Lenore E. Walker
David Shapiro
Stephanie Akl

Introduction to Forensic Psychology

Clinical and Social Psychological Perspectives

Second Edition

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Lenore E. Walker
Nova Southeastern University
Fort Lauderdale, FL, USA

David Shapiro
Nova Southeastern University
Fort Lauderdale, FL, USA

Stephanie Akl
Nova Southeastern University
Fort Lauderdale, FL, USA

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About the Authors

Dr. Lenore E. Walker and Dr. David Shapiro are two of the pioneers in the field of forensic psychology. Together with Dr. Stephanie Akl, they are professors of psychology at the Nova Southeastern University College of Psychology training doctoral and master's graduate students studying clinical forensic psychology. They all also have a small independent practice of forensic psychology where they provide evaluations and testimony in cases in the U.S. and other countries.

Dr. Lenore E. Walker became known for her expert witness testimony in high publicity cases where battered women killed their abusive partners. Explaining the counter-intuitive behavior of abused women who do not leave their abusive partners, Walker became known for applying research and clinical practice to criminal, family law, and juvenile cases. She also served as O. J. Simpson's psychologist on his trial as well as televised appearances in other cases. She is author of over 25 books including *The Battered Woman Syndrome*, 4th Edition, *Handbook on Sex Trafficking* with Giselle Gaviria and Kalyani Gopal, and *Forensic Practice for the Mental Health Clinician* with David Shapiro and numerous book chapters and articles in professional journals.

Dr. David Shapiro is sometimes known as the 'father' of clinical forensic psychology since many forensic psychologists have taken his courses in the many subfields in forensics. Former chief psychologist for the State of Maryland Department of Corrections and director of pre-trial evaluations for the forensic division at St. Elizabeth's Hospital, Shapiro has followed the development of psychology and the law over forty years specializing in both criminal law and in ethics and malpractice issues. He also served as an expert witness in the Lorena Bobbitt case as well as other high publicity cases such as John Hinckley. He is author or co-author of over 15 books including *Forensic Psychological Assessment: An Integrative Approach*, *Surviving a Licensing Board Complaint*, *Malpractice in Psychology: A Practical Resource for Clinicians*, *Risk Assessment in Clinical Practice*, *Best Practices for the Mentally Ill in the Criminal Justice System*, and *Retrying Leopold and Loeb: A Neuropsychological Perspective* along with Walker in the *Forensic Practice for the Mental Health Clinician* and numerous book chapters and articles in professional journals.

Dr. Stephanie Akl is in the independent practice of forensic psychology after graduating from the Nova Southeastern University College of Psychology's clinical forensic program. She is currently an adjunct professor there training doctoral and master's degree students in clinical forensic psychology. She has specialized in family psychology and in assessment and treatment of those experiencing trauma and abuse. She has testified in cases where abused women and children have killed their abusers in self-defense in various states across the U.S. She has developed a virtual reality program for helping train psychologists who want to work in the problem-solving courts after studying the mental health court.

Part I

What is Forensic Psychology?

1 Introduction to Forensic Psychology

Introduction

Forensic psychology is the study of the integration of psychology and the law. It is a new blend of two old professions—psychology, which is the study of human behavior, and law, which is the study of how people rule themselves in social situations. Psychologists generally use the scientific method of induction to understand human behavior while lawyers use reason or the deductive method of inquiry to understand legal issues. Each discipline uses different methods to interpret and solve problems. Like the old saying that "two heads are better than one," we believe that using the knowledge, information, and techniques of both disciplines to better understand simple and complex problems is the best way to find "truth." Table 1.1 gives a comparison of how truth is discerned using the tools found in the study of law and in psychology.

This book is written from the perspective of psychologists using their knowledge, information, and techniques to help attorneys and judges better solve legal problems. In order to provide the most help for the legal profession, it is important to understand the rules and practices of each discipline. The authors, who are all forensic psychologists, attempt to present these concepts here. Whether you are using this book as a first stepping-stone into the field of forensic psychology, or pulling it "off the shelf" for useful references and clear discussion of concepts for years to come, we hope it will leave an impact on your work and the way you think about the connections between professions.

History

Although it is fairly recent, perhaps only in the last forty years or so, that psychologists have been regularly testifying in American courts the application of science to the study of legal problems can be traced back over 100 years ago in Europe (Goldstein, 2003). In 1896, Albert von Schrenck-Notzing claims to have offered the first expert witness testimony in Munich, Germany. His testimony dealt with pretrial publicity and the impact it might have on a person's later memories. Von Schrenck-Notzing supposedly used psychological research published the previous year, 1895, about the conditions that can make testimony inaccurate to assist the court in making its decision. In 1901, William Stern published the first known journal on the psychology of forensic testimony called the *Betrage zur Psychologie der Aussage*.

Some attribute the interests in studying the criminal mind in the U.S. to Hugo Munsterberg, an experimental psychologist who was trained in Germany and came to Harvard University to set up a psychology laboratory in 1892 at the invi-

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Table 1.1 Psychological and legal methods of finding "truth"

Legal "Truth"
• Based on process of reason
• Uses deductive method of inquiry
• Uses an adversarial procedure
• Each side presents its best version of the facts
• "Truth" is somewhere between the two sides
• But only one side can win!
Psychological "Truth"
• Based on scientific observation and testing
• Uses inductive method of inquiry
• Starts with a Null Hypothesis
- Goal is to disprove it!
• Clinicians make a differential diagnosis
- Starts in the middle and rule out hypotheses
• "Truth" is based on what can be measured
• Opinions are based on scientific facts

tation of William James. Munsterbeg was highly critical of academic psychologists' lack of attention to the application of their ideas to the solution of real life problems. In his book, *On the Witness Stand* (1907) he discussed forensic applications of psychology, including the impact of memory on the accuracy of eye witness testimony, suggestibility of witnesses and on confessions, and the prevention of crime. In 1900, Alfred Binet, the French psychologist who developed the first standardized intelligence test, the Stanford–Binet, testified in court about the use of psychological tests with delinquents and criminals. These tests were later used in large scale for screening potential police as well as criminals and by World War II in the 1940s were used in many different ways to classify and design treatment for soldiers. In fact, the use of scientific psychometric tests has continued to be one of the strong assets the psychologist can bring to the law. In 1911, a Belgium psychologist, Varendonck testified that child witnesses did not have the mental capacity of adults and their testimony should not be admitted in courts. That same year, a German psychologist, Carl Marbe testified about proximate cause in a civil lawsuit. He described the psychological experiments used to determine that alcohol can have a negative impact on a person's reaction time and subsequent behavior.

In the U.S. the introduction of expert witness testimony took a similar route. In 1921 a case called *State v. Driver* recognized that a psychologist could be an expert on juvenile delinquency, but the court rejected that psychologist's testimony, anyhow. One of the first cases that set the standards of admitting all experts, including psychologists, called the *Frye* standard was decided in 1923. However, the admissibility of psychological testimony in courts has been a long, hard battle in the U.S. This may be because of the opposition of psychiatrists, who wanted to be the only discipline considered experts on medical testimony about the abnormal mind, rather than permit the broader testimony psychologists could offer about the scientific understanding of normal as well as abnormal behavior. However, the courts soon realized that

both medical and scientific testimony could assist the judge or jury in better making their decisions. In the Michigan case called *People v. Hawthorne* it was found that a "psychologist's ability to detect insanity could not be presumed inferior to medical man (sic)".

Cases in the 1950s and 1960s really began to define the profession's usefulness in the courts. The lead cases were in the area of civil rights, where social psychology knowledge was important to help the court make its decisions. In 1954, the famous desegregation case, *Brown v. Board of Education*, determined that separation was not equal education after social psychologists Kenneth and Mamie Clark demonstrated their experiments showing that children did not treat African American and Caucasian-looking dolls in the same way. This case was also important in that the American Medical Association and American Psychological Association passed resolutions that both groups were legitimate experts who could comment on social science. However, it is worth noting that the values of society must be ready to accept scientific opinion. More than fifty years earlier, when the courts decided *Plessy v. Ferguson* (1896), even scientists went along with the majority opinion that segregation of races was an acceptable policy because it was consistent with the customs and desires of the people.

Interestingly, it was not until 1962 when the U.S. District Court for the District of Columbia recognized that psychologists (not just psychiatrists) have expertise in criminal responsibility cases in a decision called *Jenkins v. U.S.* While the case itself dealt with the admissibility of a psychologist's testimony, the court's ruling went beyond disciplines and gave the power to the trial court judge to determine the testifier's expertise. Prior to 1984, the Federal Criminal Code used the term "psychiatric examination" and "psychiatric testimony." In the Insanity Defense Reform Act of 1984, the wording was changed to "psychiatric or psychological." Together with the ruling from *Jenkins,* now other types of health and mental health providers were permitted to give relevant testimony if they could demonstrate their expertise in the area. A large number of cases followed that helped the courts determine a variety of constitutional issues for imprisoned criminals such as whether or not they could be involuntarily treated, or whether they could be sent to a psychiatric hospital against their will. These will be described further in the relevant chapters.

In the late 1970s, the field of forensic psychology, as it was called when psychology and the law were combined, was sufficiently developed to petition the American Psychological Association (APA) for a division to represent psychologists who held such interests. This became the APA's 41st division, although it later changed its name to the American Psychology–Law Society, Division 41 of the APA. In 1977, the division began publishing its own journal, *Law and Human Behavior* and today there are several other important journals that publish information about psychology and the law including *Psychology, Public Policy, and Law*. There are now numerous different types of international organizations whose members specialize in the various areas of psychology and the law and who meet at different times of the year. The American Board of Forensic Psychology and its American Academy of Forensic Psychology provide training workshops that lead to diplomate status and continuing education for those who are at the highest level of practice in the field. In 2001, the APA determined that clinical forensic psychology is a specialty area for practice. This means that evaluation, assessment, intervention, or testimony with people is the clinical branch of forensic psychology, and it requires specialized training. The International Association of Applied Psychology also has a division on psychology and the law and today forensic psychologists practice in most countries of the world. In fact, psychologists and other mental health professionals meet with lawyers from around the world in international countries every two years at the International Academy of Law and Mental Health (www.ialmh.org).

What Do Forensic Psychologists Do?

One of the most common answers to the question, "Why do you want to be a forensic psychologist?" is "to learn to profile serial killers." Television shows like the Law & Order series, Criminal Minds, and others have exposed people worldwide to the notion that mental health professionals can and do work alongside police, attorneys, and other professionals in the legal system. And for good reason: the study of the criminal mind fascinates scientists as well as laypersons, and many people who go into policing, law, and psychology are fascinated with understanding why people do awful things to each other.

