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INTRODUCTION

As an eminent legal scholar has argued, “Law’ is a massive, vital presence in the United States. It is too important to be left to the lawyers—or even to the realm of pure thought” (Friedman, 1986, p. 780). Friedman’s observation was based on his appreciation of the contributions that the law and society movement has and continues to make to law. This movement, which continues strongly today, involves the major hermeneutic (e.g., history and philosophy) and behavioral and social science (e.g., anthropology, political science, psychology, sociology) disciplines studying law from their respective disciplinary perspectives in order to advance our understanding of law as an institution in society.

Although psychologists as individuals had interacted with law for more than a century (e.g., Munsterberg, 1908), psychology as a discipline did not come to recognize the importance of psychology actively relating to law until 1969 when the American Psychology–Law Society (AP-LS) first came into being as a free-standing society. By 1981, AP-LS became a division of

<http://dx.doi.org/10.1037/14593-001>

The Psychology of Law: Human Behavior, Legal Institutions, and Law, by B. D. Sales and D. A. Krauss
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the American Psychological Association (Grisso, 1991), with more than 3,000 members today (Krauss & Sales, 2014). Since the field's inception, there has been a steady increase in law-related psychology training programs (Krauss & Sales, 2014), in the onset of specialty journals relevant to the field (e.g., *Law and Human Behavior*; *Psychology, Public Policy, and Law*; *Behavioral Sciences and the Law*; *Psychology, Crime, and Law*; *Legal and Criminological Psychology*), in journals outside of the psychology-and-law interface publishing these types of articles, and in books and book series directly related to psychology and law.

As we demonstrate in this chapter and throughout the book, psychologists have already made valuable contributions to our understanding of law during the past 40 years. However, we argue that it is time to step back from what we are doing in the field, to begin to reconceptualize what we should be doing in order to substantially advance psychology's contribution to law.

To accomplish our goals, the rest of this chapter considers why many of the topics law deals with also are inherently the province of psychology and why psychologists are naturally so interested in law. We then articulate the overarching structure of psychology and law interactions and highlight the subset of the interactions on which the rest of the book focuses. We conclude the chapter by considering the need for this book, our goals for it, and how the rest of the book is organized to achieve those goals.

LEGAL TOPICS ARE INHERENTLY PSYCHOLOGICAL

The Preamble to the U.S. Constitution boldly states,

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America. (National Archives, n.d.)

This statement presages the fact that our law, starting with the Constitution, allows legal policymakers to address our health, safety, morals, defense from national and foreign enemies, and personal and commercial well-being. In short, the founders of our country envisioned that the federal government would have broad powers to create and administer laws for the benefit of its citizens.

The topics covered in the Preamble also are inherently of concern to psychology. For example, psychological scientists study justice, peace, aggression, violence, marital and interpersonal relations, safety, criminality, law enforcement, health, welfare, and environments, and we could go on. Indeed, much of law is about people's behavior and how it should be controlled or enhanced

by government, and it is psychology that is expert on human behavior. In addition, when the law talks about procedure (e.g., presenting evidence, examining and cross-examining witnesses), it is presenting rules that also regulate the behavior of legal actors (e.g., police, prosecutors, defense attorneys) and laypersons operating in a legal context (e.g., laypersons serving as jurors in a civil or criminal trial, persons serving as expert witnesses), rules that attempt to directly affect that behavior (e.g., procedural law impacts what and how witnesses can present information). Understanding behavior and its control, regulation, and facilitation is the province of psychology, perhaps even more so than the province of the law. Thus, the two professional domains (law and psychology) are constantly overlapping, even when they have not recognized this potential confluence.

Consider an illustrative topic. Should society allow for divorce? Although early American law prohibited divorce as against the public interest, over time divorce became legally acceptable if one of the parties had broken the marriage vows. Subsequently, divorce was extended with no fault needing to be claimed by either party against the other (Phillips, 1991). There were historically strong reasons for the early reticence to allow for marriage dissolution. For example, marriage was considered religiously sacred and was assumed to promote family values that included parental responsibility for child rearing. Promotion of both religious and family values was considered to be in society's best interest. However, as times and social values have changed, so too have the circumstances of relationships, marriage, and divorce. For example, dating has been facilitated by Internet dating sites (Ellin, 2009), premarital sex is common (Finer, 2007), and extra-marital sex is increasing or being increasingly admitted to (Parker-Pope, 2008).

With people considering divorce a realistic possibility, it was unavoidable that couples would want to specify in advance of marriage how their property would be divided if they subsequently divorced. However, should such personal contracts prior to marriage (aka *prenuptial* or *antenuptial agreements*) be considered legal (e.g., *Gentry v. Gentry*, 1990)? The answer was a resounding yes in this country, with all jurisdictions now allowing for them in some form.

Although it is the law that sanctions marriage and sets the rules for its dissolution, lawyers are not experts on the topics of marriage; divorce; child-rearing; and the consequences of different family and parenting arrangements on the participants, offspring, and society. It is psychologists who are. Indeed, courts even used some of the extant psychological science research on divorce and postdivorce adjustment and changing societal mores to justify recognizing prenuptial agreements in their state laws.

