

P.J. van Koppen & M.J. Cohen (2000) Psychologists in the Dutch legal domain. In: P.J. van Koppen & N.H.M. Roos (red.), *Rationality, information and progress in law and psychology (Liber amicorum Hans F.M. Crombag)* (pp. 63-78). Maastricht: Maastricht University Press

## Psychologists in the Dutch Legal Domain

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### Introduction

The aspirations of an applied field such as the psychology of law go in two directions: the study of law as a behavioural technology and the study of behaviour under the law, the behaviour of participants in the legal process. The first part of psychology and law is concerned with understanding the operation of law and legal rules and their influence on legal subjects, often through decisions by legal officers. Legal rules and their applications are based on assumptions regarding the behaviour of individuals. These assumptions and their applications are available for empirical research and testing. This area of psychology and law is the study of law as a behavioural technology,<sup>3</sup> and involves with such questions as: what factors influence legal decision-making; what kind of punishment is corrective; or which factors influence negotiations in the legal arena. Three fine examples, written in Dutch, in this area of psychology and law have been produced by Hans Crombag: the 1977 volume *Een Theorie over Rechterlijke Beslissingen* (*A Theory of Legal Decision Making*, with Johan de Wijkerslooth and Job Cohen), his inaugural lecture *Mens Rea* given in Leiden in 1981; and the product of his 1982 stay at the Stanford Advanced Studies Centre: *Een Manier van Overleven: Psychologische Grondslagen van Moraal en Recht* (*A Manner of Survival: Psychological Foundations of Morals and Law*).<sup>4</sup> In the field of law and psychology, studies on law as a behavioural technology, however, are relatively scarce, especially empirical studies. We can only speculate about the reasons. The persistent difficulty in persuading legal decision makers such as judges and prosecutors to co-operate in empirical studies is one

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3. See H.F.M. Crombag (1982) Wat is rechtspsychologie? *Ars Aequi*, 32, 237-240.

4. Respectively: H.F.M. Crombag, J.L. de Wijkerslooth and M.J. Cohen (1977) *Een theorie over rechterlijke beslissingen*. Groningen: Tjeenk Willink; H.F.M. Crombag (1981) *Mens rea*. Zwolle: Tjeenk Willink (inaugural lecture Leiden); and H.F.M. Crombag (1983) *Een manier van overleven: Psychologische grondslagen van moraal en recht*. Zwolle: Tjeenk Willink.

reason.<sup>5</sup> Another is that law and its jurisprudence is quite diverse and time-related. The assumptions underlying the law are simply difficult to discover.<sup>6</sup>

In any case, most psychologists of law have limited their research to the second part of psychology and law, to what we have called behaviour under the law: the wide variety of behaviour displayed by witnesses, defendants, jurors, and other participants in the legal process. This part of psychology and law is indeed more practical and has a high potential of helping legal decision makers. In many cases, triers of fact are faced with questions on the behaviour of suspects and witnesses, while psychologists can contribute to finding an answer.

Quite to the dismay of Hans Crombag, the potential and practical contribution of psychology to legal decision-making is ignored most of the time, at least in his view. In this chapter, we discuss whether this is true for the Netherlands in the areas in which psychology and law has been strongest: witness statements.

### When Law and Psychology Collide

Lawyers are indeed likely to become irritated when psychologists interfere with their legal work. A fine example of this kind of irritation was generated by the publication in 1992 of *Dubieuze Zaken (Dubious Cases)* by Crombag, Van Koppen and Wagenaar.<sup>7</sup> In *Dubieuze Zaken* the Theory of Anchored Narratives is presented. This theory is aimed at describing and explaining the decision of guilt by the trier of fact in criminal cases. The Theory of Anchored Narratives is an appropriate vehicle to explain where and how the process of deciding on a suspect is the guilt can go wrong. This was done using 35 cases specially selected to demonstrate these errors. It is precisely this method that evoked most of the comments made by lawyers.

In short, the Theory of Anchored Narratives entails the proposition that the decision on the guilt of a suspect is based on two elements. The court or jury primarily evaluate the quality of the story told by the prosecution. Secondly, stories told in a criminal court must not only be good, we want them to be true as well. The truth of a story is established by means of evidence. Proof, then, is the process of anchoring the story in shared knowledge about the world. This is done through general rules, e.g.

5. There are exceptions: J. ten Kate and P.J. van Koppen (1984) *Determinanten van privaatrechtelijke beslissingen*. Arnhem: Gouda Quint (diss. Rotterdam); and a recent fine study on sentencing theories and sentencing attitudes: J. de Keijser (2000) *Punishment and purpose*. Amsterdam: Thela Thesis (diss. Leiden).

6. P.J. van Koppen and D.J. Hessing (1988) Legal psychology or law and psychology. In P.J. van Koppen & D.J. Hessing and G. van den Heuvel (eds.), *Lanvers on psychology and psychologists on law* (pp. 1-8). Amsterdam: Swets & Zeitlinger, p. 3.

7. See H.F.M. Crombag, P.J. van Koppen and W.A. Wagenaar (1994) *Dubieuze zaken: De psychologie van strafrechtelijk bewijs*. Amsterdam: Contact (2e herziene druk). An English edition followed one year later: W.A. Wagenaar, P.J. van Koppen and H.F.M. Crombag (1993) *Anchored narratives: The psychology of criminal evidence*. London: Harvester Wheatsheaf.

