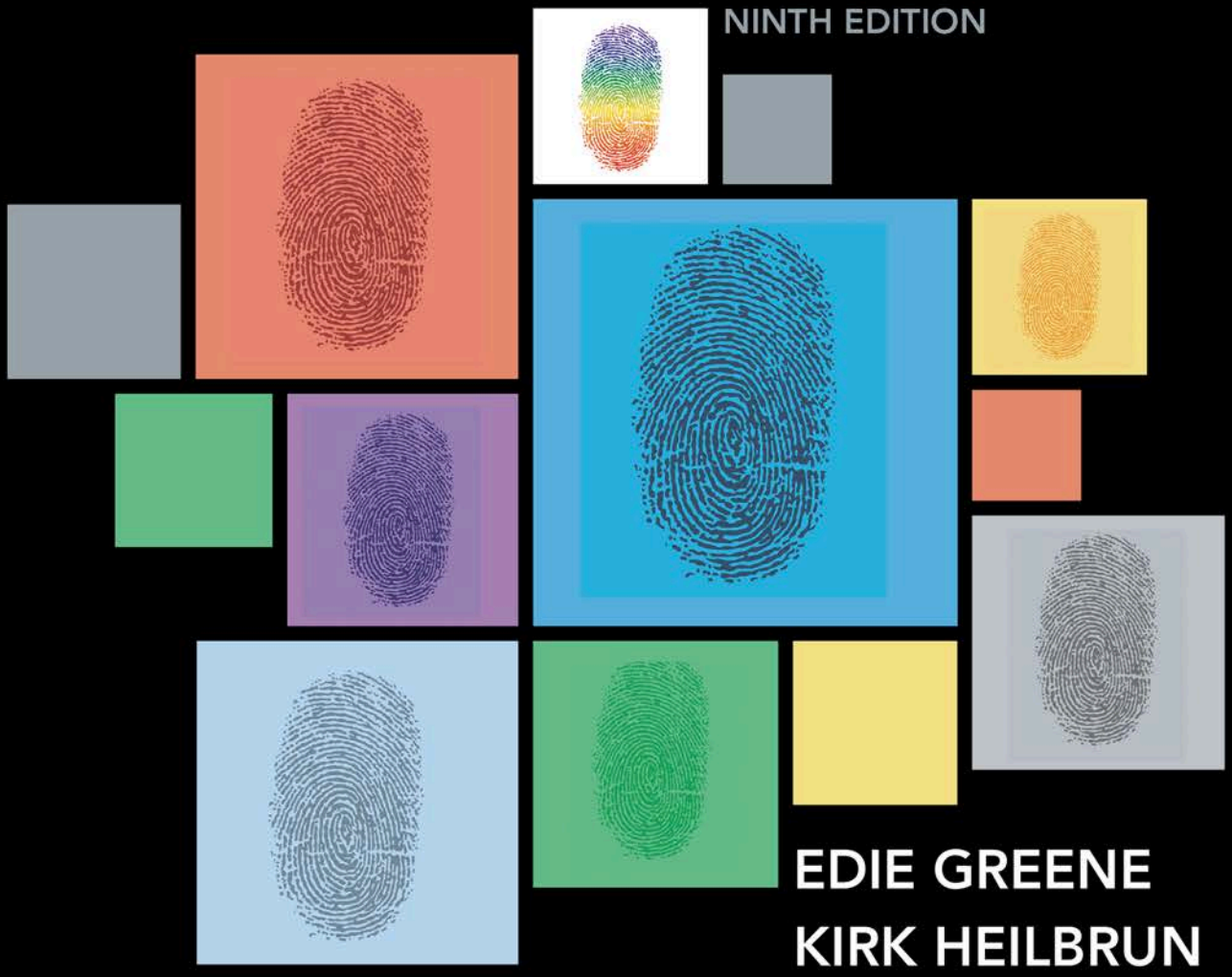
Wrightsman's

PSYCHOLOGY AND THE LEGAL SYSTEM

NINTH EDITION



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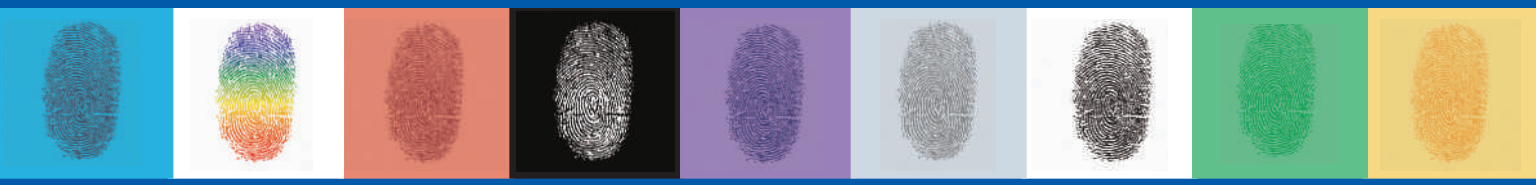

NINTH EDITION

WRIGHTSMAN'S PSYCHOLOGY AND THE LEGAL SYSTEM

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***Wrightsman's Psychology and The Legal System,* Ninth Edition**

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Dedications
To my siblings
Richard, Nancy, and Jim
How fortunate we are
-EG

To Olivia Marian Catizone
Long may you run
-KH

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Preface

This is the 9th edition of *Psychology and the Legal System.* Its longevity is a testament to the incisive, rigorous, and accessible presentation of various aspects of psychology and law originally provided by Lawrence Wrightsman in the 1st edition, published more than 30 years ago. Professor Wrightsman's name is included in the title to honor his many contributions to this book and to the field of psychology and law. As with two previous editions, we—Edie Greene and Kirk Heilbrun—are the sole authors.

We continue to believe that the law is inherently psychological. It is made by people with varying desires and ambitions, interpreted by individuals with different (sometimes contradictory) perspectives, and experienced—either directly or indirectly—by all of us. Both psychology and the law are about motivation and behavior. Indeed, for centuries the legal system has been a powerful influence on people's everyday activities. From the Supreme Court's 1954 school desegregation decision to its 2014 case concerning application of the death penalty to people with intellectual disabilities, both of which are described in this book, the courts have had considerable impact on individual lives.

As we move toward the third decade of the 21st century, we find it ever more useful to describe the law from the perspective of psychology, a behavioral science that also has a significant applied component. We are not alone. In fact, matters of law and psychology are often cited in the media. Whether they involve concerns about excessive use of force by police, partisanship in judicial elections, the impact of trauma on human behavior, or the role of extremist ideology and beliefs in fostering violence, headlines and lead stories are often about some aspect of psychology and law. Although this attention appears to cater to an almost insatiable curiosity about crime and other types of legal disputes, it also promotes some ambivalence about the law. Many citizens are suspicious of the police, but police are still the first responders in a crisis. Juries are sometimes criticized for their decisions, but most litigants would prefer to have their cases decided by juries rather than judges. Citizens value their constitutionally protected rights, but also demand security in a post-9/11 era. This 9th edition explores these tensions as well as many other captivating and controversial issues that arise at the crossroads of psychology and the law.

The primary audiences for *Psychology and the Legal System* are students taking a course in psychology and the law, forensic psychology, or the criminal justice system, and others who seek to learn more about the legally relevant science and practice of psychology. This book (and its individual chapters) may also be used as a supplement in psychology courses that emphasize applied psychology, social issues, or policy analysis. In addition, it covers a number of topics relevant to law school courses that introduce law students to social science research findings and applications.

We have attempted to find the right mix of psychology and legal analysis in the text. The book's emphasis remains on psychological science and practice, but we also summarize the legal history of many key topics and present the current status of relevant legal theories and court decisions. Specific recent topics that are covered in some detail in this edition include assessing the risk of terrorist acts based on ideologies and affiliations, the uptick in mass shootings, sexual harassment in the workplace, the toll of legal education on students' well-being, and how psychology has contributed to criminal profiling.

We continue to focus on the psychological dimensions of several topics that remain important in contemporary society, just as they were important when previous editions of this text were written. These include how attributions about the causes of behavior affect judgments of offenders and victims, lawyers' and judges' use of intuitive cognitive mechanisms to evaluate cases and make decisions, the association between beliefs about procedural fairness and people's willingness to obey the law, clinicians' assessments of competence in various domains, and racial influences on police, jury, and judicial decision-making. As in previous editions, we have updated each of these topics using the best available scientific evidence published since our most recent edition went to press.

NEW FEATURES AND REVISIONS

We have made the following major changes from the last edition:

- We strived to make *Psychology and the Legal System* more user friendly by providing current examples to illustrate the material in a straightforward and accessible way.
- We added new material on important alternatives to traditional prosecutions, namely, problem-solving courts that enable drug abusers, people suffering from mental illnesses, and veterans involved in the criminal justice system to receive structured treatments to address the underlying source of dysfunction.
- We provided several new real-world examples in boxes ("The Case of…"). These summaries describe scenarios and cases that illustrate or explain an important legal concept or psychological principle covered in the chapter. Readers will be familiar with many recent examples including clashes between white supremacists and others at the Unite the Right rally in Charlottesville, the shooting deaths of nine parishioners in Charleston, the false guilty plea that upended the career of football star Brian Banks, and the sexual assault trial of Bill Cosby. We also feature the historic cases of Ernest Miranda, Clarence Gideon, John Hinckley, Ted Bundy, and others. A few cases are either fictional (such as Dexter Morgan from the popular television series *Dexter*) or composites, but still highly applicable to the chapter material.
- We updated examples of the themes, introduced in Chapter 1, that pervade a psychological analysis of the law. These include the rights of individuals versus the common good; equality versus discretion as ideals that can guide the legal system; discovering the truth or resolving conflicts as the goals that the legal system strives to accomplish; and science versus the law as a source of legal decisions. Elsewhere (Greene & Heilbrun, 2016), we have noted that these themes continue to unify many of the research findings, policy choices, and judicial decisions detailed in the book and we return to them at several points in the text.
- This edition includes a thorough, authoritative revision of every chapter in light of research and professional literature published since the last edition. Highlights include the following:
- Chapter 1 provides an overview of the field and details the many roles that psychologists can play in the legal system.
- Chapter 2 includes new data on the well-being of law students and the professional satisfaction of practicing lawyers.
- Chapter 4, on the psychology of police, includes new material on the excessive use of force in police encounters with minority citizens, attempts to improve police-community relations, and recommendations from President Obama's Task Force on the Future of Policing in the 21st Century. They include practices that reduce crime, build public trust, and ensure officer wellness and safety.
- Chapter 5 updates the reforms to lineup procedures in cases involving eyewitness identification based on recent scientific data on eyewitness memory.
- Chapter 6 covers the psychology of victims of crime and violence. It updates research on the relationship between trauma, adverse experiences, and crime, as well as rape-supportive attitudes that include acceptance of rape myths, adversarial sexual beliefs, and hostile attitudes toward women. It notes that rape is a severe trauma that can lead to PTSD symptoms.
- Chapter 7, on the evaluation of criminal suspects, includes discussion of new techniques for detecting deception based on principles of cognitive psychology. It also describes how interrogation procedures are being reformed in light of psychological research on social influence factors.
- Chapter 8 provides new data on the effectiveness of various high-tech tools used during trials, including videoconferencing, animations, and virtual reality.
- Chapter 10 describes updates on forensic assessment in criminal cases, and Chapter 11 does the same for civil cases.
- Chapter 12 describes the complexity of jury selection in a location saturated with publicity about the crime. The case of Boston Marathon bomber, Dzhokhar Tsarnaev, serves as an example.
- Chapter 13 expands the discussion of juries in the previous chapter to cover their decision-making. We reorganized it to focus on jurors' reliance on relevant evidence, evaluated through the lens of their emotions. It includes updated information on their ability to understand and apply judicial instructions and on jury deliberations.
- Chapter 14 describes recent data on death-qualification in capital trials, a process whereby those with scruples against the death penalty are eliminated from the jury. The new research raises concerns about representativeness of the juries that decide capital cases.

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MindTap is a personalized teaching experience with relevant assignments that guide students to analyze, apply, and improve thinking, allowing you to measure skills and outcomes with ease.

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In addition to the benefits of the platform, MindTap for *Wrightsman's Psychology and the Legal System* provides helpful assignments and activities, including section quizzes and chapter tests, as well as appendices—the Ethical Principles of Psychologists and Code of Conduct and the Specialty Guidelines for Forensic Psychology, both of which provide ethical guidance for practice and research in forensic psychology, as well as the Bill of Rights, which describes the amendments to the U.S. Constitution.

Acknowledgments

For assistance in preparing this edition, we thank the Cengage staff: Erin Schnair, Product Manager; Leah Jenson, Product Assistant; Star Burruto, Product Team Manager; Tangelique Williams-Grayer, Content Developer; and James Zayicek, Project Manager. Each was extremely helpful in writing the 9th edition of *Psychology and the Legal System*.

Supplements

Instructor Resource Center. Everything you need for your course in one place! This collection of book-specific lecture and class tools is available online via www.cengage.com/login. Access and download PowerPoint presentations, images, instructor's manual, and more.

Cognero. Cengage Learning Testing Powered by Cognero is a flexible, online system that allows you to author, edit, and manage test bank content from multiple Cengage Learning solutions, create multiple test versions in an instant, and deliver tests from your LMS, your classroom, or wherever you want.

Instructor's Manual. The Online Instructor's Manual contains chapter outlines and summaries, discussion questions, suggested videos, readings, websites, and YouTube videos, and class activities.

PowerPoint. The Online PowerPoints feature lecture outlines and important images from *Wrightsman's Psychology and the Legal System,* 9th edition.

About the Authors

Rebecca Siegel

Edie Greene is currently professor at Department of Psychology, University of Colorado Colorado Springs, where she also serves as director of the graduate concentration in psychology and law and director of the undergraduate honors program. She earned her Ph.D. in cognitive psychology and law at the University of Washington in 1983 and served there as postdoctoral research associate between 1983 and 1986. From 1994 to 1995, Greene was a fellow in Law and Psychology at Harvard Law School. She has received several federally funded grants to support her research on legal decision-making, eyewitness memory, and psycholegal aspects of aging. Greene received a college-wide award for Outstanding Research and Creative Works in 1999, a university-wide award for Excellence in Research in 2001, and the Chancellor's Award for Distinguished Faculty in 2009. She has been invited to lecture at the National Judicial College and at continuing legal education programs nationwide. She consults with lawyers on various trial-related issues including jury selection, trial strategies, and jury decisions, and has, on numerous occasions, testified as an expert witness on jury behavior and eyewitness memory. In addition to serving as coauthor of the 5th to 8th editions of *Psychology and the Legal System*, Greene is the author of a number of articles, columns, and book chapters, and cosigner on several *amicus* briefs presented to the U.S. Supreme Court. She also coauthored *The Adversary System* (with Frank Strier, 1990), *Determining Damages: The Psychology of Jury Awards* (with Brian Bornstein, 2003), and *The Jury under Fire: Myth, Controversy, and Reform* (with Brian Bornstein, 2017). She has served as President of the American Psychology-Law Society/APA Division 41 and, in 2008, received the Award for Outstanding Teaching and Mentoring from that Society.