Even legal topics that are not obviously related to psychology are studied or could be studied by psychologists because they have psychological aspects.

Consider, for example, copyright law. In today's society, people and organizations that produce artistic or otherwise creative works secure a copyright for them so they can own their works, control who can use them, and profit from them. If a copyrighted work was taken without payment (e.g., theft of the book from a bookstore), the copyright holder could sue the wrongdoer for monetary damages and other appropriate remedies (e.g., an injunction to stop the continued use of the material). Society also benefits from copyright law because it encourages artistic achievement and advances culture and entertainment.

Despite the laudable goal of copyright law, in the world of high-speed Internet the threat to copyrighted material has expanded exponentially. For example, in *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.* (2005) the plaintiffs (hereafter MGM) were the copyright holders of music and motion pictures (e.g., motion picture studios, recording companies, songwriters, music publishers). Each entity and individual made their living from selling their creative products. The defendants were two companies, Grokster and StreamCast (hereafter Grokster), who tried to imitate the defunct Napster (*A&M Records, Inc. v. Napster, Inc.*, 2001; Evangelista, 2002). Grokster offered an Internet platform that allowed users to share files with other users without paying any royalty or fee to the copyright holder. MGM claimed that Grokster should be indirectly liable for their users' infringement of MGM's copyrights, but we do not hold gun stores liable for the use of a gun in a criminal act, so why hold Grokster liable? The plaintiffs argued that the company should be liable based on a theory of contributory or vicarious infringement. The U.S. Supreme Court agreed, noting among other things that Grokster intentionally induced and encouraged direct infringement, profited from the direct infringement, and declined to stop or limit the direct infringement. The Court made clear that there was nothing inherently wrong with developing file-sharing technologies. What was wrong with Grokster's actions was that they were promoting the technology for illegal purposes. The debate over how to control Internet piracy of copyrighted material continues to rage (e.g., Engleman, 2012; Weisman, 2012).

Psychologists looking at this example would immediately see a host of fascinating psychological issues. Are consumers more likely to violate moral boundaries (e.g., steal another person's intellectual property) if encouraged by a company? If yes, would all people respond similarly, and, if no, why not? For example, would developmental differences in children, adolescents, and adults increase or decrease the likelihood that they would fall prey to Grokster's incitement? Would the presumed anonymity of the Internet increase law violations by consumers, making Grokster's behavior more concerning to society and morally more reprehensible to its members? What types of interventions would decrease the likelihood of consumer misbehavior (e.g., public service messages delivered via Internet and/or television)?

Rather than focus on the consumers, other psychologists might become more fascinated with why corporate officials would actively induce law violations. For example, is it because of the corporate culture in the company, the corrupt attitudes and values of the corporate leadership that are communicated to its employees, or the moral indifference of corporate employees or independent contractors to how they earn their paychecks? Reading a case like *MGM v. Grokster* would trigger these kinds of questions to psychologists, while the results of their future research could inform future law making.

Finally, consider another nonobvious connection between the law and psychology. How should the First Amendment to the U.S. Constitution affect the access of sexually explicit material in libraries by their patrons? For example, three federal statutes have promoted the use by libraries of the Internet. The Telecommunications Act (1996) established the E-rate program, which allows qualifying libraries to buy Internet access at a discount. The Library Services and Technology Act (LSTA; undated) authorized the Institute of Museum and Library Services, a federal agency, to make grants to state library administrative agencies to electronically link libraries with educational, social, or information services; assist libraries in accessing information through electronic networks; and pay costs for libraries to acquire or share computer systems and telecommunications technologies. Because images harmful to children can also be found on the Internet, a third federal statute, the Children's Internet Protection Act (CIPA; 2003) provided that a library may not receive E-rate or LSTA assistance unless it has a policy of Internet safety for minors, which includes a technology protection measure (technology that blocks or filters Internet access) against visual depictions that constitute obscenity or child pornography and protects against minors' access to visual depictions that are harmful to them. CIPA permits the library to temporarily disable the filter to enable access by adults for legitimate research or other lawful purposes.

In *United States v. American Library Ass'n, Inc.* (2003) the plaintiffs (libraries, library associations, library patrons, and website publishers; hereafter ALA) sued the defendants (the United States, its relevant administrative agencies, and officials responsible for administering the E-rate and LSTA programs), claiming CIPA's filtering requirement violated the U.S. Constitution's First Amendment. In reaching its decision rejecting the ALA's claims, the U.S. Supreme Court considered the role of libraries in society, the problems of pornography and difficulties in weeding it out by direct blocking of each offending website, the value of Internet filtering when it is combined with a disabling feature that allows access to restricted sites when it is for legitimate purposes, and the legitimacy of government's use of withholding grant funding as an inducement for compliance, noting that libraries that wish to offer unfiltered access are free to do so without federal assistance.