‘policemen usually tell the truth in court.’ Such general rules, however, are seldom absolutely true. Witnesses sometimes err or lie, and experts occasionally do make mistakes. The rules making evidence prove something should rather be phrased like: witnesses speak the truth *most of the time*, and pathologists *almost* never make mistakes.<sup>8</sup>

The Theory of Anchored Narratives predicts that judges will anchor the narrative presented by the prosecution in their own general convictions. These convictions, or common sense rules on the state of the world, are usually left implicit. The defence has the task to make these convictions explicit and criticise them where possible. At a very minimum, the trier of fact has the obligation to anchor the evidence in common sense rules accepted by most people most of the time without further discussion. Only then, the verdict will be acceptable to all participants without further ado. In the 35 cases discussed in *Dubieuze Zaken* many instances were found in which the process did not work properly; the most notorious was a case in which the court could only have accepted the evidence if it also accepted as a general rule that babies can talk.<sup>9</sup>

Although all reviews by lawyers – and there were many – were very positive on the core issues in the volume – the Theory of Anchored Narratives – their anger was mainly aimed at the authors’ lack of knowledge of legal matters. In short: how can we believe psychologists who make legal errors in their writings? And: even if some of their comments on legal decisions were correct, judicial errors are negligible compared to “bookcases full of psychological nonsense.”<sup>10</sup>

More interesting are the comments on the methodology used in *Dubieuze Zaken*. The 35 cases discussed were considered a highly biased sample from all court cases<sup>11</sup>. Thus, the different purposes of random sampling and case studies were ignored. Re-

8. See the extensive discussion in Wagenaar, Van Koppen & Crombag, 1993, *op. cit.*, especially Chapter 2.

9. See the description in Wagenaar, Van Koppen & Crombag, 1993, *op. cit.*

10. T.M. Schalken (1992) Rechters zouden wat minder fatsoenlijk moeten worden. N.a.v. de huidige kritiek op de Nederlandse strafrechtspleging. *Nederlands Juristenblad*, 67, 889-891, at p. 889, our translation. See also the discussion on the differences in reaction between the legal and the psychological communities by M. Heijne, C. Samsom, A. Westra, M. Wehkaamp and D. Draaisma (1996) Een confrontatie van culturen: De juridische receptie van 'Dubieuze zaken'. *De psycholoog*, 31, 290-293.

11. See for instance: T.M. Schalken (1992) Rechters zouden wat minder fatsoenlijk moeten worden. N.a.v. de huidige kritiek op de Nederlandse strafrechtspleging. *Nederlands Juristenblad*, 67, 889-891; H. Franken (1992) Broddelwerk (van de rechter of de wetenschap?). *Rechtsgeleerd Magazijn Themis*, 111, 249-250; L. Frijda (1992) Over dubieuze zaken en oppervlakkige, domme rechters. *Delikt en Delinkwent*, 22, 662-672; J. Simmelink (1993) Pratende baby's en naïve strafrechters? (Een beschouwing over H.F.M. Crombag, P.J. van Koppen en W.A. Wagenaar, *Dubieuze Zaken*). *Delikt en Delinkwent*, 23, 650-670; and C.J.M. Schuyt (1992) Het juridische en het sociaal-wetenschappelijke bewijs. *Delikt en Delinkwent*, 22, 655-661.

viewers from other disciplines were more sensitive to the important differences between random sampling and case studies as done in *Dubieuze Zaken*.<sup>12</sup>

The lawyers' critique of *Dubieuze Zaken* – case studies are not valid to draw conclusions on legal decision-making – is amazing in some ways. Case studies are so central to the legal profession that one would expect that lawyers are sensitive to the power of case studies, their profession typically being based on case studies. During their studies, law students discuss precedents and court decisions to discover the niceties of the law and legal rules.

Although the lawyers' critique of *Dubieuze Zaken* may be peculiar, it does point at one important reason for communication problems between psychologists and lawyers: their huge differences in methods and methodological backgrounds.

### Uses of Psychologists in Court

Differences between psychological and legal methodology is especially problematic for communication between lawyers and psychologists serving as expert witnesses in court. It should be noted that a psychologist serving as an expert witness is there to assist the trier of fact in his decision-making.<sup>13</sup> Thus, the methods used and conclusions drawn by psychologists in court should fit the typical legal model. This model is simple: the court can only convict if the suspect's guilt has been established beyond reasonable doubt. The trier of fact does not need to be absolutely sure of the suspect's guilt, but the degree of uncertainty should be quite low.

Now, before we proceed, please note that psychologists usually only become involved in criminal cases if the rest of the evidence is not very strong. Only then does it become important to establish, for instance, whether a certain witness speaks the truth or whether a suspect's confession, which was subsequently retracted, can be trusted. In such cases the trier of fact should only use the psychologist's opinion if the meth-

12. See for instance M. Komter (1992) *Dubieuze zaken: De psychologie van strafrechtelijk bewijs* door H.F.M. Crombag, P.J. van Koppen en W.A. Wagenaar : boekbespreking. *Tijdschrift voor Criminologie*, 34, 348; R. Hastie and N. Pennington (1994) Review of W.A. Wagenaar, P.J. van Koppen & H.F.M. Crombag, *Anchored Narratives*. *Journal of Behavioral Decision Making*, 7, 293-297; J.R. Spencer (1994) Review of W.A. Wagenaar, P.J. van Koppen & H.F.M. Crombag, *Anchored Narratives* and H.F.M. Crombag, P.J. van Koppen & W.A. Wagenaar, *Dubieuze Zaken*. *Cambridge Law Journal*, 53, 179-183; and W. Twining (1995) *Anchored narratives: A comment*. *European Journal of Crime, Criminal Law and Criminal Justice*, 1995(1), 106-114.

