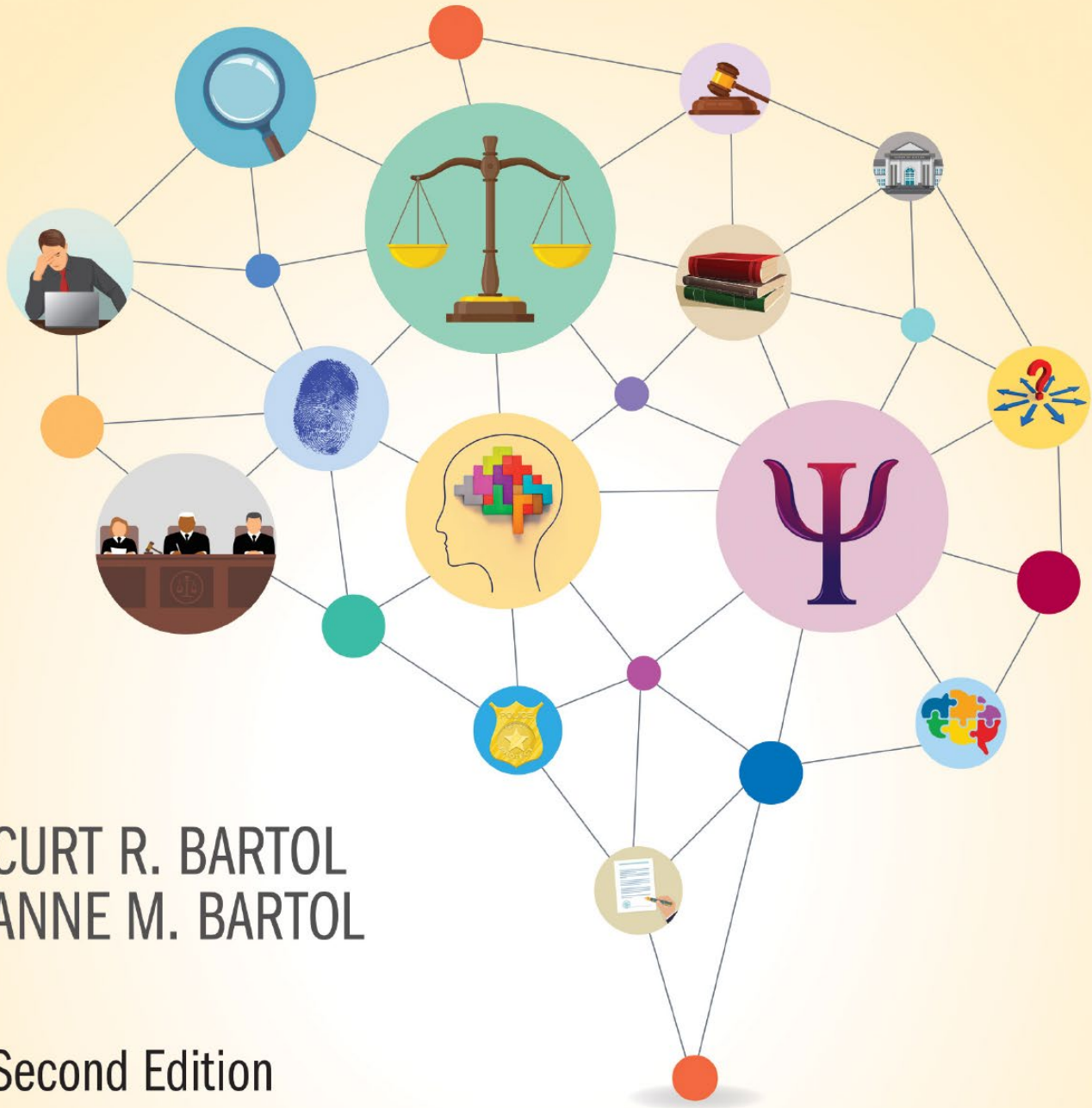

CURT R. BARTOL
ANNE M. BARTOL

Second Edition

PSYCHOLOGY AND LAW

RESEARCH AND PRACTICE

Psychology and Law

Second Edition

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Research and Practice

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Anne M. Bartol

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PREFACE

The connection between psychology and law can be traced to the turn of the 20th century, when experiments in the psychological laboratory were found to be relevant to the law. Since at least that time, the two fields have been interrelated while retaining their independence. The relationship has continued to develop, often gradually and cautiously, but always in a steady direction. The intersection of psychology and law today is well established as mutually advantageous. For research psychologists, it is a vibrant field of study. Practicing psychologists find that the requests for their services are ever increasing. For its part, the law benefits from knowledge gained from the behavioral sciences.

There are many observable differences between psychology and law, reflected in their assumptions, goals, and practices. Like all sciences, psychology is exploratory, and its knowledge is continually evolving. Often this means that psychology cannot provide definitive answers to questions the legal system poses. For example, psychologists cannot say who would be the better parent in a child custody case, but they can evaluate parenting plans. They cannot predict with a high degree of certainty whether an individual will or will not be violent, but they can offer some assessment of the probability that a given individual will do harm to himself or others.

Importantly, psychology has accumulated a wide store of knowledge in areas such as human memory, cognition, decision making, and child and adolescent development, all of which are extremely relevant to the legal system. Research on memory and cognition is relevant to eyewitness testimony. Research on group and individual decision making is relevant to the work of judges and juries. Research on the emotional and cognitive development of adolescents is relevant to their responsibility for criminal acts as well as the justice system's decisions about their future. Research on risk assessment is relevant to the prevention of violence. These are but a few of many topics to be discussed in this book.

In addition to conducting research on legally relevant topics, psychologists interact with the law in many contexts. They serve as consultants, clinicians, and experts testifying in court. Professional organizations, most notably the American Psychological Association (APA), submit briefs to appeals courts that summarize the research in given areas, such as research on adolescent decision making or the effects of discrimination.

Many mental health professionals associated with psychology and law conduct psychological assessments that are requested by lawyers and courts or mandated by statutes. For example, psychologists assess risks and threats, parenting plans, children for educational purposes, criminal defendants, emotional suffering in civil suits, and the capacity of individuals to write their wills and make health care decisions. Assessment is woven explicitly or implicitly into virtually every chapter of this book, and a special concluding chapter focuses directly on this topic.

Numerous court cases, particularly those that reached the U.S. Supreme Court and other appellate courts, are cited throughout the book. Many are summarized in accompanying tables. We caution that these cases are representative, not exhaustive. In the hands of law professors and law students, the cases in this book would be subjected to extensive legal analysis. We use them not for that purpose, but rather as a springboard to cover psychological concepts and issues.

The subject matter of the cases chosen relates to psychology, and the decisions themselves have often led to more psychological research. For example, prior to the landmark *Miranda v. Arizona* (1966) case, suspects in police custody were routinely submitted to psychologically coercive interrogation techniques without being advised of their legal rights. The decision by the U.S. Supreme Court that required police to warn suspects placed some limits on this practice, but, as many readers undoubtedly know, this was not the last word on the subject. The *Miranda* case, however, eventually led many psychologists to ask, "Do people really understand these *Miranda* warnings?" as well as to design and validate instruments to measure this comprehension. In a similar manner, Supreme Court cases related to eyewitness identification prompted researchers to examine in depth what factors led to accuracy and inaccuracy in that regard.

NEW MATERIAL AND CHANGES FROM THE PREVIOUS EDITION

Preparing a new edition of *Psychology and Law* has been both challenging and stimulating. What begins as a relatively clear-cut process ("You just update, don't you?" we are often asked) becomes much more complicated. Both psychology and law are dynamic fields, constantly in flux, despite the fact that each is based on a solid body of theory, research, and—especially in the case of law—precedent. In addition, current events provide fodder for illustrating concepts in the chapters. Consequently, what begins as a process "just" to update meanders into previously unexplored territory. This edition, for example, includes topics that had not been covered in the previous edition, such as neuropsychological assessments, telepsychology, and adversarial allegiance, as well as court decisions relating to intellectual disability, civil commitment of sex offenders, juvenile offenders, and civil rights.

Reviewers of the previous edition suggested helpful changes, most of which we have implemented. A special topics chapter has been replaced with a new chapter on children, adolescents, and the criminal law, Chapter 8. Some material from the previous special topics chapter (e.g., profiling) has been integrated into other chapters in the text when appropriate. We have deleted material on hypnosis and the polygraph, in favor of more on the cognitive interview and detection of deception. Two chapters on the jury and judge's decision making have been advanced to follow directly the chapters on psychology and the courts, the criminal investigative process, and eyewitness evidence, while the chapter on criminal competencies and responsibility now follows these. We removed *Daubert*-related material in Chapter 1 and included it in Chapter 2, which deals with courts and expert testimony.

In addition to these structural changes, this edition includes the following:

- Thirty-two new boxes, which fall under three themes: case studies, research projects, and contemporary topics. Aware that these boxes cannot do justice to a complex case, a controversial topic, or a carefully designed study, we hope that readers will be prompted to explore these resources in more depth. Most boxes include questions for discussion or further thought.
- New court cases and statutes, which have been integrated into the chapters as relevant
- Increased coverage of contemporary issues such as telepsychology, neuropsychology, adversarial allegiance, and actuarial instruments used in bail and sentence decision making

- Updated coverage of adolescent capability and criminal culpability in the eyes of the courts
- Greater emphasis on Steinberg's dual-system model and increased coverage of adolescent neuroplasticity
- Increased coverage of child welfare evaluations and parental alienation syndrome (PAS), which has gained attention in some family courts but has not been documented in the psychological research
- More coverage of juvenile interrogation, false confessions, and plea bargaining
- More in-depth descriptions of U.S. Supreme Court cases and how they affect the research and practice of psychology
- Emphasis on the ethical and legal differences between the duty to warn and the duty to protect and the wide variations in state laws that reference these duties
- Discussion of risk communication and the various models proposed for that purpose
- More emphasis on research in jury and judicial decision making, including discussion of implicit and explicit bias
- The addition of more than 300 recent research findings on topics related to psychology and law

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Once again, our own gang of eight has provided us with unflagging support and encouragement in this and every other endeavor. To a person they are compassionate, unique, whip-smart, and funny, and they give us hope for the future.

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We are appreciative of the professors who reviewed the previous edition, as well as those who reviewed three in-progress chapters:

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Finally, a book like this would not be possible were it not for the groundwork laid by researchers in psychology, law, and related fields. They have asked and answered crucial, probing questions, and they continually delve into new and exciting areas to explore. Some have careers spanning many years of research, teaching, and practice, while others are newly minted scholars. We hope they know that their work is appreciated.

ABOUT THE AUTHORS

Curt R. Bartol was a college professor for more than 30 years, teaching a wide variety of both undergraduate and graduate courses, including Biopsychology, Criminal Behavior, Juvenile Delinquency, Introduction to Forensic Psychology, Social Psychology, Profiling, and Psychology and Law. He earned his PhD in personality/social psychology from Northern Illinois University in 1972. He studied political science and law at the University of Wisconsin–Madison under a fellowship from the National Institute for the Humanities (NIH). He was instrumental in creating and launching Castleton State College's graduate program in forensic psychology and served as its director for 6 years. As a licensed clinical psychologist, he has been a consulting police psychologist to local, municipal, state, and federal law enforcement agencies for more than 30 years. In addition to *Psychology and Law*, he has coauthored *Criminal Behavior: A Psychosocial Approach* (now in its 11th edition); *Introduction to Forensic Psychology: Research and Application* (5th ed.); *Juvenile Delinquency and Antisocial Behavior: A Developmental Perspective* (3rd ed.); *Criminal and Behavioral Profiling*; and *Psychology and Law: Theory, Research, and Application* (3rd ed.). He served as editor of SAGE's *Criminal Justice and Behavior: An International Journal* for 17 years. He also co-edited *Current Perspectives in Forensic Psychology and Criminal Behavior* (3rd ed.).

