Introduction

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

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

Parks was charged with first-degree murder and attempted murder. At his trial, he presented a defense of automatism, stating that at the time the incidents took place, he was sleepwalking and was not aware of what he was doing. Briefly, automatism is defined as behavior performed in a state of mental unconsciousness or dissociation, without full awareness (Black, 1990). Parks had a history of sleepwalking and had been experiencing significant stress in his life, but there was no indication he had ever committed violence, either awake or asleep. In fact, his mother-in-law had called the
6’5” man the “gentle giant.” Parks admitted he probably committed the violence but did not have the necessary criminal intent. The trial court heard from two behavioral scientists and three mental health professionals called by the defense. They testified that Parks was sleepwalking at the time the violence occurred, that sleepwalking was a relatively common sleep disorder, and that there was no medical or psychological treatment designed to prevent it. Parks was acquitted of the crimes. In a final ruling on this case, the Supreme Court of Canada (Regina v. Parks, 1992) set guidelines for a sleepwalking defense and provided some clarity on issues relating to injurious acts and consciousness during the human sleep cycle.

In the United States, sleepwalking is rarely used as a defense to criminal conduct, but some legal commentators indicate it is only a matter of time before automatism reaches more courts (Melton, Petrila, Poythress, & Slobogin, 2007). Although violent behavior during sleep is relatively rare, it presents troubling implications for the legal system (Weiss et al., 2011). The notion that it is possible to engage in complex injurious or violent behavior while asleep is usually met with skepticism. During the night of January 16, 1997, Scott Falater, a 41-year-old product manager with Motorola, claimed he was sleepwalking when he killed his wife of 20 years. He stabbed her 44 times with a hunting knife, wrapped the bloody knife in his clothes, and hid it and other evidence in the wheel well of the family car. When he returned to a still-alive wife, he dragged her to a swimming pool and held her head underwater until she drowned. Falater did not deny killing her, but stated he did not remember anything about the incident because he was sleeping throughout. Like Park, he had a history of sleepwalking. The prosecutor in the case said the sleepwalking defense was complete nonsense and informed the press he would seek the death penalty if Falater was convicted. It is clear that the prosecutor believed that Falater was malingering, or faking, and was conscious of his actions at the time of the offense. Experts testified for both the defense and prosecution, disagreeing over whether the violence was committed while sleepwalking. According to experts for the prosecution, Falater’s actions were too calculated and deliberate for him to be sleepwalking. The jury found him guilty of first-degree murder, and the court sentenced him to life in prison without parole (Arizona v. Falater, 1997).

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

These two cases—Parks and Falater—illustrate the fascinating intersection of law and psychology. In each case, respected researchers and behavioral scientists informed the court about sleep and the not-so-common phenomenon of sleepwalking. They also discussed malingering, which is the deliberate faking or feigning of a disorder to achieve a particular desired outcome (VandenBos, 2007). In the Falater case, we also saw contrasting opinions from experts testifying for the defense and the prosecution. This is a common feature of the adversarial process that psychologists often find themselves a part of, as we discuss later in the chapter.

Goals and Definitions

This book is about psychological knowledge as it pertains to the law. It is designed to educate students about contemporary psychological research and theories that are relevant to the legal system, particularly but not exclusively as represented by the courts. Research indicates that students—though they may be very interested—know very little about psychology and law (Stark-Wroblewski, Wiggins, & Ryan, 2006). According to Stark-Wroblewski et al., “it appears that students’ knowledge of psychology and law related careers is not commensurate with their levels of interest in these areas” (p. 275). One of the major goals of this book is to fill this gap. (For information on activities and careers in psychology and law, see Boxes 1-1 and 1-2.)

Throughout the book, you will find reference to court cases and to pretrial and post-trial proceedings. Occasionally, we will refer to psychology as it relates to the legislative process, such as the framing of bills or the passage of laws. Sleep research, malingering, and expert testimony are only a few of numerous topics that will capture your attention throughout the book.

The field of psychology and law is extremely diverse, and it is expanding and changing rapidly. A substantial portion of the available research in psychology and how it relates to legal issues has been published since the 1980s, so it remains a relatively new field. Furthermore, psychology and law is a vibrant specialty with the potential for considerable additional growth in the future (Heilbrun & Brooks, 2010). This is reflected in the work of a special section of the American Psychological Association (APA), Division 41, the American Psychology-Law Society (AP-LS). Its many activities include conducting a survey of career opportunities in psychology and law, publishing online graduate school information, studying special ethical problems in expert testimony, surveying women’s issues in psychology and law, and providing comprehensive information for
anyone interested in the field. Students—both undergraduate and graduate—may join the division as Associates-at-Large.

**Definitions of Psychology and Law**

“Psychology and law” is often used interchangeably with “forensic psychology,” but there is a distinction. (*Forensic* originates from the Latin adjective *forensis*, which means of or before a forum or place of assembly—where discussions and debates of law or justice were held in ancient Rome.) In recent years, forensic psychology has been both narrowly and broadly defined (Bartol & Bartol, 2013; DeMatteo, Marczyk, Krauss, & Burl, 2009). Narrowly defined, forensic psychology is restricted to clinical work performed for and presented to the judicial system. As DeMatteo et al. (2009) note, the narrow definition encompasses only clinically based practitioners, such as clinical psychologists, counseling psychologists, school psychologists, or other specialists who testify in or consult with courts. Research psychologists who conduct research and do not consider themselves clinical or practicing psychologists are excluded from the definition. Broadly defined, forensic psychology includes both clinicians and researchers, and it includes activities related directly to the courtroom as well as both activities and situations *before* they reach the courtroom and *after* going through the civil and criminal justice systems. For example, a broad conception of forensic psychology not only includes such professional activities as trial consultation, courtroom testimony, and court-ordered child custody evaluations (all of which would be within the narrow definition), but also includes research on lie detection or eyewitness testimony by a nonclinician. Some (e.g., Bartol & Bartol, 2013; Weiner & Otto, 2014) include topics related to law enforcement (such as the screening and selection of candidates) and corrections (such as clinical services to offenders) within the realm of forensic psychology.

