and Forensic Psychologist  
at the South Wales Forensic Psychiatric Service at Caswell Clinic

**Judith M Laing, LLB, PhD**

Lecturer in Law, Cardiff University

**Lesley Noaks, MSc (Econ), BSc (Econ), PhD**

Lecturer in Criminology and Social Work, Cardiff University



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## CONTRIBUTORS

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### **Professor Nigel Eastman, MD, BSc (Econ), Barrister, FRC Psychology**

Nigel Eastman is Professor of Law and Ethics in Psychiatry in the University of London and Head of Forensic Psychiatry at St George's Hospital Medical School. He is also a consultant forensic psychiatrist in the NHS. Professor Eastman is both a psychiatrist and lawyer and much of his academic research and writing centres on law and ethics as applied to all areas of psychiatric practice. Recently he co-chaired a Department of Health sponsored 'think tank' on mental health law reform, which was a precursor to the setting up by the Department of the Richardson Committee advising in detail on law reform, and published from it Eastman, N and Peay, J (eds), *Law Without Enforcement; Integrating Mental Health and Justice* (1999, Hart). He has also conducted major empirical studies relating to the operation of mental health law, as well as being the author of many scholarly papers on mental health law and ethics. Professor Eastman is Chairman of the Law Sub-Committee of the Royal College of Psychiatrists, and a longstanding member of the Mental Health and Disability Committee of the Law Society, and has spent much time involved in policy advisory work concerning the impact of law on mental health and services. In a different strand of his work he has conducted major empirical and policy research on services for mentally disordered offenders. Recently he gave evidence to the Parliamentary Home Affairs Select Committee on government proposals for individuals with 'dangerous and severe personality disorder' (DSPD) in relation both to new law and new services for those with DSPD.

### **Dr Philip Fennell, BA (Hons) Law (Kent), MPhil Law (Kent), PhD Law (Wales)**

Philip Fennell is a Reader in Law in Cardiff Law School, Cardiff University, where he teaches Medical Law and European Community Law. He is a member of the Law Society's Mental Health and Disability Committee and was a member of the Mental Health Act Commission from 1983–89. He has published many articles on law and psychiatry. He is an editor of Butterworths Medico-Legal Reports, and is honorary legal adviser to Wales MIND. He also writes the Annual Review of Medical Law cases for the All England Law Reports. He is co-author of Gostin and Fennell, *Mental Health: Tribunal Procedure* (1992, Longman) and his book entitled *Treatment Without Consent: Law, Psychiatry and the Treatment of Mental Disorder since 1845* was published by Routledge in 1996. He has recently lectured on the Human Rights Act 1998 to the judiciary on behalf of the Judicial Studies Board.

**Dr Nicola Gray, MSc Clinical Psychology (London), BSc (Hons) Psychology (London), PhD Psychology (London)**

Nicola Gray is a Senior Lecturer in Psychology at Cardiff University where she teaches Forensic Psychology and Clinical Psychology to both undergraduates and Clinical Psychology trainees. Nicola holds a joint appointment between Cardiff University and the South Wales Forensic Psychiatric Service, where she is a Consultant Clinical and Forensic Psychologist. Her research has been mainly in the fields of cognitive function in people with schizophrenia and those with a predisposition for the illness (schizotypy); the development of cognitive tasks for the assessment of future risk of dangerousness in psychopathic offenders; offending outcome of mentally disordered patients from medium secure services; the incidence of post-traumatic stress disorder as a consequence of offending behaviour; and evaluating the effectiveness of processes underlying eye movement desensitisation and reprocessing (EMDR) in the treatment of PTSD (including those with personality disorder). She is the author of many scientific articles on both schizophrenia and forensic psychology.

