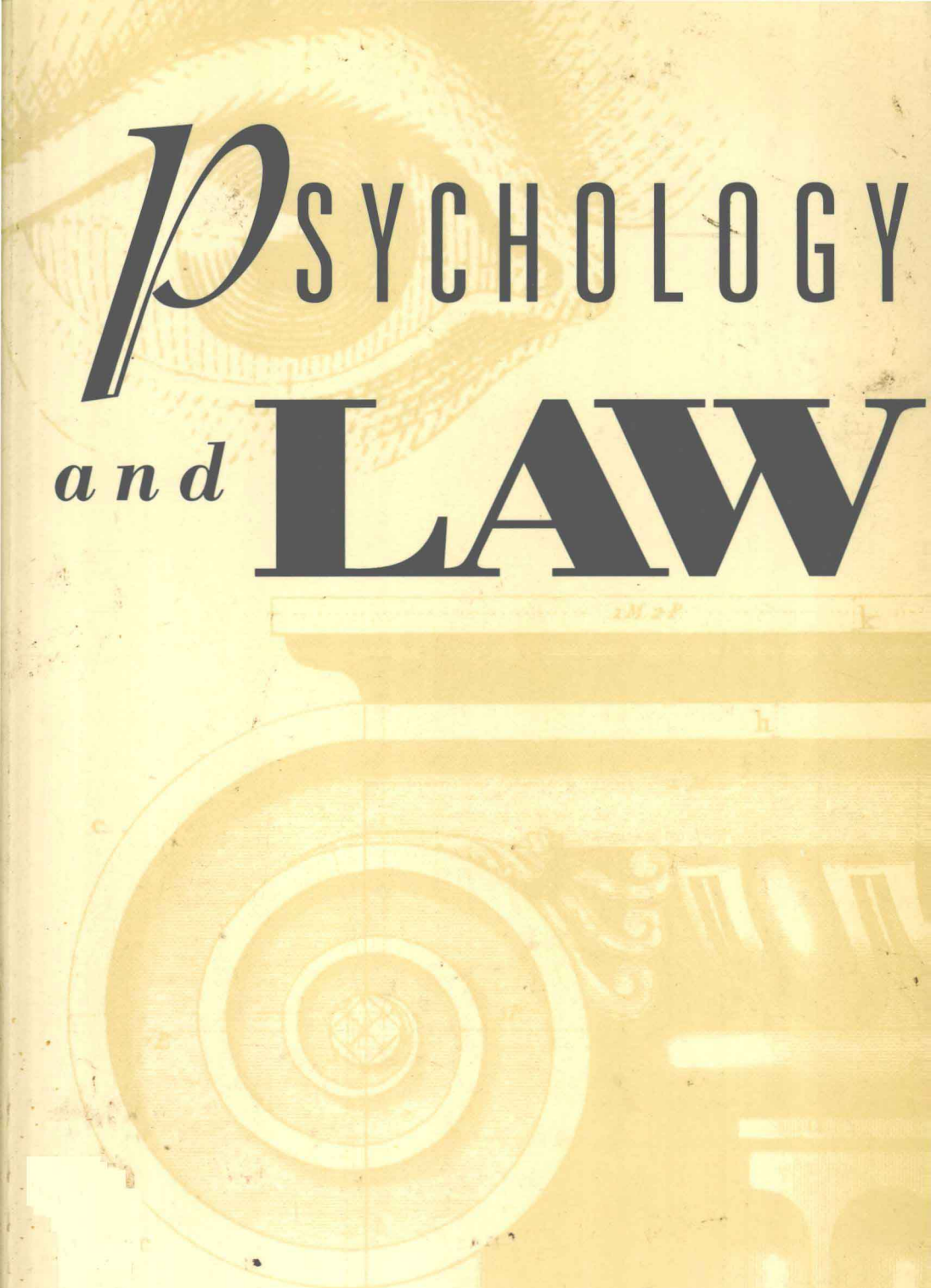
PSYCHOLOGY and LAW



A critical introduction

ANDREAS KAPARDIS

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Foreword

Psychology and Law is an expanding field throughout the world. Research and knowledge in this area increased dramatically in North America and Great Britain in the 1970s and is now mushrooming in Europe (especially in the Netherlands, Germany and Spain). The recent formation of the European Association of Psychology and Law and the several major European conferences on Law and Psychology are both symptoms of current expansion and catalysts for further expansion. Given the common concerns of psychologists and lawyers with trying to understand and predict human behaviour, it seems clear that much can be gained by applying the theories and methodology of psychology to key issues arising in law and legal processes. This is primarily what this book is about.

I am very happy to welcome Andreas Kapardis' book, which is a detailed, wide-ranging, up-to-date text on psychology and law. Despite the clear need for such a book for undergraduate and graduate students, no comparable modern text with such an international focus exists, so this book clearly fills an important gap in the literature. It covers classic topics such as eyewitness testimony, the psychologist as an expert witness, children as witnesses, jury decision-making and sentencing, as well as other important topics such as detecting deception and psychology as applied to law enforcement.

The author, Andreas Kapardis, is extremely well-qualified to write such a book. He completed interesting Masters and PhD theses under my supervision at Cambridge University (on jury decision-making and sentencing) about fifteen years ago. Since leaving Cambridge he has been very active in teaching and research in the area of legal and criminological psychology in Australia. His chapters reveal his excellent and wide-ranging knowledge of psychology and law. I was very happy that

he was able to complete his book while visiting Cambridge (and incidentally teaching my classes for me!).

Psychology and law have not always been happy bedfellows. The pioneering forensic psychologist, Lionel Haward, once described the witness box as 'an abattoir of sacred cows' for a psychologist. Nevertheless, the interest, respect and appreciation of psychologists and lawyers for each other have grown dramatically in the past twenty years, showing the great need for an up-to-date review of what is known about psychology and law. I am very happy to welcome Andreas Kapardis' book as a scholarly, but readable and accessible, introduction to this subject.