All legal systems are based on *mens rea* or the actor's state of mind, so we must have some way of getting into the mind of the criminal. This includes performing competency exams in a variety of areas by administering standardized psychological tests, determining if someone was insane at the time of commission of an act, and helping to decide the risk of future violence. As these are competencies learned from clinical psychology, we call psychologists who practice them "clinical forensic psychologists." However, while modern media has provided an entertaining window into our presence in the legal system, forensic psychologists can do many more things than just "profile a killer," interview suspects or witnesses, and provide expert testimony.

Psychologists use social psychology research about the impact of social problems on individuals, help assess attitudes, and detect bias when selecting lay jurors if they are used as triers of the facts instead of judges and submit amicus curiae briefs citing psychological research for appellate cases. They can use the knowledge about persuasion techniques to assist attorneys in preparation for and conduct of a trial. They also can provide information about the reliability and validity of eyewitness identification and the stability of memories over time and in different situations. They can offer the court information about the developmental stages of a child's cognitive skills and other abilities. Or, at the other end of the life cycle, they can offer information about the decline of cognitive functions in the elderly. As in the *Brown v. Board of Education* case mentioned above, psychologists may also introduce evidence about the impact of discrimination or other policies on general or specific populations. Sometimes this information is provided informally to the court upon request, sometimes it is provided through a formal consultation relationship established, sometimes the information is in formal written reports, and sometimes it is in oral sworn testimony subject to cross-examination.

Those who work in the criminal justice system may also provide treatment to the men and women who are mentally ill and who have substance abuse problems or are suffering from mental defects and diseases. In the U.S. as well as in other countries, it is believed that over 25% of the jail and prison population have serious mental illnesses that need medication and psychotherapy treatment. Another 50% may also have alcohol and other drug problems that if left untreated may be a primary cause of recidivism and further crime (Browne, Miller, & Manguin, 1999). We are constantly researching new treatment techniques for many specific populations (e.g., sex offenders) in an effort to help prevent them from repeating their crimes. As you will see in the chapter on interventions in forensic settings, new methods are being tried to rehabilitate criminals while they are still incarcerated. Given the enormous cost of keeping criminals in jails and prisons, we are also experimenting new treatment approaches while they are living in the community, often using electronic monitoring systems as a way of control while incorporating the idea of rehabilitation. In summary, "best practices" for working or interacting with individuals who are mentally ill and involved with the criminal justice system are crucial and are now constantly being reviewed and updated (Walker, Pann, Shapiro, & Van Hasselt, 2015).

As might be expected from our history, clinical forensic psychologists evaluate children and help the court decide what is in the best interests of the child, which is the legal standard in most

parts of the world today. Rather than sending the child to live with one or both parents based merely on what they/their lawyers tell the judge, it is now more common to have the input from a psychologist who can describe the mother's and father's parental fitness and how that matches with the needs and best interests of the child. This is especially important when dealing with allegations of physical, sexual, or psychological abuse in the family. Child abuse and termination of parental rights, delinquency and prevention of youth becoming career criminals, and other areas that affect family functioning are all areas of expertise that psychologists who work with the family have developed and their knowledge may be of benefit to the court when such issues arise.

Clinical forensic psychologists also can help in the civil area of the law by assessing the ability of clients to enter into contracts voluntarily and without duress, understanding the limits of appropriate practice and malpractice, and measuring the impact of an injury on someone's psychological health and quality of life. Psychological impact from automobile and industrial accident injuries, exposure to toxic materials, sexual harassment in the workplace, airplane crashes, acts of school or workplace violence, and other catastrophic events in life that cause injuries can be measured by using clinical psychological and neuropsychological assessment techniques that are adapted for forensic use or forensic populations. In addition, forensic assessment of the person's genuineness can be measured by using specialized tests that detect malingering or feigning symptoms for some personal gain. The person who has been damaged by negligence or some intentional harm may be awarded compensation or even punitive damages if the nexus (connection) between the act and the subsequent harm can be proven.

When lawsuits are filed in civil court, forensic psychologists are often the ones asked to assist the court in determining what is called "proximate cause." This means that "if but for the action in question," the person would not have the current injuries. In the American legal system, a person may claim damages even if the particular act was not the first time the person was so damaged. However, if the defendant being sued was the last person to harm the plaintiff, then, like the person who pushed Humpty Dumpty off the wall and his previously cracked eggshell shattered, it is that last person's responsibility. Sometimes, the court will want to apportion the damage to different contributors and psychologists may be able to assist in that task by using some of our assessment tools.

How Do Forensic Psychologists Work?

Forensic psychologists collect information about a case by first gathering research about a particular issue raised in a case. They often use articles or books published in the literature about the scientific data in the subject area. The psychologist will review the information, critique it from a scientific perspective, give various opinions that exist, and present that information to the legal community that requested it either in written or oral form. Often psychologists write a brief report or assist an attorney in writing a legal brief that will utilize this information. Sometimes the psychologist will assist an attorney in formulating questions to ask another expert on direct or cross-examination during trial or deposition. On some cases, usually large ones involving serious financial liability, the psychologist may be asked to conduct focus groups or mock trials and determine what kind of people could judge the case in the most favorable light for them and with what various types of presentations of the evidence.

Clinical forensic psychologists will also use clinical interview, standardized test data, and other clinical assessment techniques to learn about an individual person. They may diagnose mental illness, conduct neuropsychological examinations, or measure the impact from battered woman or rape trauma syndromes. It is common for psychologists to review other medical and psychological reports about the person's current and prior history. Histories of a person's education, work, and relationships are all important to develop a good understanding of a person's state of mind at any time. These data are then integrated with psychological test data and what is known about human behavior to help

answer whatever legal question is at issue. Attorneys may then retain the evaluating psychologist to testify in hearings or trials as an expert witness, not only to discuss the specific case at hand but also to help educate the court on psychological issues with which they may be unfamiliar.

Who Hires a Forensic Psychologist?

Forensic psychologists work in many different settings. Clinical forensic psychologists often have a clinical therapy practice along with their forensic practice. It may be an independent practice in their own offices, group offices that are shared with others, or it may be in a separate mental health agency. It is usually not a good idea to mix therapy and a forensic evaluation for the same person as it may cause the psychologist to become biased in some way. However, sometimes it cannot be helped and in fact will provide the court with important information that could not be obtained elsewhere. Psychologists are cautioned by the ethics code to make sure that the multiple relationship with the client does not impair the professional's objectivity and cause harm, and this caution is particularly important in forensic arenas.

Attorneys often hire forensic psychologists, usually to work on behalf of their client but sometimes to assist them in preparing the case. It could be a state prosecutor or defense attorney if it is a criminal case, or a plaintiff or defense attorney in a civil case. Sometimes a forensic psychologist may be hired by a large law firm, either for a certain specified number of hours or on a retainer agreement, to be available to assist with any cases where psychological issues are relevant. Insurance companies may hire a forensic psychologist to help defend against a particular claim or to prevent further damage to a company, such as occurred when sexual harassment laws were initially promulgated and it became clear that a company with a good plan to deal with harassment would be given better treatment in the courts than one that continued to ignore its importance while the lawsuit was pending.

Government agencies may need to hire a forensic psychologist either to deal with a specific case or to be of assistance in formulating public policy that involves psychological issues. For example, National Institute of Justice's forensic science policies have been formulated with the input from forensic psychologists with expertise in that particular area. Workers' compensation agencies need forensic psychological evaluations to determine disability income cases. Immigration officers may need forensic testimony to protect an immigrant who is being abused from being deported if she leaves her husband. Police and law enforcement departments hire psychologists to work for officers who need crisis counseling or assessment for fitness for duty. Remember our early reference to television shows like Criminal Minds? The FBI does, in fact, have a well-respected behavioral science unit that consists of law enforcement officers, criminal justice experts, and forensic psychologists. Although it does not function exactly as we see it played out on screen, the principles are the same. Mental health and legal agencies may hire forensic psychologists to train their staff in psychology and the law. Judges may hire forensic psychologists to assist them in preparing written opinions that they want published.

What Kind of Training Does a Forensic Psychologist Need?

Most forensic psychologists are trained at the doctoral level as clinical psychologists, and the forensic aspect of their training is an addition to this. In fact, most clinical forensic training programs occur after the doctoral degree is earned in postdoctoral internships and residencies or in continuing education courses. A new program is now available in some professional schools where elective credits are taken in a forensic specialization or in a "concentration" format. A sample program is outlined in Table 1.6.

Many master's level providers work as forensic clinicians (without the title of "psychologist," since this is what we call a protected title requiring specific licensure in most states).

Table 1.2 Forensic psychologists and social psychology

• Apply social psychology research to study legal issues before the court
• Apply research on attitudes to overcome bias about case
• Apply knowledge about persuasion
• Apply knowledge about bias when selecting jurors
• Assess impact of attorney's presentation
• Apply psychological research to development of public policy
Using methods such as:
• Literature searches and reviews
• Community attitude and public opinion surveys
• Focus groups
• Mock trials
• Visual and graphic trial aids
• Consult and train staff
• Oral reports
• Written reports
• Prepare amicus curiae briefs

They provide treatment in jails and prisons or as psychological assistants who administer and score psychological tests. Many family courts hire master's level mental health workers to gather background histories for children and families, assess for fitness to parent children, or provide parent training classes or other types of psychelegal interventions. In fact, the training for mental health workers in forensic settings has been in community colleges and colleges for many years now. However, the names and titles may be different from "forensic psychologist," which, as was mentioned, is more often used for those who practice at the doctoral level. It is important to check with various colleges or university systems to see what is offered and exactly what licenses, certifications, or career trajectories are available following programs offered.

Summary

In conclusion, there are many different areas of the law in which psychologists can be of assistance to educate lawyers, judges, and others in the legal system. We have mentioned some of them in this chapter. Others will be addressed throughout this book. Table 1.2 suggests some of the ways the knowledge in social psychology can be of assistance while Table 1.3 suggests the same in criminal law. Table 1.4 describes where family law can benefit from psychological knowledge and Table 1.5 does the same for other areas in civil law. Finally, we describe a model training program that might be useful to train clinical psychologists in forensic practice in Table 1.6.

Questions to Think About

1. What areas of forensic psychology practice surprised you to learn about in this chapter?
2. The Insanity Defense Reform Act of 1984 established parity between psychiatrists and psychologists in court, meaning that psychologists are now seen as 'equals' to psychiatrists in their credibility and ability to serve as experts on psychological matters. What do you think about this? Are psychologists and psychiatrists equal to each other, and if so, why do you think it took so long for the courts to recognize this?