13. We depart from the role of expert witnesses as typically performed in Dutch courts. We are aware that in other legal systems experts have a role which is more or less aimed at serving the case of one of the parties involved. See for instance the descriptions given in E.F. Loftus and K. Ketcham (1991) *Witness for the defense: The accused, the eyewitness, and the expert who puts memory on trial*. New York: St. Martin. Since our arguments do not bear on this difference between legal systems, we leave it undiscussed.

odology enables conclusions strong and firm enough to support a decision beyond reasonable doubt. Are psychologists able to draw such firm conclusions?

The most typical methodology used by psychologists is the experiment. In the experiment, differences between groups are investigated. For instance, a method is applied to assess the veracity of a witness statement and psychologists try to discover whether the method differentiates between abused and non-abused children. If the method produces statistically significant different results among abused and non-abused children, psychologists conclude that the method is useful to differentiate between their statements. ‘Statistically significant’, however, means that a difference between the two groups is found and that this difference is quite probably is not caused by coincidental and irrelevant differences between the two groups. It simply means that the independent variable has a detectable influence, is something quite different than the level of certainty required in decisions with regard to individual criminal cases. Before a psychological method can be applied in law, another hurdle must be overcome: the step from group comparison in experimental designs to application in individual cases. This was one of the reasons for Rassin, Merckelbach and Crombag to reject the application of the Criteria Based Content Analysis (CBCA) for establishing the truthfulness of child statements in sexual abuse cases.<sup>14</sup> The statistical differences found in empirical research on CBCA are just not important enough to allow its forensic use.<sup>15</sup>

It is clear that psychological research cannot be applied directly to the legal domain. How are lawyers dealing with these problems? We discuss two relevant matters here: psychologists serving as expert witnesses in court and the generation of general rules and procedures based on psychological research. These may partly answer the question as to whether lawyers confirm Crombag’s pessimism that scientific psychology is largely ignored in the Netherlands.

### **Psychologists as Expert Witnesses**

The problems with the transfer of psychological knowledge to the forensic domain warrant a critical approach towards psychologists as expert witnesses by the courts. Typically, the comments by Hans Crombag and others do not entail that courts listen

14. E. Rassin, H. Merckelbach and H. Crombag (1997) De Criteria-Based Content Analysis (CBCA) als instrument om de geloofwaardigheid van getuigenverklaringen te bepalen. *Nederlands Juristenblad*, 72, 1923-1929.

15. See for other problems in this area E. Rassin and H. Merckelbach (1999) The potential conflict between clinical and judicial decision making heuristics. *Behavioral Science and the Law*, 17, 237-248. The most extreme point of view is taken by Ebbesen and Konečni, who argue that psychologists have nothing to contribute to the law. See E.B. Ebbesen and V.J. Konečni (1997) Eyewitness memory research: Probative v. prejudicial value. *Expert Evidence*, 5, 2-28.

*too little* to psychologists, but that they listen to the *wrong* psychologists using the wrong methods. Traditionally, for instance, clinical psychologists and psychiatrists play a large role in some criminal cases. Courts accept the opinion of psychiatrists on the *toerekeningsvatbaarheid* (insanity defence) of defendants rather undiscerning.<sup>16</sup> Also, courts routinely accept the judgements on the veracity of witness statements, especially those of children in sexual abuse cases. This undiscerning acceptance has been discussed elsewhere.<sup>17</sup> A more obscured version of the same problem can be found in cases in which individuals, mostly women, file a complaint about sexual abuse that may have happened a long time ago. If no other evidence is available, psychologists sometimes interview the alleged victim to assess whether her story is true or not. One of these cases went all the way to the Dutch Supreme Court.<sup>18</sup> In this case a woman accused both a brother and an uncle of having sexually abused her for some years. A psychologist was called in to study the case file and talk to the woman. The psychologist concluded that she was speaking the truth *because* she was suffering from post-traumatic stress disorder. This diagnosis is derived from the *Diagnostic and Statistical Manual of Mental Disorders* (DSM-IV), a publication of the American Psychiatric Association, which is used worldwide for the classification of psychiatric disorders (American Psychiatric Association, 1994). The DSM-IV also lists a large number of criteria which all have to be met before a patient can be diagnosed as suffering from posttraumatic stress disorder.<sup>19</sup> As is typical in the therapeutic setting, the psychologist diagnosed the woman loosely as suffering from this disorder, without making clear to the court the DSM-criteria on which he had based the diagnosis. A much larger problem, however, is that the psychologist argued that *because* the woman was suffering from posttraumatic stress disorder, it was very likely that she suffered from the sexual trauma inflicted upon her by the suspect. How does he know? The first criterion in the DSM-IV for posttraumatic stress disorder is that: "The person has been exposed to a traumatic event in which both of the following were present: (1) the person experienced, witnessed, or was confronted with an event or events that involved actual or threatened death or serious injury, or a threat to the physical integrity of self or others; (2) the person's response involved intense fear, helplessness, or horror."<sup>20</sup> And how did the psychologist know that the woman suffered from trauma? Because she told

16. S. Tuinier (1989) *De psychiater en de wilde man: Een veldstudie over de relatie psychiatrisch syndroom en criminaliteit.*: (ongepubliceerde diss. Vrije Universiteit Amsterdam).