There continues to be debate as to the proper definition of forensic psychology, however. The most recent *Specialty Guidelines for Forensic Psychology* (American Psychological Association, 2013b) describes forensic psychology broadly but also emphasizes that it is practitioner oriented. However, the guidelines do state that practitioners can be researchers as well as clinicians. According to the guidelines,

*forensic* psychology refers to professional practice by any psychologist working within any subdiscipline of psychology (e.g., clinical, developmental, social, cognitive) when applying the scientific, technical, or specialized knowledge of psychology to the law to assist in addressing legal, contractual, and administrative matters. . . . *Such professional conduct is considered forensic from the time the practitioner reasonably expects to, agrees to, or is legally mandated to provide expertise on an explicitly psycholegal issue.* (p. 7, emphasis added)
These guidelines, revised from a previous edition called *Specialty Guidelines for Psychologists* (Committee on Ethical Guidelines for Forensic Psychologists, 1991), are undoubtedly of great benefit to psychologists providing expertise to the law.

The main topic of this text, psychology and law—which sometimes is referred to as legal psychology—can be regarded as a subdivision of a broadly defined forensic psychology, but it is better defined standing alone. Psychology and law is essentially the interaction between two disciplines; it encompasses any and all topics that are of legal interest. As such, psychology and law is nearly infinite in scope, limited only by the creativity of scholars and practitioners in disparate fields. As we will note shortly, other mental health and behavioral science professionals play prominent roles in the law as well, often in collaboration with psychologists. Separating psychology and law from forensic psychology allows us to avoid definitional and territorial dilemmas and to explore interesting areas pertaining to the relationship between psychology and the legal system in greater depth.

### Psychology and Law: Three Approaches

Over 30 years ago, Craig Haney (1980) suggested a perceptive approach to the psychology and law relationship, which we adopt and integrate throughout this text. He believed it useful to distinguish three relationships: (1) psychology *in* the law, (2) psychology *and* the law, and (3) psychology *of* the law. These three relationships are important in identifying the various roles that most psychologists take when working with the legal system.

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

These cooperative efforts across disciplines have resulted in some blurring of the professional lines and, fortunately, less animosity between professionals than was displayed in the past. Although each profession maintains its separate identity and associations, we see increasingly more collaboration in both work settings and publications. In this spirit, for example, academic journals publish interdisciplinary articles, often coauthored by professionals from different disciplines. One current handbook for professionals (Drogin, Dattilio, Sadoff, & Gutheil, 2011) consists of multiple chapters, each of which is written by a psychologist and a psychiatrist. Therefore, while we cite in particular the work of psychologists, we acknowledge the important contributions of other professionals as well. Often we refer to clinicians and mental health practitioners, rather than to psychologists, to emphasize the interdisciplinary nature of the expertise available to the law.
Based on recent statistics (Griffin, 2011), independent practice is the primary work setting of psychologists involved in psychology and law activities (43%). These are usually clinically trained, such as clinical psychologists, counseling psychologists, or school psychologists. Some clinically trained practitioners prefer to call themselves forensic psychologists, and in some states they are certified as such. In fact, in some jurisdictions, certification is a minimum requirement for testifying on such matters as the defendant’s competency to stand trial or sanity, topics to be discussed in Chapter 4. Those psychologists in independent practice also conduct risk assessments, perform child custody evaluations in family law proceedings, and assess disability claims, among other activities.

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

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

Psychology in the Law

Of the three relationships described by Haney, the psychology in the law relationship is the most common. In this situation, attorneys and judges utilize psychologists and their knowledge and experience to help in the resolution of cases. Most of the psychologists involved in this relationship are counseling, clinical, or forensic psychologists with some legal training and experience. Let’s take, for example, the family court system, which is
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Technically a subset of civil law and is covered in Chapter 9. Family courts today are widely considered overwhelmed, due to large volumes of cases often associated with both economic crises and natural disasters. The family law courts handle a large variety of cases, including but not limited to child custody requests, domestic violence restraining orders, divorce matters, care of the elderly, requests for child and spousal support, child neglect, and delinquency proceedings. Traditionally, the role of psychologists in the family court system has been relatively limited and clearly defined (Juhas, 2011). However, in light of the shifting needs and extended duties of the family court in recent years, the roles of psychologists have also expanded significantly (Juhas, 2011). It is noteworthy that psychologists are the most preferred experts in cases involving child custody (Bow, Gottlieb, & Gould-Saltman, 2011).

As illustrated above, then, the psychology in the law relationship is typically a clinical and consulting one. In both criminal and civil contexts, psychologists conduct various assessments whose results are communicated to judges and lawyers or even advise lawyers on strategies for interviewing witnesses or selecting jurors. Numerous handbooks and articles are available to assist mental health practitioners in conducting this clinical work (e.g., Grisso, 2003; Heilbrun, Grisso, Goldstein, & Laduke, 2013; Melton et al., 2007; Weiner & Otto, 2014). In addition, the American Psychological Association (APA) provides guidelines to advise clinicians. Among the most recent are the above-cited Specialty Guidelines for Forensic Psychology (APA, 2013), Guidelines for Assessment of and Intervention With Persons With Disabilities (APA, 2011), and the Guidelines for Child Custody Evaluations in Family Law Proceedings (APA, 2010b). These and additional guidelines will be referred to in later chapters. Finally, all psychologists who belong to the APA are expected to act consistently with the standards in the document Ethical Principles of Psychologists and Code of Conduct (EPPCC; APA, 2002). Guidelines are advisory in nature, whereas standards hold greater force. For example, a psychologist who violates the EPPCC may face censure by the APA and even be barred from membership.