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Acknowledgements

I decided to write this book encouraged over the years largely by my students at La Trobe University. There were already a number of books dealing with psychology and law. However, I felt that none of them had covered such a broad range of areas in the one volume. I have tried to draw on European and Australian work as well as on more traditional North American sources, and to give sufficient of the legal framework to provide a proper context for the psycholegal research that is discussed. Inevitably, the book reflects my own background and interests in psychology, legal studies, criminology and law enforcement. I hope it will be used as a textbook and will be of interest to undergraduate and graduate students, as well as to professionals in psychology, law enforcement and social work.

As the manuscript goes to print, a sense of gratitude goes to my parents who taught me early on in life that where there is a will there is a way. While working on different parts of the manuscript I benefited from discussions with David Farrington, Roger Douglas, Austin Lovegrove and Stephen Schembri. I wish to thank D. Warren, K. Volenta and M. Hyslop of La Trobe University's library at Bundoora campus for tracking down at very short notice numerous invaluable references. I consider myself fortunate to have enjoyed the excellent facilities and helpful assistance of the staff at the Radzinowicz Library, Institute of Criminology, Cambridge University. I wrote a large part of the final draft of the manuscript while on a Visiting Fellowship at Clare Hall, Cambridge. I could not have wished for a more conducive environment. A special thanks goes to Phillipa McGuinness and Lee White for their editorial comments. Of course, none of the individuals or institutions is responsible for any weaknesses, mistakes or opinions expressed in this work.

Finally, this book would not have been possible without the tremendous support and patience of my wife Maria. In appreciation, I dedicate this book to her and to our children, Kostandinos Raphael, Elena and Dina.