17. See respectively, *Dubieuze Zaken*, Chapter 13; and Rassin, Merckelbach and Crombag, 1997, *op. cit.*

18. See HR 18 November 1995, NJ 1996, 666 (*Psycholoog ondersteunt getuigenverklaring; Psychologist supports witness statement*), in which the court accepted such an expert statement as valid evidence.

19. American Psychiatric Association (1994) *Diagnostic and statistical manual of mental disorders: Fourth edition (DSM-IV)*. Washington, DC: American Psychiatric Association, p. 427-429.

20. American Psychiatric Association, 1994, *op. cit.*, p. 427.

him. This is an acceptable basis for making this diagnosis in a therapeutic setting, but if the psychologist then uses the diagnosis to convince the court that the woman had been indeed sexually abused, the reasoning has become completely circular. These kinds of expert opinions are particularly dangerous, because psychologists in the Netherlands never tell the court how they came by their diagnosis, so the circularity of the testimony remains completely hidden from the court.<sup>21</sup>

But times are changing. Recently, the Dutch Supreme Court set standards for the testimony of expert witnesses. For Dutch law this is quite novel, since the decisions about the facts are almost completely left to the inferior – district and appellate – courts.<sup>22</sup> In 1989 the Supreme Court ruled in a case in which an expert witness used the anatomically correct dolls-test to assess the veracity of a statement made by a minor in a sexual abuse case. The Court decided that if the defence seriously contested the method used by the expert, the court should explain expressly why it still used the expert's opinion as evidence.<sup>23</sup>

In the beginning of 1998, the Dutch Supreme Court broadened this decision by reversing an appellate court decision in a case in which an orthopaedic shoemaker had given an expert opinion regarding identification by means of shoe traces. The Supreme Court ruled that upon a challenge of this evidence by the accused, the appellate court should have investigated (1) whether the expert also was an expert on shoe traces; (2) if so, which methods were used to reach the opinion; (3) why the expert considered this method sufficiently reliable; and (4) the extent to which the expert was able to use this method competently.<sup>24</sup> These guidelines may seem meagre to an Anglo-Saxon lawyer, but they are completely new to Dutch criminal procedure.

All of these developments are happening under the influence of the European Court of Human Rights (ECHR) in Strasbourg. ECHR decisions are binding to national courts. Decisions by the ECHR are causing the gradual return of witnesses to the courts. Some 15 years ago, courts decided almost all cases on documents. Witnesses did play a role, but only in the form of their statements as recorded by the police or by the examining magistrate (*juge d'instruction*). Typically, expert witnesses appeared in court in the form of their written report. Although decisions on written opinions are

21. See also the description of another case in: P.J. van Koppen and H.L.G.J. Merckelbach (1998) *De waarheid in therapie en in rechte: Pseudoherinneringen aan seksueel misbruik*. *Nederlands Juristenblad*, 73, 899-904.

22. J.F. Nijboer (1992) *Forensic expertise in Dutch criminal procedure*. *Cardozo Law Review*, 14, 165-191; P.T.C. van Kampen (1998) *Expert evidence compared: Rules and practices in the Dutch and American criminal justice system*. Antwerpen: Intersentia (diss. Leiden), Chapter 4.

23. See HR 28 February 1989, NJ 1989, 748 (*anatomisch correcte poppen; anatomically correct dolls*).

24. See HR 27 January 1998, NJ 1998, 404 (*Schoenmaker blijf bij je leest; Shoeprints*).



still the rule, in the past few years more and more witnesses and expert witnesses were summoned to appear at the trial.<sup>25</sup>

In short: the courts treat experts more and more critically. A development that should be applauded. Maybe, courts are starting to listen to people like Hans Crombag. Another area in which psychologist may influence the legal system is the generation of general rules and procedures. To investigate whether psychologists exert influence in this area, we discuss two subjects: identification procedures and the handling of repressed memory cases.

### Identification Procedures

In most criminal cases the evidence is based on witness evidence. One of the most problematic witness statements is the one on the identity of the suspect where the witness never met the suspect before the crime. A witness confrontation should then be used to assess whether the appearance of the suspect corresponds to the memory that the witness has of the appearance of the perpetrator. This is done with a good line-up or photo-spread procedure, which seeks to accomplish two purposes simultaneously: to try to learn from an eyewitness who committed the crime and, at the same time, to test the accuracy of that eyewitness' identification. This dual objective is achieved by confronting the witness with a line-up of people who all conform to the general description of the perpetrator. One of these is the suspect; the others are innocent foils unknown to the witness. The witness' task is to point out the one person in the line-up he recognizes, if he recognizes anyone at all.

The result of a properly conducted line-up has a very high diagnostic value.<sup>26</sup> It is essential, however, that the procedure minimizes the chance that the witness chooses the suspect who most resembles the memory of the perpetrator rather than the one who is recognised, or that cues suggest to the witness who is the 'right' suspect to choose. For example, the use of foils who are distinguishable from the eyewitness' description reduces the effective size of the line-up, as if these foils were not even there. Moreover, it is important that a suspect's confidence in an identification (which may initially be weak) not be artificially bolstered after the line-up by a confirmation from the investigators (that the person chosen is the one they thought was the perpetrator) or by learning that other witnesses chose the same person.<sup>27</sup>

25. It should be noted that times are changing for experts in North America as well, as a result of a series of opinions by the United States Supreme Court, starting with the case of *Daubert v. Merrell Dow Pharmaceuticals* (509 U.S. 579, 1993). As a consequence, the treatment of experts in court has become more similar to the Dutch situation.