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CHAPTER ONE

INTRODUCTION

Just as lawyers-in-training must be taught to appreciate the culture of social science, so social scientists must develop a greater appreciation of the culture and traditions of law. Irrational as some of these traditions may seem, they are ancient and deeply ingrained.

(Conley, 2000, p. 827)

This book is about the interaction of psychology and law, but it is also an invitation to think about common knowledge in a different way. It is common knowledge, for example, that everyone sleeps, we all experience stress, our relationships with others are imperfect, and children are not miniature adults. It is not surprising that psychology—commonly defined as the science of human behavior—has something to say about all this. Psychologists have studied sleep, stress, healthy and dysfunctional relationships, and child development—and these represent only a minute portion of subjects that make psychology a fascinating enterprise. What we invite the reader to do in this book is appreciate the interaction of psychology and the law with regard to these and other topics. Let us illustrate with two cases.

In the early morning hours of May 23, 1987, 23-year-old Toronto resident Kenneth Parks arose from the couch where he had fallen asleep while watching *Saturday Night Live*. He put on his coat and reportedly sleepwalked to his car, got into the vehicle, and drove (apparently while still asleep) 14 miles to the home of his in-laws and broke in. Both were asleep in bed at the time. He stabbed his mother-in-law to death with a kitchen knife and seriously assaulted his father-in-law. Immediately after the incident, Parks drove to a nearby police station. He said the next thing he could recall was being at the police station asking for help and confessing to the killing.

Parks was charged with first-degree murder and attempted murder. At his trial, he presented a defense of automatism, stating that at the time the incidents took place, he was sleepwalking and was not aware of what he was doing. Briefly, **automatism** is defined as behavior performed in a state of mental unconsciousness or dissociation, without full awareness (Black, 1990). Parks had a history of sleepwalking and had been experiencing significant stress in his life, but there was no indication he had ever committed a violent act, either awake or asleep. In fact, his mother-in-law had called the 6'5" man the "gentle giant." Parks admitted he probably committed the violence but did not have the necessary criminal intent. The trial court heard from two behavioral scientists and three mental health professionals called by the defense. They testified that Parks was sleepwalking at the time the violence occurred, that sleepwalking was a relatively

common sleep disorder, and that there was no medical or psychological treatment designed to prevent it. Parks was acquitted of the crimes. In a final ruling on this case, the Supreme Court of Canada (*Regina v. Parks*, 1992) set guidelines for a sleepwalking defense and provided some clarity on issues relating to injurious acts and consciousness during the human sleep cycle.

In the United States, sleepwalking is rarely used as a defense to criminal conduct, but some legal commentators indicate it is only a matter of time before automatism reaches more courts (Melton et al., 2018). Although violent behavior during sleep is relatively rare, it presents troubling implications for the legal system (Weiss et al., 2011). The notion that it is possible to engage in complex injurious or violent behavior while asleep is usually met with skepticism.

During the night of January 16, 1997, Scott Falater, a 41-year-old product manager with Motorola, claimed he was sleepwalking when he killed his wife of 20 years. He stabbed her 44 times with a hunting knife, wrapped the bloody knife in his clothes, and hid it and other evidence in the wheel well of the family car. When he returned to a still-alive wife, he dragged her to a swimming pool and held her head underwater until she drowned. Falater did not deny killing her but stated he did not remember anything about the incident because he was sleeping throughout. Like Park, he had a history of sleepwalking. The prosecutor in the case said the sleepwalking defense was complete nonsense and informed the press he would seek the death penalty if Falater was convicted. It is clear that the prosecutor believed that Falater was malingering, or faking, and was conscious of his actions at the time of the offense. Experts testified for both the defense and prosecution, disagreeing over whether the violence was committed while sleepwalking. According to experts for the prosecution, Falater's actions were too calculated and deliberate for him to be sleepwalking. The jury found him guilty of first-degree murder, and the court sentenced him to life in prison without parole (*Arizona v. Falater*, 1997).

Why do we open this chapter—and this book—with two cases illustrating sleepwalking? This is not a topic that most readers probably associate with psychology, yet neuropsychologists are at the forefront of research in this area. Advances in sleep research have discovered that complex, violent, and potentially injurious acts can, and do, arise during the sleep cycle, without conscious awareness and, therefore, without responsibility (Mahowald & Schenck, 2000). Therefore, cases in which defendants deny responsibility for violent or injurious acts they committed while supposedly asleep appear to be on the increase (Cramer Bornemann, Mahowald, & Schenck, 2006; Mahowald & Schenck, 2000; Weiss et al., 2011). Many of these cases have involved sexual assault, including rape. However, the fact that someone injures another while purportedly asleep does not necessarily mean that person will not be held accountable, as we saw in the two cases discussed previously. Psychological research may help explain this phenomenon, but the law will decide what to do with that explanation.

These two cases—Parks and Falater—illustrate the fascinating intersection of law and psychology. In each case, respected researchers and behavioral scientists informed the court about sleep and the phenomenon of sleepwalking. They also discussed **malingering**, which is the deliberate faking or feigning of a disorder to achieve a particular desired outcome (VandenBos, 2007). In the Falater case, we also saw contrasting opinions from experts testifying for the defense and the prosecution. This is a common feature of the adversarial process that psychologists often find themselves a part of, as we will discuss later in the chapter.

GOALS AND DEFINITIONS

Psychology and Law is designed to educate students about contemporary psychological research and theories that are relevant to the legal system and those who participate in it, particularly law enforcement officers, judges, lawyers, and jurors. If you are reading this book, you are likely interested in both psychology and law. If you are a student, you may be considering a future in one or both fields, but you may not be aware of the many career opportunities

within them. As one group of researchers observed, "it appears that students' knowledge of psychology and law related careers is not commensurate with their levels of interest in these areas" (Stark-Wroblewski, Wiggins, & Ryan, 2006, p. 275). Over the past decade, however, books, journals, conferences, and classes in psychology and law, forensic psychology, investigative psychology, and legal psychology, among others, have helped fill this gap. (For information on activities and careers in psychology and law, see **Boxes 1.1** and **1.2**.)

The field of psychology and law is extremely diverse, and it is expanding and changing rapidly. This will be reflected throughout the book, as we review research and developments in case law, state and federal statutes, investigatory methods used in law enforcement, and both criminal and civil proceedings. A substantial portion of the available research in psychology and how it relates to legal issues has been published since the 1980s. Furthermore, psychology and law is a vibrant specialty with the potential for considerable additional growth (Heilbrun & Brooks, 2010). This is reflected in the work of a special section of the American Psychological Association (APA), Division 41, the American Psychology-Law Society (AP-LS) as well as its Committee on Legal Issues (COLI), which advises the APA Board of Directors. The APA's many activities include conducting a survey of career opportunities in psychology and law, publishing online graduate school information, developing ongoing ethical standards, sponsoring workshops, publishing handbooks, surveying minority issues and women's issues in the field, and preparing friend-of-the-court briefs (*amicus curiae* briefs) for appellate courts.

BOX 1.1

Work Settings of Psychologists Who Participate in Psychology and Law Activities

Based on recent statistics (Griffin, 2011), independent practice is the primary work setting of psychologists involved in psychology and law activities (43%). These individuals are usually clinically trained, such as clinical psychologists, counseling psychologists, or school psychologists. As noted in the text, some clinically trained practitioners call themselves forensic psychologists, and in some states, they are certified as such. In fact, in some jurisdictions, certification is a minimum requirement for testifying on such matters as the defendant's competency to stand trial or sanity, topics to be discussed in Chapter 7. Those psychologists in independent practice also conduct risk assessments, perform child custody evaluations in family law proceedings, and assess disability claims, among other activities.

Another 25% of surveyed psychologists in psychology and law indicated that they work in university or other academic settings. Most likely, they engage in teaching and research endeavors but also offer consulting services. Twelve percent of psychologists involved in psychology and law activities said they worked in a hospital or other human service setting. Ten percent identified governmental settings, which probably involve state-sponsored psychological clinics, federal agencies, correctional facilities, and state and local police agencies. Almost 99% of the surveyed psychologists indicated that they have a doctorate degree. Some have both a doctorate in psychology and a law degree.

Career opportunities in psychology and law are promising, but another recent survey (Buck et al., 2012) indicates that there are gender disparities, as there are in many professions. Although women are at least as likely as men to obtain advanced degrees in this field, and although they readily obtain entry-level positions in both academic and nonacademic spheres, they often do not rise as rapidly in the ranks, despite their competence or level of productivity. This tendency to not progress as rapidly as men is referred to in the literature as the *leaky pipeline effect*. The survey by Buck et al.—an anonymous survey of 738 female members of the AP-LS—indicated that gender disparities were particularly evident in academe. However, respondents in all settings expressed concerns over balancing work and life obligations. The results of the survey highlight the critical importance of recognizing the contributions of all members of professional associations and providing career assistance and mentoring to reduce disparities within professions.

Definitions of Psychology and Law

Psychology and law may aptly be referred to as *legal psychology*. Both terms are often used interchangeably with *forensic psychology*, but there is a distinction. For many years we have advocated a broad definition of forensic psychology that includes psychology and law, or legal psychology, under its umbrella (Bartol & Bartol, 1987, 2019). We will discuss this broad definition shortly.

Psychology and law can also be defined standing alone. It is the scientific study and clinical application of psychological knowledge relevant to the legal system. It is essentially the interaction between two disciplines, and it encompasses any and all topics that are of legal interest. As such, psychology and law is nearly infinite in scope, limited only by the creativity of scholars and practitioners in disparate fields. In addition to and often in collaboration with psychologists, other mental health and behavioral and social science professionals play prominent roles in the law and the legal system.

Nevertheless, it makes sense to nest psychology and law into a broad definition of forensic psychology. Indeed, many legal psychologists call themselves forensic psychologists and are so certified. In recent years, forensic psychology has been both narrowly and broadly defined (Bartol & Bartol, 2019; DeMatteo, Marczyk, Krauss, & Burl, 2009; Neal, 2018). When broadly defined, **forensic psychology** may include psychologists who considered themselves clinicians and psychologists who consider themselves researchers or scientists. Narrowly defined, forensic psychology is restricted to clinical work performed for and presented to the judicial system. As DeMatteo, Marczyk, et al. (2009) note, the narrow definition encompasses only clinically based practitioners, such as clinical psychologists, counseling psychologists, school psychologists, or other specialists who testify in or consult with courts. Research psychologists or psychological scientists who conduct research and do not consider themselves clinical or practicing psychologists are excluded from the definition. Also excluded are psychologists who consult with law enforcement agencies and juvenile and adult corrections. DeMatteo, Marczyk, et al. point out that increasing dissatisfaction with the narrow conceptualization of forensic psychology led the AP-LS to endorse a broad definition, particularly one that would embrace the contributions of researchers as well as clinicians or practitioners. Therefore, broadly defined, *forensic psychology* includes both clinicians and researchers, and it includes activities related directly to the courtroom as well as activities and situations both *before* they reach the courtroom and *after* going through the civil and criminal justice systems.

Forensic psychology is also broad, not only because it embraces the extensive contributions of clinical psychologists, but also because it welcomes the expanding research, application skills, and perspectives of developmental, social, cognitive, and neurobiological psychologists. As stated by Cutler and Zapf (2015b), "contemporarily, forensic psychology is broadly defined with respect to psychological perspectives" (p. xvii). They note that clinical psychologists provide services that include evaluations of competencies in both criminal and civil courts, cognitive psychologists may help police departments develop procedures for obtaining accurate eyewitness identifications, developmental psychologists help courts understand development in children and adolescents, social psychologists help us understand how jurors function as a group, and neuropsychologists possess vast stores of information on brain development that is pertinent to both criminal and civil cases. All these topics, and more, will be addressed in this book, because all are at the intersection of psychology and law.