Psychology and the Law

In this relationship, psychology remains a separate discipline, analyzing and examining various components of the law and the court processes from a psychological perspective. Psychology and the law represents a relationship where psychologists conduct basic and applied research into the most challenging issues faced by the legal system. With the execution of well-designed studies and the thoughtful formulation of theory to tie the results of these experiments together, psychology can develop an impressive body of psychological knowledge relevant and helpful to the law. The sleep research mentioned at the beginning of this chapter is one example. Another is the research on eyewitness testimony and lineup identifications. Mistakes in identifying criminal suspects have—far too many times—implicated innocent people (Dror & Bucht, 2012). Research by
psychologist Elizabeth Loftus and others has cogently demonstrated why these mistakes happen and has suggested ways to avoid them. Professor Loftus's research is covered in Chapter 5. Psychologist Saul Kassin and his colleagues have conducted considerable research on confessions and discovered that many confessions—even to serious crimes—are less reliable than previously assumed. Psychologists Thomas Grisso, Allison Redlich, Kirk Heilbrun, Mark Cunningham, and Richard Rogers, among others, have studied issues relating to mentally disordered offenders, comprehension of one's rights, inmates on death row, and malingering. A majority of these research psychologists in the psychology and the law relationship are social psychologists, cognitive psychologists, neuropsychologists, community psychologists, and—more generally—human experimental psychologists. The following are additional examples of questions research psychologists try to answer:

- Can decision making by jurors really be unaffected by information they are told to disregard?
- Are some people better at detecting lies than others?
- How reliable and valid is criminal profiling?
- Does human memory work well under stressful and traumatic circumstances?
- Do mentally disordered individuals have the ability to make decisions in their own best interest?
- Can hypnosis uncover long-lost memories?
- Under what conditions do false confessions to a crime occur?
- Can courts find untainted jurors in the age of the Internet?

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

We make no pretense that the legal system will change, even with knowledge of sound psychological principles, research, and theory. Law's practices are built upon a foundation of long traditions and conservative attitudes toward innovations. The legal system in most societies does not wish to be a weathervane, shifting with every new idea or untested theory that comes along. Understandably, it does not alter its practices unless there is a cogent reason for doing so. However, it is precisely the mutually
independent psychology and law relationship that holds promise for significant improvements in both disciplines. An incisive comment by John Conley (2000) illustrates the nature of the relationship well:

Just as lawyers-in-training must be taught to appreciate the culture of social science, so social scientists must develop a greater appreciation of the culture and traditions of law. Irrational as some of these traditions may seem, they are ancient and deeply ingrained. (p. 287)

Further below, we will cover key differences between psychology and law.

**Psychology of the Law**

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

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

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

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

In sum, Haney (1980) proposed an excellent framework for thinking about the relationship between psychology and law. The present book includes material relevant to
each of the above three relationships, although it focuses on the first two. It is not a “how to” book, but it often describes how psychologists do their work, including what tests or measures they employ. It does not train you in how to testify in court, prepare a profile of a serial murderer, or provide an opinion about which of two parents should be given custody of a minor child. Students of psychology know that extensive education is required before anyone acquires expertise to engage in these activities (see Box 1-2 for career path possibilities in psychology and law).

**BOX 1-2 EDUCATION AND TRAINING IN PSYCHOLOGY AND LAW**

The American Psychology-Law Society’s (AP-LS) Guide to Graduate Programs in Forensic and Legal Psychology (available at http://ap-ls.org/education/GraduatePrograms.php) lists more than two dozen doctoral programs (in both the United States and Canada) that offer clinical training in psychology and law (see also Packer & Borum, 2013). There are also 15 doctorate programs that offer nonclinical training in psychology and law (Packer & Borum, 2013). The clinical training programs usually require a 1- or 2-year internship in a clinical or forensic setting.

As of this writing, seven programs allow students to pursue a degree in law (JD, or Doctor of Jurisprudence) while simultaneously or sequentially completing the requirements for a doctoral degree in psychology (PhD or PsyD). The first law and psychology graduate program was developed at the University of Nebraska (Lincoln) in 1974 and remained for many years the largest and most diverse program in the field, offering both clinical and nonclinical training. Prospective students in a majority of the psychology and law graduate programs must be admitted to both the law school and the department of psychology.

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

There are now more than 24 masters programs that identify themselves as providing specialized training in psychology and law (http://ap-ls.org/education/Masters.php). The master’s degree by itself does not result in a license to practice psychology, since most states require a doctoral degree to be able use the title “psychologist” (Packer & Borum, 2013).
Although this is not a how-to book, it does require the reader’s basic understanding of the philosophy and methods of the behavioral sciences, because we will discuss many research studies applicable to the legal process. Despite the rapid growth of research in psychology and law, there is still a great need for well-designed and well-executed studies directed at the many legal assumptions about human behavior. There is an even stronger need for psychological theories that encompass and explain the results of this research.

Ways of Knowing and the Methods of Science

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

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

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

The fourth way of obtaining knowledge is the **method of science**, which is the testing of a statement or set of statements through observations and systematic research. On the basis of this systematic study, statements about natural events or processes are revised, reconstructed, or discarded. Science is an enterprise under constant change, modification, and expansion rather than an absolute, unalterable fact-laden system. Science teaches us that there are few certainties in the natural world and that we should base our decisions and expectations on “the best of our knowledge” at any particular time in history. The science of behavior, of course, is full of enormous challenges. As forensic psychologist Diane Follingstad (2010) astutely stated in her acceptance speech at the American Psychology-Law Association convention in Vancouver, British Columbia, “The study of human lives is difficult to do well, and even when done well, our research is only too often, only suggestive. This is our cross to bear” (p. HC 16).