26. Wagenaar, van Koppen and Crombag, 1933, *op. cit.*

27. See G.L. Wells and A.L. Bradfield (1999) Distortions in eyewitnesses' recollections: Can the post-identification feedback effect be moderated? *Psychological Science*, 10, 138-144.

Accomplishing these things ensures that the identification results from a witness' memory of the perpetrator and not by something else. For this purpose four procedural safeguards need to be routinely employed: (1) the person or persons who conduct the line-up or photo spread should not be aware of which participant in the line-up is the suspect, or which photograph is that of the suspect; (2) eyewitnesses should explicitly be told that the person being sought might or might not be in the line-up or photo spread and that, therefore, they are not obliged or expected to make an identification; (3) a suspect should not stand out in the line-up or photo spread as being different from the other people in the array as a result of the eyewitness' previous description of the person sought or other irrelevant criteria; (4) at the time of the identification and prior to any feedback, a clear statement must be taken from the eyewitness regarding his or her confidence that the identified person actually is the person sought.<sup>28</sup>

Apart from a proper identity parade, tests of the witness' memory can be conducted in two other manners: (1) mug books, on paper or on a television screen; and (2) a one-person show-up. These serve other purposes. Mug shots are photos of known criminals. If conducted properly, these are only shown to witnesses in investigations where the police have no idea where or how to find the perpetrator. Therefore, the police show the witness a selection of photos of known criminals who fit the description given by the witness. If the witness points one out, that individual becomes a suspect. This will result in a suspect-driven search,<sup>29</sup> with the potential of generating erroneous identifications, and ultimately a miscarriage of justice. For this reason, the results of witness examinations of mug shots should not be used as evidence by the court.

The one-person show-up should be used in one situation only: where the witness already knew the perpetrator before the crime took place. In such cases, the identification takes place at the scene of the crime. Showing the suspect only to the witness serves to prevent administrative errors ("is this the neighbour you meant?"). If the witness knows the perpetrator by name, this procedure is unnecessary. If used in case of a witness who saw the perpetrator only at the scene of the crime, the one-person show-up is much more likely to yield false identifications than properly organized line-ups would.<sup>30</sup> The one-person show-up is much too suggestive, because with this pro-

28. G.L. Wells, M. Small, S. Penrod, R.S. Malpass, S.M. Fulero and C.A.E. Brimacombe (1998) Eyewitness identification procedures: Recommendations for lineups and photospreads. *Law and Human Behavior*, 23, 603-647.

29. Wagenaar, Van Koppen and Crombag, 1933, *op. cit.*

30. See D.J. Dekle, C.R. Beale, R. Elliot and D. Huneycutt (1996) Children as witnesses: A comparison of lineup versus showup methods. *Applied Cognitive Psychology*, 10, 1-12; R.C.L. Lindsay, J.D. Pozzulo, W. Craig, K. Lee and S. Corber (1997) Simultaneous lineups, sequential lineups, and showups: Eyewitness identification decisions of adults and children. *Law and Human Behavior*, 21, 391-404; and A.D. Yarmey, M.J. Yarmey and A.L. Yarmey (1996)

cedure the police's signal to the witness is: "We got him. You just have to confirm it." If, in a proper line-up, the eyewitness has no good recollection of the perpetrator, or the suspect is innocent, it is most likely that he will identify an innocent foil, which can be detected as an error. Such error-detection is impossible with the one-person show-up.

Much is known about proper procedure for identification.<sup>31</sup> One of the major accomplishments in the field of law and psychology is the contribution to formal standards for conducting identification procedures. Procedured standards for the United States have been published recently.<sup>32</sup> The American guidelines are highly praised by the authors themselves. They conclude:

"Early in the 20<sup>th</sup> century, applied psychologist Hugo Münsterberg (1908)<sup>33</sup> claimed that psychology could help the legal system clarify the 'chaos and confusion' of eyewitnesses. The brilliant and influential legal scholar J. H. Wigmore (1909)<sup>34</sup> dismissed Münsterberg's claims with regard to what psychology had to offer at that time. Wigmore nevertheless felt that the day would come when psychology could in fact assist the legal system in its struggle with eyewitness evidence. Wigmore further stated that when psychology had something to offer the legal system regarding eyewitness evidence, the legal world would be ready to receive it. It appears that the time has come, at least in some measure. We think that both Münsterberg and Wigmore would be pleased [about our guidelines]."<sup>35</sup>

If the Americans are right in their enthusiasm, the Dutch have reasons to throw a big party: the first version of the Dutch guidelines for identification procedures dates back to 1989; a second version was published in 1992.<sup>36</sup> Willem-Albert Wagenaar was a

Accuracy of eyewitness identifications in show-ups and lineups. *Law and Human Behavior*, 20, 459-477.

31. See recently B.L. Cutler and S.D. Penrod (1995) *Mistaken identification: The eyewitness, psychology, and the law*. Cambridge: Cambridge University Press; and Wells, et al., 1998, *op. cit.*

32. Technical Working Group for Eyewitness Evidence (1999) *Eyewitness evidence: A guide for law enforcement*. Washington, DC: United States Department of Justice, Office of Justice Programs.

33. Meaning: H. Münsterberg (1908) *On the witness stand: Essays on psychology and crime*. New York: Doubleday, Page & Co.

34. Meaning: J.H. Wigmore (1909) Professor Münsterberg and the psychology of evidence. *Illinois Law Review*, 3, 399-445.