For organizational purposes, we have divided forensic psychology into five categories, with legal psychology or psychology and law being one of these (see **Figure 1.1**). The

Figure 1.1 Five Categories of Forensic Psychology

categories are not mutually exclusive, and there is considerable overlap in both research and practice. Although this conceptual division is by no means universally accepted, handbooks of forensic psychology commonly include coverage of the five areas. This includes the two-volume *APA Handbook of Forensic Psychology* (edited by Brian Cutler & Patricia Zapf, 2015a) and the *Handbook of Forensic Psychology* (edited by Irving Weiner & Randy Otto, 2014).

We understand and respect the perspective of psychologists who prefer to keep their specialties separate from the broader context of forensic psychology. For example, many correctional psychologists (e.g., Magaletta, Butterfield, & Patry, 2016; Magaletta et al., 2013) and police psychologists (e.g., Brewster et al., 2016) do not call themselves forensic psychologists and instead prefer the title *correctional psychologist*, *police psychologist*, or *public safety psychologist*. Magaletta et al. (2016) point out, "Unlike forensic psychology, which includes practice at the interface of psychology and law, clinical practice in a correctional setting concerns the provision of services to individuals emerging after that intersection has occurred—within correctional settings" (p. 540). There is no question that the two areas are at least related, however. As Neal (2018) writes, "Forensic and correctional psychology are related by their historical roots, involvement in the justice system, and the shared populations of people they study and service" (p. 651).

It is important to emphasize that although this text focuses on the professional roles of psychologists, other professionals may be equally important. They include psychiatrists, social workers, certified special educators, and psychiatric nurses, to name but a few. As we will mention in chapters ahead, these professionals work both individually and in teams to conduct research, consult with the legal system, and operate clinics offering services in legal contexts.

These cooperative efforts across disciplines have resulted in some blurring of professional lines and, fortunately, less animosity between professionals than was displayed in the past. Although each profession maintains its separate identity and associations, we see increasingly more collaboration in both work settings and publications. In this spirit, for example,

academic journals publish interdisciplinary articles, often coauthored by professionals from different disciplines. One current handbook for professionals (Drogin, Dattilio, Sadoff, & Gutheil, 2011) consists of multiple chapters, each of which is written by a psychologist and a psychiatrist. Therefore, while we cite in particular the work of psychologists, we acknowledge the important contributions of other professionals as well. Often we refer to clinicians and mental health practitioners, rather than to psychologists, to emphasize the interdisciplinary nature of the expertise available to the law.

To summarize, then, psychology and law is, in our view, a subset of a broader field of theory, research, and practice. As will be demonstrated throughout the book, this discipline often interacts with the other subsets of forensic psychology listed in **Figure 1.1**. It is, though, so broad in scope that it also traverses topics that are identified with other subsets. Significantly, psychology and law is the subset that is most likely to focus on civil law, which will be evident in the chapters ahead. Furthermore, it is limited only by what reaches the legal system and the creativity of psychological theorists and researchers.

PSYCHOLOGY AND LAW: THREE APPROACHES

Nearly 40 years ago, Craig Haney (1980) suggested a perceptive approach to the psychology and law relationship, which we adopt and integrate throughout this text. He believed it useful to distinguish three relationships: (1) **psychology *in* the law**, (2) **psychology *and* the law**, and (3) **psychology *of* the law** (see **Table 1.1**). These three relationships are important in identifying the various roles that most psychologists take when working with the legal system.

Psychology in the Law

Of the three relationships described by Haney, the psychology *in* the law relationship is the most common. In this situation, attorneys and judges utilize psychologists and their knowledge and experience to help in the resolution of cases. Most of the psychologists involved in this relationship are counseling psychologists, clinical psychologists, neuropsychologists, or forensic psychologists with some legal training and experience. Let's take, for example, the family court system, which is technically a subset of civil law and is covered in Chapter 9. Family courts

Table 1.1 Three Psychology–Law Relationships

Psychology *in* the Law	Psychology *and* the Law	Psychology *of* the Law
Psychologists provide services to the legal community (e.g., assessments of candidates, defendants, or litigants; consultation in jury selection)	Psychologists conduct research in areas that are pertinent to the law (e.g., eyewitness testimony, child development)	The law itself becomes the object of study (e.g., why people obey the law; decision making of judges)
Typically clinical and consulting	Mutually independent relationship between the disciplines	Abstract and theoretical approach to studying law
Most common relationship	Common relationship	Least common relationship

Source: Adapted from Haney (1980).

today handle a large variety of cases, including but not limited to child custody requests, domestic violence restraining orders, divorce matters, requests for child and spousal support, requests for visitation by relatives, relocation requests on the part of a custodial parent, child neglect, delinquency proceedings, and requests from minors seeking emancipation. Traditionally, the role of psychologists in the family court system has been relatively limited and clearly defined (Juhas, 2011). However, in light of the shifting needs and extended duties of the family court in recent years, the roles of psychologists have also expanded significantly (Juhas, 2011).

As illustrated, then, the psychology *in* the law relationship is typically a clinical and consulting one. In both criminal and civil contexts, psychologists conduct various assessments whose results are communicated to judges and lawyers or even advise lawyers on strategies for interviewing witnesses or selecting jurors. Numerous handbooks and articles are available to assist mental health practitioners in conducting this clinical work (e.g., Cutler & Zapf, 2015b; Grisso, 2003, 2013, 2014; Heilbrun, Grisso, Goldstein, & LaDuke, 2013; Melton et al., 2018; Weiner & Otto, 2014). As mentioned earlier in the chapter, the APA provides a number of standards and guidelines to advise clinicians and practitioners.

Psychology and the Law

In the psychology *and* the law relationship, psychology remains a separate discipline, analyzing and examining various components of the law and the court processes from a psychological perspective. Psychology *and* the law represents a relationship where psychologists conduct basic and applied research into the most challenging issues faced by the legal system, including the law enforcement community. With the execution of well-designed studies and the thoughtful formulation of theory to tie the results of these experiments together, psychology can develop an impressive body of psychological knowledge relevant and helpful to the law. The sleep research mentioned at the beginning of this chapter is one example. Another is the extensive research on eyewitness testimony and lineup identifications. Research by psychologist Elizabeth Loftus and others has cogently demonstrated why identification mistakes happen and has suggested ways to avoid them. Developmental psychologist Laurence Steinberg and his colleagues have extensively researched brain development in adolescents and young adults and what role this development plays in the legal context during interrogation and in holding them criminally accountable. Psychologist Saul Kassin and his colleagues have conducted considerable research on confessions and discovered that many confessions—even to serious crimes—are less reliable than previously assumed. Psychologists Thomas Grisso, Allison Redlich, Kirk Heilbrun, Mark Cunningham, and Richard Rogers, among others, have studied issues relating to offenders with mental disorders, comprehension of one's rights, inmates on death row, and malingering. A majority of these research psychologists in the psychology *and* the law relationship are social psychologists, cognitive psychologists, neuropsychologists, community psychologists, and—more generally—human experimental psychologists. The following are additional examples of questions research psychologists try to answer:

- Can decision making by jurors really be unaffected by information they are told to disregard?
- Are some people better at detecting lies than others?
- How reliable and valid is criminal profiling?
- Does human memory work well under stressful and traumatic circumstances?
- Do persons with mental disorders have the ability to make decisions in their own best interest?
- Should 14-year-olds be held responsible for serious crimes?

- What interviewing and interrogation procedures are most appropriate for adolescents?
- Under what conditions do false confessions to a crime occur?

In the psychology *and* the law relationship, psychology tries to answer questions like these and communicate them to those working within the legal system. The communication may take the form of courtroom testimony or research briefs filed with courts of appeal (to be discussed in Chapter 2). Psychological research also finds its way into judicial conferences; bar association meetings; and newsletters, journals, and books accessed by the legal community. In this sense, the relationship is truly interdisciplinary and independent. Even if the legal system chooses not to change its policies and procedures in the direction of the scientific evidence, the body of psychological knowledge remains intact.

We cannot assume that the legal system will change, even with knowledge of sound psychological principles, research, and theory. Law's practices are built on a foundation of long traditions and conservative attitudes toward innovations. The legal system in most societies does not wish to be a weather vane, shifting with every new idea or untested theory that comes along. Understandably, it does not alter its practices unless there is a cogent reason for doing so. Nevertheless, throughout the book we will see illustrations of the legal community adapting some practices based on consultation with psychologists and the results of psychological research. A few examples are law enforcement interviewing, lineup procedures, selecting jurors, and evaluating eyewitness testimony. The mutually independent psychology *and* the law relationship holds promise for significant improvements in both disciplines.

Psychology of the Law

The third relationship, psychology *of* the law, represents a more abstract approach to law as a determinant of behavior. It tries to understand the way in which law seeks to control behavior as well as how people react to and interact with the law. The following questions underscore this focus:

- How does law affect society, and how does society affect laws?
- How successful are laws and the consequences for their violation in controlling and altering human behavior?
- Why are some laws embraced or tolerated and others resisted?

Psychology *of* the law poses and grapples with questions such as these. Social psychologists, political psychologists, and psychologists working on policy issues within government agencies tend to be among the vanguard in this relationship.

A significant contribution in the psychology of the law area is the book *Crimes of Obedience* (Kelman & Hamilton, 1989), which identifies social psychological factors that operate in individuals who commit crimes or other illegal actions at the direction of those in authority. These phenomena were pertinent as long ago as in the Vietnam War (e.g., in the notorious My Lai massacre), and as recently as in Abu Ghraib prison and other detention centers, where some military personnel abused and degraded detainees. The topic is also highly relevant to political crime and corporate crime, such as when someone in public office accepts bribes or someone in a management position participates in fraudulent practices at the direction of a chief financial officer. Another good example of scholarship in psychology *of* the law is Tyler's (1990, 2006) *Why People Obey the Law*, an incisive examination of psychological principles associated with legal behavior. Like Kelman and Hamilton, Tyler tries to understand both why individuals defy the law and why they conform to it.

In sum, Haney (1980) proposed an excellent framework for thinking about the relationship between psychology and law. This present book includes material relevant to each of the three relationships, although it focuses on the first two. This is not a "how-to" book, but it often describes how psychologists do their work, including what tests or measures they employ. It does not train you in how to testify in court, prepare a profile of a serial murderer, or provide an opinion about which of two parents should be given custody of a minor child. Students of psychology know that extensive education is required before anyone acquires expertise to engage in these activities (see **Box 1.2** for career path possibilities in psychology and law).

Although this is not a how-to book, it does require the reader's basic understanding of the philosophy and methods of the behavioral sciences, because we will discuss many research studies applicable to the legal process. Despite the rapid growth of research in psychology and law, there is still a great need for well-designed and well-executed studies directed at the many legal assumptions about human behavior. There is an even stronger need for psychological theories that encompass and explain the results of this research.

BOX 1.2

Education and Training in Psychology and Law

The AP-LS has published a *Guide to Graduate Programs in Forensic and Legal Psychology, 2014–2015* (Ruchensky & Huss, 2016), as well as an updated version for 2017–2018 (Alexander, 2018). The guide is filled with helpful information, including tables detailing requirements for admission to graduate schools; available grants, stipends, assistantships, and internships; and the average time required to complete each of the programs.

The guide lists more than 24 doctoral programs (in both the United States and Canada) that offer clinical training in psychology and law (see also Packer & Borum, 2013). There are also 11 doctorate programs that offer nonclinical training in psychology and law (Ruchensky & Huss, 2016). The clinical training programs usually require a 1- or 2-year internship in a clinical or forensic setting.

Some graduate students opt for joint or combined degrees in both psychology and law, and though joint degrees are not required and are not for everyone, they do have many benefits (DeMatteo, 2019; Drogin, 2015). As of this writing, fewer than 10 programs allow students to pursue a degree in law (JD, or Doctor of Jurisprudence) while simultaneously or sequentially completing the requirements for a doctoral degree in psychology (PhD or PsyD). The first law and psychology graduate program was developed at the University of Nebraska–Lincoln in 1974 and remained for many years the largest and most diverse program in the field, offering both clinical and nonclinical training. Prospective students in a majority of the psychology and law graduate programs must be admitted to both the law school and the department of psychology.