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

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

Courts and the Method of Science

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

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

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

Throughout the text, we will encounter many cases in which expert testimony was introduced, as it was in the sleep disorder cases covered briefly early in the chapter. We are of course most interested in experts on psychological issues. Not everyone claiming expertise can testify, nor is every topic deemed to require expert testimony. Put another way, expert testimony will not necessarily be admitted into a court proceeding. For example, in all courts a minimum academic degree is expected, and in some, the person offering to testify must hold specific certifications. However, in addition to the qualifications of the individual, the topic on which she or he seeks to testify must also be assessed. In some courts, testimony on psychological profiling, hypnosis, or various “syndromes” has not been accepted. Below, we review the legal tests that are applied in determining whether expert testimony should be allowed.

The Frye Standard

Before 1993, the most frequently cited case on the admissibility of scientific evidence was *Frye v. United States*, decided by the U.S. Court of Appeals of the District of
Columbia in 1923. In that case, the trial court was asked to admit polygraph evidence that supported James Alphonzo Frye’s contention that he was not guilty of robbery and murder. The 19-year-old Frye had taken and passed a “systolic blood pressure deception test” administered by lawyer-psychologist William Marston, who was by far the most influential American psychologist associated with the legal system during this time. He held three degrees from Harvard, a bachelor’s degree, a law degree, and a PhD in psychology. Moreover, he was the first psychologist to receive a faculty appointment as professor of legal psychology at American University. James Frye’s attorney had asked that Marston be allowed to testify to the results of his polygraph examination, but the trial court denied the request. The attorney then asked if Marston could conduct the test in the jury’s presence. That request was also denied. When Frye’s attorney appealed, the Court of Appeals upheld the decision of the lower court. Quoting from the brief submitted by Frye’s lawyer, the appeals court agreed that,

> When the question involved does not lie within the range of common experience or common knowledge, but requires special experience or special knowledge, then the opinions of witnesses skilled in that particular science, art, or trade to which the question relates are admissible in evidence. (p. 1014)

However, the court also said,

> Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs. (p. 1014)

Then the appeals court continued:

> We think the systolic blood pressure deception test has not yet gained such standing and scientific recognition among physiological and psychological authorities as would justify the courts in admitting expert testimony deduced from the discovery, development, and experiments thus far made. (p. 1014)

In short, Frye made “general acceptance” of scientific knowledge the standard or test for admitting expert scientific testimony into federal courts. If the knowledge was not recognized and accepted by the scientific community at large—and the systolic blood pressure test administered by Marston was not—it should not be admitted as scientific
evidence. Eventually, as the polygraph was developed in more sophisticated fashion, it became more acceptable as evidence in courts, though it is not universally accepted and is usually admitted into court only at the defendant’s request (Iacono & Patrick, 2006).

For the greater part of the 20th century, the *Frye* “general acceptance” test was widely applied by federal courts, and many state courts accepted the same standard. In 1975, however, Congress adopted a slightly different standard in its Federal Rules of Evidence (FRE), the rules that govern the admissibility of evidence at trials in federal district courts. Many states adopt evidence rules that are patterned on federal rules (Black, 1990). Specifically, Rule 702 referred to the reliability of the evidence rather than its general acceptance (see Box 1-3). Even after these rules were passed, state and federal courts continued applying a variety of standards for admitting expert evidence (including the *Frye* standard) and with varying rigor (Shuman & Sales, 1999). It is not surprising, then, that the U.S. Supreme Court attempted to clarify the issue.

**The *Daubert* Standard**

In 1993, the U.S. Supreme Court, in what is now considered a far-reaching, landmark case (*Daubert v. Merrell Dow Pharmaceuticals, Inc.*), issued a decision that primarily supported the federal rules of evidence, but also gave approval to *Frye*’s “general acceptance” approach.

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**BOX 1-3 TWO FEDERAL RULES OF EVIDENCE REGARDING TESTIMONY**

**Article VII: Opinions and Expert Testimony**

**Rule 701: Opinion Testimony by Lay Witnesses**

If the witness is not testifying as an expert, the witness’s testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, and (b) helpful to clear understanding of the witness’ testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

**Rule 702: Testimony by Experts**

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.
In the Daubert case, two minor children and their parents sued Merrell Dow Pharmaceuticals, Inc., arguing that the children's serious birth defects were caused by their mothers's ingestion of Bendectin, a prescription anti-nausea drug manufactured by the company. Merrell Dow submitted expert evidence that the drug had not been shown to be a risk factor for human birth defects. The plaintiffs obtained the testimony of eight experts who had conducted new studies and reanalyzed previous research. The federal district court and a federal appeals court both rejected the new evidence, ruling that it did not meet the Frye standard of "general acceptability." The U.S. Supreme Court, however, unanimously ruled that "general acceptability" was too austere and should no longer be the sole criterion in federal trials. The Court asserted that

> [t]he merits of the Frye test have been much debated, and scholarship on its proper scope and application is legion. Petitioners' primary attack, however, is not on the content but on the continuing authority of the rule. They contend that the Frye test was superseded by the adoption of the Federal Rules of Evidence. We agree. (Daubert v. Merrell Dow Pharmaceuticals, 1993, pp. 586–587)

Therefore, in Daubert, the Court emphasized that the traditional Frye standard had been replaced by the Federal Rules of Evidence in federal courts. The Court did not say that general acceptance was not relevant, however; rather, it could be one of several factors to take into account in deciding whether evidence should be admitted. A majority of the Court also made it clear that trial judges should screen any and all scientific testimony or evidence for (1) relevancy, (2) legal sufficiency, and (3) reliability. All three elements are important in deciding on the acceptability of the scientific evidence presented by the experts (see Table 1-1). Some critics observed that by making federal judges scientific gatekeepers, the Court charged these judges with deciding the merits of evidence about which they had little training. We will summarize briefly each of the elements and discuss problems that can face the trial judge in applying them.