Table 1.3 Forensic psychologists and criminal law

Evaluate and testify to:
• Competency to waive miranda rights
• Competency to proceed to trial
• Competency to represent oneself at trial
• Competency to enter into a plea agreement
• Sanity and insanity issues
• Other mental status issues
• Mitigation and downward departure on sentences
• Intoxication impact on mental status
• Intellectual disability and impact on mental status
• Death penalty issues
Using methods such as:
• Standard clinical interviews and observation of clients/defendants
• Administer standardized psychological tests
• Administer other assessment instruments
• Administer neuropsychological tests
• Review other medical and psychological reports
• Review of legal documents for psychological relevance
• Integrate data with psychological research
• Create treatment plans
• Provide psychotherapy and other interventions in forensic settings

Table 1.4 Forensic psychologists and family psychology

• Assess each family member for parental fitness
• Assess each child to help determine needs and “best interests”
• Make custody and visitation recommendations
• Make recommendations about moving to another community
• Make recommendations about adoption and foster parenting
• Help determine children with special needs
• Assess for child abuse
• Assess for woman abuse
• Create parenting plans
• Monitor parenting plans
• Determine competency for pre- and post-nuptial agreements
• Assess youth arrested for juvenile delinquency
• Determine effective intervention/prevention for juveniles
• Make assessments during family feuds
• Help in determining necessity for guardianship in probate cases
Using methods such as:

(continued)

Table 1.4 (continued)

• Standard clinical interviews and observation of clients/defendants
• Administer standardized psychological tests
• Administer other assessment instruments
• Administer neuropsychological tests
• Review other medical and psychological reports
• Review of legal documents for psychological relevance
• Integrate data with psychological research
• Create treatment plans
• Provide psychotherapy
• Coach parents through custody evaluations
• Coach families through disputes around business and other matters

Table 1.5 Forensic psychologists and civil law

• Assess for competency to enter into contracts
• Assess for duress in legal contracts
• Assess for psychological impact from injury from car or other accidents
• Assess for psychological impact from injury from toxic exposure
• Assess for psychological impact from injury from catastrophic event
• Assess for psychological impact from injury due to negligence or malpractice
• Assess for sexual harassment
• Assess for psychological impact of discrimination of civil rights
• Assess for malpractice by other psychologists
• Assess for civil commitment when risk of danger to self or others
• Assess for neuropsychological consequences of head injury or other toxic exposure
Using methods such as:
• Standard clinical interviews and observation of clients/defendants
• Administer standardized psychological tests
• Administer other assessment instruments
• Administer neuropsychological tests
• Review other medical and psychological reports
• Review of legal documents for psychological relevance
• Integrate data with psychological research
• Consultation with others
• Create treatment plans for rehabilitation/recovery
• Provide expert witness testimony

Table 1.6 Model forensic psychology training program

• Ph.D./Psy.D. in clinical psychology
• Concentration with 18 credits in forensic psychology courses
– Courses can be selected from:
• Introduction to forensic psychology
• Forensic assessment
• Psychology and criminal law
• Psychology and family law
• Psychology and Juvenile justice
• Psychological interventions in forensic settings
• Police psychology
• Trial consultation and Jury selection
• Forensic psychology: special issues
• Other trauma courses
• Other assessment courses
• Forensic Practicum of 700+ hours in second or third year of program
– Practicum sites include rotation in: Mental health court Observations Jail mental health unit General population in jail Juvenile detention center Drug court Diversion programs for defendants Child protective service evaluations Immigration cases
• Research in clinical forensic psychology areas – Institute for trauma and victimology – Family violence intervention program – Police psychology – FBI practicums – Battered woman syndrome research – Neuropsychology and forensic psychology issues – PTSD and capital crime cases – Death penalty research – Immigration cases
• Dissertation or directed study in forensic area
• Optional forensic psychology internship

This program is offered at Nova Southeastern University's College of Psychology located in Ft. Lauderdale, Florida, where the authors are professors. See website at www.nova.edu for further updated information

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2 Models of Legal Systems: Spotlight on the United States

Introduction

Although most of us studied U.S. History and the Constitution when we were in school, we rarely think about it in connection with the laws that we follow on a daily basis. Indeed, knowledge about the Constitution and its Bill of Rights is important to understand how our legal system works, so a quick review of how the system in the U.S. works is in order here. This is true for any country's laws; so if you live in another country, try to substitute your country's Constitution and rules of law for those in the U.S. Obviously, those countries who use a democratic form of government will be closer to the U.S. system than those who have another form of government.

Where Do Our Laws Come from?

The U.S. Constitution divides our government into three different divisions—the executive, legislative, and judicial branches. The legislative branch is charged with making our laws, the executive branch carries them out and the judicial branch enforces them. It was thought that the tri partite split in government would provide checks and balances to assure democracy and prevent any one branch from assuming too much power. The executive branch may set rules to help them to enforce the laws, and the judicial branch may set case precedents that then are enforced by the legal system. However, the judicial system can also be used to challenge the constitutionality of any type of law by using its trial court and appellate system. Thus, our laws come from different areas of government and are constantly changing, with each branch providing checks and balances on the others. There are carefully crafted rules that must be followed when challenging whether someone is following the law, and these can change, too. As you can see, the law is a living process that changes with the times and the will of the people.

The Constitution tells us what laws are created by House of Representatives, what laws are created by the Senate, and what laws are left to the individual states to determine on their own. All of the criminal justice codes are left to the states except for those involving terrorism, kidnapping across state lines, criminal acts committed on federally controlled lands, criminal acts involving interstate commerce, and civil rights codes, all of which are governed by the Federal system. State legislatures and courts govern most of the civil laws, although some actions that are under a certain dollar amount are left to the local governments. If someone works all over the country, he or she must learn the different laws in each jurisdiction. To make matters even more confusing, different groups (including the American Bar Association) have put forth model laws governing different areas that are found in most jurisdictions and many states have adopted these "Uniform Codes" instead of writing their own laws. Some states adopt the entire code,

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language and all, while others use some but not all of the verbiage. Obviously, the neophyte to the legal system must be vigilant in learning to distinguish one from another.

What Legal Rights Do We Have?

Our legal system is based on the British Common Law system, which is used in many countries around the world. It guarantees certain basic rights–called due process–including the right to be considered innocent until proven guilty, to confront your accuser, to a speedy trial, and to be treated with certain human rights, among others. Our legal system divides legal issues into criminal and civil matters. Many of these basic rights apply to the criminal justice system. The civil system deals with property issues, contracts, family matters, wills and probate matters, and the like.

The criminal and civil systems have different standards. To prove a case in the criminal justice system demands the highest standard of proof, "beyond a reasonable doubt." This is thought to be a 99% certainty, and criminal defense attorneys usually try to cast as much doubt as possible in their trials to help their clients. That is, their strategy may be to create enough doubt that jurors cannot feel 99% sure that the defendant committed the crime. The civil standard of proof is either at a "preponderance of the evidence" or "clear and convincing" evidence. It is often said that a "preponderance of the evidence" means more likely than not (or 51% sure) while "clear and convincing evidence" is a higher standard, (around 75%). In family court the standard of proof is the "best interests of the child" and it may require preponderance or clear and convincing evidence, depending on the type of case. For example, custody decisions are usually at the preponderance of evidence level while termination of parental rights is usually at the higher standard.

We will use these terms throughout this book as they set the level of the burden of proof that one side or the other must meet. Often logic flowing from values may determine which level of proof is needed. For example, in a decision that would be difficult if not impossible to change, the higher burden of proof is usually needed. The closer a verdict might deprive a person's liberty, the higher the standard that is necessary. So, in criminal cases in most places it must be a unanimous decision of the jurors that the person is guilty beyond a reasonable doubt. But, in cases involving bad faith in fulfilling a contract, it is sufficient for the evidence to prove to a majority of the jurors it was more likely than not that this occurred. Remember how we just noted above that family court cases may have different standards for different types of cases? A judge's decision to terminate someone's parental rights deprives that person's liberty or right to their child and is very difficult (nearly impossible, in some states) to change—thus, the higher standard.

Who has the burden of proof may also be important to understand the elements of a legal case. In the Common Law system that is used in the U.S., the defense does not have to prove that someone is not guilty because everyone, even those accused of committing a crime, is considered innocent until proven guilty. Remember that the defense attorney must merely cast enough doubt about a defendant's guilt. Thus, the burden of proof is on the State to prove guilt beyond a reasonable doubt. However, attorneys understand that there are many reasons that someone may appear guilty so a psychologist might be called into testify to explain what is counter-intuitive to the average person. In civil cases the person who brings the lawsuit, the plaintiff, usually has the burden of proof and the respondent must defend it. In custody and visitation cases, the standard as we said is the best interest of the child but there are several presumptions that the law states are in the best interest of the child. These have to be overcome in advocating for a different arrangement.

For example, most states presume that some form of "shared parental custody" is in the best interest of the child. So, if that arrangement is not deemed appropriate for a child, it is necessary to both overcome the presumption in the law and prove what *is* in the child's best interests.

Different states have different laws that describe how this may be done. In some states the presumption of shared parental custody is divided into two parts: legal and residential custody. The presumption is that it is best for children to have both parents make legal decisions together, but how much time they share in each parent's residence may be different than 50/50. In fact, *time sharing* experts are often called upon to produce a *parenting plan* if the parents cannot decide it themselves. To change the standard, the burden is on the parent who wants a different plan to show that 50/50 would be "detrimental to the child's best interest." The statute defines a number of ways it is possible to demonstrate what would be "detrimental to the child's best interests." In some states, like New Jersey, the burden is to prove the presumption would cause "irreparable harm." To prove something is detrimental or will cause irreparable harm is more difficult than simply proving another arrangement would also be in the child's best interests. We will discuss these issues further in the chapter that deals with child custody.

Other Legal Systems

Other legal systems are based on variations of the Napoleonic Code, Roman Law, and Dutch legal system as well as the British Common Law. In Napoleonic tradition, for example, the accused person has the burden to prove his or her innocence rather than be presumed to be innocent. The state attorney is an inquisitor and can require the accused to answer questions. Unlike in the Common Law system where the accused has the right to remain silent and not incriminate her or himself, in other legal systems, not responding may be considered as an admission of guilt. Although there are substantial differences in the various legal systems, sometimes they do not have as much impact as we might think on the way a mental health professional might work in the courts.

For example, in South Africa, the legal system is based on a combination of different legal systems including those used by the Dutch, British, and French who settled in that country. However, many of the legal standards and burdens of proof are similar to the U.S. system. Although they have different laws that regulate the determination of criminal responsibility, they still use psychologists to assist the judge in determining the *mens rea* or state of mind of the actor at the time of the commission of the act.