Anna Heilbrun

Kirk Heilbrun is currently professor at Department of Psychology, Drexel University. He received his doctorate in clinical psychology in 1980 from the University of Texas at Austin, and completed postdoctoral fellowship training from 1981 to 1982 in psychology and criminal justice at Florida State University. His current research focuses on juvenile and adult offenders, legal decision-making, and forensic evaluation associated with such decision-making, as well as reentry and the diversion of individuals with behavioral health problems from standard prosecution. He is the author of a number of articles on forensic assessment, violence risk assessment and risk communication, and the diversion and treatment of mentally disordered offenders. In addition to serving as coauthor for the 6th to 8th editions of *Psychology and the Legal System*, he has published 10 other books on topics including forensic mental health assessment, juvenile delinquency, violence risk assessment, the Sequential Intercept Model, evaluating juvenile transfer, and forensic ethics. His practice interests also center around forensic assessment, and he directs a clinic within the department in this area, as well as a reentry project for the assessment and treatment of individuals returning to the community from federal prison. He is board certified in clinical psychology and in forensic psychology by the American Board of Professional Psychology, and has previously served as president of both the American Psychology-Law Psychology/APA Division 41, and the American Board of Forensic Psychology. He received the 2004 Distinguished Contributions to Forensic Psychology award and the 2008 Beth Clark Distinguished Service award from the American Academy of Forensic Psychology, and the 2016 Distinguished Contributions to Psychology and Law award from the American Psychology-Law Society.

1 Psychology and the Law: Choices and Roles

ORIENTING QUESTIONS

1. Why do we have laws, and what is the psychological approach to studying law?
2. What choices are reflected in the psychological approach to the law?
3. How do laws reflect the contrast between due process and crime control in the criminal justice system?
4. What are five roles that psychologists may play in the legal system and what does each entail?

Consider the following stories, all of which were prominently featured in the news:

- In a case that elevated debate about police shootings of African American citizens, a Minnesota jury had to decide whether Officer Jeronimo Yanez reasonably believed that Philando Castile was reaching for a gun when he was pulled over while driving. Among the rash of police shootings and indictments of police officers in recent years, this case was remarkable because Castile's girlfriend live-streamed and narrated the bloody scene as it unfolded. Yet the outcome was familiar: Like many other officers charged with shooting Black citizens, Yanez was acquitted.
- A Denver radio host sued Taylor Swift for $3 million after she accused him of groping her during a routine meet-and-greet. But the pop star turned the tables by countersuing for $1, which removed any suspicion of personal gain and provided an opportunity, as she said, to be an example to other women who have endured similar humiliating acts. The jury's verdict? $1 to Taylor Swift.
- A drunken driver who killed a 10-year-old boy in suburban Dallas was sentenced to spend 180 days in jail over the next 10 years, including every Christmas Day, New Year's Day, and June 8, the child's birthday. The judge said he wanted to remind the defendant of the family's loss on these important family holidays.

These stories illustrate a few of the psycho-legal topics that we consider in this book: police–community relations and discrimination, the motivations of offenders and victims, discretion in judges' sentencing decisions, and public perceptions of security and law enforcement officials. They show the real flesh and blood of some of the psychological issues that arise in the law.

The Importance of Laws

These examples also illustrate the pervasiveness of the law in our society. But how does the law work? This book will help you understand how the legal system operates by applying psychological concepts, theories, findings, and methods to its study.

Laws as Human Creations

Laws are everywhere. They affect everything from birth to death. Laws regulate our private lives and our public actions. Laws dictate how long we must stay in school, how fast we can drive, when (and, to some extent, whom) we can marry, and whether we are allowed to play our car stereos at full blast or let our boisterous dog romp through the neighbors' yards and gardens. Given that the body of laws has such a widespread impact, we might expect that the law is a part of nature, that it was originally discovered by a set of archaeologists or explorers. Perhaps we think of Moses carrying the Ten Commandments down from the mountain.

But our laws are not chiseled in stone. Rather, laws are human creations that evolve out of the needs for order and consistency. To be responsive to a constantly changing society, our laws must also change. As some become outdated, others take their place. For example, before there were shootings on school grounds, no laws forbade the presence of weapons in schools. But after a series of deadly incidents, laws that banned weapons from school property were widely established. On occasion, the reach of these zero-tolerance policies has been excessive, as Zachary Christie, a Delaware first grader learned. Zachary was suspended and ordered to enroll in an alternative program for troubled youths because he took to school a Cub Scout utensil that included a small, folding knife. When this sort of overreaching occurs, the public reacts, and the policies are revised again.

Laws Help Resolve Conflict and Protect the Public

Many standards of acceptable behavior—not purposely touching strangers on elevators, for example—seem universally supported. But in some situations, people have differences of opinion about what is considered appropriate, and disagreements result. When this occurs, society must have mechanisms to resolve the disagreements. Thus, societies develop laws and regulations to function as conflict resolution mechanisms. Customs and rules of conduct evolve partly to deal with the conflict between one person's impulses and desires and other people's rights. Similarly, laws are developed to manage and resolve those conflicts that cannot be prevented.

Public safety is always an important consideration in a civilized society. In earlier times, before laws were established to deter and punish unacceptable behavior, people "took the law" into their own hands, acting as vigilantes to secure the peace and impose punishment on offenders. Now, at least in the United States and most other nations, all governmental entities—federal, state, county, borough, municipality, and even some neighborhoods— have enacted laws to protect the public.

The Changing of Laws

The basic raw material for the construction and the revision of laws is human experience. As our experiences and opportunities change, laws must be developed, interpreted, reinterpreted, and modified to keep up with these rapid changes in our lives. As George Will put it, "Fitting the law to a technologically dynamic society often is like fitting trousers to a 10-year-old: Adjustments are constantly needed" (1984, p. 6).

The framers of the U.S. Constitution, and even legislators of 30 years ago, never anticipated how laws have changed and will continue to change. They probably never contemplated the possibility that advances in neuroscience, for example, would affect how police investigate cases, attorneys represent their clients, and juries and judges make decisions. But brain imaging technology is now used to detect brain injuries and assess pain in those involved in accidents, determine mental state and capacity for rational thought in justice-involved individuals, and detect lies and deception in those under interrogation. Although the correspondence between brain activity and behavior is far from clear at this point, neuroimaging will undoubtedly raise thorny questions for the legal system. New rules, policies, and laws will have to be created to address them.

Similarly, no one could have anticipated the ways that DNA testing would change laws involving criminal investigations. Legislatures have passed statutes that mandate the collection of DNA samples from millions of Americans, including those who have simply been arrested and are awaiting trial. Some of these individuals have objected to having their DNA collected and catalogued. But law enforcement officials claim that widespread testing will help them solve more crimes and exonerate people who were wrongly convicted. (We describe the role of DNA analysis in the exoneration of convicted criminals in Chapter 5.)

Legislators must now consider what, if any, restrictions should be placed on online activities. (Cyber-law, virtually unheard of 30 years ago, has become an important subfield in the law.) For example, individuals have been convicted of sexually abusing minors after they sexted nude and seminude pictures, and drivers have been ticketed for sneaking a peek at their phones when stopped at red lights, thereby violating their states' hands-free requirements. Should laws regulate these activities? Many people believe that these laws protect the dignity and safety of the public, yet others claim that they interfere with constitutionally protected speech and privacy rights. But most people would agree that vast changes in society have necessitated far-reaching adjustments in the law.

The invention of the automobile produced several new adversaries, including pedestrians versus drivers, and hence new laws. Car accidents—even minor ones—cause conflicts over basic rights. Consider a driver whose car strikes and injures a pedestrian. Does this driver have a legal responsibility to report the incident to the police? Yes. But doesn't this requirement violate the Fifth Amendment to the U.S. Constitution, which safeguards each of us against self-incrimination, against being a witness in conflict with our own best interests?

Shortly after automobiles became popular in the first two decades of the 20th century, a man named Edward Rosenheimer was charged with violating the newly implemented reporting laws. He did not contest the charge that he had caused an accident that injured another person, but he claimed that the law requiring him to report it to the police was unconstitutional because it forced him to incriminate himself. Therefore, he argued that this particular law should be removed from the books, and he should be freed of the charge

of leaving the scene of an accident. Surprisingly, a New York judge agreed and released him from custody.

But authorities in New York were unhappy with a decision that permitted a person who had caused an injury to avoid being apprehended, so they appealed the decision to a higher court, the New York Court of Appeals. This court, recognizing that the Constitution and the recent law clashed with each other, ruled in favor of the state and overturned the previous decision. This appeals court concluded that rights to "constitutional privilege"—that is, to avoid self-incrimination—must give way to the competing principle of the right of injured persons to seek redress for their sufferings (Post, 1963).

These examples illustrate that the law is an evolving human creation, designed to arbitrate between values in opposition to each other. Before the advent of automobiles, hit-and-run accidents seldom occurred. Before the invention of smartphones, texting at stoplights (or worse, while driving) never occurred. However, once cars and smartphones became a part of society, new laws were enacted to regulate their use, and courts have determined that most of these new laws are constitutional. The advent of Google Glasses and driverless vehicles will raise new questions about rights and responsibilities with which the law will have to grapple. Psychological research can be relevant to these questions by assessing, for example, whether navigating with Google Glasses while driving is more or less distracting than glancing at a GPS unit or phone.

The Psychological Study of Law

Laws and legal systems are studied by several traditional disciplines other than psychology. For example, anthropologists compare laws (and mechanisms for instituting and altering laws) in different societies and relate them to other characteristics of these societies. They may be interested in how frequently women are raped in different types of societies and in the relationship between rape and other factors, such as the extent of separation of the sexes during childhood or the degree to which males dominate females.

Sociologists, in contrast, usually study a specific society and examine its institutions (e.g., the family, the church, or the subculture) to determine their role in developing adherence to the law. The sociologist might study the role that social class plays in criminal behavior. This approach tries to predict and explain social behavior by focusing on groups of people rather than on individuals.

A psychological approach to the law emphasizes its human determinants. The focus in the psychological approach is on the individual as the unit of analysis. Individuals are seen as responsible for their own conduct and as contributing to its causation. Psychology examines the thoughts and actions of individuals—drug abuser, petty thief, police officer, victim, juror, expert witness, corporate lawyer, judge, defendant, prison guard, and parole officer, for example—involved in the legal system. Psychology assumes that characteristics of these participants affect how the system operates, and it also recognizes that the law, in turn, can affect individuals' characteristics and behavior (Ogloff & Finkelman, 1999). By *characteristics*, we mean these persons' abilities, perspectives, values, and experiences—all the factors that influence their behavior. These characteristics affect whether a defendant and his or her attorney will accept a plea bargain or go to trial. They influence whether a Hispanic juror will be more sympathetic toward a Hispanic defendant than toward a non-Hispanic defendant. They help determine whether a juvenile offender will fare better in a residential treatment facility or a correctional institution. And sometimes they can explain why people commit crimes. So after Stephen Paddock fired on a crowd of 22,000 people attending a country music festival in Las Vegas in 2017—the deadliest mass shooting in modern U.S. history—authorities tried very hard to understand his motivations.

But the behavior of participants in the legal system is not just a result of their personal qualities. The setting in which they operate matters as well. Kurt Lewin, a founder of social psychology, proposed the equation $B = f(p, e)$: behavior is a function of the person and the environment. Qualities of the external environment and pressures from the situation affect an individual's behavior. A prosecuting attorney may recommend a harsher sentence for a convicted felon if the case has been highly publicized, the community is outraged over the crime, and the prosecutor happens to be waging a reelection campaign. A juror holding out for a guilty verdict may yield if all the other jurors passionately proclaim the defendant's innocence. A juvenile offender may desist from criminal behavior if his or her gang affiliations are severed. The social environment affects legally relevant choices and conduct.

This book concentrates on the behavior of participants in the legal system. As the examples at the beginning of this chapter indicate, citizens are all active

participants in the system, even if they do not work in occupations directly tied to the administration of justice. We all face daily choices that are affected by the law—whether to speed through a school zone because we are late to class, whether to report the person who removes someone else's laptop from a table at the library, or whether to vote in favor of or against a proposal to end capital punishment. Hence, this book will also devote some attention to the determinants of our conceptions of justice and the moral dilemmas we all face.

But this book will pay particular attention to the role of psychology in the criminal and civil justice systems and to the central participants in those settings: defendants and witnesses, civil and criminal lawyers, judges and juries, convicts and parole boards. It will also focus on the activities of **forensic psychologists** who generate and communicate information to answer specific legal questions or to help resolve legal disputes (Melton et al., 2017). Most forensic psychologists are trained as clinical psychologists, whose specialty involves the psychological evaluation and treatment of others. Forensic psychologists are often asked to evaluate a person and then prepare a report for a court, and sometimes provide expert testimony in a hearing or trial. For example, they may evaluate adult criminal defendants or children involved with the juvenile justice system and offer the court information relevant to determining whether the defendant has a mental disorder that prevents him from going to trial, what the defendant's mental state was at the time of the offense, or what treatment might be appropriate for a particular defendant. But psychologists can play many other roles in the legal system, as well. We describe these roles later in the chapter.

Basic Choices in the Psychological Study of the Law

Just as each of us has to make decisions about personal values, society must decide which values it wants its laws to reflect. Choices lead to conflict, and often the resulting dilemmas are difficult to resolve. Should the laws uphold the rights of specific individuals or protect society in general? Should each of us be able to impose our preferences on others, or must we be attentive to other people's needs? You may have pondered this question while stopped at a traffic light next to a car with a deafening subwoofer. One of Madonna's neighbors in a posh New York City apartment building certainly pondered this question. She filed a lawsuit against the pop icon, claiming that her music was so loud that the neighbor had to leave several times a day. Whose rights prevail? A commonly asked question that taps that dilemma is whether it is better for ten murderers to go free than for one innocent person to be sentenced to death. The law struggles with this fact: rights desirable for some individuals may be problematic for others.

Consider the simple question about whether to wear a seat belt. People who opt not to use seat belts in a car are making a seemingly personal choice. Perhaps they don't like the way the belt feels. Perhaps they like having freedom to move around the car. But that choice puts them at greater risk for death or serious injury in an accident, and accidents involve costs to society, including lost wages, higher insurance premiums, and disability payments to the injured person and that person's dependents. So the good of society can be adversely affected by the split-second decision of individuals as they step into their cars.

This tension between individual rights and the common good is one example of the basic choices that pervade the psychological study of the law. But there are others. In this chapter, we highlight four basic choices inherent in laws and that apply to each of us in the United States, Canada, and many other countries. Each choice creates a dilemma and has psychological implications. No decision about these choices will be completely satisfactory because no decision can simultaneously attain two incompatible goals—such as individual rights and societal rights—both of which we value. These four choices (and the tension inherent in their competing values) are so basic that they surface repeatedly throughout this book, as they did with different examples in earlier editions (see, e.g., Greene & Heilbrun, 2015). They unify many of the research findings, policy decisions, and judicial holdings that are discussed in subsequent chapters.

The First Choice: Rights of Individuals versus the Common Good

Consider the following:

- Smokers have long been restricted to smoky airport lounges and back sections of restaurants, and often huddle together outside of workplace doors. But now smokers are banned from lighting up in some public

parks and beaches, and along shorelines and trails. When New York City enacted a ban on smoking in its 1,700 public parks in 2011, Lauren Johnston was ecstatic. She blogged about smokers polluting the air along her running loop. But Bill Saar saw it differently: "It's the most idiotic law they ever made. I've been a smoker for over 20 years. I'm not going to stop," said Saar as he puffed on a cigar while selling figurines in Union Square (Durkin, 2011). Should cities be able to limit smoking in parks shared by all? Whose rights prevail?