**Professor Robert Hare, BA, MA (Alberta), PhD (West Ontario)**

Robert Hare is Emeritus Professor of Psychology, University of British Columbia, where he has taught and conducted research for some 35 years, and President of Darkstone Research Group Ltd, a forensic research and consulting firm. He has devoted most of his academic career to the investigation of psychopathy, its nature, assessment, and implications for mental health and criminal justice. He is the author of several books and many scientific articles on psychopathy, and is the developer of the Psychopathy Checklist – Revised (PCL-R) and its derivatives. He consults with law enforcement, including the FBI and the RCMP, and is a member of the Advisory Panel established by the English Prison Service to develop new programs for the treatment of psychopathic offenders. His current research on psychopathy includes its nature, assessment issues, developmental factors, neuroimaging, domestic violence, risk for recidivism and violence, and the development of new treatment and management strategies. In addition, he lectures widely on the use and misuse of the PCL-R in the criminal justice system. Among his recent awards are the 1999 Silver Medal of the Queen Sophia Center in Spain; the Canadian Psychological Association 2000 Award for Distinguished Applications of Psychology; the American Academy of Forensic Psychology 2001 Award for Distinguished Applications to the Field of Forensic Psychology; and the 2001 Isaac Ray Award presented by the American Psychiatric Association and the American Academy of Psychiatry and Law for Outstanding Contributions to Forensic Psychiatry and Psychiatric Jurisprudence.

**Tom Horlick-Jones, BSc Mathematics and Theoretical Physics (Wales), MSc Mathematics and Theoretical Physics (Wales)**

Tom Horlick-Jones is an experienced social researcher and policy analyst whose recent work has been concerned with ethnographic studies of risk-related practices associated with organisational risk management, risk perception and decision making. He is currently Senior Research Fellow at the Cardiff University School of Social Sciences and in the Department of Operational Research at the London School of Economics and Political Science. He contributed to the Royal Society's 1992 report, *Risk: Analysis, Perception and Management*, and his publications include *Natural Risk and Civil Protection* (1995, Spon).

**Professor Barbara Hudson, BSc Economics (London), MA Sociology (Kent, Canterbury), PhD (Essex)**

Barbara Hudson is a Professor at the Lancashire Law School, University of Central Lancashire. She teaches and researches within the fields of criminology, penology and sociology of law, with particular interests in the impact of penal strategies on the marginalised and disadvantaged. Publications include *Justice Through Punishment: A Critique of the 'Justice Model' of Corrections* (1987, Macmillan); *Penal Policy and Social Justice* (1993, Macmillan); *Racism and Criminology* (edited, with Dee Cook, 1993, Sage); *Understanding Justice: An introduction to Ideas, Perspectives and Controversies in Modern Penal Theory* (1996, Open University) and *Race, Crime and Justice* (edited, 1996, Dartmouth). She has also published many articles and chapters on subjects related to the general theme of 'justice and difference'. She is currently completing a new book, *Justice in the Risk Society* (Sage). This work is concerned with conflicts between logics of 'risk control' and 'doing justice' in penal strategies and the problem of how to do 'justice' to 'difference'. The book draws on recent developments in social and legal philosophy as well as on development in criminological theory and criminal justice practice, such as discursive ethics, and restorative justice.

**Professor Hazel Kemshall, BA (Durham), MA (Birmingham), Dip Social Work (Birmingham), PhD (De Montfort)**

Hazel Kemshall is Professor of Community and Criminal Justice at De Montfort University, UK, where she has research interests in risk assessment and management of offenders and implementing effective practice. She is the author of the Home Office risk training materials for probation officers, and the Scottish Office materials for social workers, and has numerous publications on risk including *Risk in Probation Practice* (1998, Ashgate). She is a member of the Home Office group on risk assessment tools for severe personality disorder, and has recently completed a literature review on risk assessment tools for violent and dangerous offenders (2000, Home Office). She

was previously a probation officer, manager and trainer before entering academia. Her research interests include quality in service delivery, effective practice, and risk assessment and risk management. She has published extensively in these areas and has completed research for the Home Office, the Scottish Office and the Economic and Social Research Council.

**Dr Judith Laing, LLB (Hons) (Leeds), PhD Law (Leeds)**

Judith Laing is a Lecturer in Law at Cardiff Law School. Her areas of expertise are mental health law, medical law, criminal law and justice and she has published several articles in leading journals on these topics. Recent publications include 'Rights versus risk? Reform of the Mental Health Act 1983' (2000) 8(2) *Med L Rev* 210; 'Diversion of mentally disordered offenders: victim and offender perspectives' [1999] *Crim L Rev* 805; and 'An end to the lottery? The Fallon Report and personality disordered offenders' (1999) *Journal of Mental Health Law* 87. Her PhD was published in 1999 in book form by OUP, entitled *Care or Custody: Mentally Disordered Offenders in the Criminal Justice System*. She is Assistant Editor of the *Medical Law Review* and Recent Cases Editor of the *Journal of Social Welfare and Family Law*.