ANDREAS KAPARDIS

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'In the recent past psychologists' claims to knowledge and fact finding ability were altogether too forceful, and lawyers' reluctance to use psychological evidence, insights and sophisticated techniques altogether too irrational.' (Clifford and Bull, 1978:19)

'However relevant they may be to each other, the offspring of the relationship between psychology and law is still an infant and doubts are still cast upon its legitimacy.' (Carson and Bull, 1995a:3)

Introduction: Development of the Psycholegal Field

The plethora of applications of psychology to law can be differentiated in terms of what has been termed:[1] (a) 'psychology in law'; (b) 'psychology and law'; and (c) 'psychology of law'. According to Blackburn (1996:6), *psychology in law* refers to specific applications of psychology within law: such as the reliability of eyewitness testimony, mental state of the defendant, and a parent's suitability of child custody in a divorce case. *Psychology and law* is used by Blackburn (1996) to denote, for example, psycholegal research into offenders (see Howells

and Blackburn, 1995), lawyers, magistrates, judges and jurors. Finally, *psychology of law* is used to refer to psychological research into such issues as to why people obey/disobey certain laws, moral development, and public perceptions and attitudes towards various penal sanctions. As far as the term *forensic psychology* is concerned, Blackburn (1996:6) argues convincingly it should only be used to denote the 'direct provision of psychological information to the courts, that is, to psychology *in* the courts' (see also Gudjonsson, 1996).

Psycholegal research involves applying psychology's methodologies and knowledge to studying jurisprudence, substantive law, legal processes and law breaking (Farrington et al., 1979b:IX). Research into, and the practice of, legal psychology has a long tradition exemplified since the beginning of this century by the work of such pioneers[2] as Binet (1905), Gross (1898), Jung (1905), Münsterberg (1908) and Wertheimer (1906). In fact, Münsterberg has been called 'the father of applied psychology' (Magner, 1991:121).[3] The psycholegal field has been expanding at an impressive rate since the mid 1960s, especially in North America, since the late 1970s in the United Kingdom and in Australia since the early 1980s. In fact, on both sides of the Atlantic research and teaching in legal psychology has grown enormously during the last two decades (Lloyd-Bostock, 1994). More recently, the field of psychology and law has also been expanding in Europe, especially in the Netherlands, Germany and Spain (see Lösel et al., 1992a:509–53; Davies et al., 1996:579–601). As the chapters in this volume show, since the 1960s psychology and law has evolved into a single applied discipline and an often-cited example of success in applied psychology. In this context, Haney (1993) points to psycholegal researchers having tackled some very crucial questions in society and, *inter alia*, been instrumental in improving the ways eyewitnesses are interviewed by law-enforcement personnel; the adoption of a more critical approach to the issue of forensic hypnosis evidence in the courts; psychologists contributing to improving the legal status and rights of children; and, finally, generally making jury selection fairer (p. 372ff). Furthermore, the impact of legal psychology has not just been one way (Davies, 1995:187).

Despite such early works as Brown's (1926) *Legal Psychology*, and while most lawyers would be familiar with forensic psychology, traditionally dominated by psychiatrists, it was not until the 1960s that lawyers in the United States came to acknowledge and appreciate psychology's contribution to their work (see Toch, 1961, *Legal and Criminal Psychology*; Marshall, 1969, *Law and Psychology in Conflict*).[4] Since the 1970s a significant number of psycholegal textbooks have appeared in the US,[5] in England,[6] and some have been written by legal psychologists on continental Europe (Lösel et al., 1992a; Wegener et al., 1989). In addition,

following Tapp's (1976) first review of psychology and law in the *Annual Review of Psychology*, relevant journals have been published, such as *Law and Human Behaviour* which was first published in 1977 as the official publication of the American Psychology-Law Society (founded in 1968) and is nowadays the journal of the American Psychological Association's Division of Psychology and Law. Other journals are: *Behavioural Sciences and the Law*; *Expert Evidence*; *Law and Psychology Review*; *Criminal Behaviour and Mental Health*. New psycholegal journals continue to be published. The first issue of *Psychology, Crime and Law* was published in 1994 and those of *Legal and Criminological Psychology* and *Psychology, Public Policy, and Law* in 1996 in the UK and the US respectively.