- Gay and lesbian troops have served openly in the U.S. military since 2011, as have transgender troops since 2016. But in July 2017, President Trump tweeted that transgender people would be barred from enlisting and active-duty transgender personnel would be subject to expulsion. If this tweet becomes official White House policy, then opportunities for transgender individuals to serve in the military would be effectively eliminated. According to Trump, the military must be focused on winning and cannot be burdened with the "tremendous medical costs and disruption" of transgender service members. Transgender advocates quickly denounced this communication, claiming that it imposed one set of standards on transgender troops and another set on everyone else, and politicians from both parties stated that anyone who is willing to fight for their country should be welcomed into the military. Who is right?
- In a less serious sort of dispute, a growing number of cities have made it a crime to wear "sagging pants" and some cases have actually gone to trial. Three defendants were charged with violating the "decency ordinance" in Riviera Beach, Florida. Their public defenders argued that the law violated principles of freedom of expression. But the town's mayor, Thomas Masters, said that voters "just got tired of having to look at people's behinds or their undergarments … I think society has the right to draw the line" (Newton, 2009).

Values in Conflict. The preceding vignettes share a common theme. On the one hand, individuals possess rights, and one function of the law is to ensure that these rights are protected. The United States is perhaps the most individualistic society in the world. People can deviate from the norm, or make their own choices, to a greater degree in the United States than virtually anywhere else. Freedom and personal autonomy are two of our most deeply desired values; "the right to liberty" is a key phrase in the U.S. Constitution.

On the other hand, our society also has expectations. People need to feel secure. They need to believe that potential lawbreakers are discouraged from breaking laws because they know they will be punished. All of us have rights to a peaceful, safe existence. Likewise, society claims a vested interest in restricting those who take risks that may injure themselves and others, or who demand excessive resources, because these actions can create burdens on individuals and on society. The tension between individual rights and the collective good is illustrated in the situation we describe in Box 1.1.

It is clear that two sets of rights and two goals for the law are often in conflict. The tension between the rights of the individual and the constraints that may be placed on the individual for the collective good is always present. It has factored prominently into various U.S. Supreme Court decisions since the 1960s with respect to the rights of criminal suspects and defendants versus the rights of crime victims and the power of the police.

AvailableLight/Getty Images

A gay couple celebrates their recent marriage.

BOX 1.1

The "Unite the Right" Rally in Charlottesville and the Speech Rights of White Supremacists

The First Amendment to the U.S. Constitution protects the freedom of speech so long as it does not include obscenities, fighting words, perjury, and a few other types of speech. Even racially offensive speech is protected, as the Supreme Court noted in *Matal v. Tam* (2017). According to Justice Samuel Alito, who wrote the opinion in the case, "Speech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express 'the thought that we hate'."

Those protections came into sharp relief in 2017 after White nationalists held a rally in Charlottesville, Virginia that turned deadly. Charlottesville officials initially denied organizers' request for a permit to protest the removal of a statue of Confederate General Robert E. Lee from a city park. But after a lawsuit was filed by the American Civil Liberties Union (ACLU)—an organization whose work has included defending the speech rights of neo-Nazis—and a federal judge ruled against the city, rally organizers received their permit. The protest escalated into a brawl as White nationalists, some carrying clubs and assault weapons, clashed with counter-protestors, and a car attack injured 19 and killed one of the counter-protestors.

The ACLU has long maintained that its advocacy of free speech for White supremacists serves to protect the First Amendment rights of all Americans by confronting vile and detestable ideas head-on, rather than by suppressing them (Goldstein, 2017). But the freedom of speech does not extend to speech that is "directed to inciting imminent lawless action and is likely to incite or produce such action" (*Brandenburg v. Ohio*, 1969) and some contend that support from the ACLU actually encourages such actions. (The ACLU has vowed to review closely requests from White supremacist groups to assess the potential for violence and has stated that it will refuse to represent groups who protest with guns.)

Evelyn Hockstein/The Washington Post/Getty Images

White nationalists clash with counter-protesters at the Unite the Right rally in Charlottesville, VA.

This incident raises difficult questions for the future: Will local officials be tempted to thwart extremist groups who wish to hold rallies and protests in their communities? Will doing so further embolden White nationalists who have risen in prominence in recent years? Is openly carrying a gun, allowed in 45 states, a form of free speech? (This discussion shows that it may be impossible, in open carry states, to disentangle First Amendment free speech rights and the Second Amendment right to keep and bear arms.) Even more fundamentally, how does one strike a balance between the right to free expression of speech—including hate-filled speech intended to intimidate and threaten—and the right of the community to be protected from speech that promotes "lawless action"?

CRITICAL THOUGHT QUESTION

What two values are in conflict in this incident?

In the 1960s, the Supreme Court established a number of principles that provided or expanded explicit rights for those suspected of breaking the law. The *Miranda* rule guaranteeing the right to remain silent (detailed in Chapter 7) was established in 1966. About the same time, the courts required that criminal defendants, in all cases in which incarceration was possible, have the right to an attorney, even if they cannot afford to pay for one. These and other rights were established in an effort to redress a

perceived imbalance between a lowly defendant and a powerful government.

But many of these rights were trimmed in subsequent years when courts frequently ruled in favor of the police. For example, in 1996, the Supreme Court ruled that the police can properly stop a motorist whom they believe has violated traffic laws even if their ulterior motive is to investigate the possibility of illegal drug dealing (*Whren v. United States*, 1996). In 2012, the Court ruled that jail officials can strip search petty offenders even if there is no suspicion they are concealing weapons or contraband (*Florence v. Board of Chosen Freeholders*, 2012).

Two Models of the Criminal Justice System. The conflict between the rights of individuals and the rights of society is related to a distinction between two models of the criminal justice system. This distinction is between the due process model and the crime control model (Packer, 1964). The values underlying each of these models are legitimate, and the goal of our society is to achieve a balance between them. But because different priorities are important to each model, there is constant tension between them.

The **due process model**, favored in the 1960s, places primary value on the protection of citizens, including criminal suspects, from possible abuses by the police and the law enforcement system generally. It assumes the innocence of suspects and requires that they be treated fairly (receive "due process") by the criminal justice system. It subscribes to the maxim that "it is better that ten guilty persons shall go free than that one innocent person should suffer." Thus the due process model emphasizes the rights of individuals, especially those suspected of crimes, over the temptation by society to assume suspects are guilty even before a trial.

In contrast, the **crime control model**, favored in the 1990s, seeks the apprehension and punishment of lawbreakers. It emphasizes the efficient detection of suspects and the effective prosecution of defendants, to help ensure that criminal activity is being contained or reduced. The crime control model is exemplified by a statement by former Attorney General of the United States, William P. Barr, with respect to career criminals. He noted that the goal is "incapacitation through incarceration" (Barr, 1992)—that is, removing them permanently from circulation.

When the crime control model is dominant in society, laws are passed that in other times would be seen as unacceptable violations of individual rights. A 2017 Texas law known as a "show me your papers law" prohibits local authorities from limiting the ability of law enforcement or court personnel to demand proof of a person's immigration status and report it to federal officials. Texas Governor Greg Abbot claimed that the law protects public safety. But opponents contend that it erodes public trust and actually makes communities and neighborhoods less safe. Laws like this raise complicated questions about the rights of individuals to be free from police scrutiny and the obligation of the government to provide safety and security to its citizens.

Despite the drop in crime rates in recent years, vestiges of the crime control model still linger in the United States, more than in Canada, Europe, or Australia. As we point out in Chapter 14, the United States incarcerates a higher percentage of its citizens than any other country. The United States has only 4% of the world's population but 22% of its prisoners.

But the Great Recession of 2007–2009 changed societal options for dealing with crime. As federal and state budgets tightened, legislators and law enforcement officials reevaluated many "tough-on-crime" policies. Those strategies boosted spending on prisons but did little to prevent repeat offending by released inmates (Dvoskin, Skeem, Novaco, & Douglas, 2011). Because of reduced resources, officials tried to find cheaper and more effective alternatives for controlling crime and ensuring public safety. Some new programs were effective in reducing repeat offending. Crime rates in Texas dropped after it began investing in treatment programs for parolees. The prison population in Mississippi was reduced by 22% after it allowed inmates to earn time off their sentences by participating in educational and re-entry programs. Other proven alternatives included providing employment counseling and substance abuse and mental health treatment for inmates, and diverting offenders from the criminal justice system and into community-based treatment programs. We describe many of these alternatives in Chapter 9.

The Second Choice: Equality versus Discretion

Kenneth Peacock was a long-distance trucker who was caught in an ice storm and came home at the wrong time. He walked in the door to find his wife Sandra in bed with another man. Peacock chased the man away and some four hours later, in the heat of an argument, shot his wife in the head with a hunting rifle. Peacock pled guilty to voluntary manslaughter and was sentenced to 18 months in prison. At the sentencing, Baltimore County Circuit Court Judge Robert E. Cahill said he

wished he did not have to send Peacock to prison at all but knew that he must to "keep the system honest" (Lewin, 1994). He continued, "I seriously wonder how many men … would have the strength to walk away without inflicting some corporal punishment."

Move the clock ahead one day. A female defendant pleads guilty to voluntary manslaughter in a different Baltimore courtroom. She killed her husband after 11 years of abuse and was given a 3-year sentence—three times longer than that sought by prosecutors (Lewin, 1994). Some people find no inconsistency in the severity of these punishments, believing that each case should be judged on its own merits. However, psychology analyzes these decisions as examples of a choice between the goals of equality and discretion.

What should be the underlying principle guiding the response to persons accused of violating the law? Again, we see that two equally desirable values—equality and discretion—are often incompatible and hence create conflict. The principle of **equality** means that all people who commit the same crime or misdeed should receive the same consequences. But blind adherence to equality can lead to unfairness in situations in which the particular characteristics of offender, victim, or offense matter. For example, most people would think differently about punishing someone who killed randomly, ruthlessly, and without remorse, and someone else who killed a loved one suffering from a painful and terminal illness. In this example, discretion is called for. **Discretion** in the legal system involves considering the circumstances of certain offenders and offenses to determine the appropriate consequences for wrongdoing. Psychology provides concepts through which this conflict can be studied and better understood.

The Principle of Equality.

Fundamental to our legal system is the assumption advanced by the founders of the American republic that "all men are created equal." In fact, the "equal protection clause" of the Fourteenth Amendment states that no state shall "deny to any person within its jurisdiction the equal protection of the laws." This statement is frequently interpreted to mean that all people should be treated equally and that no one should receive special treatment by the courts simply because he or she is rich, influential, or otherwise advantaged. We cherish the belief that in the United States, politically powerful or affluent people are brought before the courts and, if guilty, convicted and punished just like anyone else who commits similar offenses. Consider the example of flamboyant hedge fund manager and pharmaceutical executive Martin Shkreli, who was convicted in 2017 of defrauding his investors to cover up massive stock losses and then jailed after a Facebook post offering $5,000 for a strand of Hillary Clinton's hair. Shkreli became infamous for raising the price of the drug Daraprim, used to treat newborn babies and HIV patients, from $13.50 to $750 per pill.

But the value of equality before the law is not always implemented. In the last three decades, Americans have witnessed a series of incidents that—at least on the surface—seemed to indicate unequal treatment of citizens by the legal system. A common practice among police and state patrols in the United States is *profiling*—viewing certain characteristics as indicators of criminal behavior. African American and Latino motorists have filed numerous lawsuits over the practice of profiling, alleging that the police, in an effort to seize illegal drugs and weapons or to find undocumented immigrants, apply a "race-based profile" to stop and search them more frequently than White drivers. Said Michigan Congressman John Conyers, Jr., "There are virtually no African-American males—including Congressmen, actors, athletes and office workers—who have not been

Eduardo Munoz Alvarez/Getty Images News/Getty Images

Martin Shkreli, a well-do-to CEO who was convicted of defrauding his investors.

stopped at one time or another for … driving while black" (Barovick, 1998).

The issue is not limited to driving. It affects people when they shop, eat in restaurants, travel in trains and airplanes, hail a cab, and walk through their neighborhoods. New York City police officers stopped approximately four million people between 2004 and 2012, questioning all, and frisking and arresting some. But police department statistics show that the stops were not race-neutral. African Americans accounted for 52% of the stops, and Latinos for 31%, despite constituting 23% and 29% of the city's population, respectively. According to columnist Bob Herbert, "[T]he people getting stopped and frisked are mostly young, and most of them are black or brown and poor…If the police officers were treating white middle-class or wealthy individuals this way, the movers and shakers in this town would be apoplectic" (Herbert, 2010). Moreover, New York City police were less likely to find weapons or contraband on African American and Latino suspects than on White suspects (Gelman, Fagan, & Kiss, 2007).

Since police agencies have started gathering statistics on the racial makeup of people targeted for traffic stops, border inspections, and other routine searches, and these disparities have come to light, some courts have ruled that a person's appearance may not be the basis for such stops. Psychologists also have a role to play on this issue, gathering data on the psychological consequences to victims of racial profiling, improving police training so that cultural and racial awareness is enhanced, and examining how decision makers form implicit judgments of others on the basis of race.

In keeping with the laudable goal of equality under the law, the U.S. Supreme Court has occasionally applied a **principle of proportionality** to its analysis of cases involving criminal sentencing. This principle means that the punishment should be consistently related to the magnitude of the offense. More serious wrongdoing should earn more severe penalties. If a relatively minor crime leads to a harsh punishment, then the fundamental value of proportionality and hence, equality, has been violated.

The principle of proportionality has influenced the way that juvenile offenders are sentenced. Recognizing that impulsiveness and psychosocial immaturity render juveniles less culpable *and* more likely to be rehabilitated than adult offenders, the U.S. Supreme Court has, in the quest for equality, overturned harsh sentences for juvenile offenders. Individuals who commit murder before the age of 18 cannot be subjected to the death penalty (*Roper v. Simmons*, 2005) nor automatically sentenced to life without the possibility of parole (*Miller v. Alabama*, 2012). The Court has determined that because juveniles sentenced to life in prison would spend more years and a larger percentage of their lives behind bars, that sentence is disproportionately harsh and not equal to a life sentence received by adults. We describe the case that led to that ruling in Box 1.2.

The *Miller* ruling was expanded in a 2016 decision in which the Court said that *Miller* should be applied retroactively (*Montgomery v. Louisiana*, 2016). This means that those sentenced to mandatory life sentences as teenagers will now have a chance to be resentenced or paroled. But the prospect of resentencing thousands of people serving life sentences poses challenging questions for psychology and the courts. Whereas psychological research ably provided to the Court information about normative development (i.e., that adolescence is distinguished by immaturity and thus, lessened culpability), different sources of data will be necessary when deciding, on a case-by-case basis, how a given inmate should be resentenced. Courts may need to find information on the developmental status of individuals as they were at the original sentencing (in the case of Henry Montgomery which led to the ruling, more than 50 years earlier!) and decide how to interpret such retrospective data. Courts will also need to decide whether information about the individual's current rehabilitation status, including mental health issues, is relevant. Psychologists will play an important role in assisting the courts to incorporate relevant developmental and clinical data on the individuals considered for resentencing (Grisso & Kavanaugh, 2016).

The Value of Discretion. Although equality often remains an overriding principle, society also believes that in certain circumstances, discretion is appropriate. Discretion refers to judgments about the circumstances of certain offenses that lead to appropriate *variations* in how the system responds to these offenses. It acknowledges that rigid application of the law can lead to injustices.