Mens Rea or State of Mind

The issue of *mens rea* is another interesting one that has different definitions depending on the laws at any particular time. In criminal responsibility cases, the concept of *insanity* is one that has been defined by lawmakers and not mental health professionals. Thus, adapting to the various definitions may be problematic for a psychologist (which strongly reinforces the need to learn and keep up with legal matters and changes) and different mental health workers may arrive at different opinions. To further confuse the matter, in many of the U.S. states, legislators have gone back to using the Mc'Naughten standard to define what insanity means. This standard focuses on what the person is thinking at the time of an act and not necessarily what the person is feeling or whether or not whether the person can control his or her behavior. This is further discussed in a later chapter. But, suffice it to say that a psychologist who looks at cognition or thinking, affect or feeling, and how they interact together to produce behavior may have to view the data from a different perspective when trying to determine what was in the person's mind at a different time from the examination.

Who Decides: Juries or Judges?

The U.S. is one of the few countries that still use laypersons on a jury so that a person is judged by a *jury of their peers*. For example, in Israel three judges make the decision in most serious criminal cases, while in South Africa, decisions are usually made by one judge, and judges may be elected or appointed by the ruling political party.

Although some believe that appointed judges are less subjected to politics once on the bench, others see the process of getting an appointment more tainted by politics than winning an election, even here in the U.S. In U.S. Federal court the judges are appointed by the President and confirmed by the Senate. They can keep their position for the rest of their lives unless they do something wrong that triggers the impeachment process. Clearly, judges have great power to make sure justice is done.

Although there are many benefits of the jury system we use in the U.S., in actual practice, it is rare that someone really is judged by a jury of his or her equals or peers because the methods for selecting jurors may automatically be biased. Usually juror pools come from driver's license or voter's registration lists, and as we know, not every member of a community has a driver's license or is registered to vote. Sometimes the jurisdiction where someone lives is different than the jurisdiction where the trial is held, making it less likely that an equal number of minorities will be on the jury. Many challenges to the constitutionality of a trial have claimed bias in the jury selection process, particularly those where the prosecutor seeks the death penalty. We discuss the issue of possible juror bias and ways to try to achieve a jury of a person's peers in much greater detail in a later chapter.

Divisions of Courts

It is also important to understand the division of the courts when working in the legal arena. The state court system is divided into three main branches: trial, appellate and supreme courts.

Trial Court

The trial court is often divided into state and local courts and these may have further divisions such as criminal, civil, family, juvenile, probate and in some cases, specialty courts. These new specialty courts are usually found within the criminal division and provide more rehabilitation than punishment. Typically, they deal with drug use, mental health issues, and domestic violence. They are often referred to as providing "therapeutic jurisprudence" because the goal is to stop recidivism by providing access to appropriate treatment. It is common for mental health professionals to work in these courts or at least in a close consultative relationship. We will describe them in more depth in a later chapter.

The proceedings in trial courts progress in many stages. Various pretrial issues may arise, such as admissibility or exclusion of certain evidence. These issues may be addressed in what are called *pleadings*. At times there may be actual courtroom argument and/or testimony on these issues while at other times judges make decisions based only on briefs and affidavits filed by the attorneys. Especially in civil cases there may be pretrial *interrogatories* which are questions posed to the plaintiff or defendant by opposing counsel. These are often accompanied by a *demand for production of documents*. In most civil cases and in some criminal case witnesses may testify at a discovery deposition to determine what they would say at trial and in the case of experts, on what their opinion is based. As you can see, these numerous steps even leading up to a trial can take significant time to accomplish.

In civil cases, there may be *settlement* negotiations and in criminal cases *plea* negotiations in order to avoid going to trial. If these are successful, no trial is necessary. If these maneuverings are unsuccessful, the case will go to trial. In most cases, the triers of fact will be a judge and jury.

Jury selection is a complex process that we describe later in Chap. 23. It is followed by opening statements, which each attorney gets to make and which set forth each side's best version of their cases with promises to elaborate on and prove their claims in the main part of the trial that follows. In a civil case, the plaintiffs present their case first and in a criminal trial the state presents their case, since each have the *burden of proof* that the elements of a case are actually met. If they are not, the defense in either case can make a *motion* for a *directed verdict*. The facts of the

case must be presented through questions and answers by the attorney with witnesses who are sworn to tell the truth. As we have touched on already, and we will elaborate on in later chapters, fact witnesses can only testify to what they have seen or heard while expert witnesses are also allowed to give expert opinions. The opposing side can cross-examine witnesses following their direct testimony. The purpose of cross-examination is to elicit testimony about facts that were not presented during direct testimony that may cause the finders of fact to come to a different conclusion than was intended by the direct testimony. The judge will rule on the admissibility of certain documents and testimony following preset rules of evidence.

Following the presentation of all the evidence, the attorneys each get to present a closing argument. Here the attorney will want to summarize the evidence in the light most favorable to her or his client's position. Jury instructions are proposed by the attorneys and determined by the judge. These are the questions that the jury must answer and can determine the outcome of the trial. Finally the jury is sent to deliberate if it is a jury trial. Usually a foreperson is appointed or elected. If the jury cannot agree to a verdict then they tell the judge they are *deadlocked* and ask the judge to declare a *mistrial*. Sometimes the judge will send them out to try again to reach a verdict with further deliberations. Sometimes the jurors ask for further clarification of certain evidence and the judges and attorneys may reach an agreement as to what to tell them. Usually the parties are in the courtroom when the jury's verdict is delivered. Sometimes when the judge makes the *findings of fact* they do so in a written opinion. If the litigants are unhappy with the outcome and find legal reasons to file an appeal, then the execution of the verdict may be stayed (or put "on hold," in a sense) while the appeal progresses. We discuss the appellate process later in this chapter. If you are interested in greater detail on the steps and stages of trials, see some of the references in this chapter or explore Farnsworth (2010).

Juvenile Court

In the U.S., juvenile court is an entire system that is separate from adult court. Juvenile court usually deals with youth who are alleged to have committed acts that might be considered criminal if committed by an adult, but instead are called *delinquent* because of the youth's age and maturity level. In addition, many juvenile courts deal with youth who commit what are termed *status offenses*. These are youth who are unmanageable for their parents and others in the community. For example, they run away from home, do not obey curfews, and are truant from school. The U.S. Department of Justice Office of Juvenile Justice and Delinquency Prevention (OJJDP) and the U.S. Department of Health and Human Services (DHHS) Child Protective Services (CPS) usually work together with the juvenile court personnel to help find ways to rehabilitate these children and teenagers. In many cases, the youths are sent to residential centers where they may or may not receive educational services or mental health treatment. Sometimes they are provided their own lawyers but more often, the legal system deals directly with their family, an issue which has been raised in numerous appeals over time. One notable case was *In re: Gault*, a 1967 case where the U.S. Supreme Court opined that proceedings for juveniles had to comply with the requirements of the 14th Amendment. Although the *best interests of the child* standard is supposed to apply in these cases, it is often difficult to make that happen, especially in urban areas when the courts are overwhelmed with so many problematic youth. We discuss these issues further in later chapters on juveniles, protection of children, and legal rights of children.

In the U.S., the publicity given to a few high profile cases by the media makes it seem that youth are involved in more serious crimes than actually occur especially since the number of youth committing homicides and serious crime has been continually decreasing since the mid 1990s, according to statistics promulgated by the U.S. Department Justice's Bureau of Justice

Statistics (www.DOJ.BJS.gov). Some very high profile cases where children have killed and then were tried in adult court have raised the issue of the viability of the juvenile court system. One such example is the Fort Lauderdale, Florida case of Lionel Tate, a 12-year-old boy who killed a 6-year-old girl while play wrestling with her. Another is the 2018 Pennsylvania case of Jordan Brown, who was charged with murder in adult court for the killing of his father's fiancé. Or, consider the case of Tyron Calhoun, an 11-year-old boy in Jacksonville, Florida, who was charged as an adult with manslaughter (2017). These cases will come up in later chapters, but a few critical questions are relevant here with this summary:

> Was it accurate to consider these children in the same way we consider adults just because they committed an adult crime?
> Is rehabilitation of these minors more important than punishment for the rest of their life?

These are questions that must be answered according to the standards in our legal system, but the psychologists for each side often disagree with each other in these complex cases.

Rehabilitation Courts

As we introduce you to the notion of rehabilitation courts, it is important to raise the question of rehabilitation verses punishment as we have at this point. Can a criminal justice system that is dedicated to deterrence of crime and justice, substitute treatment instead of punishment? This is a troubling issue and must be dealt with whenever mental health professionals work in the criminal justice system. It is well demonstrated in science that substituting positive behaviors or removing the cause of certain behaviors will cause them to cease, and that punishment does not permanently stop bad or maladaptive behaviors (it only suppresses the unwanted behavior, temporarily). Still, we see in practice that there is bias in the justice system and society at large towards wanting punishment as justice and atonement for a criminal act. Even when all who are participating in a case know that the individual is mentally ill and incapable of controlling his or her behavior, it is difficult to accept that treatment might be a substitute for punishment. Nonetheless the concept of restorative justice, therapeutic jurisprudence, and rehabilitation courts has been successful throughout the world in stopping the criminalization of the mentally ill.

Domestic Violence Court

One of the interesting areas where this has had some limited success is in the domestic violence courts. Abusers may be arrested upon probable cause that they committed a violent act against the woman but, the woman often goes down to the jail to bail him out the next morning. While there are numerous explanations for this altogether common behavior, and these are discussed later and in other seminal works on the topic, here we must note that battered women usually insist that they do not want their mates to go to jail; rather they want him to receive treatment to get them to stop their abusive behavior. So, advocates have designed psycho-educational programs hoping that this would promote sufficient rehabilitation. Most of these programs require that batterers spend at least one night in jail before being court-ordered to a *batterer offender-specific treatment program* to underscore the fact that domestic violence is a crime. As soon as a community institutes such a pro-arrest and rehabilitation program, the numbers of arrests dramatically increase, indicating that women really will use and cooperate with the justice system if the outcome is rehabilitation rather than simply punishment. As an example, in Denver, Colorado the number of arrests for domestic violence went from approximately 300 per year to over 10,000 the first year the domestic violence court was operational. Similar statistics were found in Miami/Dade County, Florida (Dalton, 2001). Although the evaluations show that very few batterers ever actually attend or complete such a program, of those that do approximately 75% stop their physically abusive behavior while in the program. Of these, 50% continue their psychological abuse, often making the woman's life seem much worse (Healy, Smith, & O'Sullivan, 1998). It is unknown how many stop their sexual abuse.