Although there are several doctoral programs that prepare students for specialties in psychology and law, there are many other paths that may be taken to gain entry into this field. For example, doctoral programs in clinical, school, or counseling psychology may provide an excellent opportunity to gain entry into forensic practice, especially if the program has courses in psychology and law as well as internships in forensic settings. A significant number of colleges and universities do offer these courses and internships (DeMatteo, Marczyk, et al., 2009). Postdoctoral experiences in psychology and law settings will help immeasurably in developing a professional career in the area. For those students interested in research involving psychology and law issues, doctoral programs in social, cognitive, developmental, experimental, community, neuro-, or organizational psychology are very good choices.

There are now more than 22 masters programs that identify themselves as providing specialized training in psychology and law. The master's degree by itself does not result in a license to practice psychology, because most states require a doctoral degree to be able to use the title *psychologist* (Packer & Borum, 2013). However, the master's degree can lead to a number of career opportunities, including those in forensic settings (see Zaitchik, Berman, Whitworth, & Platania, 2007). The master's degree in psychology and law might also prepare students to enter and complete training in a doctoral program.

WAYS OF KNOWING AND THE METHODS OF SCIENCE

It is helpful to set the stage for a discussion of psychological research by touching a bit more on the philosophy of science. The work of American philosopher Charles Peirce is instructive. Peirce outlined four general ways through which humans develop beliefs and knowledge about their world (Kerlinger, 1973). First, there is the **method of tenacity**, where people hold firmly to their beliefs about others because they "know" them to be true and correct, simply because they have always believed and known them to be true and correct. These beliefs are tightly embraced, even in the face of contradictory evidence: "I know I'm right, regardless of what others say or the evidence indicates."

The second way of knowing and developing beliefs is the **method of authority**. Here, people believe something because individuals and institutions in authority proclaim it to be so. If the courts over the years have said it is so, it is so. If a well-recognized and respected legal scholar makes an argument in favor of or against a proposition, that scholar's name is cited as authoritative evidence for the proposition's soundness or unsoundness. Education is partly based on this method of knowing, with authority originating from teachers, scholars, experts, and the great masters they cite. Elementary school children often quote the authority of their teacher as indisputable evidence in support of an argument; college students may assert, "It says so in the book." Tyler's (1990) research on why people obey the law, however, suggests that this expressed allegiance to authority will not necessarily translate to action unless people believe in the *legitimacy* of the authoritative source.

The **a priori method** is a third way of obtaining knowledge. Evidence is believed correct because "it only stands to reason" and is a product of logical deduction. The a priori method is the dominant approach to knowledge in the legal process. The legal system is replete with formal rules that govern the admissibility of evidence and are intended to present information in a logical, orderly fashion. The legal system also relies heavily—although not exclusively—on precedent, or the principles of law that have already been developed in past cases. The method of authority, then, is also crucial to law. Primary sources such as court decisions, statutes, constitutions, and administrative regulations are consulted by attorneys as they prepare their cases and by judges as they render their decisions. To a lesser extent, law is also derived from secondary sources, such as law reviews, legal treatises, social science journals, books, and other reference works. Basically, however, legal knowledge is derived after consultation with previous authority and a subsequent process of deduction.

The fourth way of obtaining knowledge is the **method of science**, which is the testing of a statement or set of statements through observations and systematic research. On the basis of this systematic study, statements about natural events or processes are revised, reconstructed, or discarded. Science is an enterprise under constant change, modification, and expansion rather than an absolute, unalterable fact-laden system. Science teaches us that there are few certainties in the natural world and that we should base our decisions and expectations on "the best of our knowledge" at any particular time in history. The science of behavior, of course, is full of enormous challenges.

Peirce's four methods of knowing provide a rough framework for determining the source of one's knowledge, and they will be useful guides throughout the remainder of the book. With the possible exception of the method of tenacity, each method has its place in the accumulation of knowledge, as long as we recognize which method we are using to obtain our knowledge and also understand the limitations of each. Authoritative sources and reasoning both are valuable contributors to our beliefs and opinions. The method of science provides us with additional information about the "soundness" of our authoritative and logical

knowledge, and it promotes a critical and cautious stylistic way of thinking about our beliefs. Today, much psychological literature focuses on the importance of **evidence-based practice**. This is a way of emphasizing that the methods used by psychologists (e.g., their treatment programs, the assessment measures they use) should be based on scientific documentation that they do indeed "work."

Scientific knowledge, because it is based on systematic observations, hypothesis testing, experiments, and testable statements, places itself permanently at risk of being falsified or shown to be incorrect. The knowledge is constantly updated to account for observations and experiments, and scientists try to make predictions beyond their present experience. Ultimately, scientific knowledge seeks the underlying order of things. The method of science is a testable, self-corrective approach to knowledge that offers one of the most powerful sources available for the understanding of human behavior.

Courts often turn to scientific experts in numerous fields for help in understanding complex matters that are beyond the knowledge of the average layperson. The ballistics expert, the blood spatter analyst, the cancer researcher, the marine biologist, the child developmentalist, the sleep researcher, and the clinical psychologist are all examples. **Expert testimony** is defined as the

> opinion evidence of some person who possesses special skill or knowledge in some science, profession or business which is not common to the average man and which is possessed by the expert by reason of his special study or experiences. (Black, 1990, p. 578)

Before admitting such expert testimony into a court proceeding, a judge must be satisfied that an expert has the proper credentials and that the expert's knowledge is sound. In addition, the court must be convinced that the expert testimony is supported by sound science. However, as noted by Jane Goodman-Delahunty (1997), "the introduction of expert testimony in legal proceedings, particularly testimony regarding social and behavioral scientific evidence, has rarely been accomplished without controversy" (p. 122).

Throughout the text, we will encounter many cases in which expert testimony was introduced, as it was in the sleep disorder cases covered briefly early in the chapter. We are of course most interested in experts on psychological issues. Not everyone claiming expertise can testify, nor is every topic deemed to require expert testimony. Put another way, expert testimony will not necessarily be admitted into a court proceeding. For example, in all courts a minimum academic degree is expected, and in some, the person offering to testify must hold specific certifications. However, in addition to the qualifications of the individual, the topic on which she or he seeks to testify must also be assessed. We will discuss this in more detail in Chapter 2.

ETHICAL GUIDELINES

Like all psychologists, psychology and law researchers and practitioners are expected to practice in accordance with the Ethical Principles of Psychologists and Code of Conduct (APA, 2002, as amended in 2010 and 2016: APA, 2010a, 2016). The ethics code provides five general principles and 10 standards written broadly to apply to *all* psychologists in a wide spectrum of specialties and practice. The general principles are not intended to be mandates or legal requirements for psychologists but are "aspirational goals to guide psychologists toward the highest ideals of psychology" (APA 2002, p. 1060). However, the 10 ethical standards contained within the document are enforceable rules for conduct deemed unethical by the APA.

The standards apply "only to psychologists' activities that are part of their scientific, educational, or professional roles as psychologists" (p. 1061). Violation of these standards could result in a complaint to the APA's Professional Conduct Board or a state's licensing board and, ultimately, the loss of one's license to practice psychology. (See **Table 1.2** for examples of practices that raise ethical issues. See also **In Focus 1.1** for discussion of a controversial ethical issue in recent years.)

Table 1.2 Some Practices That Have Raised Ethical Questions

- Obtaining informed consent for participation in studies of substance abuse
- Participation in military interrogations
- Evaluating sex offenders for involuntary civil commitment
- Engaging in dual relationships, that is, serving as both evaluator and treatment provider
- Assessing violence risk in death penalty cases
- Labeling juveniles as psychopaths
- Recommending custody in divorce proceedings or allowing one's biases to influence custody evaluations
- Offering assessment and treatment services electronically (telepsychology)
- Lacking relevant cultural knowledge in immigrant evaluations or in assessment procedures

Note: It is not meant to imply that these practices are in themselves unethical. Rather, they are discussed in the psychological literature as raising ethical concerns.

IN FOCUS 1.1

Telepsychology, Ethics, and the Law

It has been called **telepsychology**, virtual reality therapy, avatar therapy, distance therapy. . . . Basically, it refers to delivering psychological services at a distance, via electronic communication such as e-mail, video, video group conferencing, or even texting. Many psychologists have now begun to do this as part of their practice, sometimes even exclusively. Proponents of telepsychology say it will be a normal part of practice over the next decade, and those who do not embrace the change will be left behind (Gray, 2018).

Telepsychology is a logical choice for practitioners and many, but not all, of their clients. Families unable to make it to a clinician's office, older adults in a health care facility, people in rural areas, college students wanting to stay in touch with their therapist in another state, and prisoners with little access to mental health care in a prison setting are but a few examples.

Telepsychology raises some ethical and legal concerns, however. Although it is now quite widely accepted, even supporters caution about how it is put into practice (Luxton, Nelson, & Maheu, 2016; Palomares, Bufka, & Baker, 2016). Prime concerns are in the areas of informed consent and security and confidentiality.

Clients who are working with their mental health care provider electronically must be fully

informed of any potential uses of their information or sharing of information with other health care providers. They must understand if there are limits to confidentiality in the data obtained by the clinician. In addition, those receiving services in their homes must be tech-savvy and guard against possible invasions of their privacy.

For the psychologist, maintaining proper security is crucial. Psychologists who engage in telepsychology should be sure all communications are encrypted. They should not be using popular telecommunication channels like Skype or FaceTime (Clay, 2017). When tests or inventories are being administered at a distance, the psychologist must find a way to ensure that the individual's answers are not being provided by another person. In these cases, it is recommended that a supervised setting or an onsite proctor be used not only to monitor but also to answer questions that an individual may have.

There are practical matters to consider as well. Psychologists who engage in telepsychology must be licensed in both the state in which they practice and the state where their clients reside. Because licensing requirements vary from state to state, this can become a complicated and expensive proposition. Furthermore, these psychologists must comply with laws and regulations in these pertinent states, provinces, territories, and so forth.

Within the past decade, psychologists have had access to numerous workshops on telepsychology, but they are warned that a workshop presented sometime in the past might not have included recent developments in technology. Keeping up to date in this rapidly changing area is critical.

The APA (2013b) has now published its Guidelines for the Practice of Telepsychology, which, like all its guidelines, are intended to ensure a high level of practice and stimulate debate and research. The guidelines, available on the APA website, address such areas as professional competence, informed consent, confidentiality, disposal of data, testing and assessment, and interjurisdictional practice.

Questions for Discussion

1. A number of "therapy companies" are available on the Internet, and they hire both full-time and part-time psychologists. Obtain information about any one of these and discuss benefits you see or concerns you might have.
2. Telepsychology is not appropriate for everyone. What are examples of individuals who may not be good candidates for telepsychology?
3. Many psychologists object to "avatar therapy." Why is this so? Is avatar therapy likely to remain problematic?