Although for the law this is a constitutional issue, to psychologists who study moral, religious, and family values this is also a psychological issue. Although psychologists have been interested for years in sexual attitudes, behavior, and deviance, a case like this one would trigger very specific questions that many psychologists would immediately find compelling. For example, how important are libraries to community residents today and why? How often do residents use them and does this importance and usage vary by age or development? When the Internet is used in libraries, what types of content are sought out and with what frequency? More specifically, how many and what types of users go to a library to access sexually explicit content, with what frequency, and why? What specific types of content are sought out? If users seek out this material, how often are other library patrons exposed to it and under what conditions? Do users believe that their rights are infringed if there are safeguards in the computers to protect children from seeing sexually explicit material, and why? What are the relationships of access to sexually explicit material and the development of future behavioral problems, and what users are most susceptible to developing these problems? These are but some of the issues about which psychological research could inform Congress.

PSYCHOLOGISTS' INTEREST IN LAW

What the previously described legal examples illustrate is that the law is about human behavior, and psychologists are expert at studying that behavior and intervening on the basis of a psychological science foundation. So the eventual marriage of psychology and law was not only inevitable but needed, although it did not occur immediately. For example, Hugo Munsterberg's book *On the Witness Stand* (1908), noted earlier, is often cited as the first attempt by psychology and a prominent psychologist to directly influence the law. He called for the law to recognize the experimental strides that psychology had made in understanding eyewitness identification and memory and to integrate these and other findings into the practice of law. His argument, however, fell largely on deaf ears among legal scholars and policymakers. It would not be until well over a half-century later that the intersection of law and psychological science would be discussed widely in the professional and scholarly literatures.

The interest in the intersection of psychology and law has likely grown because of law's fundamental importance to society and all aspects of our behavior. Consider three examples from the criminal law and criminal process.

In 2008, the economic loss to victims of violent and property crime was approximately \$17.4 billion (Bureau of Justice Statistics, 2011). Not

surprisingly, law enforcement investigators attempted to develop profiles of the likely offenders in order to facilitate their investigations. Despite sometimes grandiose claims by profilers, how accurate are they? One careful assessment of both profiler practices and the supposed science of profiling showed that although a science could be developed, what currently passed as profiling was professional opinion and not scientifically derived facts (Hicks & Sales, 2006).

Many people are outraged that violent criminals can claim that they were insane at the time of the crime and therefore should not go to prison. Over the years, lawmakers have attempted to respond to this citizen concern by revising the test for insanity multiple times. However, psychological research has shown that jurors who have to apply this law to the facts of criminal cases do not decide differently when different legal tests are applied (Finkel, 1988). In addition, research has shown that fewer than 1% of felony cases involve the insanity defense, few of these actually go to trial, and fewer than a quarter of those that go to trial result in a finding of insanity. Even those who win their claim of insanity do not go free. Typically, they are sent to a secure facility for the criminally mentally ill and kept there until they are no longer dangerous to society (Borum & Fulero, 1999).

Given the substantial level of crime in America, the effectiveness of incarceration is critically important. According to research, we have more people in prison than any other country, with some states imprisoning up to 6 times as many people as do countries with populations of a comparable size (Hartney, 2006). To judge incarceration's success, we need to ask what goal or goals criminal justice policy is trying to achieve. Although there are multiple accepted reasons to incarcerate an offender (retribution, deterrence, incapacitation, and rehabilitation), some mental health scholars would argue that rehabilitation is in the long term the most important. Rehabilitation can reduce the incidence of suicide in prison, increase the effectiveness prison management, and reduce recidivism of released offenders (e.g., Ashford, Sales, & Reid, 2001).

Moreover, psychologists' interest in contributing to studies of health, parenting, marriage, the environment, interpersonal relationships, business organization and behavior, aggression, violence, and crime and criminality, to name but a few topics, will always naturally lead many of them to have an interest in contributing to the law. Although some psychologists wish to serve as experts who provide scientific or professional knowledge to legislators or other legal forums, others wish to study the law to understand why it is created and implemented in the way it is, the consequences of the implementation process, and how law can be improved by using psychological information (e.g., see Brest & Krieger's [2010] book on the use of decision science for aiding lawyers and policymakers in understanding and improving problem solving, decision making, and professional judgment).

TYPES OF INTERACTIONS BETWEEN PSYCHOLOGY AND LAW

Although the potential topics for interactions between psychology and law are extensive (Sales, 1983), those interactions can be parsimoniously grouped into three categories: Law **of** Psychology, Psychology **in** Law, and Psychology **of** Law. Although each of the interactions is important, as we explain subsequently, doing justice to each interaction would require separate book-length manuscripts. The focus of this book is on the third category Psychology **of** Law (i.e., using psychological science to study law). However, focusing on the latter category without some introduction to the former is problematic because it can leave readers with misunderstandings about why certain interactions and literature are not considered within a book on the psychology of law.

Law of Psychology

Some legal (e.g., Perlin, 1985) and psychological (e.g., Wulach, 1998) scholars study and write about the law affecting the practice and science of psychology (aka law of psychology). For example, to name but a few topics, law can affect whether individuals can call themselves psychologists (e.g., laws providing for the licensure and regulation of psychologists), the organization of psychological practices (e.g., professional incorporation; health maintenance organizations), and the reimbursement for services (e.g., insurance law, Medicare and Medicaid laws). Law can also impose practice requirements (e.g., on providing informed consent, recordkeeping, confidentiality, the right of patients to refuse service) and limit or specify the types of professional questions that psychologists may address (e.g., competency to stand trial and insanity defense assessments and interventions; e.g., Sales, Miller, & Hall, 2005; Shapiro & Smith, 2011). Professional psychologists who provide clinical services must be aware of and understand this law so that they can conform their professional behavior to its requirements.