**Dr Vivian Leacock, BA Politics (Glasgow), MA Criminology (Cantab), PhD Criminology (Cantab)**

Vivian Leacock is a Senior Research Officer in the Scottish Executive Justice Department's Central Research Unit. She has recently completed her PhD on youth justice in England and Wales at the Department of Criminology, Keele University. Her PhD demonstrated that the history of youth justice is littered with struggle, contention and ambiguity and that its fragmented history can best be understood by theorising the co-existence of shifting political rationalities and their attendant penal rationalities. Her main thesis is that key concepts in youth justice have been and still are used to justify penal interventions (variously re-packaged and re-invented as 'reforms' and/or 'solutions') that constitute the individual as actively responsible for his/her offending behaviour and capable of self-regulation. Dr Leacock writes here in a personal capacity and outwith her employment at the Executive. The views expressed in her chapter are those of Dr Leacock and not those of the Scottish Executive (nor do they reflect government policy).

**Professor Michael Levi, MA (Oxon), Dip Criminology (Cantab), PhD (Soton)**

Michael Levi is Professor of Criminology and has taught at Cardiff University since 1975. His major contributions have been in the fields of white-collar crime and corruption, organised crime, money-laundering and violent crime. In addition to many articles in books and scholarly & professional journals, his books include *The Phantom Capitalists* (1981, Gower) and *Regulating Fraud*:

*White-Collar Crime and the Criminal Process* (1988, Routledge). His most recent book (with Andy Pithouse), *White-Collar Crime and its Victims*, on the impact of fraud on individual and institutional victims and responses to it, will be published by OUP in 2002. He is senior law enforcement policy adviser to Transparency International in Berlin and has served as a member of the UK Treasury's group of money-laundering experts and of the Cabinet Office Performance and Innovation Unit's Steering Committee on the Pursuit and Confiscation of the Proceeds of Crime. He has been involved as consultant on a very large number of research studies, some of them for internal governmental reviews and for the UN, EU and Council of Europe; some for governments (Home Office, Department of International Development, Department of Social Security); and others corporate, eg Ernst & Young corporate fraud surveys. He is currently conducting an ESRC-funded study under the Future Governance Research Initiative on the factors shaping the evolution of money laundering and corruption controls worldwide.

**Anthony Maden, MB, BS (London), MRC Psychology (London), MD (London)**

Tony Maden trained in psychiatry at the Bethlem and Maudsley Hospitals, where he worked as a senior lecturer and honorary consultant, before taking up a post as Professor of Forensic Psychiatry at Imperial College, London, in February 2000. His main interests are in risk management and needs assessment in mentally disordered offenders.

**Professor Mike Maguire, MA Modern Languages (Oxford), B Litt Social Anthropology (Oxford)**

Mike Maguire is Professor of Criminology and Criminal Justice at Cardiff University, Wales. He has conducted major research projects and published widely on burglary, victimisation, prisons, probation, parole and policing, and is currently involved in studies of targeted policing and prisoner resettlement under the Home Office Crime Reduction Programme. His main interests include penology, penal policy, regulation and accountability. He is a co-editor of *The Oxford Handbook of Criminology* and of *Punishment and Society*, and is a member of the Prison Service/Probation Service Joint Accreditation Panel.

**Dr Lesley Noaks, MSc (Econ), BSc (Econ) (Wales), PhD Criminology (Wales), Dip Applied Social Studies (Wales)**

Lesley Noaks is a Lecturer in Criminology and Social Work at Cardiff University. She has conducted research into criminology and criminal justice for the last 10 years, and her most recent projects include research for the Home Office in 1999 on Risk Assessment with Dangerous and Sex Offenders, and for the Nuffield Foundation in 1999 on Access to Justice for Remand Prisoners. She has a number of publications, including three jointly edited



texts: Noaks, L, Levi, M and Maguire, M, *Contemporary Issues in Criminology* (1995, Wales UP); Dobash, R, Dobash, R and Noaks, L, *Gender and Crime* (1995, Wales UP); and Brookman, F, Noaks, L and Wincup, E, *Research Methods in Criminology* (1999, Ashgate).