Because the practice of forensic psychology differs in important ways from the more traditional practice of psychology, forensic psychologists are also expected to follow the specific ethical principles outlined in the Specialty Guidelines for Forensic Psychology (APA, 2013c). Guidelines differ from standards in that standards are mandatory and guidelines are aspirational in intent. "They are intended to facilitate the continued systematic development of the profession and facilitate a high level of practice by psychologists" (APA, 2013c, p. 8). The forensic guidelines pertain to any psychologist working within any sub-discipline or specialty of psychology (e.g., clinical, developmental, social, cognitive, or neuropsychology) "when applying the scientific, technical, or specialized knowledge of psychology to the law to assist in addressing legal, contractual, and administrative matters" (APA, 2013c, p. 7). Furthermore,

> these Guidelines apply to all matters in which psychologists provide expertise to judicial, administrative, and educational systems including, but not limited to, examining or treating persons in anticipation of or subsequent to legal, contractual, or administrative proceedings; offering expert opinion about psychological issues in the form of amicus briefs or testimony to judicial, legislative, or administrative bodies; acting in an adjudicative capacity; serving as a trial consultant or otherwise offering expertise to attorneys, the courts, or others; conducting research in connection with, or in the anticipation of, litigation; or involvement in educational activities of a forensic nature. (p. 7)

This statement provides an excellent example of the many psycholegal activities engaged in by psychologists working in some capacity in psychology and law. The Specialty Guidelines for Forensic Psychology also urge psychologists interested in working in psychology and law to obtain a fundamental and reasonable level of knowledge and understanding of the legal system and legal rights of others. This expectation requires the psychologist to become especially knowledgeable about the laws within the jurisdiction in which he or she is providing services. The guidelines further expect psychologists working in a forensic setting to be sensitive to and informed about the individual differences in cultural, linguistic, situational, and personal characteristics of their clients.

Although all guidelines are important, the one advocating sensitivity in this last regard has taken on special significance in recent years. Many psychologists now work with immigrants seeking asylum, undocumented immigrants who are subject to deportation proceedings, or both documented and undocumented immigrants who have been victimized by crime. Culturally rooted misunderstandings may cloud professional judgment, raising many ethical issues (Filone & King, 2015). Drogin and Biswas (2016) emphasize that psychologists providing psychology and law services should become culturally competent about the diverse populations they are working with. They write that "cultural competency in the forensic system needs to take into account the history of migration and a person's status in the dominant society as part of the narrative of how that person has arrived at a given point in his or her life" (184). Similarly, Fisher (2014) refers to *cultural competence* as multicultural ethical competence, which is a "process that draws on psychologists' human responsiveness to those with whom they work and awareness of their own boundaries, competencies, and obligations" (p. 36). It involves openness to multiple worldviews and different cultural traditions, beliefs, and values.

Two additional guidelines that will be relevant in the chapters ahead are the Guidelines for Child Custody Evaluations in Family Law Proceedings (APA, 2010b) and the Guidelines for Psychological Evaluations in Child Protection Matters (APA, 2013a). Child custody evaluations involve disputes over decision making, caretaking responsibilities, and custody arrangements following marital or other relationship dissolution. The evaluation usually focuses on the skills, deficits, values, and tendencies relevant to parenting roles and the child's psychological needs. Ideally, the evaluation should provide recommendations for accommodating the best fit for both caretakers and the child. "Psychologists render a valuable service when they provide competent and impartial opinions with direct relevance to the 'psychological best interests' of the child" (APA, 2010b, p. 863).

In psychological evaluations in child protection matters, psychologists may act as court-ordered evaluators, or may be retained by a state child protection agency, organization, or persons interested in the welfare of the child, to conduct psychological assessments of possible child maltreatment. If maltreatment or abuse has occurred, the psychologist will try to answer the extent to which the child's psychological well-being is affected by the abuse and what kind of treatment may be recommended. In child protection cases, the psychologist may be asked to evaluate whether the parent(s) can be successfully treated to prevent future harm, and what would be the psychological effects on the child if returned to the parent(s) or removed from the home. "Psychologists typically also consider specific risk factors such as substance abuse or chemical dependency, domestic violence, health status of family members, and entire family context" (APA, 2013a, p. 21). These and additional guidelines will be referred to in later chapters. They are important in understanding the roles and responsibilities of psychologists practicing in psychology and law.

One ethics code that is nearly universal for practicing psychologists across the world is confidentiality (Leach, 2009). Essentially, confidentiality is a cornerstone of psychological practice (Leach, 2009). "Psychologists have a primary obligation to respect the confidentiality of information obtained from persons in the course of their work as psychologists" (APA,

1981, p. 635). They may reveal such information to others only with consent of the person or the person's legal representation. In some situations where confidentiality is not assured, psychologists must inform the person they are interviewing or testing about the possible uses of the information. An example of this is when psychologists are asked to evaluate the defendant in a criminal case.

Psychologists are permitted to break confidentiality in many jurisdictions if they are treating or assessing a client who clearly threatens violence toward another person. Depending on the jurisdiction, they may be expected, obligated, or required to take appropriate steps to warn or protect the person being threatened. For example, they might have to notify law enforcement, warn the threatened person directly, or take steps to initiate an emergency commitment to a secure psychiatric facility. It is obviously crucial for psychologists to understand the requirements of the law in each state in which they practice. We will discuss the duty to warn or protect in more detail in Chapter 10.

PSYCHOLOGY AND LAW: A CHALLENGING ALLIANCE

The admissibility of expert testimony, mentioned briefly earlier and to be discussed again in Chapter 2, illustrates the occasionally tenuous relationship between psychology (and other sciences) and the law. The quote at the beginning of the chapter highlights the need for understanding on both sides. As will be seen throughout the text, psychologists confront numerous situations that may test their patience with the law as a whole. This is particularly likely to occur in the relationship of psychology *in* the law, where researchers may encounter challenges to their scientific methods or clinicians may be pressed to provide opinions that they believe to be beyond the scope of their role or even their knowledge. We will show in later chapters, for example, that it is not unusual for psychologists to be asked, "Was this defendant insane?" or "Is this person dangerous?" Insanity is a legal determination, not a clinical one, and dangerousness cannot be absolutely predicted. Therefore, a psychologist will be more apt to say that an insanity defense can be supported or that there is a significant likelihood that someone will harm others if not detained. Even these statements are not universally condoned without some qualification, however.

As another example, psychologists are sometimes asked which parent should be given custody of minor children in divorce proceedings. Psychologists can assess parenting plans, but many believe they should not provide a final recommendation to a judge making a custody decision, although both professional standards and guidelines allow them to do so if they wish. In sum, psychology cannot provide absolute truths or easy answers. Instead, it has many partial, often tentative answers embedded in probabilities.

Even in the psychology *and* the law relationship, there are pitfalls. Recall that it is in this relationship that we find more researchers than clinicians, although it is important to emphasize that many psychologists are both. The clinician may conduct research, and the researcher may have a limited private practice. Research psychology is largely nomothetic as opposed to idiographic in scope. The **idiographic approach** emphasizes the intensive study of one individual. The **nomothetic approach** focuses on the search for general principles, relationships, and patterns by combining data from many individuals. Therefore, research psychologists—like clinicians—are generally cautious in responding to questioners who would prefer simple, certain answers or solutions to complex issues. Moreover, the principles and theories proposed by psychology are confirmed only through the collection of consistent and supporting data, a process that is not only long and rigorous but also punctuated by debate and differing interpretations of the data. "History suggests that the road to a firm research consensus is extraordinarily arduous" (Kuhn, 1970, p. 15).

Psychological theories or "truths" are arrived at primarily through studies that employ methods emphasizing prediction, measurement, and controlled comparisons. As will be seen later in the text, in some areas, research psychologists have amassed a good deal of information that allows them to make statements with confidence. We know, for example, that eyewitness testimony is extremely fallible under certain conditions but should not be totally discounted; we know, also, that as a group, juveniles lack a comprehension of the constitutional rights guaranteed to them, leading many scholars to believe juveniles should not be allowed to waive their rights to a lawyer. On the other hand, research on the effects of divorce on children is still evolving, questions on the validity of psychological profiling abound, and research is mixed on the reliability of some measures intended to assess risk of sex offending. All these topics will be discussed in the chapters ahead.

DEFINING AND CLASSIFYING LAW

Law is difficult to define. To paraphrase a wise legal scholar, Judge Learned Hand, the person who has given up trying to define law has attained humility. Crafting a universal definition of law is an elusive enterprise. Few scholars are able to propose a definition that will satisfy everyone else. There is less disagreement when scholars discuss classifications or types of law. For example, law can be classified both by its *content* and by its *origin*.

Content Classifications

The traditional content classifications are two-category distinctions—those between civil and criminal law and between substantive and procedural law, to be discussed in the following sections. Increasingly, scholars prefer to use terms that specify content even more clearly, such as education law, media law, mental health law, environmental law, family law, medical law, and public health law.

Civil and Criminal Law

The distinction between civil and criminal law rests primarily on the idea that the one is more focused on the settling of a dispute or righting of a wrong, while the other is more focused on accusation and acquittal or punishment. In **civil law**, two or more parties (litigants) approach the legal system seeking resolution of a dispute or redress for a harm they have allegedly suffered. The **plaintiff**, the person bringing the case, is hoping for some remedy from the law. (The **defendant**, or respondent, is the person or entity that allegedly harmed the plaintiff.) Although the remedy may include fines, compensatory damages, and punitive damages, the concept of punishment is not the main purpose of civil law. It is designed to settle disputes, or to "make whole" the person or persons who suffered harm. This is accomplished through such means as monetary awards or **injunctions** (court orders to one party to cease some activity, such as venturing on property). **Criminal law**, on the other hand, involves an alleged violation of rules deemed so important that the breaking of them incurs society's formal punishment, which must be imposed by the criminal courts. (In a criminal case, the *defendant* is the person or party against whom prosecution is brought.) An important component of criminal law is the need to have the rules stated clearly by Congress when it comes to federal crimes, and state legislatures when it comes to state crimes. Very rarely, crimes are covered in the state or federal constitutions; for example, the U.S. Constitution prohibits treason. To be a crime, an action or failure to act (e.g., failure to file income taxes) must be prohibited (or mandated) in the statutes, and the maximum punishment for violation of that rule must be

specified. This does not mean that the person found guilty of violating the law *will* receive that maximum punishment; rather, it is considered fair that people be warned of the possible punishment before committing a crime.

Although it may not seem difficult to discern criminal from civil law, the lines between the two are sometimes blurred. In most states, for example, if a juvenile is charged with violating the criminal law, he or she will most likely be brought to a juvenile or family court, which is considered a civil rather than a criminal setting. Likewise, a person with a mental disorder who is charged with a criminal offense may be committed to a mental institution through civil proceedings, rather than led through the criminal courts. Over the past two decades, there has been increasing *civil* commitment of dangerous sex offenders after they have completed their criminal sentences. This is an extremely controversial topic that will be discussed at some length in Chapter 10.

Disputes between private persons or organizations, such as breaches of contract, libel suits, or divorce actions, clearly represent civil law. The government also may be a part of a civil suit, either as plaintiff or defendant (also called respondent). However, when the government fines a corporation for dumping hazardous waste or polluting the waters, the fine may be either a civil or a criminal penalty. In December 2012, the oil corporation BP pleaded guilty to criminal charges associated with the Deepwater Horizon oil spill in the Gulf of Mexico in 2010. Civil suits against that company continue to this day, although some settlements have been reached. Earlier, the massive cases of Enron Corporation, Anderson Accounting Firm, and WorldCom in 2002 included violations of both criminal and civil laws. Anderson was convicted of obstruction of justice, and Enron was faced with both criminal and civil investigations into its corporate practices. This also happened in the case of Bernard Madoff, who pleaded guilty in 2009 to numerous federal charges involving securities fraud, money laundering, and perjury over a 20-year period. In the largest fraud case in Wall Street history, Madoff received a 150-year prison sentence.

Civil law cases are often more complex and difficult than criminal law cases, and the legal territory is more likely to be uncharted. The notorious Agent Orange civil case, for example, in which approximately 16,000 families of Vietnam veterans sued Dow Chemical and six other chemical companies for exposing them to the toxic effects of a defoliant made of dioxin, took nearly 20 years to settle in the federal courts. Other high-profile cases were the tobacco litigation proceedings of the 1990s. As noted previously, cases arising from the 2010 oil spill continue to be heard. In the Madoff case, his victims—who included individuals, banks, investment firms, and charitable foundations—filed more than 1,000 civil lawsuits.