The law also affects other types of psychological services (e.g., educational psychologists) and psychological scientists. For example, psychologist-researchers are required to conform to the federal requirements of their institutional review board when planning to conduct research (U.S. Department of Health and Human Services, Office for Human Research Protections, 1993). Some scholars have even suggested that the law ought to be used in psychology in a more fundamental way. For example, Levine (1974) discussed the possibility of using legal adversarial procedures for resolving arguments about the appropriateness of competing theories in psychology. The notion that such dispute resolution procedures could facilitate the discovery of scientific truth is intriguing, but it would take careful theorizing and empirical study of the

truth-finding process to determine the best procedures for advancing scientific knowledge. This development has yet to occur.

Psychological scientists who study law (psychology of law; see the Psychology of Law subsection later in this chapter) can address Levine's recommendations and the application of other legal concepts and procedures to psychological work (e.g., the law's concerns with fairness, justice, and autonomy as applied to psychological services and the treatment of subjects in research). Similarly, psychology of law research can address how law affects professional psychologists, their practices, their professional behaviors and services, their patients, and the clients of their services if other than the patients. For example, does the legal obligation to issue warnings to intended victims of potentially dangerous patients (*Tarasoff v. Regents of the University of California*, 1976) decrease the likelihood of patients fully revealing their ideation and cognitions to their therapists?

What is important for our purposes is that we recognize that law affects psychology and psychologists and that knowledge of this law is essential so that psychologists can conform their behavior to these legal requirements. In addition, knowledge of this law should be used to encourage the scientific study of how these laws impact psychological work and its outcomes and whether other legal arrangements would be more effective for achieving societal needs. For example, psychological scientists can determine the impact of specific laws on psychologists' professional and scientific decision making, such as whether confidentiality, privileged communication, and mandatory reporting laws affect psychologists and their patients' behaviors (e.g., Wise, 1978). Knowledge about the consequences of different laws (one goal for a psychology of law; see later subsection) can improve the capabilities of legal decision makers (e.g., legislators) to create new more effective laws or refine existing ones relevant to psychological practice and services (see the next subsection, Psychology in Law). Although conceptually interesting, the study of the law's regulation of psychological practice and science is beyond the scope of this volume and is not be discussed further.

Psychology in Law

Psychology is used to provide services in law (aka psychology in law). Professional and research psychologists provide expert testimony in court (e.g., Brodsky, 1991, 1999; Sales & Shuman, 2005), before legislatures (e.g., Sales & VandenBos, 1994), and before administrative agencies (e.g., Sternberg, 2006). This type of information can be used as background for the need for a new law or a revision in the existing law, and psychologists can serve as policy analysts for legal agencies helping to evaluate the effects of current laws or the need for new ones. Perhaps more visibly, professional psychologists

provide assessment (e.g., Melton, Petrila, Poythress, & Slobogin, 2007) and therapeutic services in legal settings (e.g., Harden & Hill, 1998). Some psychologists have even written about why the law should admit such information in legal settings and the types of admissibility standards that should be applied to it (e.g., Monahan & Walker, 2009).

The use, misuse, and nonuse of psychological information in law (psychology in law) raise important and complex issues for both psychology and the legal process. For example, consider three cases that attempted to use psychological knowledge in law. Each demonstrates some of the value and problems in using psychological knowledge for this purpose as well as the intricacies and nuances of the issues that need to be addressed when discussing the application of psychology in law.

The first example, which occurred early in the 20th century, examined the constitutionality of an Oregon statute that made it a misdemeanor to have female employees work more than 10 hours in a day. In reaching its decision, the U.S. Supreme Court relied on the expert information presented by the defendant's lawyer in his brief to the Court (*Muller v. Oregon*, 1908). That lawyer was Louis Brandeis, who later went on to become a justice on the U.S. Supreme Court, with lawyers' briefs that advance social knowledge as the basis for legal arguments becoming known as Brandeis briefs. It also is noteworthy that the decision was not in keeping with prior U.S. Supreme Court decisions that would have dictated that the Court find the Oregon statute unconstitutional. The social knowledge presented in Brandeis's brief led the Court to the opposite conclusion.

Although often cited as the first use of social science knowledge in law, it actually is not. Brandeis cited governmental reports and not social science research to make his argument. Because there was a lack of relevant empirical research in that era, the Court made use of what it considered the best expert opinion of the day in ruling that the statute was constitutional. In addition, the question of whether and under what conditions nonscientific expert testimony ought to be admitted into evidence is still an issue that is hotly contested today (e.g., *Coble v. State*, 2010; Sales & Shuman, 2005).