**Professor Richard Sparks, BA Social and Political Sciences, MPhil and Phd Criminology (Cantab)**

Richard Sparks is Professor of Criminology at Keele University. His main research interests are in penal politics, the sociology of penal policy and institutions and criminology's relations with social and political theory. He has written or edited seven books including (with Tony Bottoms and Will Hay) *Prisons and the Problem of Order* (1996, OUP); (with Evi Girling and Ian Loader) *Crime and Social Change in Middle England* (2000, Routledge); (with Tim Hope, eds) *Crime, Risk and Insecurity* (2000, Routledge) and (with David Garland, eds) *Criminology and Social Theory* (2000, OUP). Sparks is Associate Editor of the *British Journal of Criminology* and Editor-in-Chief of *Punishment and Society*.

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*Nicola Gray*

*Judith Laing*

*Lesley Noaks*

*November 2001*

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# **RISK: THE PROFESSIONAL, THE INDIVIDUAL, SOCIETY AND THE LAW**

*Nicola Gray, Judith Laing and Lesley Noaks*

Calculating and managing risks which nobody really knows has become one of our main preoccupations. That used to be a specialist job for actuaries, insurers and scientists. Now, we all have to engage in it, with whatever rusty tools we can lay our hands on – sometimes the calculator, sometimes the astrology column. [Beck in Franklin, 1998, p 12.]

## **1.1 INTRODUCTION – ‘RISK SOCIETY’**

A defining feature of contemporary criminal justice discourse has been the prominence of issues of risk. Risk as represented in criminal justice worlds has taken on a variety of guises. Risk ‘talk’ reveals a preoccupation both with those seen to pose a risk and those considered to be at risk. Linked to such preoccupations is a growing absorption with the legal, medical and psychological means by which we seek to manage risk. This text seeks to focus on all three of those elements and also consider the inter-relationships between them.

The body of theory which has defined us as a ‘risk society’ (Beck, 1992; Ericson and Haggerty, 1997) has pointed to the centrality of risk to social arrangements. Recent developments in criminal justice and mental health policy have been underpinned by the ways in which, as a ‘risk society’, we are increasingly motivated to invest in means to obviate the threat to ourselves from all forms of harm – personal, financial, emotional or physical. Identifiable high levels of anxiety in relation to crime provide an important backdrop to an increasing suspicion of the risks that others pose to personal security. Garland (1996) argues that individual households have adapted to high rates of crime with greater investment in physical security precautions and more security consciousness. Entwined with this has been more emotional investment in the ‘war’ against crime by the individual citizen. As a ‘cultural phenomenon’ crime control has become a pervasive feature of the lives of many individual citizens. Responses to crime have occurred both at the individual and at the more collective policy level and are reflected in a number of recent legislative changes outlined below. Consequent to such developments ‘risk institutions and their communication systems have become an important basis of our society’ (Ericson and Haggerty, 1997, p 11).

Sheptycki (1997, p 307) also argues that 'discourses of insecurity' and fear of crime are driving the growth in surveillance devices and procedures in many facets of late modern society. There is a related drive to create 'zones of risk suppression', which physically separate those who consider themselves at risk from those they judge to be a source of danger. While classically these occur in the gated communities of the USA, the thinking behind them increasingly permeates criminal justice philosophies and practices in the UK. Feeley and Simon (1992) identify the pre-eminence of thinking and working practices which seek to identify and classify sources of risk. Recent attention to sex offender registration schemes, and the promotion of standardised risk assessment tools, commonly for inclusion in pre-sentence reports, represent what they have termed the risk penology. In such climates, Shearing and Stenning (1987) argue that control and surveillance are 'pervasive'. Such control is 'consensual' with little evidence of, or need for, compulsion. Fear and a sense of danger serve to reinforce cleavages in society, emphasising division and a sense of the other. In the 'Risk Society' a significant proportion of citizens are more than willing to co-operate to support enhancement in the methods of surveillance. As crime has become increasingly salient for individual citizens they have become increasingly willing to co-operate in the expansion of control networks.