Despite the fact that in the UK lawyers and psychologists have been rather less ready than their American colleagues to 'jump into each other's arms', enough push by prison psychologists and increasing interest in the field (for example, at the Social Science Research Centre for Socio-Legal Studies at Oxford, the Psychology Departments of the University of East London [previously North-East London Polytechnic], the London School of Economics and Political Science and Nottingham University, as well as at the Institute of Criminology at Cambridge) had gathered enough momentum by 1977 for the British Psychological Society to establish a Division of Criminological and Legal Psychology. By the early 1980s empirical contributions by legal psychologists at Aberdeen University added to the momentum. Annual conferences at the Oxford Centre formed the basis for Farrington et al.'s (1979a) *Psychology, Law and Legal Processes* and Lloyd-Bostock's (1981a) *Psychology In Legal Contexts: Applications and Limitations*, 'established a European focus for collaboration between the two disciplines, attracting scholars from many different countries' (Stephenson, 1995:133) and paved the way for the more recent annual European Association of Psychology and Law Conferences. These two publications, together with Clifford and Bull's (1978) *The Psychology of Person Identification* and other British works published in the 1980s and early in the 1990s, have established psychology and law as a field in its own right in Britain, despite the fact that in 1983 the Social Science Research Council, under a Conservative government, ceased funding conferences for lawyers and psychologists (King, 1986:1). Psychological associations outside the UK also set up relevant divisions, for example, in the US in 1981 and in Germany in 1984 (see Lösel, 1992). In 1981 the American Psychological Association founded Psychology and Law as its 41st Division (Monahan and Loftus, 1982).

Besides a spate of international conferences on legal psychology that have been held in the UK and on continental Europe, there now exist both undergraduate and post-graduate programs in legal psychology

(Lloyd-Bostock, 1994:133). Finally, a number of universities on both sides of the Atlantic have recognised the importance of legal psychology by dedicating chairs to the subject (Melton et al., 1987). It must not be forgotten, however, that while by the beginning of the 1980s in the US one-quarter of graduate programs offered at least one course and a number had begun to offer forensic minors and/or PhD/JD programs (Freeman and Roesch, 1992), few psychology departments offered courses in psychology and law prior to 1973 (Diamond, 1992).

1 Bridging the Gap Between Psychology and Law: Why It has Taken so Long

In his book, *On The Witness Stand*, Münsterberg (1908:44–5) was critical of the legal profession in the US for not appreciating the relevance of psychology to their work.

However, Münsterberg was overselling psychology and his claims were not taken seriously by the legal profession (Magner, 1991). The rather unfortunate legacy left by Ebbinghaus (1885) and his black-box approach to experimental memory research – best exemplified by his use of nonsense syllables – contributed to the state of knowledge in psychology at the time and was one significant factor that negated the success of Münsterberg's attempt. Fortunately, the dominance of the black-box paradigm in experimental psychology came to an end with the publication in 1967 of Neisser's futuristic *Cognitive Psychology* book.

In the ensuing six decades, whilst behaviourism on the one hand and the experimental psychologists' practice on the other of treating as 'separate and separable' perception, memory, thinking, problem solving and language (Clifford and Bull, 1978:5) permeated and limited psychological research greatly, the early interest in psycholegal research fizzled out. However, by the late 1960s, as psychology matured as a discipline and, amongst other developments, social psychology blossomed in the US, the experimental method came to be applied to problems not traditionally the concern of psychologists. Psychologists began turning their attention to understanding deception and its detection, jury decision-making, the accuracy of eyewitness testimony and sentencing decision-making as human processes. Most of the early psycholegal researchers with a strong interest in social psychology focused on juries in criminal cases, those with an affinity to clinical psychology concerned themselves with the insanity defence, while cognitive psychologists examined eyewitness testimony. These same areas continue to be of interest to psycholegal researchers today but the questions being asked are more intricate and the methods used to answer them are more sophisticated (Diamond, 1992:VI). However, the somewhat