Our second example goes to the heart of racial discrimination in education. In the mid-20th century, the U.S. Supreme Court in *Brown v. Board of Education* (1954) used actual social science studies to help it decide that requiring "negroes" to attend separate but supposedly equal schools violated the U.S. Constitution's 14th Amendment guarantee of the equal protection of the laws. In that case, "negro" school-aged children from Delaware, South Carolina, Virginia, and Kansas had been denied admission to "white" schools under laws permitting racial segregation. Lower federal courts had ruled in favor of the States and their laws in all these cases except Delaware on the basis of the separate but equal doctrine and the Supreme Court's earlier decision in

Plessy v. Ferguson (1896). According to that doctrine, equality of treatment for equal protection purposes could be shown by the existence of substantially similar educational facilities. Relying on then recent social science studies, the Supreme Court in *Brown* overturned the long line of legal precedent:

In the field of public education the doctrine of “separate but equal” has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment. (*Brown v. Board of Education*, 1954, p. 495)

Further, the Court recognized that the findings of the social science research, current at the time of the decision, provided reasonable justification for its overturning of *Plessy*, noting that “whatever may have been the extent of psychological knowledge at the time of *Plessy v. Ferguson*, this finding is amply supported by modern authority.” Specifically, the Court observed that

segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system. (*Brown v. Board of Education*, 1954, p. 494)

Although this case seemingly provides an excellent example of the value of psychological knowledge in law, the empirical research relied on by the Court suffered from poor methodology and was inadequate as a basis for constitutional decision making. For example, Kenneth Clark and Mamie Clark carried out a study in which they investigated racial identification, ego development, and self-awareness in Black school children (K. Clark & Clark, 1939). Approximately 250 Black children, half from desegregated public northern schools in Springfield, Massachusetts and half from segregated southern public schools in Hot Springs, Pine Bluff, and Little Rock, Arkansas, were presented with dolls that were identical in every respect except their skin color and hair color. One doll was dark-skinned with brown hair and the other was white-skinned with yellow hair. The subjects were asked to give the experimenter the doll that they like to play with, the doll that is the nice color, the doll that looks bad, and the doll that is the nice doll. Two significant problems clearly exist with the design of this research. Foremost is the assumption that a child’s doll preference to the experimenters’ questions reflects his or her underlying self-image. Neither the researchers

nor the Court had information about the validity of that assumption. The study also confounded geographic region and segregation. The subjects' preference for a particular doll could be the result of the fact that the subject lived in the south or the north rather than it being solely an effect of the segregation or desegregation of the school.

Even if these methodological confounds did not exist, the conclusions drawn from Clark and Clark's doll studies were suspect. In actuality, the researchers found that the segregated Black children preferred Black dolls more than the desegregated children when asked which doll they preferred to play with and which was the nice doll. This is the exact opposite of what you would expect if segregation was harmful to these Black children's self-image.

Finally, consider the case of *Roper v. Simmons* (2005). In the early 21st century, the U.S. Supreme Court in *Roper* faced the question of whether the death penalty constituted cruel and unusual punishment when it was applied to juveniles. The case revolved around Christopher Simmons, 17, who with a friend, Charles Benjamin, age 15, had broken into the home of Shirley Cook, tied her up with duct tape, placed her in a minivan, drove her to a park, and dropped her still bound and alive body off a bridge into the Meramec River where she drowned. Simmons told his accomplice in advance of the crime that they might get off if they were caught because they were minors. Simmons was later arrested after he bragged about what he had done. Confessing his crime to the police and agreeing to videotape a reenactment of the event, Simmons was tried as an adult, found guilty of murder in the first degree, and sentenced to death.

Following his sentencing at trial, the U.S. Supreme Court decided *Atkins v. Virginia* (2002), which found that it was "cruel and unusual punishment" under the Eighth Amendment to the U.S. Constitution to execute individuals who were mentally retarded (Court's phrasing). Simmons's attorneys argued that a similar rationale should exist for barring the execution of juveniles. Although 25 years earlier the U.S. Supreme Court had held that application of the death penalty to 16- and 17-year-old juvenile offenders was constitutional (*Stanford v. Kentucky*, 1989), the Court in *Roper* found this practice to be unconstitutional on the basis of its review of relevant developmental psychological science.

Although the psychological science cited by the court was methodologically sound, the policy conclusions that the Court reached extended far beyond what was justified by the data. Most of the developmental research presented in the Amicus Brief of the American Psychological Association (2004) suggested important differences in the decision-making and cognitive abilities of adolescents (minors who have entered puberty and have not reached 18 years of age) and adults (those 18 years and over). The brief argued that this research supported prohibiting the application of the death penalty to adolescents on

the basis of the logic that adolescents who lack adultlike decision-making capabilities are arguably more similar to mentally retarded persons discussed in *Atkins*. However, courts respond to specific fact situations and not generalities, with the Court in *Roper* concerned with the segment of adolescents who are 16 and 17 years old. Therefore, the real question the Court should have focused on is what has the research on 16- and 17-year-olds shown when their decision-making abilities are compared with those of adults. The American Psychological Association brief was not that specific, using the broader adolescent research (i.e., puberty to 18 years of age) to justify policy conclusions about 16- and 17-year-olds. In fact, the research specific to this segment of adolescents revealed in some studies few significant differences between the decision-making capabilities of 16- and 17-year-olds and those 18 years old and older (American Psychological Association, 2004), which would support at least a partial continuation of the policy set forth in *Stanford* (i.e., the constitutionality of the application of the death penalty to older adolescents).