Of important note here, it is difficult to say whether these programs deal with those batterers who are mentally ill in addition to abusing power to gain control over the woman. Those who have tried to measure their effectiveness suggest that the majority of batterers will reoffend within the first year of arrest (Sherman, 1992). In many cases, the violence escalates over time. So, does arrest and diversion to a therapeutic court slow down or stop domestic violence? We will address that question in further depth later but first we must also look at the premise that the criminal justice system can deliver effective treatment and punishment simultaneously.

Drug Court

Unlike domestic violence courts, drug courts have been highly successful in getting those who have been unable to stop their use of unlawful substances into treatment programs. Again, do the treatment programs really work? Does one model work better than another? The most popular models are those based on the Alcoholics Anonymous (AA) or Narcotics Anonymous model, the cognitive-behavioral model and the controlled drinking model. Some remain steadfast believers in one of these models over the others. However, the scientific data demonstrate that each of these models may be helpful for certain people with certain motivation, although the cognitive-behavioral model seems to be the best supported by outcome data. Some in the criminal justice system claim that despite the success that some people have in controlling their drinking or drug abuse after treatment, if we send people into rehabilitation, we are being soft on crime. Yet, as mentioned earlier, over 60% of the population in the jails has some form of addiction to one substance or another, and many crimes are committed in connection to drugs and/or alcohol. For example, what do we make of the person who has been breaking into empty houses to steal jewelry to fund a drug addiction? Is this person the same as another who broke into houses to steal expensive goods to sell simply for his or her own profit? Despite the high rates of addiction among those who commit crimes, rarely do you find adequate treatment programs in jails and prisons. So what are the answers here?

These are serious public policy questions that psychologists can help policy makers answer. It is important to provide the data to the courts and legislators about the success or lack of success of these programs. Often the idea to set up a treatment program is a good one but the community underfunds it, thereby making it impossible for the intervention to be ultimately successful, at least in the long term. It is difficult to terminate an unsuccessful program as politicians are reluctant to fund a different one, so it is sometimes thought that even a semi-successful program is better than nothing. Again, a partnership between the mental health professional and the courts can spot these problems before they get serious or prevent them from occurring in the first place.

Appellate Courts

The Appellate Court is the court that hears cases where someone believes that the proper legal procedure was not followed during the trial court phase. As had been the case throughout this chapter, different states are organized differently. Some states organize their courts with several judges reviewing a case and offering an opinion, while others have the entire court make a decision. Regardless of this structure, one judge is usually assigned the case to read and outline for the other judges to review. This job may be assigned to a law clerk who is an attorney and works for that judge. Sometimes, when decisions raise a psychological issue, the court may request a brief from a psychologist or psychological association to help advise them on the scientific data. If it is formally submitted, it may be called an *Amicus Curiae* brief (Amicus Curiae means *friend of the court* in Latin). The American Psychological Association (APA) enters Amicus briefs into cases in which members have an interest if there are psychological data that they believe will be helpful to the court in making its decision. The APA maintains a database of the Amicus briefs it has submitted on its website (https://www.apa.org/about/offices/ogc/amicus/index-issues), which can be a helpful resource for psychologists and other mental health professionals.

Supreme Court

The Supreme Court is the highest court in a state (except in New York State, where the trial court is called the Supreme Court). When an appellate court decision is challenged, it is submitted to the Supreme Court Justices for a decision. Their decisions only deal with issues on law and legal issues, not on the merits of the case itself. The Supreme Court has the right to accept or deny reviewing a case. This process is called accepting or denying *certiorari*, often shortened to *cert*. Typically, the Supreme Court will only accept cases that they believe have legal complications requiring a decision to guide other similar cases. If a litigant is unhappy with the decision rendered by this court, then it is possible to go to the Federal Court for relief by filing a *Habeas petition*, but only if they believe the legal process itself was violated.

The most common challenge is to the rulings that the trial court judge made during or before the trial. It is difficult to prove that the judge made an incorrect ruling as the rules of evidence often give the judge great latitude in making decisions. Even if the judge is found to have erred, the Supreme Court still might not overturn the decision if that error is considered to be insignificant to the final outcome (sometimes called *harmless error*). The expense of this process is great especially since transcripts of proceedings must be typed and often there is little likelihood (certainly no guarantee) that the Federal Courts will look any more favorably on the issues than the State court did, so it is less common than most people believe that cases go so far unless they deal with major policy issues.

Federal Court System

The U.S. Federal Court System is organized in a manner similar to state courts. The trial court is the first court, where the judges called *justices* who preside are appointed by the President and confirmed by the Senate. *Magistrates*, who are like assistant judges assigned to work with Federal Court Justices, often sort through the cases that come to the court and hear some of the pretrial motions. Federal Court Justices are appointed for life, so it is clear that they hold a lot of power in the U.S. justice system. They can only be removed by impeachment by Congress. One of the most famous impeachment trials was of Miami Federal Court Justice Alcee Hastings, who was appointed by President Jimmy Carter and served in his seat for 10 years before he was removed from his position for bribery and perjury. He then ran for Congress and was elected from the Southern Florida district that he continues to represent, among many of the same members of Congress who found his behavior inappropriate as a judge. Interestingly, Representative Hastings is now the dean (or longest-serving member) of Florida's Congressional delegation after Bill Nelson left office in January 2019.

As was mentioned earlier, certain cases go directly into Federal Courts while others get there after being adjudicated in State courts first. Civil rights cases, especially those arising from the various Federal laws preventing discrimination, are usually tried in Federal court. So, too, are cases involving terrorism, kidnapping across state lines, interstate commerce, criminal acts committed on federally controlled lands (e.g., military bases or Native American reservations). Federal Court has power over the entire country; thus, decisions that are promulgated from there have more influence than from state courts. Judges in state court often are persuaded by Federal court decisions, although it is not necessary in all cases to abide by them especially if state laws rule.

Like the state court system, Federal court has an appellate section and then, the U.S. Supreme Court (U.S.S.C.). The only recourse from a decision in the U.S.S.C. is for Congress to pass a new law. However, if that is done, the nine Justices who sit on the U.S.S.C. could rule the new law unconstitutional, keeping up the battle between jurisdictions if it so choses. As an example, this occurred years ago over the issue of whether it was a criminal act to burn the U.S. flag. In the case *Texas v. Johnson* in 1989, the U.S.S.C. determined that statutes against burning

the U.S. flag are unconstitutional restrictions of public expression. In response, Congress passed another act to protect the flag against desecration, but the U.S.S.C. reaffirmed the *Johnson* decision in a new case, *United States v. Eichman.* Congress had only one recourse left—to propose a Constitutional amendment—but this amendment failed in the Senate by one vote in 2006. In 2019, a member of the Senate proposed reviving the amendment. Amicus Curiae briefs are frequently filed by interested parties when the U.S.S.C. is considering a case that has importance for that party. In cases that deal with mental health issues, the APA as well as many other professional organizations frequently file such briefs setting forth the literature in that particular area, as mentioned earlier.

Oral Versus Written Testimony

Psychologists who testify before the various courts in the U.S. are frequently asked to give oral testimony presented by the attorney for one side and be cross-examined by the other side. While written testimony may be accepted in legal cases in various other countries, in the U.S. it is more common for criminal and most civil cases to require the oral testimony. This permits the other side to have an opportunity to question the basis on which the opinion testimony is made. Cross-examination is an important part of the U. S. legal system as it can be used to make sure that an expert does not have undue influence over a particular case without careful examination of the factual basis. In some cases, such as family law, the court may accept a written report in lieu of oral testimony if there is no objection from the other side. Often the court appoints these experts and so their opinion has great weight with the court. Some psychologists believe that it is best to be appointed by the court, while others believe that they can be equally fair no matter who hires them. Sometimes the admission of an expert's opinion is challenged even before cross-examination occurs. The Frye standard, decided in 1923, held that if an expert's opinion is generally accepted in the relevant scientific community and will aid the trier of fact, then the testimony must be admitted. However, more recent cases, including the Daubert case in 1993 and subsequent decisions have given the judge more power to decide if the evidence is based on a scientific foundation. The modification of the Federal Rules of Evidence in 2001 and its Rule 702 puts forth a similar requirement. Admissibility issues will be further discussed in the next chapter.

Rules of Evidence

Every state and the Federal government have legislated Rules of Evidence that govern court trials by setting forth what will and will not be considered evidence in cases. These Rules of Evidence may be modified by the legislative branch or through case law from appellate court opinions. These rules are supposed to control for admitting only the most reliable and relevant facts in a case. Each state publishes their Rules of Evidence along with their laws. Generally, witnesses in a trial are permitted to testify about facts —this means only relevant information that the witness personally sees or hears. Expert witnesses, on the other hand, are also allowed to testify to their opinions about the facts of the case. Therefore, it is important to be sure that someone who offers an opinion really knows the subject matter about which he or she is testifying. Otherwise, it is believed that there may be biased information that is also unreliable and not credible which can confuse the judge or jury. Countries that do not use the lay person jury system are less concerned with confusing judges, who are supposed to be professionally trained to sort out fact from fiction.

Summary

This chapter described the different types of governments and legal system and how the laws and case precedents create the rules by which the law works. We went into depth about the U.S. system. It is important for mental health professionals to understand the laws that govern the

case on which they prepare to offer their opinions. It is also important to know the different standards of proof necessary before forming an opinion. Clinical psychologists may get confused by the standard of proof for a scientific hypothesis to be accepted, which is usually that results will be accepted if at least 95–99 out of 100 times it will occur because of the facts presented. In the law, the burden of proof is only that high in criminal cases. Most other cases accept that standard of "more likely than not" something has occurred based on the facts presented. Understanding how the mental health testimony fits into the bigger picture of the law will make the expert witness more likely to educate the triers of fact, which is the major purpose of offering expert testimony.

Questions to Think About

1. Should we, as trained professionals, ever serve on a jury? Can we ever truly be a part of a 'jury of one's peers?'
2. Based on what you have read so far, do you think it is better for a forensic psychologist to prepare and present oral testimony or written testimony?
3. In this chapter we touched on the idea of children being charged and tried in adult courts after committing particularly serious crimes. At what age should a youth's behavior have the full consequences afforded to an adult?

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3 Admissibility of Expert Testimony

Jane Smith was standing on a busy street corner and observed the truck run a red light and collide with two different automobiles. The red one jumped the curb and hit several pedestrians. The pedestrians filed a lawsuit against the truck driver and wanted to call Jane as a witness to the accident. The defense protested and wanted to call a psychologist to testify about the unreliability of Jane's memory of the events. Should the defense psychologist be allowed to testify?