35. G.L. Wells, R.S. Malpass, R.C.L. Lindsay, R.P. Fisher, J.W. Turtle and S. Fulero (2000) From the lab to the police station: A successful application of eyewitness research. *American Psychologist*, (forthcoming, June 2000).

36. Werkgroep Identificatie (1989) *Identificatie van personen door ooggetuigen*. Den Haag: Ministerie van Justitie, Recherche Advies Commissie, werkgroep Identificatie (voorzitter P. Bender) and revised: Werkgroep Identificatie (1992) *Rapport identificatie van personen door ooggetuigen*. Den Haag: Ministerie van Justitie, Recherche Advies Commissie, werkgroep Identificatie (voorzitter P. Bender; 2e herziene druk). There is an important difference between the American and Dutch procedure. In the Dutch line-up procedure the line-up is executed

member of the committee who drafted the guidelines. These guidelines provide drafted clear-cut rules as to how the police should conduct identification procedures.<sup>37</sup>

Nevertheless, the police usually get identification procedure wrong.<sup>38</sup> The most common error committed is that a one-person show-up is used, instead of a proper line-up, in case of a witness who knows the perpetrator solely from the crime scene. This seems to remain a structural problem, which is caused by the following: although the principles of a line-up are simple, organizing one means much work for the police. People from a modelling agency must be hired to serve as foils. They must be present at the same time as the witness, the suspect, the suspect's attorney, the prosecutor, and a number of policemen not involved in the investigation, and in addition the show must be run according to the book.<sup>39</sup> A one-person show-up is much easier. Besides, Dutch courts are very lenient regarding the execution of identification procedures. Courts routinely accept procedures that fail to meet one or more of the requirements of a proper line-up. So, why should the police bother? It induces the police to see the line-up as a risk. They consider the line-up much more difficult for the witness; why run the risk that the witness does not identify the suspect as the perpetrator if courts do not adhere to the principles of identification evidence?

Consequently, the police regularly commit every conceivable error in conducting identification procedures. A case from 1998 provides an example of flaw is so obvious that one wonders how such errors can occur in the first place.<sup>40</sup> In this case, a witness saw five men in a car. One of them had a gun. Five suspects had been arrested and the policewoman running the investigation showed each of them to the witness in a one-person show-up. Each time, the witness identified the suspect. The policewoman honestly wrote all these errors in her report. And the largest error was still to come.

The question remained as to which suspect had held the gun. The police report then reads as follows:

“After Dekkers had been confronted with each of the suspects, he stated that he recognized each of them, but had not indicated yet which of the suspects had the gun. So I asked him to point out the suspect that had held the gun. Dekkers

double blind, in that a policeman who does not know which individual in the line-up is the real suspect escorts the witness. This rule is not part of the American guidelines. See also G.M. Davies and T. Valentine (1999) Codes of practice for identification. *Expert Evidence*, 7, 59-65, who also demonstrate that the procedures in England and Wales are superior to those in the United States.

37. There is also a small booklet which contains everything a policeman might want to know on the subject: A.G. van Amelsvoort (1996) *Handleiding confrontatie*. Den Haag: Vuga (2e herziene druk).

38. P.J. van Koppen and D.J. Hessing (1999) De confrontatie in de praktijk. *Ars Aequi*, 48, 103-107.

39. See Van Amelsvoort, 1996, *op. cit.*

40. Taken from Van Koppen and Hessing, 1999, *op. cit.*

stated that he was not sure and hesitated between numbers 1 and 3. Subsequently, I informed Dekkers that both other witnesses had identified the first suspect as the man with the gun. I said he should not hesitate and point one out with confidence. Then Dekkers stated that he was confident that suspect number 1 had held the gun.”

An example of a more subtle error is where the police officer conducting a line-up tells a witness who is unsure which line-up member he recognizes, to “take another look at suspect number 1” or some other inadvertent (or intentional) signal that tells the witness whom to select. In these kinds of cases, the defence time and again calls in cognitive psychologists to explain to the court what went wrong. In the end, all this work will only help if Dutch courts publicly denounce departures from the identification guidelines and stop accepting all kinds of larger and smaller errors. In private, judges do tell us that they follow the guidelines in assessing witness identifications. The problem is that in these cases a firm standpoint taken by the courts usually results in an acquittal, which is seldom appealed and never published. In short: psychology and law exerted some influence on legal procedure here, although practice proves to be more resistant than one would hope and the extent of the influence remains to be seen.

### Recovered Memories

The police may often ignore the guidelines for identification evidence; for the area of recovered memories this is less possible, because there legal psychological work has led to *binding* guidelines.

The guidelines have been made for cases in which adults claim to have been sexually abused long ago, although they have said nothing about it for years. Some of them have been silenced by fear. Others claim to have remembered nothing of the abuse for a long time and only to have become conscious of the abuse after therapy or some other experience. In the latter case, we are dealing with repressed or recovered memories. These usually involve accounts by adult women who claim to have experienced long-term sexual abuse during childhood. The women often identify multiple offenders.

Adult women often report such sexual abuse to the police or lay civil claims – or do both. In the Netherlands the possibility to take such action was recently extended,<sup>41</sup> so that, depending on the offence, victims can report childhood abuse up until they are 33 years old. The judge in these cases needs to know how much value can be attached to the victims’ statements after such a long time. The veracity of their state-

41. In 1994 a law was passed in the Netherlands to extend the statute of limitation for sexual offence cases. *Wet Verlenging Verjaringstermijn Zedenzaken*, 1994.

ments is usually crucial, because other evidence is lacking or limited. The police are confronted with similar problems.