Relevancy refers to the expectation that the scientific findings must be directly pertinent to the specific case being presented. When the relationships between the scientific evidence and the facts of the case are not adequately demonstrated, the evidence is not admissible. Goodman-Delahunty (1997) provides a good example in which the defendant was charged with the statutory rape of his daughter. This is a sex crime in which there is no force, but the victim is too young to give consent under the law. The defense tried to show—through expert testimony—that the defendant did not belong in a category that characterized 40% of incest abusers. Individuals in this group, a large minority of incest abusers, were fixated pedophiles (child molesters).

The defense sought to show that because the defendant did not exhibit the characteristics of a fixated pedophile, he was unlikely to have committed the crimes
charged against him. The court pointed out that the defendant was never changed with being a fixated pedophile, and unless the defense could show a link between nonproclivity for pedophilia and nonproclivity for incest abuse, the relevance of the testimony was lacking. (p. 130)

The *Daubert* criterion of *legal sufficiency* refers to the expectation that the expert evidence be probative rather than prejudicial. In other words, the scientific evidence must provide proof or evidence specific to the issues of the case, rather than misleading, prejudicing, or confusing the jury. If the impact of the evidence is more prejudicial than probative, the court may exclude the expert testimony. For example, “some courts merely preclude the expert from mentioning the term ‘rape trauma syndrome’ while favoring the more neutral term ‘posttraumatic stress disorder,’ because the former tends to give the impression that rape had occurred, which is prejudicial” (Goodman-Delahunty, 1997, p. 130). Still, some lawyers have argued that expert testimony is prejudicial by its very nature because an expert may be perceived by jurors to possess some sort of deep knowledge and skill considerably beyond the layperson (Goodman-Delahunty, 1997).

The third criterion articulated by *Daubert* refers to *reliability*. Here, the Court specified four factors that federal trial judges should consider: (1) whether the scientific theory or technique can be and has been tested, (2) the error rate of the particular scientific technique, (3) whether the theory or technique has been subjected to peer review and publication, and (4) general acceptance of the theory or technique within the scientific community. (Note that this last is essentially the standard set in the *Frye* case.) An absence or weakness in one of the four factors would not necessarily exclude the evidence, however.

The first of these factors refers to whether a scientific theory is formulated in such a way as to be capable of being tested and *falsified* by a researcher, often referred to as

<table>
<thead>
<tr>
<th>Table 1-1</th>
<th>Factors for Trial Judges to Take Into Account in Deciding Whether to Admit Scientific Evidence in Accordance With the <em>Daubert</em> Case</th>
</tr>
</thead>
<tbody>
<tr>
<td>Factor</td>
<td>Questions to Ask</td>
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<tr>
<td>Relevancy</td>
<td>Does the evidence pertain directly to the case?</td>
</tr>
<tr>
<td>Legal Sufficiency</td>
<td>Does the evidence have probative value? Does its probative value outweigh its possible prejudicial impact?</td>
</tr>
<tr>
<td>Reliability</td>
<td>Can the evidence be tested, and has it been tested? If tested, what is the error rate? Is the technique/method/test reviewed and published? Is the technique/method/test accepted by the scientific community?</td>
</tr>
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falsifiability. This point is an important one in the world of science, but it is also somewhat difficult to understand. For example, in Daubert, Chief Justice Rehnquist, dissenting in part with the majority decision, wrote, “I defer to no one in my confidence in federal judges; but I am at a loss to know what is meant when it is said that the scientific status of a theory depends on its ‘falsifiability,’ and I suspect some of them will be, too” (p. 600).

In his classic work, The Logic of Scientific Discovery, the philosopher of science Karl Popper (1968) (referred to by the Justices in Daubert) asserted that a truly scientific statement not only is capable of being verified or shown to be correct for the time being, but also is capable of being falsified or shown to be incorrect. In fact, Popper argued that one crucial criterion of a scientific statement is its constant vulnerability to being refuted by common experience or special experience. That is, the terms in any scientific statement or theory must be so precise, clear, and unambiguous that anyone planning to test the statement clearly understands what it is saying and can test it and potentially show the statement to be incorrect. “A theory which is not refutable by any conceivable event is nonscientific,” Popper (1962, p. 26) affirms. According to Popper (1962, 1968), the prudent scientist must ask whether it is conceivable to set up conditions where the statements accounting for the observed phenomena could be shown to be incorrect. If such conceivable conditions cannot be proposed, the statement or theory is not scientific. A truly scientific statement, then, is constantly at risk of being shown incorrect in accounting for observations and experience.

The Supreme Court’s second reliability factor refers to the question, is there a known or potential error associated with the scientific evidence? This implies that federal courts should determine the acceptable level for an error rate. However, the Court did not define error rate, nor did it provide guidance by indicating what the acceptable level might be. Moreover, precisely how should these considerations be applied to the evidence presented in a case?

The third reliability factor that the Daubert Court recommended refers to the question, have the findings been subjected to peer review and publication? In other words, has the evidence been reviewed by other experts (peers) in the field and met with their approval? Most professional and scholarly journals and periodicals in science (including the social and behavioral sciences) require that each manuscript undergo a rigorous evaluation by peers before being acceptable for publication. If the majority of these peer reviewers believe the manuscript falls short of the scientific requirement of solid methodology, analysis, conclusions, or contributions to the literature, the manuscript is likely to be rejected by the journal editor. Therefore, if research is published, the courts can assume that the evidence has at least received some approval from the scientific community.