Lionel Tate was twelve years old when he wrestled to death a six year old whom his mother was babysitting. He was arrested and charged with her murder and the state attorney waived his prosecution into adult court. Tate's lawyers wanted to put on psychologists to testify that the research demonstrated that twelve year old children in general do not have the mental capability for forming the same intent to kill as an adult. Other psychologists who had actually examined Tate were prepared to testify for both sides; each side putting forth the viewpoint supporting their own position. Should the judge allow the research psychologists to testify about science in general without those experts having examined Lionel Tate?

Sarah went out on a date with James and when they returned he invited her into his apartment for a drink. She accepted his invitation as he had been a perfect gentleman during the rest of the evening. Within a short time after getting there, James began kissing her. Sarah was relaxed and enjoying the attention until his kisses became more insistent and rough. She became frightened of the look in James' eyes when she asked him to stop and he did not comply. She began crying out and begged him to stop and take her home. He refused and raped her. Sarah was upset and reported the sexual assault to the police. James admitted having a sexual encounter with Sarah that night but insisted it was mutually consensual. The state attorney wants to call as a witness a psychologist who will testify that Sarah demonstrates characteristics of rape trauma syndrome and therefore this could not have been a consensual encounter for her. Should the court allow the psychologist to testify?

These cases illustrate some of the dilemmas encountered by courts when deciding who is an expert and to what an expert may testify. In the first example, the court must decide if the testimony of the eyewitness was reliable. Would a psychologist's testimony about the research on the accuracy of eyewitness memory help the court do its job? In the second example, the court has to decide if scientific testimony by the general expert who did not examine Tate would provide information in addition to the experts from each side who examined him to assist the jury in making the decision whether he had the capability to form the same intent as an adult. In the third example, the court must decide if the fact that Sarah demonstrated characteristics of rape trauma syndrome would prove that James had actually raped her.

Courts do not want to permit someone who is not qualified to give an expert opinion nor do they want to allow biased information to prejudice the jury against either side of a case. It is important to remember that while each side in a case should be allowed to present their very best version of the facts, the Rules of Evidence try to permit only those facts that are reliable and relevant to be admitted. These factors are called *probative*. If a fact is more likely to cause the judge or jury to become biased against one side

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than to educate in a probative manner, then it can be ruled inadmissible because it is *prejudicial.* So, even though a psychologist may meet all of the qualifications to be admitted as an expert, the court may be able to rule that the testimony is not admissible because of these other reasons. Over the course of the years, courts in the United States have adopted several different criteria for the admissibility of scientific or expert testimony. While none of these deals explicitly or exclusively with testimony from the mental health professional, they have all been used to evaluate the admissibility of such testimony.

History

Frye Test

The first test for the *admissibility of expert testimony* occurred in 1923 in a case entitled *Frye versus United States* (293 F.1013, 1923). While this case dealt with the admissibility of the polygraph in court, it has been used in a much wider context to decide the admissibility of any proffered or proposed expert testimony. It is described as a general acceptability theory; that is, if the theory, methodology or conclusion that is being *proffered* or offered as expert testimony is generally accepted within the relevant scientific field, it is deemed to meet the criteria for acceptability. *Reliability*, in other words, is determined by *general acceptability*. One of the problems with the Frye Standard is that it did not define what 'generally acceptable' meant. Subsequent commentary by various legal scholars has described general acceptability as referring to acceptance by "a substantial majority of the relevant scientific discipline" but, once again, the term "substantial majority" was not defined. In a similar manner, the "relevant scientific discipline" was not well defined.

Let us take a concrete example. Say you are evaluating whether a particular psychological test that purports to predict sex offender recidivism meets the Frye Standard. You would have to think about who the relevant scientific community is. Does it consist of all psychologists, all clinical psychologists, all psychologists who perform sex offender evaluations or all psychologists who are familiar with that particular instrument? The testimony will be admitted depending on which scientific community is selected. In one study performed for attorneys who were trying to challenge the new sex predator civil commitment laws, a survey was done to assess how many psychologists attending a state psychological association meeting knew or had used any of the actuarial instruments designed to help predict the risk of a sex offender committing another sex crime. Very few had knowledge of the actuarial instruments used. Although the trial court ultimately admitted the testimony, had the case gone up to the appellate level, the study may have had an impact on their decision. Nevertheless, despite these drawbacks, the Frye Standard has been used by judges for many years as the criterion for the admissibility of expert testimony. It is still used today by many states.

One of the other major problems that the Frye Standard encountered was that because its criterion was general acceptability, there was no room for the admissibility of a well-validated but innovative or new technique. Let us assume that a particular scientist has done extensive work validating a new scientific procedure. No matter how extensive the validity studies are, under a Frye Standard, unless it is well known and well accepted in the scientific community, it could not be admitted into evidence. A good example occurred during the trial of John Hinckley, Jr. when, during some of the proffered testimony, the defense wanted material admitted that had to do with a neuropsychiatrist's diagnosis of Hinckley as schizophrenic based on what was then a new technique of brain imaging studies. This work was very well validated from a scientific view but, since the idea of abnormal brain structure in schizophrenics was not generally accepted in the scientific community in 1981, the testimony was ruled inadmissible. Of course, had this testimony been proffered in the present day and age where this technique is well accepted, it would most probably be admitted into evidence.

1975 Federal Rules of Evidence

In 1975, the Federal Rules of Evidence were adopted by the United States Federal Court System to replace the Frye Standard. The Rules had special sections (Rules 702 through 705) to assist the court with criteria for the admissibility of expert testimony. The Federal Rules of Evidence have since been incorporated into the evidence codes in many states so that now they have either an exact replica or words closely approximating them as the basis for their own rules of evidence. These sections, relevant for our discussion here, dealt with what was called "scientific, technical, or other specialized knowledge". The *Rules of Evidence* stated that if such scientific, technical or other specialized knowledge would be of assistance to the triers of fact (judges or juries) and out of the ken or knowledge base of the ordinary layperson, then an expert who is qualified by knowledge, skill, education, experience and training could render an opinion.

Let us look at each of the elements of this standard. First, note that it deals with broader information than merely scientific, for it talks about the possible introduction into expert testimony of technical or specialized knowledge as well. This becomes a particularly critical issue when the admissibility of "social science" or "behavioral science" evidence, such as psychology, is debated. Is psychology scientific, is it technical knowledge, or is it some kind of specialized knowledge? Certainly, most psychology research studies are scientific but testimony about clinical diagnoses and symptoms may not always be considered so. How this question is answered leaves one to different answers regarding admissibility.

The second important phrase is that the material be "of assistance to the trier of fact". This may seem somewhat paradoxical to the reader. Why should we be discussing material at all if it were not of assistance to the trier of fact? What is meant here is that the knowledge posed by the expert witness must not be something already known by the average person. In other words, it must add something new to the knowledge base of the layperson or provide some information to challenge misinformation that the trier of fact (judge or jury) could be expected to deduce from common sense that is really counterintuitive to scientific findings.

A good example would be testimony regarding the battered woman's syndrome which helps the layperson understand why a woman does not just leave an abusive husband. Consider a case where a woman has killed an abusive husband. Although she may have been abused for twenty years prior to the killing, she might not have perceived herself in danger of being killed until the present situation. A judge or a lay juror could, from a common sense knowledge base, ask the questions, "Why didn't the woman just leave the relationship?" Testimony regarding the risk of being killed if she left and the battered woman's syndrome together with the concept of learned helplessness would help explain to the trier of fact why the woman didn't "just leave". In other words, presentation of the research, along with the results of the clinical examination of this particular woman, adds something to the knowledge base of the trier of fact and is therefore considered to be "of assistance" because it both addresses the common misperceptions of the average person who thinks it is possible to "just leave" and provides new information that would not be readily available without the expert's opinion. An expert who is qualified by virtue of knowledge, skill, education, experience and training can then be permitted to testify. These arguments will occur during the qualification of an expert witness by the judge. An attorney who will propose or proffer an expert to the court will have the expert describe her or his education, training and general skills in a variety of areas. Once the judge qualifies that individual as an expert, he or she can offer opinion testimony. Only the judge can decide who is an expert and who is a fact witness.

Rule 703 discusses the criteria required for the methodology upon which the expert bases his or her opinion. It indicates that the methodology used by the expert must be of the sort "reasonably relied upon by other experts in the same field". One of the problems with this aspect of

the Federal Rules of Evidence is the phrase "reasonably relied upon" was not defined, leaving it to the courts to figure out if a method is scientific or not.

Ultimate Issue Testimony

Another important element in this Rule and subsequent cases regarding admissibility of expert testimony is whether or not an expert can give so-called *ultimate issue testimony*. In most cases, the "ultimate issue" is defined as the actual legal conclusion that the judge or jury must come to at the end of the case. However, what actually is defined as the ultimate issue in a particular case is often variable. Some courts more narrowly restrict testimony to avoid invading the province of the jury, while others permit a wider reach toward the ultimate decision. The psychologist is allowed to give diagnoses, conclusions and recommendations, as well as descriptions of an individual's mental disorder but may or may not be allowed to actually testify to the causal link between that and, for instance, the criminal offense, depending on how broadly or narrowly the court defines the ultimate issue.

Forensic psychologists have debated whether or not an expert witness should testify to the ultimate issue in a case in state courts where there may not be a legal rule governing its admissibility. Some contend that experts should not address such issues, that not only does it usurp the role of the trier of fact but it is contended that it may even be unethical, for it asks the expert to draw legal and perhaps even moral conclusions which may be beyond the psychologist's expertise and for which psychologists often do not have sufficient data to answer. Others contend the expert may well have sufficient data to offer such an opinion to the court and should do so with the understanding that the court may not agree with it. Others note the practical issue that courts may insist that experts answer such questions. If the expert refuses, the court could turn to someone else. Still others believe that it is better to respond to the "elements" of the issue, rather than the issue, itself, by citing, for instance, the data supportive of an inability to understand wrongfulness or an inability to conform behavior to the law without actually stating that a defendant was insane at the time of the crime. This issue is more fully discussed in later chapters.

Daubert, Kumho and Relevant Case Law

In actual practice, following the introduction of these Federal Rules of Evidence, courts used some informal combination of the Frye Standard and the Federal Rules of Evidence to determine admissibility of expert testimony until 1993, when the United States Supreme Court dramatically altered the standards for admissibility of expert testimony in Federal cases when deciding a case called Daubert. In this case, *Daubert versus Merrell Dow Pharmaceuticals* (509 U.S. 579, 113 S.Ct. 2786, 1993) the court dealt with whether a particular medication caused birth defects, so the attorneys for the plaintiff wanted to introduce expert testimony by a biochemist who had re-analyzed the prior medication tests (called trials) and found that the trials that had declared the medication safe had not been done properly. The trial court ruled that the testimony was inadmissible, finding that the re-analysis of the prior trials was "junk science" because the biochemist had used a new methodology that was not generally accepted and therefore failed to meet the Frye Standard.