Typical of such cases is that the victim has undergone psychotherapy prior to reporting the abuse to the police. Therapy seems to play an important role in the origination of the report. This creates a problem for victims who claim to have repressed the memories of sexual abuse for a long time. There are many indications that therapy is the decisive factor in the report's origination and that the story reported was created by the therapy. Such cases must be distinguished from cases in which the victim has always remembered the sexual abuse, but only feels strong enough to report the abuse after therapy. In both types of case the victim received therapy before reporting the sexual abuse. For this reason, the police cannot always tell from the outset with which type of memories they are being confronted.

The recovered memory cases have led to great controversy, in which by many suggest that experiences may be so traumatic that victims may not be able to deal with them in a normal way.<sup>42</sup> Instead, such memories are said to become repressed, i.e. relegated to a particular part of the memory system, called the unconscious. There they lie untouched by conscious experience and therefore unaltered, but also inaccessible by ordinary mnemonic techniques. They stay active, however, in that at times they disturb normal conscious experience and behaviour in ways unknown to those who possess them.

The theory of repressed memories is controversial and has in recent years led to what is sometimes referred to as 'the memory wars'.<sup>43</sup> Many clinicians claim that they have often succeeded in recovering repressed memories of traumatic events in their patients.<sup>44</sup> Others have stated that repression is not a real phenomenon. Memory, they say, does not work that way and if recovery of repressed memories seems to occur,

42. E.S. Blume (1993) *Secret survivors: Uncovering incest and its aftereffects in women* (10th ed.). New York: Ballentine; J.L. Herman (1992) *Trauma and recovery*. New York: Basic Books; L. Terr (1994) *Unchained memories: True stories of traumatic memories, lost and found*. New York: Basic Books; R. Frederickson (1992) *Repressed memories: A journey to recovery from sexual abuse*. New York: Simon and Schuster.

43. F. Crews (1995) *The memory wars: Freud's legacy in dispute*. London: Granta; E.F. Loftus (1997) Dispatch from the (un)civil memory wars. In J.D. Read and D.S. Lindsay (eds.), *Recollections of trauma: Scientific evidence and clinical practice* (pp. 171-198). New York: Plenum; J.D. Read (1999) The recovered/false memory debate: Three steps forward, two steps back? *Expert Evidence*, 7, 1-24; M.G. Goldzband (1995) The hottest topic. *Psychiatric Annals*, 25, 477-485.

44. E. Bass and L. Davis (1995) *The courage to heal: A guide for women survivors of child sexual abuse* (3rd ed.). New York: Harper & Row; J. Briere and J. Conte (1993) Self-reported amnesia for abuse in adults molested as children. *Journal of Traumatic Stress*, 6, 21-31; G.C. Feldman (1993) *Lessons in evil, Lessons from the light: A true story of satanic abuse and spiritual healing*. New York: Crown; Terr, 1994, *op. cit.*; L.E.A. Walker (1994) *Abused women and survivor therapy: A practical guide for the psychotherapist*. Washington, DC: American Psychological Association.

the resulting memories are really pseudomemories, artefacts of the psychotherapeutic methods employed by the therapists.<sup>45</sup> Gradually, however, clinicians have come to admit that induction of pseudomemories during therapy is not altogether impossible.<sup>46</sup>

Several studies have attempted to provide us with proof of the existence of repression.<sup>47</sup> Most of these studies, however, employed a retrospective methodology, which is really inappropriate for deciding the issue. Moreover, for the occurrence of amnesia they relied on the self-reports of the alleged victims. These studies have been heavily criticised for these and other methodological flaws.<sup>48</sup> For the time being we tend to

45. D.S. Holmes (1990) The evidence for repression: An examination of sixty years of research. In J.L. Singer (ed.), *Repression and dissociation: Implications for personality theory, psychopathology, and health* (pp. 85-102). Chicago: University of Chicago Press; E.F. Loftus (1993) The reality of repressed memories. *American Psychologist*, 48, 518-537; E.F. Loftus and K. Ketcham (1994) *The myth of repressed memory: False memories and allegations of sexual abuse*. New York: St. Martin; S.A. Mulhern (1991) Satanism and psychotherapy: A rumor in search of an inquisition. In J.T. Richardson & J. Best and D.G. Bromley (eds.), *The satanism scare: Social institutions and social change* (pp. 145-172). New York: Aldine De Gruyter; R.J. Ofshe and E. Watters (1994) *Making monsters: False memories, psychotherapy, and sexual hysteria*. New York: Scribner; H. Wakefield and R. Underwager (1992) Uncovering memories of alleged sexual abuse: The therapists who do it. *Issues in Child Abuse Accusations*, 4, 197-213; N.P. Spanos (1996) *Multiple identities and false memories: A sociocognitive perspective*. Washington, DC: American Psychological Association.

46. J. Briere (1997) An integrated approach to treating adults who were abused as children with specific reference to self-reported recovered memories. In J.D. Read and D.S. Lindsay (Eds.), *Recollections of trauma: Scientific evidence and clinical practice* (pp. 25-48). New York: Plenum; C.A. Courtois (1998) *Recollections of sexual abuse: Treatment principles and guidelines*. New York: Norton; R.P. Kluff (1997) The argument for the reality of delayed recall of trauma. In P.S. Appelbaum & L.A. Uyebara and M.R. Elin (eds.), *Trauma and memory: Clinical and legal controversies* (pp. 25-57). New York: Oxford University Press; F. Grunberg and T. Ney (1997) Professional guidelines on clinical practice for recovered memory: A comparative analysis. In J.D. Read and D.S. Lindsay (eds.), *Recollections of trauma: Scientific evidence and clinical practice* (pp. 541-555). New York: Plenum.