Civil law today is also highlighted in the multitude of suits that have been filed by persons alleging sexual harassment, often by high-profile public figures and public officials, and suits filed by survivors of gun violence. In many states, statutes of limitation have been extended, allowing victims of sexual abuse to sue their abusers or the institutions that protected the abusers (or failed to protect the victims). A **statute of limitation** is a time period that determines the date after which a suit can no longer be filed. The intersection of psychology and civil law is demonstrated in many of the following chapters, and most particularly in Chapters 8 through 11.

Substantive and Procedural Law

Another way of classifying law by content, besides civil and criminal, is to divide it into substantive and procedural categories. **Substantive law** defines the rights and responsibilities of members of a given society as well as the prohibitions of socially sanctioned behavior. For example, the Bill of Rights in the U.S. Constitution specifies fundamental rights of citizens, such as the right to freedom of speech and the right to be free from unreasonable search and

seizure. In landlord–tenant laws, certain duties of both parties are described. Other examples of substantive law include state and federal statutes that define and prohibit fraud, embezzlement, murder, rape, assault, arson, burglary, and other crimes against personal safety and property.

Procedural law outlines the rules for the administration, enforcement, and modification of substantive law in the mediation of disputes. In a sense, procedural law exists for the sake of substantive law. It is intended to give defendants in a criminal case and litigants in a civil case the feeling that they are being fairly dealt with, and that all are given a reasonable chance to present their side of an issue before an impartial tribunal (James, 1965). State laws that tell how to initiate a civil suit or that specify the documents to be filed and the hearings to be held in child custody disputes illustrate procedural law. Other examples are the rules of evidence in criminal courts, such as the type of testimony that may be offered by an expert witness. Other excellent examples of procedural law are the Federal Rules of Civil Procedure and Federal Rules of Criminal Procedure, which are periodically revised to reflect the spirit of the times as well as modern technological advances.

Classifying by Origin

Another common method of classifying law is by looking for its sources, such as constitutions, court decisions (case law), statutes, rules of administrative agencies, and treaties. With the exception of treaties, the sources of law exist at both the federal and state (including municipal) levels.

Constitutional Law

The law contained in the U.S. Constitution and the constitutions of individual states comprises **constitutional law**. It provides the guidelines for the organization of national, state, and local government, and it places limits on the exercise of government power (e.g., through a Bill of Rights). Thus, in two psychology-related U.S. Supreme Court decisions, the Court announced that it was cruel and unusual punishment, in violation of the Constitution, to execute individuals who are intellectually disabled (*Atkins v. Virginia*, 2002) or so severely mentally ill that they could not understand why they were being executed (*Ford v. Wainwright*, 1986). As will become evident in later chapters, though, these decisions are not as clear-cut as they may appear, and later cases were decided in efforts to clarify the decisions.

The law that emerges from court decisions is sometimes referred to as **case law** or *judge-made law*. It has developed from **common law** (local customs formed into general principles) and through precedents set in previous court decisions. Case law may involve the interpretation of a statute. For example, if the legislature of a given state passes a law including a provision that psychiatrists are to conduct evaluations of a defendant's competency to stand trial, a court may be asked to interpret whether the legislature intended *psychiatrist* as a generic term that could also cover psychologists.

The rules and principles outlined in the courts' written decisions become precedent under the doctrine of ***stare decisis*** (to stand by past decisions) and are perpetuated, unless a later court chips away at or overturns them. As we will note shortly, precedent is a key element in distinguishing law and psychology. However, *stare decisis* is more a matter of policy than a rigid requirement to be mechanically followed in subsequent cases dealing with similar legal questions. Thus, while lower courts are expected to follow the precedents set by higher or appellate courts, an appeals court need not follow strictly the doctrine established by an earlier appeals court in the same geographical area. They generally do, however, because doing so contributes to efficiency, equality, and the development of the

law (Abraham, 1998). As will be noted in Chapter 2, it sometimes happens that federal appeals courts in different parts of the United States have issued very different decisions on similar matters; in these situations, the U.S. Supreme Court may decide to hear a case to resolve the discrepancy.

Statutory Law

Written rules drafted and approved by a federal, state, or local lawmaking body are known as **statutory law**. Thus, local ordinances such as parking regulations or noise abatement orders are included in this category. Statutes may be what most people mean when they refer to "law." They include a multitude of provisions, such as what services will be provided to the public, what factors entitle a person to initiate a civil suit, what crimes will be considered felonies or misdemeanors, and what the responsibilities of individual citizens are. Congress or state legislatures pass numerous statutes directly relating to psychology. For example, a state legislature may mandate that all law enforcement officers must pass a psychological test before hire or that certain individuals with mental illness must be supervised in the community and not be allowed to buy a gun. As other illustrations, Congress enacts statutory law in its periodic passing of health care legislation (e.g., the Affordable Care Act) and crime control legislation that includes provisions relating to bail reform, violence against women, or gun safety.

Administrative Law

Law that is created and enforced by representatives of the numerous administrative and regulatory agencies of national, state, or local governments is known as **administrative law**. Examples of such agencies at the federal level are the Nuclear Regulatory Commission (NRC), the Food and Drug Administration (FDA), the Securities and Exchange Commission (SEC), the Federal Communications Commission (FCC), and the ubiquitous Internal Revenue Service (IRS). These and other agencies have been delegated broad rulemaking, investigation, enforcement, and adjudication powers by Congress. In addition, every state assigns agencies to create, administer, and enforce laws such as those pertaining to zoning, public education, and public utilities. Examples of state agencies that relate to psychology are departments of mental health or mental hygiene, departments of education, departments of correctional services, and the various professional licensing boards that oversee the quality of services provided by psychologists, lawyers, physicians, and other professionals.

PSYCHOLOGY AND LAW: SOME DIFFERENCES

There are many differences between psychology and law that make the relationship a challenging one. As the late Allen Hess (2006) wrote, "as psychologists and lawyers work together with greater frequency, there are more chances for misunderstandings to occur. It is useful to consider distinctions that can become troublesome if not recognized" (p. 43). Hess then outlined some of these differences, several of which we discuss here (see also **Table 1.3**).

The law often requires quick answers, and psychologists—particularly when conducting assessments for lawyers and courts—are sometimes asked to produce results under less-than-ideal situations, such as interviewing a defendant in a jail setting. The law tends to be idiographic, while psychology tends to be nomothetic. Law is case focused, intent on solving each case, one at a time.

Table 1.3 Some Differences Between Psychology and Law

Psychology	Law
Values objectivity	Values advocacy
Research based	Adversarial approach
Empirical	Rational
Method of science	Method of authority
Nomothetic data	Idiographic or case data
Exploratory	Expedient
Seeks falsification	Seeks resolution
Sees knowledge as tentative	Emphasizes importance of precedent

Law is generally conservative, and it builds a body of knowledge slowly, based on precedent. While psychology builds on past research findings, it is not precedence bound. In fact, psychologists often engage in replication of published experiments, sometimes years after the fact. Furthermore, as scientists, psychologists can and often do embark on exploring new research territory, but they cannot expect that the law will embrace their findings immediately or enthusiastically.

The major difference between psychology and law is the adversarial nature of the law and the exploratory and objective nature of psychology. The dominant model used in the American legal system is an adversarial one. It assumes that the best way to arrive at truth is to have proponents of each side of an issue advocate and present evidence most favorable to their position. The contenders confront one another in pretrial proceedings or during the trial, where truth is tested and refined through the "fight" theory of justice (Frank, 1949). It is assumed that justice will prevail once each side has had the opportunity to present its version of the evidence to a neutral decision maker—the judge or the jury. It is also assumed that "objective" truth about human behavior cannot be acquired from only one version of the story. Instead, different versions of the truth are sought, which, when put together, allow for judgment within an acceptable margin of error. By contrast, psychology, often directed by theory, arrives at "truth" and scientific knowledge through the accumulation of data derived from well-designed and thoughtful studies. This knowledge does not occur instantly.

The adversarial model presents problems for clinicians and for research psychologists. Not only does it concentrate on just one case at a time, but it also encourages lawyers to dip in and out of the data pool and pick and choose the segment of psychological information they wish to present in support of their position. The lawyer may select only part of an experiment and present the material out of context. Even in cross-examination, the opposing lawyer may be unaware of the real context or of contradictory findings. This procedure allows distortion and misrepresentation of research findings, because the lawyer's main concern is to provide the decision maker with evidence that will be favorable to the lawyer's client. Therefore, by using legal skill—but without having to appreciate the goals of science—lawyers can apply almost any psychological data in the service of their position. The adversarial model relies not necessarily on truth, but on persuasion (Haney, 1980). Adversary proceedings have the advantage of avoiding the dangers of unilateral dogmatism, but we cannot forget that the essential purpose of each advocate is to outwit the opponent and win the case (Marshall, 1972).

Psychologists may agree that the most desirable role for the psychologist who is called as an expert witness is that of the "impartial educator." Many experienced psychologists, however, contend that this role is extremely difficult if not impossible to maintain. For one thing, there are implicit pressures from the attorney who hired the psychologist. In recent research, this has become to be discussed as *adversarial allegiance* or *adversarial bias*, a concept we will cover in more detail in Chapter 2 (Murrie & Boccaccini, 2015). For another, even when the psychologist is court-appointed and is acceptable to both sides (as might happen during pretrial proceedings), the presiding judge may press the psychologist to provide simple "yes" or "no" answers. Often, psychologists would like to expand on their findings but may be precluded from doing so by the rules of evidence or the objection of one of the attorneys.

It must be emphasized, though, that law needs psychology, along with other sciences. Law is, after all, a basically human enterprise and practice. It should be clear by now that a vast store of knowledge obtained by the sciences is making its way into the legal arena. Moreover, mental health evidence is frequently viewed "as important, if not essential, to addressing certain legal issues (e.g., sanity, emotional damages, parental fitness)" (Edens et al., 2012, p. 259). However, "some judges, attorneys, academics, and jurors view at least some mental health experts—if not the entire field—with a considerable degree of suspicion, if not overt distain and/or hostility" (p. 260).

It can be said that persons associated with both fields are at fault. Skeem, Douglas, and Lilienfeld (2009) reflect this viewpoint in the preface to their book, *Psychological Science in the Courtroom*: "Many legal decisions are still based on inadequate psychological science or, worse, no psychological science at all" (p. ix). Thus, the uneasy alliance continues. Although there will always be an imperfect fit between law and psychology—due to their underlying philosophical and methodological differences—there is reason for optimism as professionals in both fields become better at the work they do and more appreciative of their respective contributions.

SUMMARY AND CONCLUSIONS

Psychology is the science of behavior. This is not a perfect definition, but it is the one commonly subscribed to by many if not most psychologists today. This science makes numerous contributions to the legal system.

Haney (1980) proposed a helpful tripartite relationship between psychology and law: psychology *in* the law, psychology *and* the law, and psychology *of* the law. Although there is overlap, psychologists engaged in the first relationship are primarily clinical, in the second primarily research based, and in the third primarily philosophical in their approach. These relationships are not mutually exclusive; a given psychologist may operate in all these realms, although one is likely to predominate.

Psychology and law focuses on psychological knowledge as it relates to the legal system—which includes the law enforcement community as well as participants in the judicial process in both criminal and civil courts. This chapter has provided illustrations and has alluded to many topics—sleep research, eyewitness testimony, expert testimony, child custody determinations, insanity—and numerous other examples are included throughout the book.

The respective fields of law and psychology differ in both philosophy and methodology. Law is not easy to define. It is often conceptualized on the basis of its classifications, its sources, or its content. Law—at least in the adversarial system—is based on advocacy and precedence. It is expedient, case oriented, rational, and geared toward solutions to a problem. Psychology is nomothetic, research based, and exploratory in nature. As in most sciences, firm conclusions are evasive, and theories are constantly being tested. There is always the possibility that a discovery will be falsified. In law, although judgments in individual cases

may be reversed, the general principles are retained unless there are compelling reasons to do otherwise. In other words, the law tends to be conservative (A. K. Hess, 2006). These fundamental differences may make for a challenging and sometimes uneasy alliance between psychology and law, but it is clear that their interaction has increased and developed in recent years. As will be illustrated throughout the book, this is to the benefit of both fields.