The United States Supreme Court (USSC) in a majority opinion authored by Justice Blackmun described the Frye Standard as too austere, not allowing for innovation and creativity, and suggested using the Federal Rules of Evidence with some important modifications for judges to test for scientific reliability of a proposed expert's opinion. These new standards are now called the Daubert Standards and have been adopted by a number of different states. The reasoning behind this Supreme Court decision was to give judges more guidance in how to make these difficult admissibility decisions. An important point to be noted is that Justice Blackmun restricted the analysis in the case only to scientific evidence

because that was the nature of the evidence being considered in the Daubert case. The implication of Justice Blackmun's comment was that the criteria which he was describing would be applicable only to scientific testimony and that technical or other specialized information could well be judged by other criteria. Nevertheless, many people misinterpreted Daubert as requiring the application of certain standards useful in judging scientific evidence to all forms of expert testimony.

Blackmun also noted that the criteria to be outlined were suggested guidelines and were not "*dispositive*" or required; that is, these were guidelines that the judge, as a gatekeeper, would utilize to determine the admissibility of expert scientific testimony. Some legal scholars believe that the Daubert decision gives judges more power to decide what expert to admit and (whom) to keep out of court, while others see Daubert only as a guide to the decision-making power that judges always had under Frye and the Federal Rules of Evidence.

The criteria suggested by Blackmun appeared to be an elaboration of the previously undefined "reasonable reliance" discussed in the Federal Rules of Evidence 703 as follows:

1. The hypothesis to which the matter pertains is testable;
2. It has been tested;
3. The procedure has a known error rate;
4. The procedure has been published;
5. It has been peer reviewed; and,
6. It is generally accepted by the scientific community.

As noted above, there was a good deal of discussion following the handing down of this decision among mental health professionals, wondering where exactly expert psychological testimony would fall. It takes only a moment's reflection to realize that much of what clinical forensic examiners do in their evaluations may not have testable hypotheses nor known error rates. What, for instance, is the testable hypothesis in a child custody evaluation? How does one determine the "*known error rate*" of a clinical interview? Does it have to do with whether or not the judge or jury agrees with the proposed testimony? These are all issues that appear to separate clinical forensic evaluations from the kinds of criteria enumerated in the Daubert case if they are strictly followed rather than just used as guidelines as Blackmun suggested. In fact, a number of experimental psychologists praised the decision, indicating that it would prohibit any of the more clinically oriented material which they regarded as *junk science*. Thus, the tensions between research and applied psychologists became embroiled in legal decision-making policies.

Many courts adopted this rather narrow interpretation of Daubert that resulted in the exclusion of a large body of expert testimony which could not be scientifically validated. On the other hand, more clinically oriented individuals were of the opinion that the narrowly construed Daubert criteria would keep a great deal of valuable clinical material out of consideration in the courts. If you remember, in the earlier chapters, we described the introduction of psychology in the courts as coming about because of the helpfulness of describing what goes on in a criminal's mind. Would the very information that psychology admitted into the courts now be rejected because of the narrow interpretations of what is psychological science?

As noted earlier, how one conceptualizes psychology is a critical issue. Is psychology a science? Is it technical knowledge? Or it is specialized knowledge? These questions were debated by psychologists in a very heated manner for a good number of years following the Daubert decision. In addition, several courts issued dramatically different opinions regarding how Daubert should be applied. As an example, in *United States versus Scholl* [959 F. Supp. 1189 (D.Ariz. 1997)], the court refused to allow any testimony from a psychiatrist regarding the characteristics of a particular individual with a certain diagnosis with the exception of the diagnostic criteria as enumerated in the then used nosology under *DSM-IV*. It ruled that anything else did not meet the Daubert Standard. On the other hand, a case from the Seventh Circuit, *United States versus Hall* (93 F.3d 1337, 45, 7th

Cir., 1996) suggested that social science testimony could not be judged by the same criteria as "Newtonian science" and essentially suggested that social science testimony should be judged by a Frye Standard, rather than by a Daubert Standard. Suffice it to say, there was anything but unanimity both in court rules and among mental health professionals.

Further clarification appeared to come in 1999 in a case called *Kumho Tire versus Carmichael* (526 U.S. 137, 119 S.Ct. 1167, 1999). In this case, which dealt with the proffered expert testimony of a "tire expert", the trial court ruled as inadmissible the expert's testimony because he had not conducted any controlled scientific experiments. The expert, on the other hand, based his opinion on thirty years of experience rather than on empirical studies. On appeal, the United States Court of Appeals for the Eleventh Circuit reversed the trial court, indicating that the Daubert criteria should be applicable only to scientific testimony, rather than to "experience-based testimony".

When the case reached the USSC, however, the high court ruled that Daubert should be applicable to all proposed expert testimony but that it should be interpreted flexibly and that the criteria enumerated earlier were only guidelines and were not intended to be taken as rigidly excluding different kinds of expert testimony. In fact, the USSC went on to state that the important issues were "*relevance* and *reliability*" and that it was the discretion of the trial judge to determine what ways relevance and reliability would be determined. This essentially reopened the area for clinical forensic psychological expertise since the judge did not have to rely on those factors enumerated in Daubert. Kumho was important because it made the admissibility of expert testimony far more flexible and far more at the discretion of the individual trial judge.

More recently, Rule 702 of the Federal Rules of Evidence was modified and adopted in December 2000. This was further developed in the revisions of the Federal Rules of Evidence in 2011 and in 2016. The modifications supplemented but did not replace Rule 702. The first part of the new modification is important for mental health professionals because it parallels very closely what appears in various Codes of Ethics: We make diagnoses, conclusions or recommendations only when there are sufficient data to back them up. The second part of the Standard, which calls for the testimony to derive from reliable principles and methods is apparently another attempt to discourage the use of unvalidated or unreliable methods. To meet this part of the criterion, the proposed expert witness has to demonstrate that he or she has applied the principles and methods reliably to the facts of this case. In other words, the expert must be aware of what the appropriate scientific psychological procedures are and demonstrate that he or she has reached the conclusion by using the proper procedures and utilized them in an acceptable manner.

Clinical forensic psychologists need to demonstrate that the methods by which they have performed evaluations meet psychological standards. This may include use of standardized tests that have research methodology with reliability and validity measures, as well as standard errors written in the manuals. It may also include utilizing textbooks that describe clinical examinations using mental status exams, standard clinical interview techniques and various ways of assessing the samples of behavior. Many clinical forensic psychologists have begun using structured interviews to meet these standards, including tests that measure over or under reporting symptoms of mental illness. This may be another way to demonstrate the careful methodology used before coming to conclusions.

Despite the liberal thrust of Kumho suggesting that these four scientific factors may not be applicable to areas that are not 'hard science', some courts continue to reject expert testimony in the social and behavioral sciences because it fails to meet these criteria. However, a moment's reflection would expose this line of reasoning as illogical since many observations in the behavioral sciences do not have tests of hypotheses or known error rates, e.g., whether a defendant meets the criteria for an insanity defense or who would be the better parent in a child custody case. Similarly, for forensic assessments in

general, the methodology is that we try to integrate data from multiple data sources, looking for consistencies and inconsistencies across those sources. What would be a testable hypothesis here is that the integration of all of these data sources gives a number that neatly fits into an equation, telling the mental state of the defendant at the time of a criminal offense or the individual's parenting capacity. Unfortunately, many of our colleagues who see the need for psychology to become purely scientific applaud this approach. If it cannot be determined scientifically, then it has no place in court. Science is regarded as a yardstick against which all expert testimony is assessed. However, most mental health professionals acknowledge that their work, in fact, is a blend of scientific, technical and specialized knowledge.

Slobogin (1997) made the observation that the most frequent reason for the exclusion of expert testimony in behavioral science was its failure to assist the trier of fact. In some cases, in fact, the expert is seen as overstepping his or her bounds and invading the province of the trier of fact. Heilbrun (1996) observed in a symposium that he chaired that year that in the three years since Daubert was decided, there had been a variety of cases regarding admissibility of expert testimony in the behavioral sciences but none of them reflected a major change. In other words, testimony that was admissible under Frye was also admissible under Daubert and testimony that was excluded would have been excluded under either standard. With this background in mind, the misunderstanding of the application of the Daubert criteria in admissibility of behavioral science testimony becomes clear.

Recent research conducted at Nova Southeastern University (Shapiro et al., 2015) revealed some rather striking findings: Only three percent of proffered expert testimony was rejected due to its not meeting the above-mentioned scientific criterion. Researchers surveyed 147 recent court cases involving the admission or rejection of proffered expert testimony using search terms such as admissibility and expert psychological testimony. The results are presented in Table 3.1.

Overall, 48% of the testimony considered was admitted. In the 147 case summaries that were analyzed, there was a reference to a total of 156 examples of expert testimony. (Some cases involved more than one expert or had more than one example of testimony from each.) This analysis raised questions about the assertion made earlier that science is the yardstick against which expert testimony is measured. In actual cases, the scientific criteria are rarely mentioned and issues dealing with relevance, reliability, assistance to the trier of fact and not invading the province of the jury are far more frequently utilized. Some decisions reflected the tendency to accept otherwise questionable expert testimony but given insufficient weight to reject testimony about ultimate issues, to reject testimony containing jargon and to reject testimony deemed to be confusing or prejudicial.

It is noteworthy that in a case from 2006 (*U.S. v. Simmons*), the district court held that the expert's qualifications, such as education, experience and training, were better indices of merit in admissibility decisions than the "Daubert scientific factors". In fact, the criteria mentioned in Daubert of falsifiability and known error rate were often not understood by judges. According to this research, judges do not apply these factors in determining the admissibility of expert testimony in the behavioral and social sciences anyway. Once judges determine that the psychological evidence has gained general acceptance in the relevant field as measured by peer review, publication or case precedent, they tend to ignore the other Daubert factors because they deemed them as unnecessary. Slobogin (1997) has stated that falsifiability and error rates are difficult for courts to determine.