narrow focus of psycholegal research caused enough concern to Saks (1986) as to remind such researchers that 'the law does not live by eyewitness testimony alone' and to urge them 'to explore under-represented areas of the legal landscape' (Diamond, 1992:VI). It is comforting for psychologists to know that, with the general growth and maturity of their discipline, major industrialised society has come to realise the wide-ranging benefits of psychology (McConkey, 1992:3).

Why, then, has it taken so long for the field of psychology and law to develop when, as some authors would argue,[7] psychologists and lawyers do have a lot of common ground? Both disciplines focus on the *individual* (Carson, 1995a). Yarmey (1979:7) wrote that 'both psychology and the courts are concerned with predicting, explaining and controlling behaviour', while according to Saks and Hastie (1978:1): 'Every law and every institution is based on assumptions about human nature and the manner in which human behaviour is determined'. In fact, Diamond (1992:VI–VII) states that 'on grandiose days, I think that law should be characterised as a component of psychology, for if psychology is the study of human behaviour, it necessarily includes law as a primary instrument used by society to control human behaviour. Perhaps this explains why laws are such a fertile source of research ideas for psychologists'. Similarly, Crombag (1994) argues that law may be considered a branch of applied psychology because the law mainly comprises a system of rules for the control of human social behaviour. Listing law as a component of psychology, however convincing the arguments put forward for it might be, is not a suggestion that will endear psycholegal researchers to lawyers.

While the law relies on assumptions about human behaviour and psychologists concern themselves with understanding and predicting behaviour, both psychology and law accept that human behaviour is not random. More specifically, research in psychology relates to various aspects of law in practice (Lloyd-Bostock, 1988:1). As in other countries, the legal profession in Australia, justifiably, perhaps, has been rather slow to recognise the relevance of psychology to its work. Compared to law, psychology is, chronologically speaking, entering its adulthood and, given a number of important differences between the two disciplines, it comes as no surprise to be told that there is tension, conflict between the two disciplines (see Marshall, 1966) that persists today (Carson and Bull, 1995b; Diamond, 1992:VIII). Bridging the gap between the two disciplines on both sides of the Atlantic, in Australia, New Zealand and Canada, as well as, for example, in Spain and Italy (see Garrido and Redodo, 1992; Traverso and Manna, 1992) has not been easy. In fact, there is a long way to go before the remaining ambivalence about psychology's contribution to academic and practising lawyers and

ethical issues of such a function will be resolved (Lloyd-Bostock, 1988). Admittedly, 'Different psychologists have different ideas about what psychology should be about' (Legge, 1975:5) and 'Law, like happiness, poverty and good music, is different things to different people' (Chisholm and Nettheim, 1992:1). The simple fact is that there are significant differences in approach between psychology and law. To illustrate, the two disciplines operate with different models of man. The law, whether civil or criminal, generally emphasises individual responsibility in contrast to the tendency by a number of psychological theories to highlight 'unconscious and uncontrollable forces operating to determine aspects of individuals' behaviour' (King, 1986:76). In addition, 'The psychologists' information is inherently statistical, the legal system's task is clinical and diagnostic' (Doyle, 1989:125–6). As Clifford (1995) has put it: 'the two disciplines appear to diverge at the level of value, basic premises, their models, their approaches, their criteria of explanation and their methods' (p. 13).

In a submission to the Australian Science and Technology Council in the context of its investigation into the role of the social sciences and the humanities in the contribution of science and technology to economic development (see McConkey, 1992:3) it is stated that:

> Psychology discovers, describes and explains human experience and behaviour through the logic and method of science. Psychological research and application is based in a logical, empirical and analytical approach, and that approach is brought to bear on an exceptionally wide range of issues.