Many professionals in the legal system have the opportunity to exercise discretion, and most do so regularly. Police officers show discretion when they decide not to arrest someone who has technically broken the law. They show discretion when they calculate the level of fines for speeding. (Incidentally,

BOX 1.2

The Case of Evan Miller: Life Sentences for Juvenile Offenders Are Excessive Punishment

On July 15, 2003, 52-year-old Cole Cannon knocked on the door of his neighbor's trailer in the small town of Speake, Alabama, asking for some food. That trailer belonged to the family of 14-year-old Evan Miller, an active drug user being raised in an extremely abusive family and suffering from mental health problems. After Cannon had eaten, Miller and a friend accompanied him back to his trailer, intending to get him drunk and rob him. The three played drinking games and smoked marijuana, and when Cannon passed out, Miller began hitting him, first with his fists and then with a baseball bat. The friend then set fire to Cannon's trailer, where he died of smoke inhalation.

Miller was charged with murder in the course of arson and was tried as an adult, subject to all the penalties of adult felons. After he was convicted, the judge imposed a mandatory sentence of life without parole. Miller's appeal focused on his immature judgment and lack of moral sense. His attorneys argued that such a severe sentence was a form of cruel and unusual punishment, banned by the Eighth Amendment.

The case was eventually decided by the U.S. Supreme Court. Among the documents that justices considered was a brief submitted by the American Psychological Association summarizing research relevant to adolescent development. It concluded that (a) adolescents are less mature than adults in ways that make them less culpable and (b) it is not possible to predict with any reliability whether a particular juvenile offender is likely to reoffend violently (APA, 2012). In her majority decision, Justice Elena Kagan acknowledged that youths are different than adults, given their "diminished culpability and heightened capacity for change." She concluded that laws which mandate life sentences, when applied to juvenile offenders, are unconstitutional. Miller's case was referred back to the courts in Alabama for reconsideration of his life sentence.

CRITICAL THOUGHT QUESTION

According to the Supreme Court, why does a sentence of life without parole constitute cruel and unusual punishment when applied to a juvenile offender?

saying "I'm sorry" actually results in lower fines [Day & Ross, 2011]!) Prosecutors exercise discretion when they decide which of many arrestees to charge and for what particular crime. Juries exercise discretion in not convicting defendants who killed under circumstances that may have justified their actions (e.g., self-defense or heat of passion; the jury in the case of Officer Yanez, described at the beginning of the chapter, is an example). Prison officials have discretion to award "good behavior," grant furloughs and move prisoners to more and less confining conditions. Probation officers and parole boards make discretionary recommendations based on the circumstances and characteristics of individual offenders.

Parole boards also have the opportunity to exercise discretion when they decide whether to commute a death sentence to life imprisonment (a process called granting clemency) or to allow an execution to proceed as planned. The Georgia Board of Pardons and Parole faced that stark choice in 2011 when it had to decide whether death row inmate Troy Davis, who had been convicted for murdering a police officer, should be executed by lethal injection or allowed to live. This case, described in Box 1.3, raises interesting questions about both discretion and the possibility of error in the criminal justice system.

Discretion may be most obvious in the sentences administered by judges to convicted criminals. In many cases, judges are able to consider the particular circumstances of the defendant and of the crime itself when they determine the sentence. It would seem that this use of discretion is good. Yet as we describe in Chapter 14, it can also lead to **sentencing disparity**, the tendency for judges to administer a variety of penalties for the same crime. The contrasting sentences handed out by judges in the Baltimore cases we described earlier provide one example of sentencing disparity. Other examples stem from the fact that state laws typically determine sentencing options, so offenders sentenced in one state may receive different sanctions than offenders who commit the same offense in another state.

BOX 1.3

The Case of Troy Davis and a Parole Board's Discretion

Former President Jimmy Carter, Pope Benedict XVI, the Indigo Girls, Nobel Laureate Desmond Tutu, former FBI Director William Sessions, Amnesty International, and former Georgia Supreme Court justices may not agree on much. But in 2011 they all called for a stop to the pending execution of Georgia death row inmate Troy Davis, who they claimed was an innocent man. Davis was convicted of murder in the 1989 shooting death of off-duty Savannah police officer Mark MacPhail and sentenced to death. Over the course of 20 years, Davis maintained his innocence, and his claim was bolstered by the possible confession of another person and by the recantation of seven eyewitnesses who said they lied during Davis' trial because they were threatened by another suspect. Some jurors who convicted Davis signed affidavits declaring that they doubted his guilt.

In Georgia, the authority to commute a death sentence into a less severe sentence rests with the Georgia Board of Pardons and Paroles. (In some states, governors have this discretion.) That board had declined to commute Davis' sentence once before. With an execution date pending and all other options exhausted, Davis' attorneys appealed one last time to the five-member board, which conducted a hearing in which they heard from Davis' attorneys and supporters, and from prosecutors and MacPhail's relatives. Despite doubts about Davis' guilt, his surprising assortment of supporters, and petitions, rallies, and vigils held around the world on his behalf, the board denied Davis' request. He was executed in 2011.

Jessica McGowan/Getty Images News/Getty Images

Supporters of Troy Davis.

CRITICAL THOUGHT QUESTION

Explain why the Georgia Board of Pardons and Paroles may not have been willing to grant clemency to Troy Davis.

Sentencing disparity is also apparent in the penalties given to African Americans and members of other minority groups. African Americans are imprisoned at rates five to seven times higher than those of White Americans partly due to disparities in arrests for drug crimes. Police concentrate more attention on drugs that racial minorities use, resulting in a far greater likelihood of jail time for drug use (Davis, 2011). Sentencing disparities can also be seen for Hispanics: One in six Hispanic males and one in 45 Hispanic females can expect to be imprisoned in his or her lifetime, more than double the rates of those who are not Hispanic (Mauer & King, 2007).

A simple explanation for this disparity is **racial bias**, whereby police officers, prosecutors, jurors, and judges use an individual's race as a basis for judging his or her behavior. Race-based stereotypes affect beliefs about offenders' culpability and dangerousness, as well as perceptions of the likelihood of reoffending (Spohn, 2015). Sometimes bias and stereotyping is explicit and intentional, and other times it is implicit and unintentional. **Implicit bias** is especially concerning, since people are unaware that they are being influenced by race; for example, they may get a "bad feeling" from a Latino defendant (Hunt, 2015). But once these biases occur, they can act as a filter for interpreting and using other information about the offender and the circumstances. Fortunately, some studies have shown that once decision makers are made aware of the potential for racial bias, they can largely avoid it (Pearson, Dovidio, & Gaertner, 2009).

A subtler, more insidious form of race-based judgments may be prevalent in the justice system, however. Social psychological research has shown that individuals of the same race may be stereotyped and discriminated against to different degrees, depending how "typical" of

their group they appear. Individuals receive longer sentences when they have more Afrocentric facial features (Blair, Judd, & Chapleau, 2004) and darker skin tones (Viglione, Hannon, & DeFina, 2011). Even more troubling, in death penalty cases involving White victims, the likelihood of a Black defendant being sentenced to death is influenced by whether he or she has a stereotypically Black appearance (Eberhardt, Davies, Purdie-Vaughns, & Johnson, 2006).

To counteract sentencing disparity, many states implemented what is known as **determinate sentencing**: the offense determines the sentence, and judges and parole commissions have little discretion. But judges were frustrated by the severe limitations on their discretion imposed by determinate sentencing. One federal judge who resigned his appointment in protest said, "It's an unfair system that has been dehumanized. There are rarely two cases that are identical. Judges should always have discretion. That's why we're judges. But now we're being made to be robots."

The pendulum has now swung away from determinate sentencing and toward allowing judges more discretion. Permitting judges more leeway to consider factors such as the defendant's background, motivations for committing the crime, and any psychological disorders may strike a balance between the uniformity that determinate sentencing imposed and the judicial discretion that many judges prefer.

The Third Choice: To Discover the Truth or to Resolve Conflicts

What is the purpose of a court hearing or a trial? Your first reaction may be "To find out the truth, of course!" Determining the truth means learning the facts of a dispute, including events, intentions, actions, and outcomes. All this assumes that "what really happened" between two parties can be determined.

Finding out the truth is a desirable goal, but it may also be lofty and sometimes downright impossible. The truth often lies somewhere between competing versions of an event. Because it is difficult for even well-meaning people to ascertain the true facts in certain cases, some observers have proposed that the real purpose of a hearing or trial is to provide social stability by resolving conflict. Supreme Court Justice Louis Brandeis once wrote that "it is more important that the applicable rule of law be settled than [that] it be settled right" (*Burnet v. Coronado Oil and Gas Co.*, 1932). This is a shift away from viewing the legal system's purpose as doing justice toward viewing its goal as "creating a sense that justice is being done" (Miller & Boster, 1977, p. 34).

Because truth is elusive, the most important priority of a hearing or a trial may be to provide a setting in which all interested parties have their "day in court." Justice replaces truth as the predominant goal. In fact, attorneys representing the opposing parties in a case do not necessarily seek "the truth." Nor do they represent themselves as "objective." They reflect a different value—the importance of giving their side the best representation possible, within the limits of the law. (The Code of Ethics of the American Bar Association even instructs attorneys to defend their clients "zealously.") Because lawyers believe the purpose of a hearing or trial is to win disputes, they present arguments supporting their client's perspective and back up their arguments with the best available evidence.

One argument in favor of the adversary system, in which a different attorney represents each party, is that it encourages the attorneys to discover and introduce all evidence that might induce the judge or jury to react favorably to their client's case. When both sides believe that they have had the chance to voice their case fully and their witnesses have revealed all the relevant facts, participants are more likely to feel they have been treated fairly by the system, and the system is more likely to be considered an effective one. This is an important part of a theory known as **procedural justice**, a concept presented in Chapter 2.

"Conflict resolution" and "truth," as goals, are not always incompatible. When all participants in a legal dispute are able to raise concerns and provide supporting documentation, the goal of learning the truth becomes more attainable. But frequently there is tension between these goals, and in some instances, the satisfactory resolution of a conflict may be socially and morally preferable to discovering an objectively established truth. Yet resolving conflict in a hurried or haphazard manner can have a downside, as illustrated by the experience of Richard Jewell.

Jewell was a security guard at the 1996 Summer Olympics in Atlanta. Shortly after a bombing that disrupted the Games, the Federal Bureau of Investigation (FBI) began to question Jewell, who discovered the bomb. Although at first the FBI denied that he was a suspect, they treated him like one, and his name and photograph were widely publicized. The pressure to find the person responsible for this terrifying act—and the desire

Erik S. Lesser/Getty Images News/Getty Images

Eric Rudolph, a North Carolina fugitive, pled guilty in 2005 to a bombing at the 1996 Olympics in Atlanta.

to give people a sense that no more bombings would occur because the perpetrator had been caught—doubtless influenced the premature focus on Richard Jewell. Despite relentless FBI investigation, no charges were brought against Jewell, and in 2005, Eric Rudolph, a fugitive who lived in the hills of North Carolina for years after the bombing, pleaded guilty of the offense.

Truth versus Conflict Resolution in Plea Bargaining and Settlement Negotiations. The legal system is a massive bureaucracy, and in every bureaucracy, there is a temptation to value pragmatic efficiency rather than correct or just outcomes. The heavy reliance on plea bargaining is often criticized because it appears to give priority to conflict resolution over truth seeking. As we describe in Chapter 8, between 90% and 95% of defendants never go to trial; they accept the offer of the prosecutor and plead guilty to a lesser charge. Even some innocent persons plea-bargain after being convinced that the evidence against them is overwhelming. Indeed, plea bargaining is an integral part of the criminal justice system. The state benefits by avoiding the expense and trouble of a trial and the possibility of an acquittal, and sometimes, by obtaining the testimony of the accused person against others involved in the crime. The defendant benefits by receiving some kind of reduction in the penalty imposed. In addition to these pragmatic benefits, justice is furthered by a system that rewards a show of remorse (which usually accompanies a guilty plea) and enables the prosecutor and defense counsel, together with the judge, to negotiate a resolution appropriate to the degree of wrongdoing (Kamisar, LaFave, & Israel, 1999). Nonetheless, plea bargaining reveals that the goal of maintaining stability and efficiency in the system is achieved at some cost. That cost is the public's opportunity to determine the complete truth.

The civil justice system uses a procedure similar to plea bargaining to resolve about 90% of the conflicts between a plaintiff and a defendant. **Settlement negotiation** involves a sometimes lengthy pretrial process of give-and-take, offer-and-demand that ends when a plaintiff agrees to accept what a defendant is willing to offer (typically, money) to end their legal disagreement. It also favors the goal of conflict resolution at the expense of determining what *really* happened.

For example, in 2013, settlement negotiations led to an agreement between the National Football League (NFL) and thousands of former players who suffered concussive injuries on the gridiron. Players alleged that the NFL was responsible for the rules and regulations of the game and that it concealed information on the potential consequences of repetitive head injuries. They settled for $765 million, including $75 million for baseline medical exams for nearly 20,000 former players. The negotiated settlement avoided lengthy and expensive litigation, enabled many players to seek the medical attention they needed, and, according to one football commentator, "saved the game" (Spencer, 2013).

New Thoughts on Conflict Resolution. Despite the traditional prominence of adversarial procedures to resolve disputes, many legal problems are actually handled in a nonadversarial manner. Throughout the book we present situations in which people work together in a cooperative way to settle their differences and reach a resolution that is acceptable to all.

Many divorcing couples opt to collaborate rather than contend with each other as they end their marriage. In situations where parents have failed to nurture their children, family court judges temporarily remove children from their homes and provide

extensive counseling, education, and other social service interventions to parents, hoping eventually to restore the family unit. In some jurisdictions, people arrested for drug-related crimes are given the opportunity to have their cases resolved in drug courts that focus on treating the underlying problem of addiction, rather than simply punishing the offender. In lawsuits in which plaintiffs are injured due to defendants' negligence and the parties attempt to negotiate a settlement rather than go to trial, these negotiations offer an opportunity for defendants to apologize to plaintiffs. Research shows that apologies advance settlement negotiations (Robbennolt, 2013) and reduce plaintiffs' inclinations to sue (Greene, 2008). They also affect the bottom line: In medical malpractice cases, apologies reduce the average payout by $32,000 (Ho & Liu, 2011).

What these situations have in common is that they do not operate in a zero-sum fashion in which one party wins and another loses. Rather, they attempt to maximize positive outcomes for all concerned, with the objective of keeping the dispute from escalating further and involving more formal adjudication proceedings.

The idea that the law is a social force with consequences for people's well-being, an approach termed therapeutic jurisprudence, is discussed further in Chapter 2. Reform-minded lawyers, jurists, and legal scholars advocate for legal procedures and institutions that facilitate therapeutic ends. They ask how the law can be applied or reformed to enhance individuals' welfare. Therapeutic jurisprudence has been applied in nearly all areas of the law including criminal law, family law, employment law, probate, health care, workers' compensation, and labor arbitration.

The Fourth Choice: Science versus the Law as a Source of Decisions

When one discipline (in our case, psychology) seeks to understand another (the law), a dilemma is likely to arise because each approaches knowledge in a different way. When asked, "How do you know whether that decision is the right one?" each relies on different methods, even though both share the goal of understanding human experience.

As you read this book you will learn that in many cases the U.S. Supreme Court and other courts have considered data and conclusions presented by psychologists and other social scientists. In several of these, the

Alex Wong/Getty Images News/Getty Images

The justices of the U.S. Supreme Court.

American Psychological Association (APA) prepared a written document, called an ***amicus curiae* brief** ("friend of the court" brief), for consideration by an appellate court. Such *amicus curiae* briefs provide the courts with information from psychological science and practice relevant to the issues in a particular case. In many of its decisions (including *Miller v. Alabama*, presented earlier in this chapter), the Supreme Court incorporated input from the *amicus curiae* brief, although in other cases, it disregarded the social science data altogether. This inconsistency reflects the fact that the justices sometimes use different procedures and concepts from those of social science in forming their judicial opinions (Grisso & Saks, 1991).