47. A.W. Schefflin and D. Brown (1996) Repressed memory or dissociative amnesia: What the science says. *Journal of Psychiatry and Law*, 24, 143-188.

48. E.F. Loftus, M. Garry and J. Feldman (1994) Forgetting sexual trauma: What does it mean when 38% forget? *Journal of Consulting and Clinical Psychology*, 62, 1177-1181; H.G. Pope and J.I. Hudson (1995a) Can individuals 'repress' memories of childhood sexual abuse? An examination of the evidence. *Psychiatric Annals*, 25, 715-719; H.G. Pope and J.I. Hudson (1995b) Can memories of childhood sexual abuse be repressed? *Psychological Medicine*, 25, 121-126; H.G. Pope, J.I. Hudson, J.A. Bodkin and P. Oliva (1998) Questionable validity of 'dissociative amnesia' in trauma victims: Evidence from prospective studies. *British Journal of Psychiatry*, 172, 210-215; C.R. Brewin (1996) Scientific status of recovered memories. *British Journal of Psychiatry*, 169, 131-134; H.F.M. Crombag and H.L.G.J. Merckelbach (1996) *Hervonden herinneringen en andere misverstanden*. Amsterdam: Contact.

adopt Holmes' dictum that "at present time there is no controlled laboratory evidence supporting the concept of repression".<sup>49</sup>

In the meantime, Hans Crombag and Harald Merckelbach published a volume of the subject.<sup>50</sup> The book did not seem to have a direct impact, because the repressed memory cases kept coming. But gradually things changed, also under the influence of groups of individuals who claimed they were at the receiving end of unfounded accusations based on recovered memories.<sup>51</sup> The Minister of Justice asked Van Koppen to write a report on the subject.<sup>52</sup> Simultaneously, the chief prosecutors in the country asked a committee headed by the prosecutor-general J.C.A. Al – of which Hans Crombag was a member – to do the same. All this resulted in guidelines drafted by the then chief prosecutor in Zwolle Joost Hulsebek.<sup>53</sup> Although these guidelines are more generally aimed at how the police and prosecution – for whom the guidelines are binding – should treat cases of sexual abuse in which the alleged victim is dependent on the alleged perpetrator, it reproduces the phases in police investigation as presented in the Van Koppen report, but also introduces something completely new into the legal world. In cases in which the complaint to the police (1) contains recollections of abuse before the age of 3; (2) pertains to ritual abuse; or (3) recovered memories, the police and the prosecution are *obliged* to consult an expert group before taking any further action. The consultation is compulsory, but the expert group's advice is not. But please note that this advice becomes part of the case file, so that the prosecution must have strong arguments to take any steps other than those advised by the expert group. These guidelines are unique in the world and their origins can be directly traced to work done by Hans Crombag.

49. Holmes, *op. cit.*, pp. 85-102. For similar conclusions see also D.S. Lindsay and J.D. Read (1995) 'Memory work' and recovered memories of childhood sexual abuse: Scientific evidence and public, professional, and personal issues. *Psychology, Public Policy, and Law*, 1, 846-908; Loftus, Garry and Feldman, 1994, *op. cit.*; and R.J. Ofshe and M.T. Singer (1994) Recovered-memory therapy and robust repression: Influence and pseudomemories. *International Journal of Clinical and Experimental Hypnosis*, 42, 391-410.

50. Crombag and Merckelbach, 1996, *op. cit.*

51. See the description of this process by the Nationale Ombudsman (2000) *Openbaar rapport op verzoekschrift van De Werkgroep Fictieve Herinneringen met een klacht over een gedraging van het Ministerie van Volksgezondheid, Welzijn en Sport*. Den Haag: De Nationale Ombudsman (rapport nummer 2000/105, d.d. 3 april 2000).

52. P.J. van Koppen (1998) *Recovered crimes: Sexual abuse reported to the police after therapy*. Leiden: Netherlands Institute for the Study of Criminality and Law Enforcement (NISCALE) (Advice to the Minister of Justice; translation of P.J. van Koppen (1997) *Hervonden misdrijven: Over aangiftes van seksueel misbruik na therapie*. Leiden: Nederlands Studiecentrum Criminaliteit en Rechtshandhaving (NSCR) (Advies aan de Minister van Justitie)).

53. College van Procureurs-Generaal (1999) *Aanwijzing opsporing seksueel misbruik in afhankelijkheidsrealities*. *Staatscourant*, 174 (10 september), 13.



## Conclusions

Our conclusion can be quite simple. Hans Crombag is wrong in his opinion that the potential and practical contribution of psychology to legal decision-making is most of the time ignored. It is not ignored, although relations are sometimes very tense. The public reactions of lawyers to *Dubieuze Zaken*, in which judicial decision-making in criminal cases were criticized, were very fierce. The legal profession has been much more receptive to results from research in legal psychology in areas other than the one here discussed. The two examples we offered – the guidelines for eyewitness identification and for repressed memory cases – are outright successes of legal psychology, although not across the board. Lawyers seem to listen better to legal psychologists the further away psychologists' stay from the core business of lawyers. Thus, proposals for eyewitness identification are more readily accepted than proposals for changes in judicial decision-making. And even in the latter case, the core issues of *Dubieuze Zaken* seem to continue to trickle down onto the domain. Hans Crombag should not be so pessimistic!