KEY CONCEPTS

Administrative law 19
A priori method 10
Automatism 1
Case law 18
Civil law 16
Common law 18
Constitutional law 18
Criminal law 16
Defendant 16
Evidence-based practice 11
Expert testimony 11
Forensic psychology 4
Idiographic approach 15
Injunctions 16
Malingering 2
Method of authority 10
Method of science 10
Method of tenacity 10
Nomothetic approach 15
Plaintiff 16
Procedural law 18
Psychology and law 4
Psychology and the law 6
Psychology in the law 6
Psychology of the law 6
Stare decisis 18
Statute of limitation 17
Statutory law 19
Substantive law 17
Telepsychology 12

CHAPTER TWO

PSYCHOLOGY AND THE COURTS

An Overview

The courtroom is a place best reserved for those who are brave, adventuresome and nimble-witted.

(Schwitzgebel & Schwitzgebel, 1980, p. 241)

The observation in this quote referred primarily to expert witnesses testifying in courts, but it could apply to other participants as well, including lay witnesses. Victims of crime or civil wrongs are often brave, as are many defendants. Lawyers and judges are (sometimes) adventuresome and nimble-witted. Members of the jury must be brave in their own way. They must listen patiently to evidence that is often disturbing, deal with delays, and process information that can be confusing.

We all know what a typical courtroom in the United States looks like, and many of us have been in them as participants or observers. Print news media have long covered criminal trials, but it was not until the U.S. Supreme Court allowed states to open their courtrooms to broadcast media (*Chandler v. Florida*, 1981) that this technology let us observe at least some "real" court proceedings—arraignments, portions of a trial, sentencing proceedings—from a distance. Today, although some restrictions on broadcast and still cameras still exist, broadcast outlets often stream proceedings instantaneously so that they reach viewers across the world. Thus, we saw the man who allegedly killed 14 students and three teachers in Parkland, Florida, on February 14, 2018, appear in a courtroom the next day for a brief appearance before a judge. Because broadcast equipment is not allowed in federal courts, though, we do not see live proceedings such as arraignments or trials of people charged with federal crimes. For these, we are dependent on print media, sketch artists, and the accounts of broadcast reporters standing outside the courtroom after they have witnessed the proceedings. With rapidly developing technology, court proceedings also can now occur with participants in different locations. For example, a criminal defendant may appear before a judge for a status hearing while held in jail miles away from the judge sitting in her courtroom.

The courtroom events portrayed in the news media are often unrepresentative. They are typically portions of a sensational criminal trial, such as the testimony of a key witness or the sentencing of an individual convicted of a heinous crime or a crime that has shattered a community, like a reckless driving incident that caused death or serious injuries. Civil trials, compared with criminal trials, get little attention. Furthermore, although there are exceptions, the public rarely is informed of pretrial proceedings.

Most cases do not go to trial. Research demonstrates that about 90% of *criminal* cases are settled between a defendant's first court appearance and the trial stage, and more than 95% of

criminal charges are settled by a guilty plea (Neubauer, 2002; Redlich, Wilford, & Bushway, 2017). More than three-quarters of *civil* cases that reach the courts are settled without going to trial (Abadinsky, 2007).

The entertainment media have also helped increase public familiarity with courts and how they work. Although network law shows of old were considered naive and unrealistic, there are now highly regarded network and cable shows that depict law in action in a realistic way. Nonetheless, even as in the best of the hospital shows, the main characters—particularly lawyers—may be flawed, but they are almost invariably intellectually sharp, quick-witted, and impeccably dressed. These shows also have led to a significant increase in law school applications. As many lawyers will admit, though, a satisfactory job is not assured, and their work can include a fair amount of drudgery.

Despite growing familiarity with the courtroom and its various proceedings through both news and entertainment media, we are generally less knowledgeable about the structure of courts or the legal questions and standards that judges, lawyers, and jurors must address. Even basic legal distinctions, such as the difference between criminal and civil law, may be foreign to many people. This chapter, therefore, introduces the reader to the court system and discusses the judicial process in both criminal and civil cases. We will cover fundamental concepts and focus on matters relating to courts that are most relevant to psychology. In addition, we will highlight issues that create special challenges to those trying to span the boundaries between psychology and law, which in some ways are such disparate disciplines, as we saw in Chapter 1.

ORGANIZATION OF THE COURTS

The court system in the United States is a **dual system** consisting of federal and state courts, which are interrelated yet independent of one another. Federal courts deal with matters relating to the U.S. Constitution and a wide variety of federal criminal and civil laws, including administrative laws. In addition, they hear cases involving disputes between citizens of different states, although their power to do this has been shared with state courts in order to lessen the burden on federal courts (Abraham, 1998).

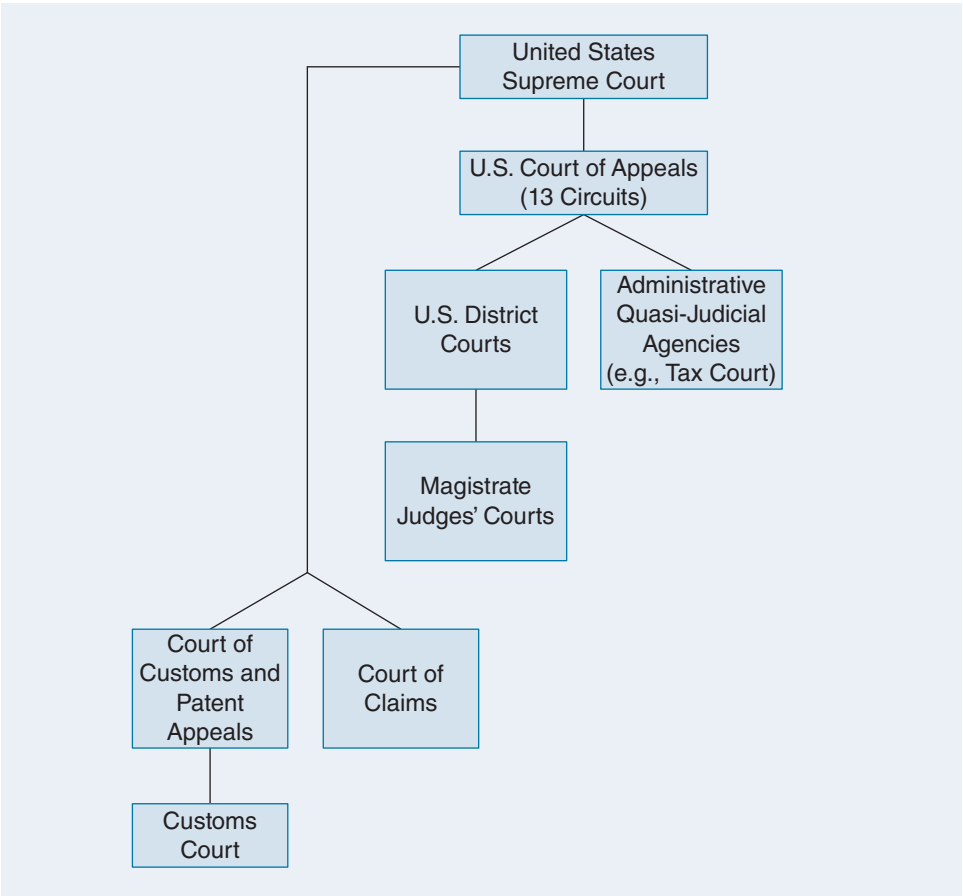
The federal court system has its origins in the U.S. Constitution, which establishes one Supreme Court and "such inferior Courts as the Congress may from time to time ordain and establish" (Article III, Section I). The first law passed by Congress was the Judiciary Act of 1789, which began to create the federal judiciary. Over the years, Congress has tinkered with a variety of courts, adding and deleting them as the country has grown and the geography of the nation has changed. Take, for example, the FISA courts that have recently received so much public attention for allowing law enforcement officials to conduct surveillance activities and execute search warrants in offices and residences of persons associated with the current president. These courts were created by Congress under the Foreign Intelligence Surveillance Act (FISA) of 1978. If the FISA court approves the law enforcement request, a warrant is granted. These warrants also are time limited, but can be renewed every 90 days if continuing probable cause exists to justify the surveillance. Law enforcement agents must show that they have obtained relevant information from the surveillance and will likely continue to do so. FISA court proceedings are secret, and all warrants are classified. In creating FISA courts, Congress intended to set a high bar for approval of such warrants, given that they allow law enforcement to spy on citizens.

In sum, today's federal court system comprises appellate, trial courts, and specialized courts. The **appellate courts** consist of one Supreme Court and, at an intermediate level, 13 courts of appeal for the various circuits. The **trial courts** in the federal system represent

94 judicial districts, including one district in each state, the District of Columbia, and Puerto Rico. Three territories of the United States—the Virgin Islands, Guam, and the Northern Mariana Islands—also have district courts. Attached to these district courts are magistrate judge's courts, where much of the preliminary work on criminal and civil cases is done. In addition, the federal system includes a variety of **specialized courts**, such as immigration courts, bankruptcy courts, patent courts, tribal courts, the FISA courts mentioned previously, and special district courts. **Figure 2.1** provides a simplified view of the federal court structure.

State courts deal with matters concerning the laws of the 50 states. They parallel the structure of federal courts in that there are both trial and appellate courts. However, there are wide variations in the numbers and levels of courts within each state. Particularly in heavily populated states, a bewildering array of courts can exist. All states have a court of last resort, but some have no intermediate appellate court. If that is the case, decisions at the trial court level are appealed directly to the state's court of last resort. The great majority of states today also have a wide variety of specialized courts (e.g., traffic, small claims, and family courts), and as will be seen shortly, many states are experimenting with other specialized courts, such as drug, mental health, domestic violence, and veterans' courts. **Figures 2.2** and **2.3** contrast the court structure in two states, one very simple and the other complex.

Figure 2.1 Illustration of the Federal Court System



The term **jurisdiction** is used to refer to the authority given to a particular court in resolving a dispute. Jurisdiction is best understood as "the geographic area, subject matter, or persons over which a court can exercise authority" (Abadinsky, 1995, p. 144). Occasionally, two or more courts may have the authority to hear a case, which is called **concurrent jurisdiction**. For example, a particular law violation may have the potential of involving both federal and state courts. An employer who refuses to promote an employee with disabilities may be violating both federal and state statutes. In this situation, the person filing suit (the plaintiff) may have the choice of filing in the federal or state court. Likewise, in the criminal context, one incident can represent an alleged violation of both federal and state law.