The fourth factor refers to the question, is the technique or methodology at issue generally accepted by the scientific community? Therefore, the Frye standard did not
disappear. Instead, the general acceptance standard was imbedded into questions asked by federal courts in deciding whether scientific evidence should be admitted. In other words, is the technique or methodology generally accepted by a majority of the researchers in that particular field? Interestingly, this general acceptance hurdle often remains a major one for scientific evidence. As we will see in later chapters, expert testimony on some psychological tests, methods, and syndromes is often rejected primarily because judges believe they lack acceptance in the field. On the other hand, other courts have moved away from general acceptance and toward a closer examination of the scientific foundations of evidence (Ogloff & Douglas, 2013).

**Supreme Court Decisions After Daubert**

The Daubert rule was reaffirmed and extended by the U.S. Supreme Court in General Elec. Co. v. Joiner (1997) and Kumho Tire Co., Ltd. v. Carmichael (1999). Together, these three cases represent what is called “the Daubert trilogy,” and they also represent the Supreme Court’s landmark rulings on admissibility of expert testimony.

The Joiner case centered on identifying the cause of lung cancer diagnosed in Robert Joiner, an electrician who alleged that his exposure to electrical transformer chemicals (PCBs, dioxin, and furans) promoted his lung cancer. The case was a complex one and shifted from state to federal courts, with many pretrial proceedings in both jurisdictions. Relevant to our discussion is Joiner’s wish to call researchers who were ready to testify that these chemicals could promote cancer and likely did so in Joiner’s case, even though he was a smoker and had a family history of lung cancer. The trial court did not admit the testimony, saying the experts failed to demonstrate a relationship between the chemicals and the cancer in Joiner’s case. Joiner appealed that decision, and the federal appeals court (11th Circuit) ruled in his favor. The three corporations affected by the suit (General Electric, Westinghouse Electric, and Monsanto) appealed that decision to the U.S. Supreme Court, saying that the trial court had been correct in not admitting the testimony of the scientists.

The U.S. Supreme Court unanimously supported the decision of the trial court to exclude the expert testimony. Two of Joiner’s four experts were not willing to link increases in lung cancer to exposure to PCBs. The other two, who were more willing to do that, had conducted studies that the trial judge thought were not directly related to the case or that included exposure to other contaminants, in addition to PCBs. The Supreme Court decided that the district court judge had carefully reviewed the evidence and had not abused his discretion by refusing to admit the expert testimony. As a result of that decision, it is clear that to be admissible, experts must adequately explain their scientific conclusions to trial judges (Blanck & Berven, 1999). The unanimous decision also demonstrates the reluctance of the Supreme Court to second-guess decisions at the
trial level, particularly if presiding judges have carefully performed their roles as finders of fact. We will see additional illustrations of this in other landmark cases.

The *Kumho* case involved testimony of an engineer concerning the role a defective tire played in causing an auto accident. The engineer’s testimony had been classified as “technical” rather than traditionally “scientific.” Basically, the question raised by *Kumho* is extremely relevant to psychology, because it relates to the admissibility of expert opinion based on *clinical* experience and observation rather than science that is normally conducted under controlled laboratory conditions (Blanck & Berven, 1999). As discussed earlier in the chapter, both clinicians and research psychologists participate in the relationship with law. The Supreme Court concluded that the admissibility rules articulated by *Daubert* extended to clinical and technical knowledge. Therefore, the *Kumho* conclusion means that federal trial courts should apply the *Daubert* standard to what was traditionally considered “nonscientific” testimony from experts. This would include the clinical testimony of psychologists and other mental health workers. As Otto and Heilbrun (2002) note, it is now clear that clinicians as well as researchers are scientists for the purpose of providing expert testimony. Indeed, since the *Daubert* trilogy cases, the methods used by clinicians—such as the instruments they administer in assessing individuals—are often scrutinized by trial courts in deciding whether to allow expert testimony.

In addition, treatment approaches may also be challenged if they are not supported by empirical research. This has led to a major focus in the literature and in the psychological profession on evidence-based practice. An evidence-based treatment or practice is one that has been tried and tested, with favorable results overall. “Whatever clinical value unvalidated psychological assessment or treatment techniques may or may not have in the consultation room, *Daubert* makes plain that testimony employing such techniques has no place on the witness stand” (Faigman & Monahan, 2009, p. 23). Commentators note that the trilogy of cases has influenced the practice of law as well as the practice of psychology and other sciences. Attorneys are more proactive in selecting their experts and preparing for trial, and judges are more likely to exclude evidence now than before *Daubert* (McAuliff & Groscup, 2009).

Some states decided to apply the *Daubert* scientific standard soon after the Supreme Court issued the ruling. However, approximately 14 states continue to apply the *Frye* or similar test for the acceptability of scientific evidence in the courtroom (Hunt, 2010). That is, rather than conducting an elaborate review of relevance, error rate, falsifiability, and other aspects of the complex *Daubert* case, they focus primarily on whether the science has general acceptance among peers.

It has been 20 years since the *Daubert* case was decided by the Supreme Court. Over this time period, both civil and criminal courts have dealt with scientific evidence and have measured it according to the guidelines issued in that opinion. There is even an
online “Daubert tracker” that allows people to follow relevant cases. Scholars in both psychology and law will likely continue to cite and study this case well into the future.