In addition to employing different procedures, each profession may use idiosyncratic or unique concepts to describe the same phenomenon. An attorney and a social scientist will see the same event from different perspectives. Neither is necessarily more accurate than the other and their differences are the result of exposure to and training in different points of view. The following subsections illustrate such differences in more detail (see also Ogloff & Finkelman, 1999; Robbennolt & Davidson, 2011).

Law Relies on Precedents; Psychology Relies on Scientific Methods. In contrast to the law, psychology is generally committed to the idea that there is an objective world of experience that can be understood by adherence to the rules of science—systematic testing of hypotheses by observation and experimental methodology. As a scientist, the psychologist should be committed to a public, impersonal, objective pursuit

of truth, relying on methods that can be repeated by others and interpreting results by using predetermined standards. Although this traditional view of psychology's approach to truth is sometimes challenged as naive and simplistic because it ignores the importance of the personal, political, and historical biases that affect scientists as much as nonscientists (Gergen, 1994), it still represents the values and methods in which most psychologists are trained. (It also represents the authors' beliefs that the scientific method and the research skills of psychologists are the most essential and reliable tools available for examining the many important legal questions we address throughout the book.)

By contrast, when they establish new laws, legal experts rely heavily on **precedents**—rulings in previous cases (as well as the Constitution and the statutes) for guidance. **Case law**—the law made by judges ruling in individual cases—is very influential; statutes and constitutional safeguards do not apply to every new situation, so past cases often serve as precedents for deciding current ones. The principle of ***stare decisis*** ("let the decision stand," reflecting the importance of abiding by previous decisions) is also important in this process. Judges typically are reluctant to make decisions that contradict earlier ones, as the history of the Supreme Court's school desegregation cases indicates.

When the U.S. Supreme Court decided unanimously in 1954, in *Brown v. Board of Education*, that public school segregation was contrary to the notion of equality for all, many reports claimed that it "supplanted" or even "overturned" a ruling in the 1896 case of *Plessy v. Ferguson*. But intermediate decisions by the Court permitted this seemingly abrupt change to evolve gradually. A brief history of rulings that led up to the *Brown v. Board of Education* decision illustrates this phenomenon, and the way that the law proceeds from case to case.

We begin with the state of Louisiana's dispute with Homer Plessy. During a train trip in Louisiana in the 1890s, Plessy sat down in a railroad car labeled "Whites Only." Plessy's ancestry was mostly Caucasian, but he had one Negro great-grandparent. Therefore, according to the laws of Louisiana at that time, Plessy was considered Black (or *colored*, the term used then). Plessy refused to move to a car designated for "colored" passengers, as a recently passed state law required. He took his claim to court, but a New Orleans judge ruled that, contrary to Plessy's argument, the statute that segregated railroad cars by race did not violate the Fourteenth Amendment to the Constitution. In other words, it did not fail to give Plessy "equal protection under the law." Plessy persisted in his appeal, and eventually, in 1896, the U.S. Supreme Court upheld the decision of the judge and the lower courts. Judge Henry Billings Brown, speaking for the majority faction of the Supreme Court, declared that laws that had established separate facilities for the races did not necessarily imply that one race was inferior to the other.

Although this opinion was a far cry from the 1954 *Brown* decision, which highlighted the detrimental effects of segregation on the personality development of Black children, cases decided between *Plessy* and *Brown* would foreshadow the Court's eventual leanings. One case was brought by George McLaurin, the first Black student admitted to the University of Oklahoma's Graduate School of Education. Although McLaurin was allowed to enroll, he was segregated from all his classmates. His desk was separated from all the others by a rail, to which the sign "Reserved for Colored" was attached. He was given a separate desk at the library and was required to eat by himself in the cafeteria. In the 1950 case of *McLaurin v. Oklahoma State Regents*, the U.S. Supreme Court ruled unanimously that these procedures denied McLaurin the right to equal protection of the law. The Court concluded that such restrictions would "impair and inhibit his ability to study, to engage in discussion and exchange of views with other students." But the Court did not strike down *Plessy v. Ferguson* in this decision.

With a more liberal Court in the 1950s, however, there was enough momentum to reverse *Plessy v. Ferguson*. Chief Justice Earl Warren, who liked to ask, "What is fair?" spearheaded the unanimous decision that finally overturned the idea that separate facilities can be "equal." He wrote that separating Black children "from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely to ever be undone" (*Brown v. Board of Education*, 1954).

The school desegregation cases show that lawyers have historically reasoned from case to case. They locate cases that are similar to the one at hand and then base their arguments on the rulings from these legal precedents. Psychologists, on the other hand, value the scientific method, rely on experimental and evaluation studies, and prefer to gather data that describe large numbers of people.

Some commentators have recently suggested that society would be better served by a legal profession that was less resistant to objective, rigorous, and scientific

evidence, however (Greiner & Matthews, 2016). They extol the virtues of using **randomized controlled trials (RCT)** to accumulate knowledge about what works in the legal system and what does not, but have discovered very few examples of such studies in law. One exception was a study of the effectiveness of mandatory domestic violence counseling that compared re-arrest rates after either one year of probation (the control condition) or a year of probation plus six months of counseling (the treatment condition). (There were no statistical differences; Feder & Dugan, 2002). Calling attention to the paucity of RCT studies in the law may spur legal research to become somewhat more evidence-based—and in that way, somewhat more like psychology—in the future.

Law Deals with Absolutes; Psychology Deals with Probabilities. Legal questions often require an "either–or" response: A person is either fit or unfit to be a parent; a person was either insane or not insane when he or she committed a particular act (Ellsworth & Mauro, 1998). Psychologists are not comfortable reasoning in absolutes. They prefer to think in terms of probabilities (e.g., that a defendant's delusional thinking *could* indicate a psychiatric disorder, that a White eyewitness to a crime is *more likely to* misidentify a Black perpetrator than a White perpetrator). Although the law looks to psychologists for "either–or" answers (e.g., "Is the defendant competent to stand trial?" and "Was the defendant insane at the time of the crime?"), psychologists usually prefer to answer in terms of likelihoods or quantified "maybes." Lawyers may have difficulty with such inconclusive responses because they need a final resolution to a dispute.

Law Supports Contrasting Views of Reality; Psychology Seeks One Refined View of Reality. As indicated earlier, judges and jurors must decide which of two conceptions of the truth is more acceptable in light of conflicting facts. Attorneys assemble all the facts that support their side and argue forcefully that their version of the facts is the correct one. Although this procedure is similar to some scientific activities (a psychologist may do a study that compares predictions from two theories), the psychologist is trained to be objective and open to all perspectives and types of data. The psychologist's ultimate goal is to integrate or assimilate conflicting findings into one refined view of the truth, rather than choosing between alternative views.

Some observers have likened this difference between psychology and law to the difference between scaling a mountain and fighting in a boxing match. As psychologists gain a clearer understanding of a topic (e.g., the causes of elder abuse), they scale a figurative mountain, at the top of which lies true and complete understanding. Although they may never actually reach this pinnacle of knowledge, psychologists highly value the accumulation of data, the development of psychological theory, and the quest for "truth." By contrast, lawyers are less interested in ascertaining the objective truth about a topic and are more concerned with winning against their adversary, resolving a dispute, or, more recently, enhancing the laws' effect on all parties.

Such distinctions only scratch the surface of the differences between law and psychology. In Chapter 2 we consider differing notions of justice in the two fields, and in subsequent chapters, we discuss the implications of these differences. As with the previous choices, selecting one domain over the other does not always yield a satisfactory resolution. The use of both perspectives moves us closer to an adequate understanding than does relying only on one. For example, using a psychological principle such as attribution of responsibility—a judgment of who is responsible for a particular outcome in a particular situation—can explain why some people decide to sue and others opt not to (Robbennolt & Hans, 2016). Both psychologists and lawyers should remain aware of the limits of their own perspective and realize that both viewpoints are essential for a fuller understanding of complex behavioral issues in the law.

But the contrast in knowledge-generating procedures does raise difficult procedural questions. What roles should the psychologist play in the legal system? What ethical concerns are associated with psychologists' involvement in the legal system? These and other basic questions are among the areas discussed in this book.

Psychologists' Roles in the Law

Most courses in psychology portray only two roles for psychologists: those of the scientist who conducts basic research about the causes and consequences of behavior and the applied psychologist (usually a clinical psychologist) who tries to understand and assist individuals or groups in addressing behavioral issues. The possibilities are more elaborate, however, when the psychologist is involved in the legal system. We describe five distinct

BOX 1.4

The Case of Tatiana Tarasoff: The Duty to Protect

Few legal decisions have had as much impact on the practice of psychotherapy as the now-famous case of *Tarasoff v. Regents of the University of California.* The decision focuses on the duties required of psychotherapists whose clients threaten violence to identifiable others.

Prosenjit Poddar was a graduate student at the University of California who became infatuated with Tatiana Tarasoff. Poddar was inexperienced in romantic relationships and was confused about Tatiana's on-again–off-again behavior; she was friendly toward him one day but avoided him completely the next night. After Poddar became a client of a psychologist at the university counseling center, he confided that he intended to kill a girl who had rebuffed him. The psychologist told his supervisor of this threat and then called the campus police, requesting that they detain Poddar. They did so but soon released him, believing his promise that he would stay away from Tatiana, who was out of the country at the time. Poddar didn't keep his promise. Two months later, he went to Tatiana's home and stabbed her to death. He was eventually convicted of murder.

Tatiana Tarasoff's parents sued the university, the psychologists, and the campus police for failing to warn them or their daughter about Poddar's threats. The California Supreme Court ruled in the parents' favor by deciding that the university had been negligent. The first *Tarasoff* decision (1974) established a duty on psychotherapists to warn the victims of therapy patients when the therapist "knows or should have known" that the patient presented a threat to that victim. The court established a standard that therapists have a duty to use "reasonable care" to protect identifiable potential victims from clients in psychotherapy who threaten violence. A second *Tarasoff* decision in 1976 broadened this duty to include the protection of third parties from patient violence. Courts in several other states have extended this duty to the protection of property and the protection of all foreseeable victims, not just identifiable ones.

The *Tarasoff* case still governs psychologists' conduct in multiple states. Many psychologists feel caught in a no-win situation: They can be held responsible for their clients' violence if they do not warn potential victims, but they can also be held responsible for breaching their clients' confidentiality if they do.

CRITICAL THOUGHT QUESTION

Why is it necessary to specify explicitly what psychologists must do if they hear a client threaten to harm a person or property?

roles for psychologists in the legal system: basic scientist, applied scientist, policy evaluator, forensic evaluator, and consultant. The work inherent in these roles ranges from isolated academic research in psychology that may be relevant to law, on one end, to active collaboration with people who work in the legal system, on the other end.

As you will see, the five roles vary in several respects. But whatever the role, it includes standards about what is acceptable and unacceptable behavior. Professionals often develop explicit statements of ethical standards of behavior. For psychologists, those principles and standards (called the *Ethical Principles of Psychologists and Code of Conduct*) have been published by the American Psychological Association (2017). They describe a series of broad principles followed by a more specific set of standards. Adherence to the standards is mandatory for psychologists. Among the many topics they cover is when psychologists should terminate treatment and how to do so.

Making the right ethical choice can be complicated. Sometimes, certain standards (e.g., confidentiality in therapy) may conflict with other obligations (e.g., the legal obligation to prevent harm to third parties inflicted by therapy patients). This conflict was apparent in the controversial *Tarasoff* decision by the Supreme Court of California, described in Box 1.4.

In the following sections, we describe the various roles that psychologists assume in relation to the legal system and the ethical issues that arise in each context. A footnote on psychologists' relationship to the law: Students often wonder how they can become involved in this field as basic scientists, applied scientists, policy evaluators, forensic evaluators, or consultants.

What career paths should one pursue, and what professional opportunities exist at the ends of those trails? How might a developmental psychologist, a cognitive neuropsychologist, or a clinician (for example) interact with the legal system? The website of the American Psychology-Law Society (a division of the APA) has practical and career-related advice for practitioners, educators, researchers, and students (www.ap-ls.org). Those undertaking careers in psychology and law should also familiarize themselves with the ethical requirements pertaining to their professions.

The Psychologist as a Basic Scientist of the Law

A **basic scientist** pursues knowledge for its own sake. Basic scientists study a phenomenon for the satisfaction of understanding it and contributing to scientific advances in the area. They do not necessarily seek to apply their research findings; many have no concern with whether the knowledge they generate will be used to resolve real-world problems. Yet often their results can address important practical issues, including some that arise in the law. For example, though not specifically conducted for use in the courtroom, laboratory research on visual perception can help us understand the accuracy of eyewitness testimony about a crime or accident. Psychologists who test different theories of memory promote a better understanding of whether repression can cause long-term forgetting of traumatic events. Basic research on the relationship between social attitudes and behavior can clarify why people obey or disobey the law. Research in personality psychology can help to show what kind of person will become a follower in a terrorist group and what kind of person will be a leader. Studies of adolescents' brain development may be relevant to their decisions about whether to commit crimes. Finally, research can assess whether forensic psychologists' attitudes about the causes of crime affect their professional evaluations of criminal defendants.

The Ethics of the Basic Scientist. Like all scientists, psychologists who do basic research must adhere to standards of conduct in how they undertake and report their studies. In practical terms, this means that they cannot fabricate or forge data, plagiarize, or present a skewed selection of the data to hide observations that do not fit their conclusions. They must treat research participants in an ethical manner. (All institutions that receive federal research funding have review boards that evaluate the way scientists treat human and animal subjects.) Basic researchers sometimes have a conflict of interest when faced with competing concerns such as honestly reporting their research findings versus making a profit or "getting published." In these situations, they should learn to recognize and be honest about potential conflicts of interest and communicate them to interested parties before undertaking the research.

The Psychologist as an Applied Scientist in the Law

An **applied scientist** is dedicated to applying knowledge to solve real-life problems. Most of the public's awareness of a psychologist's work reflects this role, whether this awareness comes from viewing TV's Dr. Phil or watching a psychologist testify as an expert on cybercrime on the television show CSI. Indeed, an important role for psychologists who are interested in applying the findings of their profession involves serving as an expert witness in a legislative hearing or in a courtroom.

Juries, judges, and legislators cannot be well versed in every topic from abscesses to zinfandel wine. An **expert witness** is someone who possesses specialized knowledge about a subject, knowledge that the average person does not have. Psychologists may testify as expert witnesses during a trial based on their knowledge, experience, and training regarding psychological issues. The expert's task is to assist jurors and judges by providing an opinion based on this specialized knowledge.

Either side, as part of its presentation of the evidence, may ask the judge to allow expert witnesses to testify. The judge must be convinced that the testimony is of a kind that requires specialized knowledge, skill, or experience and that it will help promote better legal decision making. (When psychologists testify concerning a particular individual based on the results of a forensic evaluation, they take on a different role, one we describe later in this chapter.)

The psychological topics that call for scientific expertise are almost limitless. As expert witnesses, psychologists have been called on to testify in many types of cases. For example, expert testimony may be useful in understanding:

- Employee discrimination through selection and promotion procedures
- The effects of posting warning signs or safety instructions on potentially dangerous equipment
- The factors that may cause a suspect to make a false confession
- The effects of suggestive questions on children's memory of alleged abuse

The Ethics of the Applied Scientist/Expert Witness. The psychologist as expert witness represents a profession that stands for objectivity and accuracy in its procedures. Even though expert witnesses are usually hired and paid by one side, they are responsible for reporting all their conclusions, regardless of whether these favor the side paying them. It violates the ethical standards of both psychologists and lawyers for expert witnesses to accept payment that is contingent on the outcome of the case.