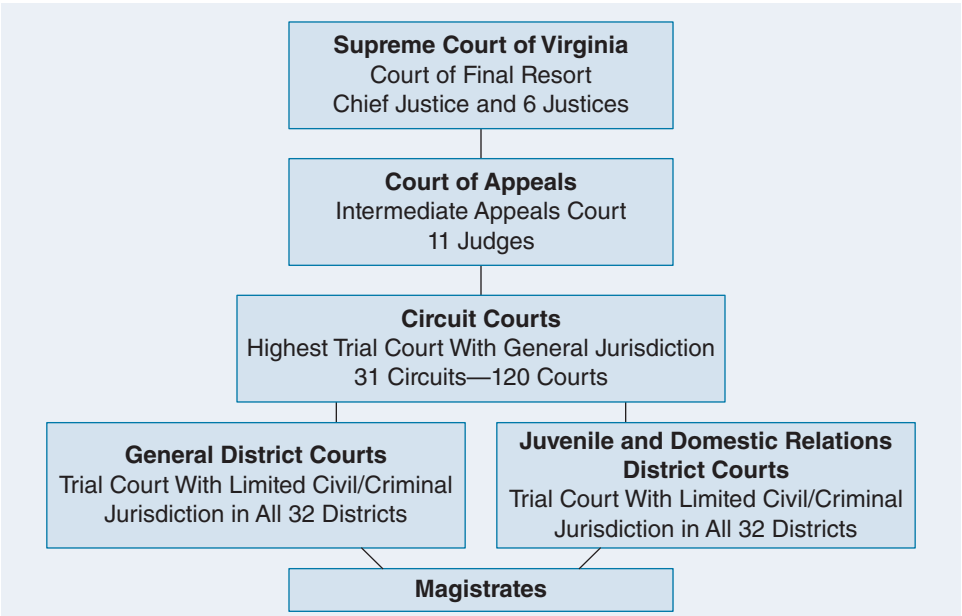
Trial courts, compared with appellate courts, are divided into courts of **general jurisdiction** and **limited jurisdiction**. Trial courts are often referred to as the workhorses of the judicial system, because their dockets are filled with a multitude of cases and papers to be processed. Trial courts of general jurisdiction have broad authority to deal with a wide range of issues. Felony trials as well as major trials in civil cases are held in these courts. Courts of limited jurisdiction, by contrast, are the entry-level courts. They typically cannot conduct felony trials, although judges can hold preliminary hearings, issue search warrants, and conduct a variety of pretrial proceedings. In state court systems, courts of limited jurisdiction are referred to as lower courts, municipal courts, city and town courts, or inferior courts. Magistrate judges' courts, attached to U.S. district courts, are the courts of limited jurisdiction in the federal system.

We will now look more closely at the work of federal and state courts.

Federal Courts

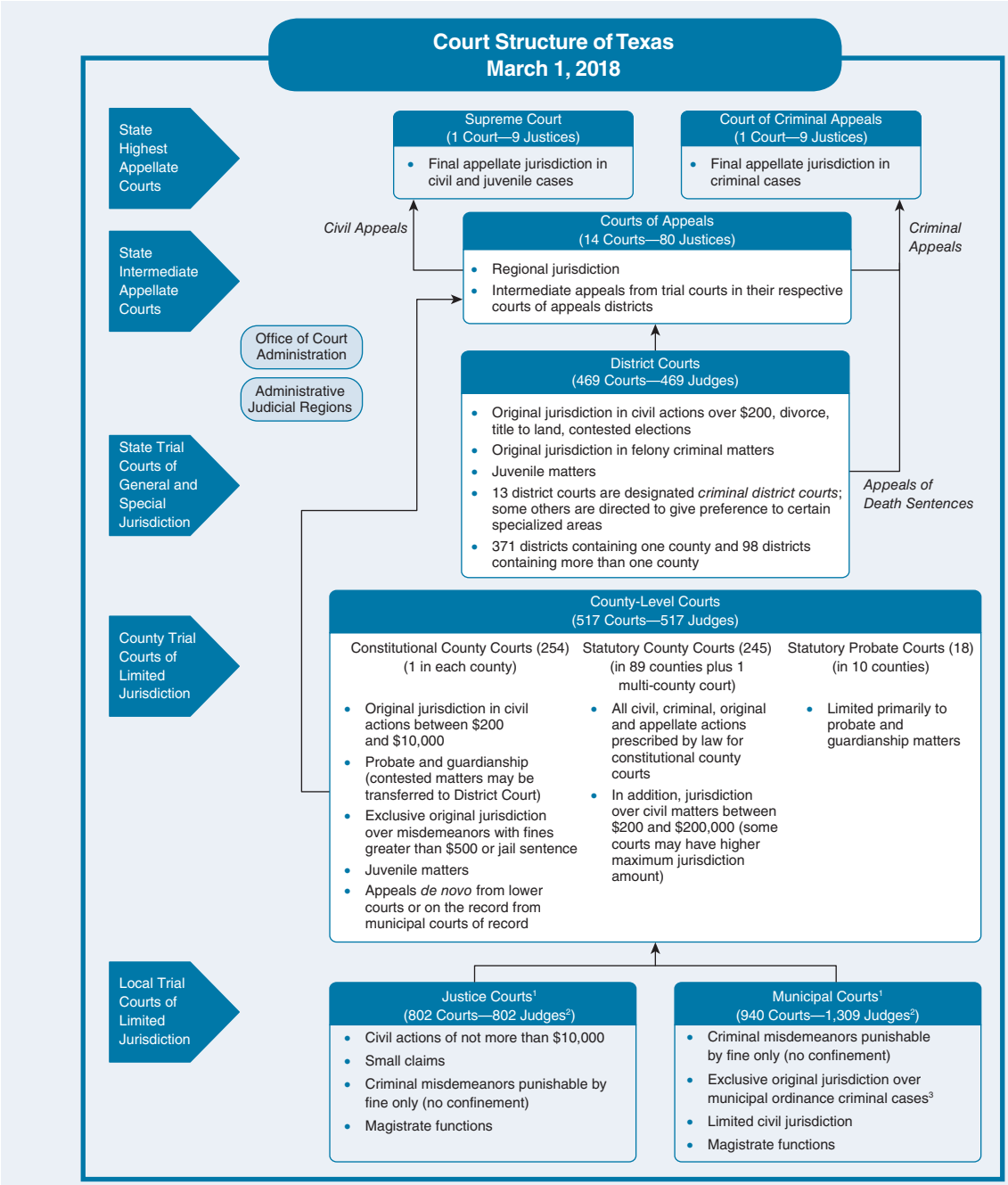
The subject matter jurisdiction of federal courts is set forth in Article III, Section 2 of the U.S. Constitution. Clearly, the federal courts had high demands on their time right from the outset:

Figure 2.2 View of the Court Structure of Virginia



Source: Adapted from "Diagram of Virginia's Judicial System," *Virginia Courts in Brief.* Copyright 2009 Office of the Executive Secretary, Supreme Court of Virginia. All rights reserved. Retrieved from Virginia's Court System, http://www.courts.state.va.us/courts/home.html.

Figure 2.3 Court Structure of Texas



Source: "Court Structure Chart," *About Texas Courts: Court Structure & Jurisdiction*. Retrieved August 1, 2018, from Texas Judicial Branch, http://www.txcourts.gov/about-texas-courts.

1. The dollar amount is currently unclear.
2. All justice courts and most municipal courts are not courts of record. Appeals from these courts are by trial de novo in the county-level courts, and in some instances in the district courts.
3. Some municipal courts are courts of record; appeals from those courts are taken on the record to the county-level courts.
4. An offense that arises under a municipal ordinance is punishable by a fine not to exceed (1) $2,000 for ordinances that govern fire safety, zoning, and public health or (2) $500 for all others.

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

Congress over the years has passed a wide array of laws that have had the effect of increasing the work of federal courts, but in some cases limiting it as well. Laws relating to the protection of the environment, employment discrimination, health regulation, crime control, safety in the workplace, and broadcasting are but a few examples of the workload expansion. Over the past two decades, Congress has also greatly expanded the work of immigration courts and added new judges. Today there are approximately 58 immigration courts. They consider requests for asylum and monitor deportation proceedings, among many other tasks.

The 94 U.S. district courts—the trial courts—carry most of the workload in the federal system. At the next level up from the trial courts are the appellate courts. The United States is divided into 12 geographically defined jurisdictions or circuits, each with a court of appeals. In addition, there is a federal circuit court of appeals, which has nationwide jurisdiction in a variety of subject matters, such as government contracts, for a total of 13 circuits (see **Figure 2.1**). The 13 federal appellate courts comprise between three and 15 judges, who meet both in panels of three and, in major cases, as a whole (*en banc*). The primary purpose of the court of appeals is to review decisions made by the federal district courts within its jurisdiction. A court of appeals also reviews cases heard by specialized courts, such as tax courts, and the various federal administrative agencies.

While the intermediate appellate courts in the federal system must rule on all cases properly presented to them for review, the highest court in the land, the U.S. Supreme Court, has much more discretion. The Supreme Court consists of nine Justices nominated for life by the president, and again with the advice and consent of the U.S. Senate. The Supreme Court begins to meet on the first Monday of October each year and usually continues in session until June or July. (See for a list of the Justices as of Summer 2018.)

Although what the Court may hear (subject matter jurisdiction) is defined by Congress as well as the Constitution, the Justices are given nearly complete control of their docket through their ability to refuse to hear and review specific cases. The cases the Justices select are usually those believed to address important unanswered questions, and they often involve an interpretation of the U.S. Constitution. In *Obergefell v. Hodges* (2015), for example, the Court ruled that same-sex couples were guaranteed a right to marry by the 14th Amendment's due process and equal protection clauses. In other situations, though, the Court has not been willing to wade into a controversial issue, despite questions that have yet to be answered. For example, in a Second Amendment case, the Court asserted that the Second Amendment conferred an individual right to bear arms (*District of Columbia v. Heller*, 2008), but it has yet to say that this includes a right to bear arms outside one's home. It has refused thus far to hear cases addressing that question. The U.S. Supreme Court has also emphasized that the right to bear arms is not absolute; the government can place reasonable restrictions, such as who can obtain arms and where weapons can be prohibited. Thus, it is left to Congress and individual states to pass laws to this effect. Finally, the Court has refused to hear several cases that would challenge the constitutionality of the death penalty in light of evolving standards of decency.

Table 2.1 Justices of the U.S. Supreme Court, Date Seated, and Nominating President (as of Summer 2018)

Justice	Date Seated on Bench	Nominating President
John G. Roberts, Chief Justice	September 29, 2005	George W. Bush
Clarence Thomas	October 23, 1991	George H. W. Bush
Ruth Bader Ginsburg	August 10, 1993	William J. Clinton
Stephen G. Breyer	August 3, 1994	William J. Clinton
Samuel A. Alito, Jr.	January 31, 2006	George W. Bush
Sonia Sotomayor	August 8, 2009	Barack Obama
Elena Kagan	August 7, 2010	Barack Obama
Neil M. Gorsuch	April 10, 2017	Donald J. Trump
Brett M. Kavanaugh		Donald J. Trump

Note: As of press date, the date that Brett M. Kavanagh was scheduled to be seated on the bench was not yet known.

The Supreme Court also has issued recent major decisions on other constitutional issues, such as those related to affirmative action (*Fisher v. University of Texas*, 2013) and voting rights (*Husted v. A. Philip Randolph Institute*, 2018; *Shelby County v. Holder*, 2013). The Voting Rights Act of 1965 was dealt a major blow by the Court, when it ruled in the *Shelby* case that states with a history of discriminatory voting practices were no longer required to gain approval from the federal government before making changes in their voting laws. In *Husted*, the Court, in a close 5-4 decision, allowed the state of Ohio to purge people's names from voter registration lists if they did not vote for 4 years. Likewise, affirmative action was not enthusiastically supported by the Court, when a majority sent the *Fisher* case back to Texas courts for a closer look at the formula the University of Texas used to admit students. All these cases were watched closely by legal psychologists, and in some—for example, *Obergefell* and *Fisher*—the American Psychological Association (APA) had filed *amicus curiae* briefs. (*Amicus* briefs will be discussed later in the chapter.) If the Justices agree to hear a case, they issue a **writ of *certiorari*** calling for the lower court's record to be sent up for review. A *writ* is a written judicial order. In this case, the lower court is ordered to produce the documents needed to review the proceedings.

About 5,000 appeals are filed with the U.S. Supreme Court each year, but a vast majority are denied because the subject matter is either not proper or not of sufficient importance to warrant full Court review. In addition, there is simply not enough time for the Justices to hear all the cases that come to their attention. Four of the nine Justices must agree to hear a case. The denials of *certiorari* may or may not include a brief statement explaining why the decision of the lower appellate court must stand. As a recent example, in a death penalty case (*Reeves v. Alabama*, cert. denied, 2017), the Justices refused to hear from a petitioner on death row who argued that he had been denied the effective assistance of counsel because his lawyer refused to hire a mental health expert to evaluate his intellectual ability. Evidence of intellectual