One of the main aims of this book is to analyse the relationship between theoretical models of risk and recent developments in criminal justice and mental health policy. Such developments are reviewed from psychological, psychiatric, legal and criminological perspectives. While the book is divided into sections linked to these elements a major focus of the text is with the interface between the disciplines. Such considerations become important in the face of changes currently being addressed on the boundaries of professional roles. Recent developments, including the recent legislative proposals on Dangerous and Severe Personality Disorder (DSPD), point to an increasing fusion of roles between key players in criminal justice and mental health spheres. This interplay between the key players is a major focus of several contributions to this book (Eastman, Fennell, Kemshall and Maguire).

The advent of government proposals to manage high-risk individuals (DSPD) and the consequences of these proposals for the individuals and professionals involved has been a major catalyst for this edited volume. The personality disordered have, over recent years, gained a more prominent profile with the emergence of a number of highly-publicised tragedies and killings, such as the murder of Megan and Lin Russell by Michael Stone, and the notorious paedophile, Sydney Cook, who has confessed his intention to continue to sexually offend against children. In the wake of such incidents, the government published a Consultation Paper, *Managing Dangerous People with Severe Personality Disorder – Proposals for Policy Development* (Home Office/Department of Health, 1999) in July 1999, to consider ways of

introducing greater control over those who pose a significant risk to others. Its publication followed the announcement that powers would be established to indefinitely detain people with personality disorders who represent a danger to the public. The review process culminated in the government's White Paper on reforming mental health legislation, published in December 2000 (Home Office/Department of Health, 2000). The White Paper has emphasised the importance of managing risk and fully endorses the aim of public protection. It recommends a radical overhaul of the current mental health legislation and has proposed new criteria for compulsory commitment, which give authority to assess and detain all those who pose a significant risk of serious harm to others as a result of severe personality disorder. Both lawyers and psychiatrists (Crawford *et al*, 2001; Eastman, 1999; Gledhill, 2000; Laing, 1999) are highly critical of the proposals, perceiving them to be essentially public protection measures rather than progressive and enlightened mental health reforms. The government is making no excuses that the primary objective is risk management and public protection, and society's interests are being elevated above all others. However, it must not be forgotten that there are other competing interests at stake. It is of equal importance to consider the rights of the individual patient/offender and the interests of the criminal justice and mental health professionals involved, as well as the views and needs of society in general.

There are a number of significant features of this proposed legislation that make the existence of this book important. Foremost is the fact that the legislation proposes for the first time in the history of our criminal justice and mental health systems that individuals are to be indefinitely detained on the basis of 'risk'. Such developments directly put in jeopardy the civil liberties of these disordered individuals – those defined as the risky 'other'. Climates of fear and mistrust have historically created periods where the individual freedoms of the minority have been sacrificed to the anxieties and concerns of the majority. Such developments will require professional groups, faced with their extended roles, to question the ethics of what they are being required to do in order to address public insecurities. Politically it may not be popular to question the reliability of the risk assessment and management strategies that we have. Despite this, professionals in criminal justice, mental health and related fields will be required to manage a balancing of individual civil liberties and the greater good of society. Several of the contributors to this text (Fennell, Eastman, Hudson, Kemshall and Maguire, Leacock and Sparks) point to some of the ethical dilemmas that they will face in attempting to carefully balance the rights of those 'at risk' (victims and society) with the individual rights of the risky 'other'.

These ethical dilemmas are particularly acute for mental health professionals, who will be required to assess and manage the risky 'others' under the new DSPD proposals. From a psychiatric and psychological

perspective, the main issues raised by the proposed legislation are (1) the profession's ability to reliably and validly diagnose 'severe personality disorder'; (2) its ability to accurately identify, assess and manage 'risk'; and (3) the ethics (professional and personal) of indefinitely and compulsorily detaining individuals purely on the basis of the risk that they pose and when they may not (yet) have committed a criminal offence. These issues will be discussed in Section One of this book – *Risk Assessment in Mental Health and Professional Responsibility*. The three contributors to this section (Eastman, Hare, Maden) are all internationally renowned clinicians and academics within forensic mental health (psychiatry and psychology), but, as you will see, they all hold widely differing views as to how these dilemmas should be resolved.