As these cases exemplify, although psychological information is used in law, understanding the appropriateness of using psychology in legal settings is a complex, nuanced task that requires detailed consideration in its own right. This type of analysis is best left to another book. Thus, we do not directly discuss psychology in law topics further in this volume but rather turn our attention to the prime focus of the rest of this book, the psychology of law.

Psychology of Law

The third type of interaction between psychology and law is where psychological science studies written law and law-related issues. This type of scholarship is particularly important because lawyers typically employ a lay theory of human behavior that is untested and may be markedly inaccurate (e.g., Findley & Sales, 2012; Lieberman & Sales, 2007; Shafrir, 2013). Such lay theory is likely to lead to fallacious assumptions about human behavior, how best to regulate it to achieve societal goals, and the behavioral consequences of those regulations. For example, which laws achieve their goals and under what conditions are they most likely to do so? Are there symbolic or indirect effects of each law and, if yes, to what consequence? Are there unintended negative effects of the law? Law can also provide entitlements to citizens, so psychological science also needs to understand their impact, value, and behavioral effects. Lawyers are ill prepared to address these types of questions and issues.

Not surprisingly, psychological scientists now regularly study the law (aka psychology of law). Law journals (e.g., Diamond, Rose, & Murphy, 2006), social science journals (e.g., Haney & Zimbardo, 1998), interdisciplinary journals (e.g., Krauss, 2006), and scholarly books (e.g., Findley & Sales, 2012) carry writings that empirically examine the law or critically review

empirical evidence relevant to it. For example, Ramirez and Crano (2003) empirically examined whether California's three-strikes law produced its intended deterrent and incapacitation effects on a variety of offender types. They found that the law did, in fact, have deterrent effects for minor crimes but not for major ones. In addition, although this law produced incapacitation effects for both violent and minor criminals, it did not demonstrate either type of effect for drug offenders. This pattern of findings suggests that although the three-strikes law met its goal for some offenders, it had limited influence or effect on one of the largest classes of offenders in the state, drug offenders. Such research is essential for understanding if a law is achieving its goals and for identifying to lawmakers areas to focus on in their efforts to improve the criminal justice system's response to crime. As a second example, consider research examining jurors' reaction to judicial instructions to ignore hearsay evidence in their decision making. It revealed that such admonitions may increase rather than decrease the weight jurors place on such evidence (e.g., Lieberman & Sales, 2007).

Although some of the writings by psychological scientists suggest the need for modifications of current law, why should legal professionals care about what psychological science has to say about law? Some legal scholars may argue that the law should not be dependent on the results of the work of scientists because law is based on a legal-normative framework that trumps all other considerations. Indeed, legal professionals typically craft their arguments and reach their decisions without the benefit of scientific analysis or scientific information.

However, there are serious problems with ignoring reliable and valid scientific knowledge. If law is the product of behavioral and social assumptions made by legal decision makers, ineffective or less than ideal legal arrangements will result, even within its normative framework, unless we have scientific research to identify how the law works in action and why it is working the way it does. For example, requiring mandatory divorce mediation makes superficial sense on the assumption that mediation can lower the costs of divorce compared with relying on litigation. However, psychological research has shown that for couples in an abusive relationship, mandatory divorce mediation increases the chances that the victimized spouse will be further abused and possibly even murdered (Beck & Sales, 2001). Therefore, one of the normative goals on which the law relies in this instance, efficiency, should not be immune from the lessons that can be learned from empirical study.

Psychological science can even help us understand what is normative in society and in law. Consider the case of *United States v. Virginia* (1996). The Virginia Military Institute (VMI), one of the schools supported by Virginia tax revenues and, therefore, a public educational institution, refused to admit female applicants. The plaintiff in this case, the U.S. government, argued

that VMI and the State of Virginia violated the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. A critical question for the U.S. Supreme Court was what the Equal Protection Clause requires in the educational context. VMI in response to an earlier lower federal court ruling created a separate all-female institute, the Virginia Women's Institute for Leadership, within a small college in the state. VMI also argued that females could not withstand the rigors of the adversative method of training employed by VMI. In response, the Court had to consider whether the two separate educational opportunities were substantially equal, whether some women were as capable as males to withstand the adversative training method, and whether any needed modifications of VMI's physical facility and educational standards "would destroy the Institute rather than enhance its capacity to serve the 'more perfect Union'" (*United States v. Virginia*, 1996, p. 558). To address these issues, the Court considered Equal Protection jurisprudence; a factual comparison of the structure, funding, alumni support, and likely outcomes following graduation for the two programs; and the research on gender differences in education and experiences of women in professional education before determining that VMI must admit qualified female applicants going forward. The result was that scientific and other nonlegal information was able to help the court inform its normative interpretation of equal protection jurisprudence in higher education.