But achieving objectivity is not easy. When testifying as experts, psychologists have an ethical responsibility to be honest and open with the court about their opinions. Yet they may be tempted to sympathize with the side that has employed them. Is it possible to increase experts' objectivity? One commentator has proposed using "blinded" experts selected by an intermediary and hired to review the case without knowing which side has requested an opinion (Robertson, 2010). When blinded experts were pitted against traditional experts in a study examining mock jurors' decisions, the former were perceived as more credible and persuasive than the latter (Robertson & Yokum, 2011).

Another ethical dilemma arises whenever the adversary system forces an expert to make absolute "either–or" judgments. Has the pretrial publicity caused potential jurors to be biased against the defendant? In a custody case stemming from a divorce, which parent would be better for the child to live with? Does the evaluation of a defendant indicate that she is mentally ill? In all of these situations, the law requires the psychologist to reach a firm conclusion on the witness stand, regardless of ambiguity in the evidence (Sales & Shuman, 1993). This is an example of the absolute versus probabilistic judgment differences we described earlier in the chapter.

Admissibility of Expert Testimony. In order to maximize the likelihood that expert testimony is based on legitimate scientific knowledge and to exclude "junk science," lawmakers have developed criteria for judges to use when determining whether to allow an "expert" to testify. Each state and the federal government have their own criteria for determining admissibility.

In federal courts and over half of the states, these criteria are informed by a two-prong test developed by the U.S. Supreme Court in a highly influential case, *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1993). First, the trial judge must determine whether the testimony is relevant and if relevant, whether it is based on reliable and valid science. In essence, judges function as "gatekeepers" who must evaluate potential expert testimony by the standards of science.

Judges have disallowed expert psychological testimony as irrelevant. Consider the case of unlucky Pedro Gil. On a night of wild abandon in the fall of 1993, Gil hoisted a bucket of plaster over the wall of a Manhattan rooftop. It dropped seven stories to the ground and hit and killed a police officer standing on the street below. Gil claimed that he expected the bucket to drop unceremoniously onto an unoccupied street directly below him, rather than to continue forward as it fell and land on the street where the police officer was positioned. To support his naive belief that objects drop straight down, Gil's attorneys attempted to introduce the testimony of a cognitive psychologist with expertise in intuitive physics. The expert planned to testify that people commonly misunderstand physical laws but the trial judge did not let him testify, claiming that intuitive physics was irrelevant to the issues under contention. The jury convicted Gil of second-degree manslaughter.

Judges have also disallowed expert testimony as unreliable. Richard Coons, a Texas psychiatrist, testified in death penalty trials that he developed his own methodology to determine whether a defendant poses a risk of future dangerousness. (Prior to sentencing a defendant to death, juries in Texas must agree that there is a probability that he or she poses a continuing threat to society.) Coons considers an offender's criminal history, attitudes toward violence, and conscience, yet he could not show that these factors have been validated by any research or that his predictions are accurate. After an appellate court deemed Coons' testimony unreliable, over-ruling a trial court judge who had admitted the expert testimony, a defense attorney quipped, "It's overdue."

One clear implication of the *Daubert* decision is that judges must become savvy consumers of science if they are to decide which opinions qualify as "scientific." Since the *Daubert* case, the admissibility of expert evidence has become an important pretrial issue and judges need to scrutinize the reasoning and methodology underlying experts' opinions (Chlistunoff, 2016). They have the option to appoint neutral experts to help them decide whether to admit disputed scientific evidence (Domitrovich, 2016).

The Psychologist as a Policy Evaluator in the Law

In addition to their knowledge of substantive problems, psychologists have methodological skills that they use in assessing or evaluating how well an intervention has worked. Psychologists and other social scientists have been asked so frequently in the last several decades to conduct evaluation studies that a separate subfield called policy evaluation, or evaluation research, has emerged. The **policy evaluator** provides data to answer questions such as "I have instituted a policy; how do I know whether it was effective?" Or, more laudably, "I want to make a change in our organization's procedures, but before I do, how do I design it so I will be able to determine later whether it worked?"

Psychologists working as policy evaluators might be asked whether changing the laws for teen drivers by restricting the number of passengers they can carry will reduce traffic accidents, whether the chemical castration of released rapists will reduce the rate of sexual violence, or whether changing from automobile patrols to foot patrols will improve relations between police and the community. The methodological skills of a psychologist as policy evaluator are essential in assessing existing programs and policies and designing innovations so that their effects can be tested.

As an example, psychologists have been involved in evaluating policies and programs intended to help children prepare to testify in court. In one program, nearly two hundred 4- to 17-year-olds attended Kids' Court School in Las Vegas a week or two before their scheduled testimony. Psychologists measured their court-related anxiety before and after an intervention that consisted of education about legal proceedings, stress inoculation, and a mock trial. As predicted, anticipatory anxiety decreased from pretest to posttest, suggesting that the program can serve as a model for reducing court-related stress in child witnesses (Nathanson & Saywitz, 2015).

The Ethics of the Policy Evaluator. The psychologist who evaluates the impact of proposed or existing legislation and court or correctional procedures faces ethical responsibilities similar to those of the expert witness. The standard rules of scientific procedure apply, but because of the source of employment and payment, there are pressures to interpret results of evaluation studies in a certain way.

Consider, for example, a large state correctional system that wants to improve its parole process. Correctional officials know that when released into society, heavy drug users are likely to commit further crimes to maintain their drug habit, and are therefore likely to return to prison. Accordingly, the system seeks to introduce and evaluate an innovative halfway house program for parolees with a history of narcotics addiction. It hires a policy evaluator to design a study and evaluate the effects of this innovation. The correctional system provides funding to carry out the study, and officials are sincerely committed to its goals. Assume the psychologist concludes that the halfway house does not significantly reduce drug use by parolees. The authorities are disappointed and may even challenge the integrity of the policy evaluator. Yet, as scientists, program evaluators must "call 'em like they see 'em," regardless of the desirability of the outcome.

Even if the program is successful, the policy evaluator faces other ethical dilemmas. To assess such an innovative program, the researcher might conduct a randomized controlled trial that entails denying some parolees access to the program by placing them in a "no treatment" control group. The ethical dilemma becomes more critical when some potentially lifesaving innovation is being evaluated. But often it is only through such research methods that a potentially helpful new program can be convincingly demonstrated to be effective.

The Psychologist as a Forensic Evaluator in Litigation

In addition to evaluating policies and programs, psychologists may be asked to evaluate individuals involved in civil and criminal cases to report their findings to a judge, and on occasion, to testify about the results in court. Forensic evaluators assess matters such as:

- The competence of a defendant to proceed with adjudication of charges (often called "competence to stand trial," although most criminal charges are adjudicated through plea bargaining rather than trial)
- The mental state of a defendant at the time of an alleged offense (often called "sanity at the time of the offense")
- The degree of emotional or brain damage suffered by a victim in an accident
- The effects on a child of alternative custody arrangements after divorce
- The risk of future violent or otherwise criminal behavior
- The prospects for a convicted defendant's rehabilitation in prison or on probation

There are two ways that mental health professionals become involved in litigation as **forensic evaluators**: they are either court-appointed or hired by one of the parties involved in the litigation (defense, prosecution, or plaintiff). Serving in the court-appointed role involves receiving an order from the judge authorizing the mental health professional to evaluate a given individual for a specific purpose. The judge may also specify additional considerations such as how the results are to be communicated. There is typically an expectation that the resulting forensic evaluation will be considered by the judge without being introduced by either side.

Forensic evaluators for one of the parties involved in the litigation have a different expectation: That particular party may control when (and whether) the forensic assessment findings are actually introduced as evidence in the case. Some referrals for forensic assessment come from attorneys who authorize the evaluations without resorting to any kind of court authority. (This kind of right is usually reserved for the defense in a criminal prosecution; the prosecutor cannot request a **forensic mental health assessment** unless it is approved by the court—and therefore known to the defense.) These tasks will be discussed in much more detail in Chapters 10 and 11 of this book. They are also described in detail elsewhere (e.g., Heilbrun, Grisso, & Goldstein, 2009; Melton et al., 2017).

The Ethics of the Forensic Evaluator. The ethical considerations associated with the role of forensic evaluator are fairly formal and specifically described in several documents. In addition to the ethical principles disseminated by the APA, two other sets of ethical guidelines affect the practice of forensic evaluators. Neither is "enforceable" in the sense that the APA *Ethical Principles of Psychologists and Code of Conduct* is. Nonetheless, both serve as important sources of authority and may affect the judgments of courts regarding the admissibility and weight of forensic assessment evidence. These two documents are the *Specialty Guidelines for Forensic Psychologists* (APA, 2013) and the *Guidelines for Child Custody Evaluations in Family Law Proceedings* (APA, 2010).

Across these three documents, there is substantial emphasis on providing evaluations that (1) are clear in their purpose; (2) are conducted by individuals who are competent by virtue of their education, training, and experience; (3) are respectful of appropriate relationships (and avoid multiple relationships, such as both forensic evaluator and therapist, in the same case); (4) provide the appropriate level of confidentiality consistent with circumstances and the applicable legal privilege; (5) use methods and procedures that are accurate, current, and consistent with science and standards of practice; and (6) communicated appropriately.

Like other expert witnesses, forensic evaluators have an obligation to be objective in their assessments and reporting, yet may be tempted to favor the side that has retained them. This concern is illustrated by a study of how pairs of independent forensic psychologists, retained by opposing attorneys, evaluated a common individual. Despite using a standardized diagnostic test for psychopathy, the psychologists tended to rate the individual in a manner favorable to the side that retained them (Murrie, Boccaccini, Guarnera, & Rufino, 2013). This sympathy may not even be conscious; instead, the psychologist may simply reach conclusions that are motivated by subtle partisan allegiance to the client. For this reason, adherence to relevant ethical standards is of paramount importance.

The Psychologist as a Consultant in Litigation

The final role for psychologists in the law is that of consultant. The field of **trial consulting** provides one example of this role for psychologists working in the legal arena. Social scientists who began this work in the 1970s used so-called scientific jury selection procedures (further described in Chapter 12) to assist defense lawyers in highly politicized trials resulting from antiwar activities in the United States. Since then, these techniques have been refined and expanded. The national media devoted extensive coverage to the use of trial consultants in the celebrity-status trials of Martha Stewart and O. J. Simpson, and research on community attitudes was influential in the 2001 conviction of a former Ku Klux Klansman for the 1963 bombing of a Birmingham, Alabama church. (We describe this case in more detail in Chapter 13.)

Today the field of trial consulting is a booming business and involves far more than jury selection. Trial consultants also conduct community attitude surveys to document extensive pretrial publicity or to introduce findings as evidence in trials involving discrimination or trademark violation claims (Posey, 2015). They test the effectiveness of demonstrative evidence (Richter & Humke, 2011), provide guidance to attorneys seeking damage awards (Bornstein & Greene,

2011a), and prepare witnesses to testify (Stinson & Cutler, 2011).

There is no expectation of impartiality in any of these roles as there would be for psychologists acting as basic scientists, applied scientists, policy evaluators, or forensic evaluators. Nor is there an expectation that the consultant must present information in a balanced way. However, the psychologist must still provide the attorney with good information in order to promote more effective performance in litigation. How the attorney decides to use such information is within that attorney's discretion.

Critics have argued that these techniques essentially rig the jury (Kressel & Kressel, 2002) and create a perception that psychologists can manipulate the trial process (Strier, 2011). But at least in the realm of jury selection, it is difficult to determine whether scientific jury selection is more effective than traditional jury selection. Cases that employ scientific jury selection techniques differ in many ways from cases that do not, and "success" is hard to define (Lieberman, 2011). (Does a low-damage award or conviction on a less serious charge connote success? Perhaps.) Consultants suggest that they are simply borrowing techniques commonly used in politics and advertising and bringing them into the courtroom. Politicians hire people to help them project a better image, and advertisers try to enhance the ways that retailers connect with consumers. Shouldn't lawyers be able to do the same? Consultants also argue that in an adversarial system, attorneys should be able to use every tool available to them.

The Ethics of the Consultant in Litigation. As we noted earlier, when the psychologist becomes a consultant for one side in the selection of jurors, there may be ethical questions. Just how far should the selection procedures go? Should jurors have to answer consultants' intrusive questions about their private lives? Should consultants be able to sculpt the jury to their clients' advantage? Do these techniques simply constitute the latest tools in the attorney's arsenal of trial tactics? Or do they bias the proceedings and jeopardize the willingness of citizens to participate in the process? These questions deal with fairness, and scientific jury selection may conflict with the way some people interpret the intent of the law.

Returning to the advertising analogy, are psychologists who work for an advertising agency unethical when they use professional knowledge to encourage consumers to buy one brand of dog food rather than another? Many of us would say no; the free-enterprise system permits any such procedures that do not falsify claims. This example is analogous to jury selection because rival attorneys—whether they employ trial consultants or not—always try to select jurors who will sympathize with their version of the facts. Since the adversarial system permits attorneys from each side to eliminate some prospective jurors, it does not seem unethical for psychologists to assist these attorneys, as long as their advocacy is consistent with the law and the administration of justice. The same can be said about consultants retained by attorneys to provide information to enhance the presentation of a case.

When psychologists become trial consultants, they also subscribe to the ethical code of the attorneys, who, after all, are in charge of the trial preparation (Stolle & Studebaker, 2011). Trial consultants who are members of the American Society of Trial Consultants must adhere to the Code of Ethical Principles, Professional Standards, and Practice Guidelines developed by that organization (ASTC, 2017).

Summary

1. ***Why do we have laws and what is the psychological approach to studying law?*** Laws are human creations whose major purposes are the resolution of conflict and the protection of society. As society has changed, new conflicts surfaced, leading to expansion and revision of the legal system. A psychological approach focuses on individuals as agents within a legal system, asking how their internal qualities (personality, values, abilities, and experiences) and their environments, including the law itself, affect their behavior.

2. ***What choices are reflected in the psychological approach to the law?*** Several basic choices must be made between pairs of options in the psychological study of the law. These options are often irreconcilable because each is attractive, but both usually cannot be attained at the same time. The choices are (1) whether the goal of law is achieving personal freedom or ensuring the common good, (2) whether equality or discretion should be the standard for our legal policies, (3) whether the purpose of a legal inquiry is to discover the truth or to provide a means of conflict resolution, and (4) whether it is better to apply the methods of law or those of science for making decisions.

3. ***How do laws reflect the contrast between the due process model and the crime control model of the criminal justice system?*** The decade of the 1960s represented an era in which due process concerns were paramount and court decisions tended to favor rights of the individuals, particularly those suspected of crimes, over the power of the police and law enforcement. Since then, the crime control model, which seeks to contain or reduce criminal activity, has been favored by many. But some of the harsh policies and penalties consistent with this perspective have resulted in large increases in prison populations and little reduction in rates of reoffending. The 2007–2009 recession caused legislators and judges to consider community-based alternatives that control crime more effectively.

4. ***What are five roles that psychologists may play in the legal system and what does each entail?*** Five possible roles are identified in this chapter: the psychologist as (1) a basic scientist, interested in knowledge related to psychology and law for its own sake; (2) an applied scientist who seeks to apply basic research knowledge to a particular problem in the legal system; a psychologist serving as an expert witness on a scientific question is an applied scientist in the law; (3) a policy evaluator who capitalizes on methodological skills to design and conduct research that assesses the effects of policies and program changes in the legal system; (4) a forensic evaluator who is either appointed by the court or retained at the request of one of the parties in the litigation to perform a psychological evaluation of an individual related to a legal question; and (5) a consultant who works on behalf of a party or position in litigation. Each role entails its own set of ethical dilemmas.