Psychology and the Law: A Challenging Alliance

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

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

Even in the psychology and law relationship there are pitfalls. Recall that it is in this relationship that we find more researchers than clinicians, although it is important to emphasize that many psychologists are both. The clinician may conduct research, and the researcher may agree to a lawyer’s request to testify about her work. Research psychology is largely nomothetic as opposed to idiographic in scope. The idiographic approach emphasizes the intensive study of one individual. The nomothetic approach focuses on the search for general principles, relationships, and patterns by combining data from many individuals. Therefore, research psychologists—like clinicians—are generally cautious in responding to questioners who would prefer simple, certain answers or solutions to complex issues. Moreover, the principles and theories proposed by psychology are confirmed only through the collection of consistent and supporting data, a process that is not only long and rigorous, but is also punctuated by debate and differing interpretations of the data. “History suggests that the road to a firm research consensus is extraordinarily arduous” (Kuhn, 1970, p. 15).
Psychological theories or “truths” are arrived at primarily through studies that employ methods emphasizing prediction, measurement, and controlled comparisons. As will be seen later in the text, in some areas, research psychologists have amassed a good deal of information that allows them to make statements with confidence. We know, for example, that eyewitness testimony is extremely fallible under certain conditions but should not be totally discounted; we know, also, that as a group, juveniles lack a comprehension of the constitutional rights guaranteed to them, leading many to believe juveniles should not be allowed to waive their rights to a lawyer. On the other hand, research on the effects of divorce on children is still evolving, questions on the validity of psychological profiling abound, and research is mixed on the reliability of some measures intended to assess risk of sex offending. All of these topics will be discussed in the chapters ahead.

**Defining and Classifying Law**

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

**Content Classifications**

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

**Civil and Criminal Law**

The distinction between civil and criminal law rests primarily on the disputive versus punitive nature of a case. In civil law, two or more parties (litigants) approach the legal system seeking resolution of a dispute. The plaintiff, the person bringing the case, is hoping for some remedy from the law. Although the remedy may include fines, compensatory damages, and punitive damages, the concept of punishment is not the main purpose of civil law. It is designed to settle disputes, or to “make whole” the person or persons who suffered harm. This is accomplished through such means as monetary awards or injunctions (court orders to one party to cease some activity, such as venturing on property).
Criminal law, on the other hand, involves an alleged violation of rules deemed so important that the breaking of them incurs society’s formal punishment, which must be imposed by the criminal courts. An important component of criminal law is the need to have the rules stated clearly by Congress when it comes to federal crimes, and state legislatures when it comes to state crimes. Very rarely, crimes are covered in the state or federal constitutions; for example, the U.S. Constitution prohibits treason. To be a crime, an action or failure to act (e.g., failure to file income taxes) must be prohibited (or mandated) in the statutes, and the maximum punishment for violation of that rule must be specified. This does not mean that the person found guilty of violating the law will receive that maximum punishment; rather, it is considered fair that people be warned of the possible punishment before committing a crime.

Although it may not seem difficult to discern criminal from civil law, the lines between the two are sometimes blurred. In most states, for example, if a juvenile is charged with violating the criminal law, he or she will most likely be brought to a juvenile or family court, which is considered a civil rather than a criminal setting. Likewise, a mentally disordered individual charged with a criminal offense may be committed to a mental institution through civil proceedings, rather than led through the criminal courts. Over the past two decades, there has been increasing civil commitment of dangerous sex offenders after they have completed their criminal sentences. Disputes between private persons or organizations, such as breaches of contract, libel suits, or divorce actions, clearly represent civil law. The government also may be a part of a civil suit, either as plaintiff or defendant (also called respondent). However, when the government fines a corporation for dumping hazardous waste or polluting the waters, the fine may be either a civil or a criminal penalty. In December 2012, the oil corporation BP pled guilty to criminal charges associated with the Deepwater Horizon oil spill in the Gulf of Mexico in 2010. Civil suits against that company continue to this day, although some settlements have been reached. Earlier, the massive cases of Enron Corporation, Anderson Accounting Firm, and WorldCom in 2002 included violations of both criminal and civil laws. Anderson was convicted of obstruction of justice, and Enron was faced with both criminal and civil investigations into its corporate practices. This also happened in the case of Bernard Madoff, who pled guilty in 2009 to numerous federal charges involving securities fraud, money laundering, and perjury over a 20-year period. In the largest fraud case in Wall Street history, Madoff received a 150-year prison sentence.

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

**Substantive and Procedural Law**

Another way of classifying law by content, besides civil and criminal, is to divide it into substantive and procedural categories. **Substantive law** defines the rights and responsibilities of members of a given society as well as the prohibitions of socially sanctioned behavior. For example, the Bill of Rights in the U.S. Constitution specifies fundamental rights of citizens, such as the right to freedom of speech and the right to be free from unreasonable search and seizure. In landlord–tenant laws, certain duties of both parties are described. Other examples of substantive law include state and federal statutes that define and prohibit fraud, embezzlement, murder, rape, assault, arson, burglary, and other crimes against personal safety and property.

**Procedural law** outlines the rules for the administration, enforcement, and modification of substantive law in the mediation of disputes. In a sense, procedural law exists for the sake of substantive law. It is intended to give defendants in a criminal case and litigants in a civil case the feeling that they are being fairly dealt with, and that all are given a reasonable chance to present their side of an issue before an impartial tribunal (James, 1965). State laws that tell how to initiate a civil suit or that specify the documents to be filed and the hearings to be held in child custody disputes illustrate procedural law. Other examples are the rules of evidence in criminal courts, such as the type of testimony that may be offered by an expert witness (see Box 1-3). Other excellent examples of procedural law are the Federal Rules of Civil Procedure and Federal Rules of Criminal Procedure, which are periodically revised to reflect the spirit of the times as well as modern technological advances.

**Classifying by Origin**

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

**Constitutional Law**

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

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

The rules and principles outlined in the courts’ written decisions become precedent under the doctrine of stare decisis (to stand by past decisions) and are perpetuated, unless a later court chips away at or overturns them. As we will note below, precedent is a key element in distinguishing law and psychology. However, stare decisis is more a matter of policy than a rigid requirement to be mechanically followed in subsequent cases dealing with similar legal questions. Thus, while lower courts are expected to follow the precedents set by higher or appellate courts, an appeals court need not follow strictly the doctrine established by an earlier appeals court in the same geographical area. They generally do, however, because doing so contributes to efficiency, equality, and the development of the law (Abraham, 1998). As will be noted in Chapter 2, it sometimes happens that federal appeals courts in different parts of the United States have issued very different decisions on similar matters; in these situations, the U.S. Supreme Court may decide to hear a case to resolve the discrepancy.