NEED FOR THIS BOOK

Despite the clear potential value of psychological science for law, a major question remains: Is this research being pursued in ways that will be maximally productive in advancing our understanding of law and law-related activities and in ways most likely to convince lawmakers and legal practitioners to seek out and apply this information? Unfortunately, right now the answer is no, for a variety of reasons.

Although the interaction we focus on in this book is referred to as the psychology of law, it is important to note that some researchers engaged in ongoing psychological research on human behavior that is divorced from the legal context will assert policy and/or legal implications for their results. In some cases, the connection will be relevant, as for example when cognitive psychologists study flaws in the visual identifications of stimuli and then extrapolate that work to eyewitness identifications in the criminal process. In other situations, the psychological science tells us little about the law, even when that law is related to a psychological topic. For example, research on subtle forms of prejudice can have relevance to legislators' interest in creating or revising antidiscrimination and antiharassment laws, but such work offers little insight

into the consequences and value of the written law that is developed or applied. This is because the research did not address a law's specific needs and concerns, which leads to the concern about the direction of psycholegal research.

If psychology ignores the law's needs and concerns then psychology instantly becomes less relevant to legal decision makers and implementers. For example, if psychologists do not explicitly understand the assumptions that lawmakers use when creating laws then they are unlikely to focus their research on testing their validity, and psychologists will be unable to provide precise information on when they are incorrect and require modification. To do that, psychologists need to fully understand the law they are studying in order to create a body of literature that will be of interest to lawyers, legal scholars, and legal decision makers.

Another point is that when attempting to study the law, researchers typically use simplistic characterizations of it, thereby compromising the value of their work. For example, you cannot assume that studies of criminal litigation using one type of crime will teach the legal community about attorney, juror, or judicial behavior with all other types of crime. In addition, other professional and procedural factors (e.g., defense attorney and prosecutorial advocacy strategies and techniques, evidence strength, burden of proof, burden of persuasion, the standard of proof) can influence outcomes. These concerns apply to all types of psycholegal studies. For instance, to accurately understand stop-and-frisk law requires both knowledge of the substantive law in the various jurisdictions but also knowledge of the procedural rules that law enforcement is supposed to follow in those jurisdictions. These rules may be statewide in coverage but can vary within and across jurisdictional lines.

Definitions used in the laws also may differ in the different state and federal jurisdictions. To assume the existence of only one definition in research and then to try to generalize the findings across jurisdictions is inappropriate. In addition, the law is rarely defined by a single source. Laws written by legislatures are interpreted (often in substantive ways) by trial and appellate courts and by administrative agencies (e.g., Internal Revenue Service, Environmental Protection Agency). If psychological science does not programmatically assess the individual and combined effects of potentially critical variables in explaining the law, lawyers, judges, and legal policymakers will legitimately ignore that science, ensuring that psychology's impact on law will grow at a glacial pace.

Even with this increased sophistication, for a psychological science of law to be maximally relevant to the law it should account for the three components of law: written law, the legal systems that implement that law, and the behaviors of the legal actors who administer or apply that law and of the nonlegal actors who violate that law or serve the law (e.g., serving as jurors and witnesses). Failures in the psychological science of law often occur because researchers

failed to correctly understand (a) the requirements of the written law, (b) the legal systems' effects on how that law is administered, (c) the behavior of the legal and nonlegal actors who bring the law to life, and/or (d) the way these components vary within and across jurisdictions. It is essential for the growth of the psychology of law that researchers programmatically and comprehensively study this complexity in order to provide the legal community with the essential facts about both the law in the books and the law in action.

Moreover, it is both ironic and deeply troubling for a field known as the psychology of law to ignore the substance and complexity of that law. The lack of attention by the legal community to psycholegal research is understandable but should be disappointing to us, particularly when we compare law's interest in other social science disciplines, such as economics and sociology, with its interest in psychology. For example, law and economics scholarship is clearly seen by many legal scholars as integral with law, with the result that it is influential in legal education and decision making, with many of the most notable legal scholars and judges approaching their analyses from this interdisciplinary perspective (e.g., Posner, 2011, 2014). One explanation for this difference in social science influence is that these other fields rely on macro-analyses of large group behavior. They are relevant to law because the basic disciplinary studies can reveal important information about large group tendencies relating to such things as the economy, immigration, poverty, and corporate behavior, with this information being relevant to shaping the debates about future laws in each area. Ultimately, however, law is not only about large group probabilities but about regulating individual behavior in specific contexts. It is psychological science that is in the ideal position to understand how that behavior forms and the role of law in affecting that behavior.

To do this effectively, psychologists either need to rigorously understand the law and the legal topics that they will be studying or pair with legal scholars as collaborators who can provide the needed expertise. This was recognized in the early years of the AP-LS, which would become the major psychology and law interest group, with lawyers being prominently involved with psychologists (e.g., Grisso, 1991). In recent years, lawyers and law professors who were once some of the main promoters of psychology of law research have been vanishing from AP-LS. The editorial board of the first law and psychology journal, *Law and Human Behavior*, which would later become the official journal of AP-LS, was multidisciplinary and included psychologists, legal scholars, sociologists, criminologists, political scientists, and historians. Over time, the members of AP-LS have become more homogeneous in training, expertise, and methodology employed in their scholarship, with the other social science and legal scholars forming their own societies to influence law (e.g., American Law and Economics Association, Law and Society Association, Society for Empirical Legal Studies).