Law, on the other hand, as Farrington et al. (1979b:XIV) put it: 'is a practical art, a system of rules, a means of social control, concerned with the solving of practical problems'. Furthermore:

> The law is based on common-sense psychology which has its own model of man, its own criteria ... its own values. Common-sense explanation in the law is supported by the fact that workable legal processes have evolved under constant close scrutiny over many centuries. It is in this sense 'proven'. But this is quite different from explanation in terms of psychological theory backed by empirical evidence of statistically significant relationships. (p. XIII)

Finally, whereas the image of human beings projected by American social psychologists is that of the 'nice person', the law, and especially the criminal law, is characterised by a more cynical view of human nature and this view tends to be adopted by those who work within and for the legal system (King, 1986:76).

Psycholegal researchers (for example, in eyewitness testimony) have utilised a variety of research methods including incident studies, field

studies, archival studies and single case studies (see Clifford, 1995: 19–24; Davies, 1992). Many psychologists rely a great deal on the experimental method, including field experiments, to test predictions and formulate theories that predict behaviour and are sceptical of lawyers' reliance on common-sense generalisations about human behaviour based on armchair speculation, however ratified by conceptual analysis (Farrington et al., 1979b:XIII). A feature that unifies a lot of psychological research is their preference for subjecting assertions to systematic empirical research and, where possible, testing them experimentally. This will often involve randomly allocating persons to different conditions who, at the time, are normally not told the aim of the experiment. Clifford (1995) provides an excellent account of contemporary psychology's premises and methods. Many psychologists who favour experimental simulation tend not to also consider the issue of values in psychological and psycholegal research in general, and in particular whether psychologists can indeed avoid value judgements by demonstrating the 'facts'.

Theoretical models of man espoused by experimental psychologists have involved man as a black box, a telephone switchboard and, more recently, man as a computer. These models, which are different from the lawyer's notion of 'free will', have been rejected by cognitive psychologists because they do not take into account man as a thinking, feeling, believing totality (Clifford and Bull, 1978:5), as someone who interacts with the environment in a dynamic way.

For many a psychologist, a great deal of information processing is done without people being aware of it; the lawyer, on the other hand, operates a model of man as a free, conscious being who controls his/her actions and is responsible for them. What the law, based on a lot of judicial pronouncements, regards as 'beyond reasonable doubt' is rather different from the psychologist's conclusion that an outcome is significant at a 5 per cent level of statistical significance. One interesting aspect of this, for example, is the lawyer's reluctance to quantify how likely guilt must appear to be before one can say that such doubt as exists is not reasonable. The lawyer in court is often only interested in a 'yes' or 'no' answer to a question asked of a psychologist who is appearing as an expert witness, while, at best, the psychologist may only feel comfortable with a 'maybe' response. It should be noted, however, that the answers of interest to a practising lawyer might vary according to whether it is examination in chief or cross-examination. In the former, the lawyer is interested in a story, whereas in the latter, the lawyer is interested in questions that require a 'yes' or 'no' answer (see Chapter 8). Also, lawyers look at the individual case they have to deal with and highlight how it differs from the stereotype, they try hard to

show in court that one cannot generalise, whereas psychologists talk about the probability of someone being different from the aggregate.