Key Terms

***amicus curiae* brief**
applied scientist
basic scientist
case law
crime control model
determinate sentencing
discretion
due process model
equality
expert witness
forensic evaluator
forensic mental health assessment
forensic psychologists
implicit bias
policy evaluator
precedents
principle of proportionality
procedural justice
racial bias
randomized controlled trials
sentencing disparity
settlement negotiation
stare decisis
trial consulting

2 The Legal System: Issues, Structure, and Players

ORIENTING QUESTIONS

1. What is the difference between the adversarial and inquisitorial systems of justice?
2. How do notions of morality and legality differ?
3. How do different models of justice explain people's level of satisfaction with the legal system?
4. What is commonsense justice?
5. How are judges selected, and how do their demographic characteristics and attitudes influence their decisions?
6. How does the experience of law school affect its students?
7. What is known about lawyers' professional satisfaction?
8. What factors explain lawyers' overconfidence, and how can it be remedied?

To understand how and why psychologists interact with the law, one needs a basic understanding of how the legal system operates. Accordingly, in this chapter, we focus on the legal system itself. We describe the nature of the adversary system and psychological aspects of legality, morality, and justice. We discuss courts and examine the roles played by the major players in the legal system—judges and lawyers. An understanding of the workings of the legal system will help make clear why psychologists are interested in studying and assisting judges, lawyers, and ordinary citizens involved in the law.

The Adversarial System

In both criminal cases that concern conduct prohibited by law and civil cases that concern disputes between private parties, American legal procedures involve an **adversarial system** of justice. Exhibits, evidence, and witnesses are assembled by representatives of one side or the other to convince the fact finder (i.e., judge or jury) that their side's viewpoint is the correct one. During a trial, the choice of what evidence to present is within the discretion of those involved in the litigation and their attorneys. Judges rarely call witnesses or introduce evidence on their own.

The adversarial system is derived from English common law. This approach contrasts with the **inquisitorial system** used in Europe (but not in Great Britain), in which the judge has more control over the proceedings. Lind (1982) described the procedure in France as follows: "The questioning of witnesses is conducted almost exclusively by the presiding judge. The judge interrogates the disputing parties and witnesses, referring frequently to a dossier that has been prepared by a court official who investigated the case. Although the parties probably have partisan attorneys present at the trial, it is evident that control over the presentation of evidence and arguments is firmly in the hands of the judge" (p. 14). In the inquisitorial system, the two sides do not have separate witnesses; the witnesses testify for the court, and the opposing parties are not allowed to prepare the witnesses before the trial.

The adversarial model has been criticized for promoting a competitive atmosphere that can distort the truth. During a trial, jurors may have to choose between two versions of the truth, neither of which is completely accurate, because witnesses often shade their testimony to favor their "side." In addition, skillful lawyers can effectively impugn the credibility of hostile witnesses, and criminal defendants rarely testify, despite being the most important source of information about the events in question (Slobogin, 2014).

Research on these contrasting approaches reveals several benefits of the adversarial model, however. A research team led by a social psychologist, John Thibaut, and a law professor, Laurens Walker (Thibaut & Walker, 1975; Walker, La Tour, Lind, & Thibaut, 1974) conducted programmatic research and concluded that the adversarial system led to less-biased decisions that were more likely to be seen as fair by the parties in dispute. One explanation for this more favorable evaluation of the adversarial system is that it is the system with which Americans are most familiar. But people who live in countries with nonadversarial systems (France and West Germany) have also rated the adversary procedure as fairer (Lind, Erickson, Friedland, & Dickenberger, 1978), perhaps because the adversarial system allows attorneys and their clients to control the arguments and strategies.

Because the adversarial system permits the litigants to "call the shots," it seems optimized to produce fair and just outcomes. But are they also the *correct* outcomes, given the facts of the case? Maybe not, according to Thibaut and Walker (1978). They noted that inquisitorial procedures seem optimized to produce truthful outcomes because they involve a neutral third party who gathers the relevant evidence without influence from the parties who have a stake in the dispute.

People's perceptions of justice and truth apparently do depend on the legal procedures to which they are exposed. In one study that demonstrated that point, participants read the evidence about an allergic reaction in a dog-bite case. The evidence was presented in either an adversarial manner where the litigants found their own scientific experts and worked with them prior to trial, or an inquisitorial manner where the judge appointed an expert witness who worked independently of the litigants. People exposed to adversarial procedures thought they produced verdicts that were just but not necessarily accurate, whereas those exposed to inquisitorial procedures thought the reverse: the verdicts were accurate but not necessarily just (Sevier, 2014). Stated simply, adversarial systems seem to provide more justice and inquisitorial systems seem to provide more truth. But in addition to justice and truth, one should also consider the tensions between what is legal (or illegal) and what is moral (or immoral).

Legality versus Morality

Laws are designed to regulate the behavior of individuals—to specify precisely what conduct is illegal. But do these laws always correspond to people's sense of right and wrong?

Consider the case of Lester Zygmanik. Lester was charged with murdering his own brother, George, because George had demanded that Lester kill him. A motorcycle accident a few days earlier had left George, age 26, paralyzed from the neck down. He saw a future with nothing but pain, suffering, and invalidism; as he lay in agony, he insisted that his younger brother Lester, age 23, swear he would not let him continue in such a desperate state. (Other family members later verified that this had been George's wish.) So, on the night of June 20, 1973, Lester slipped into his brother's hospital room and shot him in the head with a 20-gauge shotgun. Dropping the gun by the bed, he turned himself in moments later. There was no question about the cause of death; later, on the witness stand during his murder trial, Lester told the jury that he had done it as an act of love for his brother. Because New Jersey had no laws regarding mercy killing, the prosecution thought a case could be made for charging Lester with first-degree murder.

The state believed it had a good case against Lester. His actions met every one of the elements that the law required for his guilt to be proved. First, there was premeditation, or a plan to kill. Second, there was deliberation (as defined in the New Jersey criminal code—"the weighing of the 'pros' and 'cons' of that plan"). Third, there was willfulness ("the intentional carrying out of that plan"). Lester had even sawed off the shotgun before hiding it under his coat, and he had packed the bullets with candle wax, which compacted the explosion and made it more deadly. Lester forthrightly admitted to his lawyer: "I gave it a lot of thought. You don't know how much thinking I did on it. I had to do something I knew that would definitely put him away" (Mitchell, 1976, p. vii). At his trial, Lester took the stand and described his motivations, explaining that he did what his brother wanted.

If you had been a juror in this trial, how would you have voted? College students usually split just about evenly between verdicts of "guilty of first-degree murder" and "not guilty." Those who vote guilty often hope that the sentence will be a humanitarian one, but they believe it is their duty to consider the evidence and apply the law. Certainly, this was an act of murder, they say, regardless of Lester's good intentions. But those who vote not guilty often feel that it is appropriate, on occasion, to disregard the law when mitigating circumstances are present or when community standards argue for forgiveness.

Both reactions are reasonable, and they illustrate the dilemma between treating similar offenders equally and showing discretion if circumstances warrant. They also demonstrate important differences between judgments based on **black-letter law** and those based on one's conscience or personal sentiments about a given situation. By "black-letter law" (sometimes referred to as the *law on the books*), we mean the law as set down by our founding fathers in the Constitution, as written by legislators, and as interpreted by judges. According to the black-letter law, Lester Zygmanik was guilty. But there is another way to judge his actions—by focusing on his altruistic motives and his desire to help his brother, rather than to harm him.

As Lester Zygmanik's trial began, the prosecutor was confident that he would be found guilty. The jury, composed of seven men and five women, was tough, conservative, and blue-collar. The judge had even ruled that

the term *mercy killing* could not be used in the trial. But after deliberating for fewer than three hours, the jury found Lester Zygmanik not guilty. The jurors focused, apparently, on the relationship between Lester and his brother, and they concluded that Lester had been overcome by grief, love, and selflessness. Their decision implicitly acknowledged that moral considerations such as the commitment to care for others were more important to their decision than the strict guidelines of the law.

Obviously, the Lester Zygmanik trial is not the only one in which a defendant claimed his act was a mercy killing. Helping terminally ill patients to commit suicide (so-called assisted suicide) is usually justified by the "offender" as an act of compassion or mercy, ending the "victim's" pain and suffering. In fact, in five states—Oregon, Washington, California, Montana, and Vermont—it is legal for a physician, under narrowly defined circumstances, to help a person to die. In the United States, public support for this practice ranges from 47% to 69% (Emanuel, Onwuteaka-Phillipsen, Urwin, & Cohen, 2016). Many people would be loath to call the "perpetrators" of these acts criminals, and proponents of assisted suicide often hail them as heroes.

Mercy killings and assisted suicides are examples of **euthanasia**, the act of killing an individual for reasons that are considered merciful. They illustrate the often-tragic differences between what an individual feels is the morally right or just thing to do and what the law describes as an illegal act to avoid. Should someone who voluntarily, willfully, and with premeditation assists in killing another human *always* be punished? Or should that person, in some circumstances, be treated with compassion and forgiveness? Many people can imagine exceptional circumstances in which individuals who have technically broken the law should be excused. Often, these circumstances involve a lack of intention to harm another person and the desire to help a person who is suffering. The topic of euthanasia highlights the tension between legality and people's perceptions of what is moral, ethical, and just.

Citizens' Sense of Legality and Morality

We might assume at first that what is defined as "legal" and what is judged to be "morally right" would be synonymous. But in the Zygmanik case, what the jury considered to be a moral action and what the justice system considered the proper legal resolution were inconsistent. Legislators and scholars have argued for centuries about whether the law should be consistent with citizens' sense of morality. In fact, inconsistencies abound. For example, prostitution is universally condemned as immoral, yet it is legal in parts of Nevada and in many European and South American countries as well as in Australia and New Zealand. Acts of civil disobedience, whether performed six decades ago in racially segregated buses in Montgomery, Alabama, or, more recently, to protest President Trump's travel ban or treatment of women are applauded by those who consider some laws and policies to be morally indefensible.

Psychologists have now conducted a number of studies that illustrate the differences between citizens' sense of morality and justice, on the one hand, and the legal system's set of formal rules and laws, on the other. At first glance, it may seem nearly impossible to study people's views about the legitimacy of formal laws because there are so many variations in laws and so many different penalties for violating those laws. (Criminal penalties are decided on a state-by-state basis in the United States, so there could be 50 different penalties for the same crime.) Fortunately, though, a large majority of states base their criminal laws on the Model Penal Code drafted by the influential American Law Institute in the 1960s. Thus we can ask whether the principles embodied in the Model Penal Code are compatible with citizens' intuitions about justice and legality. Do people tend to agree with the Model Penal Code or does their sense of right and wrong diverge from this black-letter law? One set of relevant studies has examined the category of attempted crimes and the important role that intention plays in these cases.

Attempted Crimes and the Concept of Intention in Law and Psychology. Consider the following fundamental question of criminal law: How should attempted (but not completed) crimes be punished? An attempt may be unsuccessful because the perpetrator tries to commit a crime but fails (e.g., he shoots but misses) or because the attempt is interrupted or abandoned (e.g., robbers are about to enter a bank with guns drawn when they see a police officer inside).

The Model Penal Code says that attempts should be punished in the same way as completed crimes. If the offender's conduct strongly corroborates his criminal **intention**—showing that he not merely thought about the crime but actually tried to accomplish it—the Model Penal Code decrees that he should be punished to the same degree as the successful offender. Focusing on the central role of intent, the Model Penal Code assigns the same penalty to attempted crimes as

BOX 2.1

The Case of a Duped Would-Be Offender

In March, 1987, George Taylor forced his way into a woman's apartment in New York City and made sexual advances while threatening her with a knife. Fearful of the knife, the victim tried to convince Taylor that he could be her boyfriend, that he didn't need to impose himself in this way, and that he could come to her house anytime. Taylor relented, walked into an adjacent room, and took off the surgical gloves he had been wearing, saying he was not going to need these anymore. The victim then persuaded Taylor to accompany her to a liquor store to buy a bottle to celebrate getting to know each other. But as they were leaving the apartment she ducked back inside, locked the door, and called the police.

Despite arguing that he voluntarily and completely abandoned any intention of carrying out a crime, Taylor was convicted of attempted rape. The appellate court pointed out that in a parallel situation, if a person shoots at an intended victim and misses, he has no defense to the charge of attempted murder because his poor aim, rather than his lack of criminal intent, allowed the victim to live. Following that logic, the court ruled that it was the victim's escape, rather than Taylor abandoning his criminal intention, that prevented the rape.

CRITICAL THOUGHT QUESTION

Did the jury that convicted Taylor and the appellate court that upheld his conviction follow the rule of the Model Penal Code? Do you think jurors should be asked to peer into an offenders' minds and guess what they were thinking at the time of an attempted but incomplete act? How far along in executing a crime must offenders go in order to be guilty of a crime that they did not complete?

completed crimes. Thus, the pickpocket who thrusts his hand into another person's pocket, only to find it empty, is just as guilty (and just as deserving of punishment) as the pickpocket who makes off with a fat wallet. Regardless of the outcome of this act, the pickpocket tried to steal—and so, by definition, a crime was committed. A similar situation arose in the interesting case of (*People v. Taylor*, 1992), described in Box 2.1.

According to the Model Penal Code, an offender who tries but fails is just as culpable as an offender who tries and succeeds. But do ordinary people think about intent and attempted crimes this way? Do they think that *trying* to break into a store is as serious as *actually* breaking into the store?

Psychologist John Darley and his colleagues asked respondents to read short scenarios that described people who had taken one or more steps toward committing either robbery or murder and to assign punishment to those people (Darley, Sanderson, & LaMantia, 1996). They found that people's intuitions differed in predictable ways from the position of the Model Penal Code. In situations where the person depicted in the scenario had taken only preliminary action (e.g., examining the store he planned to burgle or telling a friend about his plan), few people thought he was guilty, and those who did assigned mild punishments. Yet, according to the Model Penal Code, this person is just as guilty as one who actually completed the burglary. When the scenario described a person who had reached the point of "dangerous proximity" to the crime, punishments increased, but they still were only half as severe as those assigned to the person who actually completed the crime. Apparently people do not accept the view that intent to commit an act is the moral equivalent of actually doing it. Their notions about criminality and the need for punishment are more nuanced, less "black and white" than what the Model Penal Code prescribed.

Psychology's focus on mental states also reflects more differentiations and less clear-cut distinctions than those of black-letter law. Psychology considers a spectrum of behavior, motivated by a variety of influences and ranging from accidents to behavior influenced by stress, peer pressure, or immature judgment, to actions that are deliberate and carefully planned.

Even this continuum may oversimplify variations in intention because it minimizes the importance of environmental and cultural influences that affect people differently. The social context in which behavior occurs can strongly influence a person's intention to behave in certain ways. In some contexts, it can be very hard for an individual to conceive of behavioral options. Therefore, one person's ability to intend a given behavior might be much more limited than

that of another person who has more behavioral alternatives.