ORGANIZATION OF THE BOOK

This book will show readers the precise ways in which psychologists often do not understand the law, how this has affected their research, how the current literature has thereby been ineffective. If psychological scientists intend to carry out research independent of lawyers, they will need to appreciate what constitutes the province of law and why and how it is complex and nuanced. Most important, we demonstrate how psychology of law ought to rebuild itself to become a leading social science and a significant contributor to legal discussions in the 21st century.

To do so, we start Chapter 2 by considering the three components of law (i.e., the law as written, the effects of its legal systems on our understanding and implementation of written law, and the behavior of its legal actors and nonlegal actors when behaving in legal contexts or under legal constraints) and the interactions of these three components in explaining both the law in the books and in action. This chapter also considers the legal origins of these components in the United States, tracing those origins to the words of the U.S. Constitution. This document, in turn, established our tripartite structure for government (the Legislative, Executive, and Judicial Branches), as defined in the U.S. Constitution's Articles 1, 2, and 3, with each branch having the power to create written laws and systems. In addition, it is the legal actors within each branch who implement these written laws and perform the systems' tasks but do so with significant discretion. Thus to understand the law, psychological science needs to study each of the three components of law within each branch as well as determine how the interactions between branches shape behavioral outcomes. Such research is critical to understanding the law as it is carried out rather than as it is idealistically imagined. Ultimately, this knowledge provides the basic foundation for a roadmap of what psychological science should be addressing in the psychology of law.

Chapter 3 then addresses why psychology should study the three components of law, doing so by identifying approximately a dozen critical questions that psycholegal scientists should ask in their research. Within each question, the chapter considers why the results of such research could profoundly affect our understanding of law; where problems exist in a studied law, legal system, or law-related behavior that may be invisible to lawmaker; why these problems exist; and how the results of our psychological science could help lead to improvements in the written law, the structure and operation of legal systems, and/or the behaviors of legal and nonlegal actors when operating under legal constraints or in legal contexts.

Understanding why psychology of law research should be conducted if it is to be relevant to law does not yet tell us the kinds of research that could be performed when addressing each of the questions addressed in Chapter 3.

Chapter 4 addresses this issue by identifying the five traditional goals for scientific research (description, explanation, prediction, intervention, and prevention) and explains why a psychology of law should incorporate all five goals in any program of research to study law and the questions noted in the prior chapter.

Another issue is that most research in the psychology of law has not attempted to systemically identify and study the potential causal variables that will explain why the law is operating as it does and why it may not be as effective as it should be in achieving legal and societal goals. Chapter 5 considers how levels of analysis (e.g., neuroscientific, cognitive, social, personality, legal) can be integrated into Chapter 4's goals for psychological science, with particular emphasis on discussing the types and range of causal and explanatory factors that future psycholegal research ought to address.

Although causal explanation is critical in understanding behavior outside of legal settings, psychological scientists rarely or never spend time studying whether their explanations are equally valuable in explaining behavior in actual legal contexts. More specifically, how do jurisdictions differ in their written laws and practices, and do these changes matter when trying to understand causal pathways that lead to the creation or implementation in law? If the answer to the latter question is yes, the future of the field lies in the programmatic identification of not only the range of possible explanatory factors that may be operating in causal pathways but also in how these factors influence legal behaviors when addressing actual laws and practices in each jurisdiction and when addressing each law-related issue or question.

Moreover, psychological scientists also need to ask if their methods are truly addressing legal problems that exist in the real world or simply creating results that are internally valid and publishable in scholarly journals but do not generalize outside of their studies' parameters. Studying law is no different from studying any other behavior in any other environment. We must be concerned with using reliable and valid scientific methods. Chapter 6 addresses these issues, identifying why psycholegal research has often failed to achieve the highest standards in this regard and how we should address these issues going forward.

Finally, our field needs to systematically reflect on how the concerns raised here can be addressed, whatever the psycholegal topic, and applied to topics previously ignored by psycholegal researchers. Such research will require recognition of the unique problems the psychological study of law poses for psychological scientists and the potential pathways to overcoming those problems. Chapter 7 ties together the information presented in Chapters 2 through 6 by discussing and exemplifying its integration with regard to the law of plea bargaining. It systematically shows how the three branches interact with the three components of law (Chapter 2), how these interactions can

be addressed through research that attempts to answer the questions that are relevant when psychologists study law (Chapter 3), and how all of these points are best accomplished by programmatically incorporating the five goals for science when doing the research (Chapter 4), systematically incorporating the full range of causal and explanatory factors (Chapter 5), and using valid and reliable scientific methods (Chapter 6).

Chapter 8 concludes the book with reflections on overarching concerns about successfully creating this new psychology of law and essential solutions to them. If the recommendations in this chapter and the rest of this book are followed, psycholegal research can move from where it currently is to where it ought to be. This will result in a more complete understanding of all aspects of law, its need for revision, and the types of revisions that are likely to achieve the law's goals and society's goals for law. It also should result in psychology achieving a prominent position in the law and social science interface.