In addition to significant differences between psychology and law (see Carson, 1995b), there is the fact that the approaches of various branches of psychology differ in the degree to which they are based on what might be called scientific experiments. Furthermore, some psychologists have cast doubt on the practical utility of findings from controlled laboratory experiments that reduce jury decision-making, for example, to a few psychology undergraduates reading a paragraph-long, sketchy description of a criminal case and making individual decisions on a rating scale about the appropriate sanction to be imposed on the defendant (see Bray and Kerr, 1982; King, 1986; Konečni and Ebbesen, 1992). Rabbit (1981) pointed out that 90 per cent of the studies quoted in standard textbooks on the psychology of memory available then only tested recognition or recall of nonsense three-letter syllables. More recently, Konečni and Ebbesen (1992:415–16) have argued that: 'It is dangerous and bordering on the irresponsible to draw conclusions and make recommendations to the legal system on the basis of simulations which examine effects independently of their real-world contexts' (that is, on the basis of invalidated simulations or those that are not designed to examine the higher-order interactions). More recent research on the jury (see Chapter 5) includes protocol analyses, in-depth interviews with jurors after they have rendered verdicts in real cases, elaborate simulations involving video-taped trials and juror respondents, and even randomised field experiments (see Heuer and Penrod, 1989). Similarly, eyewitness testimony researchers have been making increasingly greater use of staged events and non-psychology students as subjects, as well as utilising archival data (see Chapters 2 and 3).

King (1986) has also criticised legal psychologists' strong reliance on the experimental method, arguing that there is a tendency to exaggerate its importance; that treating legal factors as 'things' and applying to them experimental techniques and statistical methods gives rise to at least four problems, namely, inaccessibility, external validity, generalisability and completeness (p. 31). King has also argued that exclusive reliance on experimental simulation also encourages legal psychologists to focus on inter-individual behaviours without taking into account the social context to which they belong (p. 7); that Karl Popper's (1939) refutability has been shown by philosophers of science to be a questionable criterion for defining whether a theory is scientific. Furthermore, King contends that the real reasons for legal psychologists' continued use of the experimental method as the prime or sole method for studying legal issues is: (a) a belief by psychologists that using the experimental method enables them to claim they are being 'scientific'

in carrying out their research; (b) a need felt by psychologists for recognition and acceptability; and (c) a belief by psychologists that they are more likely to be accepted and recognised as 'experts' if they are seen to be 'scientific'. Finally, neo-Marxist critics of the use of the experimental method (see Wexler, 1983) 'see the failure to pay attention to the context of social behaviour as a political act perpetrated by psychologists in order to obscure the true form and content of social interaction' (King, 1986:103). King has advocated a shift 'away from the restrictive and self-aggrandising notions of what constitutes "scientific" research which have tended to serve as a starting point for much of what passes for legal psychology' (p. 82). No doubt many psychologists would disagree both with Wexler's (1983) picture of them as involved in a political conspiracy informed by a particular ideology and with King's (1986) push to get them to use the experimental method less in favour of ethnomethodology as their preferred method of enquiry.

Highlighting the dangers inherent in studying eyewitness testimony under rather artificial conditions in the laboratory, Clifford and Bull (1978) reminded their readers that such research could lead psychologists to advance knowledge that is, in fact, the reverse of the truth, as in the case of the influence of physiological arousal on recall accuracy. A theory of recall, or any other psychological theory for that matter, arrived at on the basis of grossly inadequate research could hardly be expected to be taken seriously by lawyers.[8]

According to Hermann and Gruneberg (1993:55), in the 1990s memory researchers no longer presume that a laboratory procedure will or will not extrapolate to the real world because the ecological validity issue in memory research has largely been solved. Hermann and Gruneberg propose that: 'It is time now to move beyond the ecological validity issue ... to the next logically appropriate issue – applied research'. In so doing legal psychologists in the late 1990s should heed Davies' (1992) words that:

> no one research method can of itself provide a reliable data base for legislation or advocacy. Rather, problems need to be addressed from a number of perspectives, each of which makes a different compromise between ecological validity and methodological rigour. (p. 265)

Another reason why problems arise when psychology and law meet is that, as Lösel (1992:15) points out, for the psychologist the plethora of theories and perspectives in the discipline is a matter of course. In law, however, the main goal is uniformity and the avoidance of disparity. Consequently, lawyers regard the numerous viewpoints in psychology as contradictory. Taking the psychological literature on bystander intervention and using good samaritanism (that is, intervening to assist or