Psychologists have also studied how people assign causes, including intentions, to the behavior of others. A well-established theory in social psychology, **attribution theory**, focuses on how people explain others' intentions. According to the theory, attributions tend to vary along three dimensions: *internality*—whether we explain the cause of an event as due to something internal to a person or to something that exists in the environment; *stability*—whether we see the cause of a behavior as enduring or merely temporary; and *globalness*—whether we see the cause as specific to a limited situation or applicable to all situations. An individual who makes internal, stable, global attributions about an act of misconduct ("He is so evil that he doesn't care what anyone thinks or feels about him") will see an offender as more culpable and more deserving of punishment than a person who offers external, unstable, specific explanations for the same act ("As a result of hanging out with a rough crowd, she was in the wrong place at the wrong time").

When making inferences about what caused another person's behavior—especially behavior that has negative consequences—we tend to attribute the cause to stable factors that are internal to the person. That is, we are inclined to believe that others are predisposed to act the way they do. But when our own actions lead to negative outcomes, we are more likely to blame the external environment for the outcome, suggesting an unstable cause for our behavior that will probably change in the future.

Consequences of Citizen–Code Disagreements.

What difference does it make if laws do not comport with people's sense of right and wrong? Can people simply ignore laws they believe to be immoral? Indeed, we can find many examples of situations in which people opt not to obey laws and legal authority. When parents fail to make child support payments or when people violate restraining orders, it is often because they do not accept the legitimacy of a judge's decision. When people use illegal drugs or cheat on their income tax returns, it is often because they do not believe that the laws regulating these behaviors are just or morally right. During the era of prohibition in the United States, when alcohol consumption was outlawed, honest citizens became "criminals," entire illicit industries were created, and gang membership and gang-related violence increased significantly.

But there may be more significant and more general consequences of discrepancies between citizens' sense of morality and the legal system's sense of legality. For the law to have any authority, it must be consistent with people's shared sense of morality. When that consistency is lacking, citizens may feel alienated from authority and become less likely to comply with laws they perceive as illegitimate (Carlsmith & Darley, 2008). Initial disagreement with one law can lead to contempt for the legal system as a whole, including the police who enforce laws and the judges who punish wrongdoers. If the law criminalizes behaviors that people do not think are immoral, it begins to lose its legitimacy. In the words of Oliver Wendell Holmes, "[The] first requirement of a sound body of law is that it should correspond with the actual feelings and demands of the community" (1881, pp. 41–42).

What Is Justice?

More than 2,000 years ago, at the beginning of the *Republic*, Socrates posed this question and we continue to ponder it today. Definitions of justice have changed throughout history. In the Old Testament and in Homer's *The Iliad*, justice meant something like revenge. By the time of the Golden Age of Athens in the fifth century B.C.E., the concept of justice came to be less about vengeance and more about achievement of the well-being of individuals (Solomon, 1990). The development of Christianity and Islam accentuated a conception of justice within religious traditions of morality. As a result, people began to see matters of social injustice (e.g., the suffering of the poor and the oppressed) as issues of concern, along with offenses against one's person or one's family (Solomon, 1990).

Distributive and Procedural Justice

Our discussion so far has assessed perceptions of legitimacy in the *outcomes* of legal disputes, such as whether the would-be pickpocket who came up empty-handed should be punished as severely as the one who got the loot. This focus on the fairness of the outcome in a legal dispute is the main concern of **distributive justice** models. According to the principles of distributive justice, a person will be more accepting of decisions and more likely to believe that disputes have been resolved appropriately if the outcomes seem just (or if the outcomes—in the same sense as salaries or promotions—seem distributed equitably, hence the term *distributive justice*).

A series of classic studies in psychology and law showed that although distributive justice theories were

correct, there was clearly more to the story. This work, conducted by a psychologist and a law professor, suggests that disputants' perceptions of the fairness of the *procedures* are vitally important to the sense that "justice" was done (Thibaut & Walker, 1975). Such an orientation leads us to think of justice not only as punishment for wrongdoing but also as a process by which people receive what they deserve or are due. **Procedural justice** models suggest that if individuals view the procedures of dispute resolution or decision-making as fair, then they will view the outcome as just, regardless of whether it favors them or not. According to this perspective, important issues in a contested divorce include the means by which each person was wronged and whether the marriage can be dissolved in a manner satisfactory to both. In a dispute with an insurance company over an accident claim, one might ask whether the injured party was treated fairly or unfairly.

Generally, individuals perceive a decision-making process as fair to the extent that they believe they have a voice in how the process unfolds, are treated with dignity and respect during the process, and trust the authorities in charge of the process to be motivated by concerns about fairness (Sydeman, Cascardi, Poythress, & Ritterband, 1997). A full opportunity to state one's viewpoint and to participate actively and personally in the decision makes a strong contribution to an assessment of fairness, probably because it allows people to feel that they retain some control over their affairs (Ebreo, Linn, & Vining, 1996).

Procedural fairness is an important consideration in the resolution of child custody and child support disputes, for example. To the extent that family court judges use fair procedures, they are more successful in creating post-divorce situations in which both fathers and mothers are involved in their children's lives and take responsibility for financial and emotional support (Bryan, 2005). This is true regardless of the outcome. Thus, fathers, who often lose child custody hearings, are more likely to maintain contact with their children into the future if they believe that the hearing was fair.

These findings also apply in the real-world interactions that occur in police stations and courtrooms. Police officers and judges are not likely to generate warm feelings in the community when they give people less than what those people feel they deserved, or when they limit people's abilities to act as they wish. Do citizens have a better view of police officers and judges (and, by extension, of the entire legal system) if they perceive that they are being treated fairly? Will this make it more likely that they will cooperate with legal authorities and comply with the law?

To answer these questions, Tyler and Huo (2002) interviewed individuals in Oakland and Los Angeles who had a recent experience with a police officer or a judge. The researchers asked about the fairness of the outcomes of those encounters with authorities, and about the fairness of the procedures that were used to achieve the outcomes. They also measured people's trust in the motives of a particular authority figure by asking participants whether they felt that their views had been considered and whether the authority cared about their concerns.

As one might expect, the favorability of the outcomes shaped participants' responses to this encounter. We feel better about situations and people when we get what we want from those situations and from those individuals. But importantly, the willingness to accept the decision of a police officer or judge was strongly influenced by perceptions of procedural fairness and trustworthiness: When people perceived that police officers and judges were treating them fairly and when they trusted the motives of these officials, they were more likely to accept their decisions and directives.

Procedural fairness also has long-term effects on people's willingness to obey the law. Tyler and Jackson (2014) surveyed 1,600 people who mirrored the demographics of the American population in their views of the police, courts, and the law, and in their public behaviors. They found, unsurprisingly, that the risk of being caught and punished affected compliance with the law, but so did people's views about the legitimacy of the police and the courts. If people thought these authorities were legitimate—a crucial component of procedural justice—they were more willing to obey laws regarding both minor crimes like speeding and littering and serious crimes like theft. The police themselves are affected by perceptions of procedural fairness: those who believe their departments have fair procedures and decision-making are likely to obey their supervisors, are psychologically and emotionally grounded, and trust the communities they police (Trinkner, Tyler, & Goff, 2016).

The principles and consequences of procedural fairness extend well beyond the confines of a police station or courthouse. How adults, particularly parents, resolve conflicts that inevitably arise in a family influences the behavior of children. One team of researchers asked middle-school students to describe how a recent conflict or disagreement with their parents was resolved: "Did your parents treat you with respect? Were they equally

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Citizens are more likely to obey laws when they think that police use fair procedures.

fair to everyone involved?" The students also described mild forms of aggressive behavior—bullying—they had directed at other students. Analyzing these two sets of responses, the researchers determined that higher perceived levels of procedural fairness in the family were associated with lower frequencies of bullying behavior at school (Brubacher et al., 2009).

Commonsense Justice: Everyday Intuitions about Fairness

Another approach to the study of justice—one closely aligned with the analysis of citizens' agreement with the criminal code—is to learn about the intuitions that average people hold about culpability, fairness, and justice. Psychologist Norman Finkel examined the relationship between the black-letter law and what he called **commonsense justice**—ordinary citizens' basic notions of what is just and fair. Finkel's work has much to say about inconsistencies between the law and public sentiment in the types of cases we have examined in this chapter—assisted suicide and euthanasia—as well as in cases involving self-defense, the insanity defense, the death penalty, and felony murder (Finkel, 1995). Commonsense justice is also reflected in cases in which a jury refuses to convict a defendant who is legally guilty of the crime charged—the phenomenon known as jury nullification.

According to Finkel and others who have pondered commonsense justice (e.g., Miller, Blumenthal, & Chamberlain, 2015), there is evidence that the black-letter law on the books may be at odds with community sentiment. This work is an important contribution to the field of law because it explains *how* people's sentiments depart from legal concepts and procedures. There are three identifiable discrepancies.

1. *The commonsense context is typically wider than the law's.* Ordinary people tend to consider the big picture: Their assessment of the event in question extends backward and forward in time (including, for example, a defendant's conduct prior to the incident and behavior after the crime), whereas the law allows consideration of a more limited set of circumstances. For example, in a date rape case or other case in which the victim and defendant knew each other, jurors would be likely to consider

the history of the individuals, both together and apart. Is the incident one in a series of troublesome encounters in a tumultuous relationship? Have these events been alleged by other partners?

Although people contemplate the wider context of the story, the law freezes the frame at the time of a wrongful act and then zooms in on that relatively finite moment. Reasoning that this narrower perspective will result in a cleaner and more precise judgment, the law determines culpability on the basis of actions and intentions within this narrow window. But people would often rather learn about the big picture; for many, viewing only the last act does little to reveal the entire drama (Finkel & Groscup, 1997).

2. *Commonsense perspectives on the actions of a defendant and victim are more subjective than the law allows*. In disputes that involve people with a prior history, for example, observers construct a story about what happened and why. They do this by stepping into the shoes of the disputants and viewing the events through their eyes. The stories they construct typically describe hidden motives and desires gleaned from past conduct. But this perspective can result in judgments based on changing and inconsistent sentiments rather than discernible and objective facts.
3. *Observers take a proportional approach to punishment, whereas the law asks them to consider the defendant in isolation*. Imagine a situation in which an armed robber enters a convenience store while his female accomplice watches guard outside the store. Further imagine that things go awry—the robber ends up shooting the cashier, and the cashier dies. The robber has certainly committed a crime, but what about the accomplice? According to the felony-murder doctrine (which applies in about half the states), the accomplice is as culpable as the triggerman. Yet this egalitarian approach seems to contradict the notion of proportional justice, in which a defendant's actions and intentions are assessed in comparison to others and more culpable defendants are dealt with more severely. People easily make distinctions among types of crimes and criminals, and they usually want more severe punishment for those they find most blameworthy.

It is now understood that community sentiments affect laws and policies in many aspects of our everyday lives, including same-sex marriage and divorce (Barth & Huffman, 2015), campus-related violence and safety (Campbell, 2015), the use of social media (Kwiatkowski & Miller, 2015) and child custody (Sigillo, 2015). In each instance, there are legitimate debates about the extent to which commonly held beliefs—community sentiments—*should* influence the laws and policies that govern our behavior.

Courts

We now turn our attention to the reality of resolving legal disputes and the structures our society has enacted to do so. Disputes that reach the legal system are often, though not always, resolved in court. New community-based alternatives to standard prosecutions are increasingly used. **Diversion** to an alternative system may occur upon one's first encounter with a police officer, or when the case is referred to any of several "problem-solving courts" (also called specialty courts). Rather than focusing on punishment for wrongdoing, as traditional courts tend to do, problem-solving courts deal with the underlying reasons that individuals commit crimes in the first place. Such problem-solving courts include drug court, mental health court, and veterans' court (addressing issues of drug abuse, mental illness, and exposure to trauma, respectively), among others. Chapter 9 describes community-based alternatives, including specialty courts, in detail.

Different kinds of courts have been created to handle specific legal issues. Because we cover various court cases relevant to psychology throughout this book, an understanding of the structure of both the traditional and alternative court system will be helpful. In the next section we describe the traditional court system.

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U.S. Supreme Court building.

State Courts

Although there are 50 different state court systems in the United States, they all typically include "lower" courts, trial courts, and appellate courts. Lower courts have jurisdiction over specific matters such as probate of wills (proving that a will was properly signed), administration of estates (supervising the payment of a deceased person's debts and the distribution of his or her assets), small claims, and traffic offenses. Family courts handle cases involving divorce, child custody, and child dependency. Juvenile courts deal with legal questions concerning delinquency and juvenile offenders. Both family courts and juvenile courts tend to focus on helping people rather than punishing them. In fact, juvenile courts have functioned for many years to protect children from the rough-and-tumble world of adult criminal courts and to resolve cases in a supportive, nonadversarial way.

Trial courts typically decide any case that concerns a violation of state laws. Most criminal cases (e.g., those involving drunken driving, armed robbery, and sexual assault) are tried in state trial courts. Prominent examples of trial courts in action come from the recent spate of prosecutions of police officers for assaulting or killing black citizens.

State court systems also include one or more courts of appeal, similar to the federal appellate courts, and a state supreme court. Like the U.S. Supreme Court, state supreme courts review only those cases deemed to be especially important or controversial. Published opinions are found in bound volumes called Reporters, and all opinions are accessible online.

Federal Courts

Federal courts have jurisdiction over cases arising under the Constitution or laws of the United States but typically do not have jurisdiction over cases arising under state law, unless the plaintiff and defendant in a civil case are from different states. Federal courts include trial courts, appellate courts, and the U.S. Supreme Court. When Congress passes a law regarding federal crime (e.g., the statute making identity theft a federal crime), the effect is to increase the caseload of the federal courts.

Federal trial courts are called U.S. District Courts. There is at least one district in every state; some states (California, for example) have several districts.

The federal appellate courts are called the U.S. Courts of Appeals. There are 13 federal courts of appeals, divided into geographical "circuits." In population, the largest circuit is the Ninth Circuit, which includes California, and the smallest is the First Circuit, which includes only a few New England states. Appeals are assigned to three-judge panels. The three judges examine the record (documents that the lawyers believe the judges need in order to decide the case), read the briefs (the lawyers' written arguments), and listen to the oral argument (the lawyers' debate about the case) before voting. The panel decides the case by majority vote and one of the judges writes an opinion explaining why the court decided as it did. Like state court opinions, these opinions are published in bound volumes called Reporters, which can be accessed online, including through the Westlaw and Lexis computerized legal research services.

The U.S. Supreme Court

Nine justices make up the U.S. Supreme Court, which has the authority to review all cases decided by the federal appellate courts. But the Supreme Court reexamines only a small percentage of the cases it is asked to consider—cases that the justices view as most significant. The Supreme Court also has the authority to review state court decisions that involve constitutional or federal law issues. Judges and lawyers refer to the latter as *raising a federal question*. A case involving the sale of violent video games to minors was both legally and psychologically significant, and illustrates how a state case raises a federal question. We describe it in Box 2.2.

Justices of the Supreme Court, like other federal judges, are appointed by the president and confirmed by the Senate. They are granted a lifelong tenure to allow them to be impartial, not influenced by the whims of political or legislative interests. In theory, their nomination is also expected to be above the fray of partisanship. But we saw a great deal of politicking surrounding the recent appointment of a replacement for Justice Antonin Scalia, who died in 2016. President Obama nominated Merrick Garland, the chief judge of the Court of Appeals for the District of Columbia, to replace Scalia. But Garland's confirmation was blocked by Republican lawmakers who argued that the appointment should fall to the President who would be elected later that year, rather than to the lame-duck Obama. So despite Garland's impressive credentials (Lyall, 2017), the vote on his confirmation never occurred and President Trump nominated Neil Gorsuch, also a federal appeals court judge, who was confirmed by the Republican-led