**Statutory Law**

Written rules drafted and approved by a federal, state, or local law-making body are known as statutory law. Thus, local ordinances such as parking regulations or noise abatement orders are included in this category. Statutes are what most people mean when they refer to “law.” They include a multitude of provisions, such as what services will be provided to the public, what factors entitle a person to initiate a civil suit, what crimes will be considered felonies or misdemeanors, and what are the responsibilities of individual citizens. Congress or state legislatures pass numerous statutes directly relating to psychology. For example, a state legislature may mandate that all law enforcement officers must pass a psychological test before hire or that certain mentally ill individuals must receive ongoing treatment in the community. As other illustrations, Congress enacts statutory law in its periodic passing of health care legislation (e.g., the Affordable Care Act) and crime control legislation that includes provisions relating to bail reform, violence against women, or gun safety.
Administrative Law

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

Psychology and Law: Some Differences

There are many differences between psychology and law that make the relationship a challenging one. As the late Allen Hess (2006) wrote, “As psychologists and lawyers work together with greater frequency, there are more chances for misunderstandings to occur. It is useful to consider distinctions that can become troublesome if not recognized” (p. 43). Hess then provided a useful chart outlining these differences, several of which we discuss here (see also Table 1-2).

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

Law is generally conservative, and it builds a body of knowledge slowly, based on precedent. While psychology builds on past research findings, it is not precedence bound. As scientists, psychologists can and often do embark on exploring new research territory, but they cannot expect that the law will embrace their findings immediately or enthusiastically.

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

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

Psychologists may agree that the most desirable role for the psychologist who is called as an expert witness is that of the “impartial educator.” Many experienced

<table>
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<th>Table 1-2 Some Differences Between Psychology and Law</th>
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<tbody>
<tr>
<td><strong>Psychology</strong></td>
</tr>
<tr>
<td>Values objectivity</td>
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<tr>
<td>Research based</td>
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<tr>
<td><strong>Empirical</strong></td>
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<tr>
<td>Method of science</td>
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<tr>
<td>Nomothetic data</td>
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<tr>
<td><strong>Exploratory</strong></td>
</tr>
<tr>
<td>Seeks falsification</td>
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<td><strong>Sees knowledge as tentative</strong></td>
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psychologists, however, contend that this role is extremely difficult if not impossible to maintain. For one thing, there are pressures from the attorney who hired the psychologist. For another, even when the psychologist is court-appointed and is acceptable to both sides (as might happen during pretrial proceedings), the presiding judge may press the psychologist to provide simple, “yes” or “no” answers. Often, the psychologist would like to expand on his findings but may be precluded from doing so by the rules of evidence or the objection of one of the attorneys.

It must be emphasized, though, that law needs psychology, along with other sciences. Law is, after all, a basically human enterprise and practice. It should be clear by now that a vast store of knowledge obtained by the sciences is making its way into the legal arena. Moreover, mental health evidence is frequently viewed “as important, if not essential, to addressing certain legal issues (e.g., sanity, emotional damages, parental fitness)” (Edens et al., 2012, p. 259). However, “some judges, attorneys, academics, and jurors view at least some mental health experts—if not the entire field—with a considerable degree of suspicion, if not overt distain and/or hostility” (Edens et al., 2012, p. 260). It can be said that persons associated with both fields are at fault. Skeem, Douglas, and Lilienfeld (2009) reflect this viewpoint in the preface to their book, Psychological Science in the Courtroom: “Many legal decisions are still based on inadequate psychological science or, worse, no psychological science at all” (p. ix). Thus, the uneasy alliance continues. Although there will always be an imperfect fit between law and psychology—due to their underlying philosophical and methodological differences—there is reason for optimism as professionals in both fields become better at the work they do and more appreciative of their respective contributions.

**SUMMARY AND CONCLUSIONS**

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

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

This book focuses on psychological knowledge as it relates to the legal system—particularly but not exclusively reflected in the work of criminal and civil courts. This chapter has provided illustrations and has alluded to many topics—sleep research, eyewitness testimony, expert testimony, child custody determinations, lie detection, insanity—and numerous other examples are included throughout the book. Because
this volume will include references to research, the chapter included material on the philosophy of science and how courts evaluate (or are expected to evaluate) scientific testimony. The U.S. Supreme Court’s Daubert trilogy of cases and the Frye standard were offered as foundations to studying material in later chapters. In deciding whether scientific evidence should be admitted into court, the trial judge considers its relevance, reliability, and legal sufficiency, as well as the credentials of an expert.

The respective fields of law and psychology differ in both philosophy and methodology. Law is not easy to define. It is often conceptualized on the basis of its classifications, its sources, or its content. Law—at least in the adversarial system—is based on advocacy and precedence. It is expedient, case oriented, rational, and geared toward solutions to a problem. Psychology is nomothetic, research based, and exploratory in nature. As in most sciences, firm conclusions are evasive, and theories are constantly being tested. There is always the possibility that a discovery will be falsified. In law, although judgments in individual cases may be reversed, the general principles are retained unless there are compelling reasons to do otherwise. In other words, the law tends to be conservative (Hess, 2006). These fundamental differences may make for a challenging and sometimes uneasy alliance between psychology and law, but it is clear that their interaction has increased and developed in recent years. As will be illustrated throughout the book, this is to the benefit of both fields.

**KEY CONCEPTS**

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