An important aspect of the proposed developments in relation to DSPD, and the relatively recent partnership requirements with regard to Dangerous and Sex Offenders (Crawford, 1997) is that their introduction requires a review of working relations between traditionally distinct professional groups. Following on from such legislative changes, groups such as psychiatrists, psychologists, police officers, probation officers and social workers find themselves having to review the boundaries of their role. As subsequent chapters will demonstrate (Eastman, Fennell, Kemshall and Maguire), professional roles are becoming increasingly diffuse and overlapping, as the mental health and criminal justice systems converge. This convergence will have major implications for the working practices of the different professions involved.

It will be crucial for the different disciplines involved to understand the concepts, professional ethics, methodologies, and practices of others. In the field of forensic mental health 'multi-disciplinary' is usually taken to mean the different health-related disciplines who, together, provide care for mentally disordered offenders (for example, mental health nursing, psychology, psychiatry, occupational therapy, social work). Because these disciplines work together (often on a daily basis) in the assessment, treatment and management of individuals with severe mental disorder and offending behaviour, they have developed an understanding and mutual respect for the philosophies and language, techniques and professional practices of each other. Unfortunately, the same might not be said to be true for the scientific and academic disciplines, however.

From a legal perspective, the need to balance the competing interests is crucial, as respect for individual rights and the protection of civil liberties are fundamental and gaining increasing prominence in light of the enactment of the Human Rights Act 1998 in October 2000. The Act has incorporated international human rights law directly into the United Kingdom legal system. This means that as well as protecting the public, any resulting legislation will also be required to emphasise and protect the rights of the detained individuals themselves. Specifically, under s 19 of the Act



there is now an express obligation to ensure that any future legislation conforms with the European Convention on Human Rights (ECHR). With respect to the detention of dangerous people, any future legislation must comply with Article 5 of the Convention which safeguards against the arbitrary deprivation of liberty, especially Article 5(1)(e) which provides for the detention of 'persons of unsound mind, alcoholics, or drug addicts or vagrants'. In future, therefore, not only will courts be required to interpret any legislation in accordance with the Convention, but there is also this express obligation imposed on the government to ensure that any future legislation is compatible with it. In light of these obligations, contributors to Section Two of the book – *Risk Management and the Law: Balancing Individual Rights and Public Protection* (Fennell, Hudson) – assess the government's proposals from a human rights perspective. Their chapters focus on the role of the law and how it should ensure that rights and risks are carefully balanced to ensure compliance with the ECHR. It is also important to ensure that the procedures for assessing risk are robust and reliable in order that justice and due process is respected, and individual liberty is not deprived on the basis of inaccurate or exaggerated predictions of risk.

The pre-eminence of risk in our society cannot be understated – all sectors of society are preoccupied with notions of risk. Ericson and Haggerty in their attention to the role of the police in the 'risk society' point to an 'insatiable quest for more and better knowledge of risk', which can merely serve to reinforce pre-existing anxieties rather than counter them. Furedi in his text *Culture of Fear* (1997) also points to the prominence of notions of risk in how individuals organise their lives and evaluate their existence. He is not only concerned with crime related fear but rather with the proliferation of a whole range of anxieties, including fear about health and the environment. For him individuals increasingly live their lives through a prism of risk, adopting a range of risk limitation strategies, intended to enhance their risk aversion. Linked to this a risk management industry has emerged, which includes the various modes of classification and categorisation recently adopted in criminal justice spheres. Feeley and Simon (1992) propose that resort to the actuarial language of prediction is likely to be an ongoing process and will remain as a distinguishing characteristic of penal practice for the foreseeable future. With that in mind, several contributors highlight the prominence of risk assessment strategies and the use of actuarial data in predicting and managing risky behaviour in a number of different contexts. Kemshall and Maguire's chapter provides a pertinent review of how such approaches impact on multi-agency work with sexual and violent offenders. Eastman, Hare and Maden assess the efficacy of different risk management tools employed in psychology and psychiatry for identifying risk in disordered individuals; whereas Levi focuses on empirical data in identifying and regulating the risks of financial crime and Horlick-Jones uses the Notting Hill Carnival as an example of the importance of empirical work in effective risk management.