Fradella (2003) have surveyed cases in terms of the issues generally admitted as part of behavioral science expert testimony and those rejected. Some examples of those areas allowed are false confessions, competency to stand trial, criminal responsibility, retrieval of repressed memories, emotional distress, characteristics of sexual predators and characteristics of certain types of victims. Testimony about credibility of

Table 3.1 Percent of cases citing factors in admissibility

Factor	Percent of cases citing factor (%)
Relevance to the issue in the case	27
Reliability (Did the methodology measure what it purported to measure?)	32
Scientific validity (Daubert criteria)	3
Qualifications of expert	22
Trier of fact	33
Weight	6
Rejection due to expert testifying about ultimate issue	6
Probative versus prejudicial to jury	12
Methodology	11
General acceptance	3
Clinical judgment	1
Within ken of jury	2
Reliance on sufficient facts or data	6
Lack of peer review	1
Invasion of province of jury	4

other witnesses and the effect of drugs on memories was generally not accepted. Courts appeared to differ on whether or not testimony about the reliability of eyewitness identification should be admitted as expert testimony.

2011 Federal Rules of Evidence

Rule 702: Testimony by Expert Witnesses

In 2011, Rule 702 of the Federal Rules of Evidence regarding testimony of expert witnesses is restated a bit more succinctly: "*A witness who is qualified as an expert by knowledge, skill, experience, training or education may testify in the form of an opinion or otherwise if (a) the expert's scientific, technical or other specialized knowledge would help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; (d) the expert has reliably applied the principles and methods to the facts of this case*" (Publ. 93-595, April 26, 2011, Effective December 1, 2011). It should be noted that the use of the word "reliable" is really closer to what mental health professionals discuss as valid.

Rule 703: Bases of Expert Testimony

> An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted, but if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs the prejudicial effect.

This rule helps clarify the role of the expert and how it is distinct from the role of a fact witness who can only testify to what he or she has personally observed. The expert, on the other hand, may rely in part on interviews with third parties or psychological test results that a fact witness may not. However, the expert can only do so if others in the same field would utilize this (if it is a standard procedure) and the *probative*

value (how important it is to the progression of the case) substantially outweigh the *prejudicial value* (how much bias it might introduce into jury deliberation or how much harm it might cause to a patient whose records are reviewed and presented in court). Initially there were those who believed that only testimony from forensic psychology experts would be considered opinion testimony, while treating psychologists would be fact witnesses. However, treating experts can give opinions on diagnoses, progression in treatment, likelihood of remission and similar issues, so they, too, can be declared experts by the judge under Federal Rule 703.

Rule 704: Opinion and Ultimate Issue

As noted before, the ultimate issue question remains controversial but the Federal Rules says that an opinion is not automatically objectionable because it "embraces" an ultimate issue. However, it continues to state an expert in a criminal case should not state an opinion about whether the defendant did or did not have a mental state or condition that constituted an element of the crime charged or of the defense. These matters are left for the trier of fact to decide. In other words, while experts may testify to a diagnosis or mental condition, such as Schizophrenia or Intellectual Disability, they are not allowed to state whether that condition led the defendant to be unable to form intent or premeditation. Often state courts do not follow this rule which is enforced primarily in Federal court cases.

Rule 705: Disclosing Facts or Data Underlying the Expert Opinion

While the fact or data require disclosure on cross-examination, the expert is not required to testify to the facts or data underlying the opinion on direct examination. However, in actual practice, the expert is usually asked what records were reviewed to assist in the formation of an opinion. Generally, then, as long as an expert is properly qualified and the methodologies used are consistent with generally accepted behavioral science techniques, testimony regarding mental disorder is welcomed by the court.

Psychological Science's Role in Admissibility Issues

Until 1962 the courts refused to permit the testimony of psychologists in forensic cases stating they did not have sufficient medical training to do so. In the case of *Jenkins v United States (1962) (307 F 2 d 637)* the American Psychological Association (APA) submitted an *Amicus Curiae* or '*friend of the court*' brief providing evidence of psychologists' education and training to diagnose and treat mental illness to the D.C. Circuit appellate court. Since that time, the APA has filed Amicus briefs in over 200 federal and state cases providing the appellate courts with scientific evidence on a variety of topics such as child abuse, disability rights, racial segregation, sexual orientation, affirmative action hospital privileges, mental health parity, gender violence, juvenile maturity and others. Many of these cases have been cited in the judges opinions having major impact on influencing their decisions. Many of these amicus briefs can be found on the APA website (www.apa.org/amicus) citing the science at that time. A recent article in the APA Monitor reviewed ten (10) of those cases most influenced by the Amicus program (https://www.apa.org/monitor/2019/12/cover-courts?utm_source=facebook&utm_medium=social&utm_campaign=apa=monitor&utm_content=psychology-changes-law).

Summary

In summary, we have discussed the legal rules for admitting clinical forensic psychological testimony in the United States courts today. Many countries follow similar standards even if they do not have the detailed written rules that govern the Rules of Evidence for each state and the Federal courts. Interestingly, once the expert's testimony is admitted into court, it's

impact on the judge or jury has just begun. First, the attorney who requests that the expert testify must develop appropriate questions to bring out the relevant knowledge to the specific case. Psychologists cannot testify to anything that is not asked of them. Secondly, the opposing attorney has the opportunity to cross-examine the expert witness to try to shake the person's credibility or even impeach him or her with contradictory materials. We discuss preparations for testimony in a later chapter. Thirdly, the judge has an opportunity to instruct the jury on the weight to give the expert's testimony when instructing the jury. Sometimes information upon which experts may base their opinion may not have been factually proven. Judges may also instruct juries to remember this during the expert's testimony. It is clear that forensic psychologists have many hurdles to overcome before they can present their opinions in individual cases but when we do get into court, what we say may educate judges and jurors to more reasoned judgments.

Questions to Think About

1. What kind of scientific criteria should a judge consider in order to admit psychological testimony in a case?
2. Should psychologists offer opinions on "ultimate legal issues"? Why or why not?
3. Should someone who is a psychic healer be allowed to testify in a case? Justify your answer.

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Part II

Understanding the Criminal Mind

4 Criminal Responsibility

Chris is a 21-year-old man who admitted to killing his roommate in a particularly violent and bloody manner. He left his body to 'rot', while taking his car for a joy ride. Later, when caught, he gave many different descriptions of what happened and could offer no reasonable explanation. 'Chris' was charged with first degree murder. His lawyers tried to understand what was in his mind when he killed his roommate. The psychological evaluation of his documented history revealed that he was brain damaged at birth, had an IQ of 70 on various intelligence tests, was physically and sexually abused as a child, and had been previously hospitalized for violent and uncontrollable behavior. One psychologist who evaluated him when he was in jail found him to be so mentally impaired that he met the state's definition of insanity while another psychologist said he was malingering and should be held responsible for the murders. How can a judge and jury make decisions about what should happen to Chris in this case?

The question of what is in the 'criminal mind' has always fascinated people including those who study psychology and the law. What does someone like Chris think about when he kills an innocent person? How does he feel at the time of the murder and afterward? Can Chris appreciate the wrongfulness of his behavior and understand the consequences? Can he control his behavior even if he does not know the difference between right and wrong? Is he the same or different from us?

Definitions

Criminal responsibility refers to an individual's mental state at the time of an offense. The absence of criminal responsibility may be adjudicated as *Not Guilty by Reason of Insanity*. Mental state at the time of the offense includes more elements than just *legal insanity*. It may, for instance, encompass other mental state defenses, such as *diminished capacity, extreme emotional distress, imperfect self-defense, justification defenses* as described in Chap. 6 on self-defense and other descriptions of *mens rea* or what was in their mind at the time of the offense.

In order for an individual to be convicted of a crime, the state must prove two elements—first, what is called the *actus reus*, or that the act itself occurred, and secondly, *mens rea*, or that a person had a mental state that resulted in the commission of the offense. Although sometimes a person may be charged with a crime even before a body is found, usually the circumstantial evidence has to be sufficient in order for the court to find what is called *probable cause* to make the legal charge. Evidence such as blood that has been cleaned can still be found using chemicals such as luminal, DNA analysis, and hair follicles,

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and other technology can also be used as part of the evidence for proving *actus reus.* Video cameras are widely used to identify defendants including those intended for other surveillance purposes. These may be used to prove that the defendant was at the crime scene even when the victim is no longer visible. However, intent may still have to be proved. For example, if a person assaulted another individual while in the midst of seizure activity, having no conscious recognition of her behavior, then *mens rea* could not be said to have existed. That behavior could then possibly be excused under the law.

Levels of Responsibility for Behavior

Along with the concept of *mens rea* is the legal system's requirement that different mind-sets be punished at different levels of responsibility. So, for instance, in Chris's case cited above, he was charged with *first degree murder* which required the state of mind or *mens rea* of specific intent or premeditation of the murders. If, in fact, it can be proven that he did not have the requisite mind-set or intent to kill the roommate but behaved in a dangerous manner and knew or should have known that the consequences of his actions would result in their deaths, then he would more properly be charged with *second degree murder*. So, intent-to-kill calls for a higher level of responsibility than killing without the intent and may be punished at a more severe level, usually by life in prison. If he killed his roommate and was intending to rob him using a gun, it may raise his charges to a felony murder and in some states he would be eligible for the *death penalty.* We discuss the legal issues in death penalty cases later in Chap. 7.

In some states, if Chris could prove that the roommate had provoked him in some way or that he was suffering from extreme emotional disturbance, then he might be convicted of *manslaughter*, which is not considered murder. *Voluntary manslaughter* is an intent crime so it requires the person to know what they did at the time, but this knowledge is influenced by their emotional state. *Involuntary manslaughter*, which is rarely used except for vehicular homicide, does not require intent, but the person was expected to know that his or her actions were reckless or dangerous. If Chris is convicted of voluntary manslaughter, he still might get a lengthy prison sentence, but it usually is shorter than a first or second degree murder conviction. Although manslaughter may require the mental state of intent, even if it is not the intent to kill, sometimes juries will compromise on this verdict when the elements of insanity are not completely met. In some countries, such as South Africa, if it can be proven that the person's mental condition caused him or her to function as an "*automaton*," without any thought at all, Chris' behavior may also be excused or he may be found guilty of the equivalent crime of manslaughter.

If Chris can prove that his mental retardation, behavioral disorders, and mental illness prevented him from knowing the difference between right and wrong and the consequences of his actions, then he may be excused from being held responsible for criminal behavior because of his mental state. This is called the insanity defense, and the jury would be asked to issue a verdict called, "*Not Guilty by Reason of Insanity*." In most states and Federal court, this verdict would result in Chris being sent to the state hospital's forensic division for treatment. In some states such as Colorado, the person is sent for an evaluation and, if found to be sane and not dangerous at that time, is not hospitalized but rather released from custody. Interestingly, in some states a forensic team in the state hospital actually performs the insanity evaluation for the prosecution and if they testify that the person is not insane but the jury comes back with an insanity verdict, then the person must be released. Although the forensic hospital is legally required to release the person when the mental illness is no longer present, this is rare when the crime is as serious as Chris'.

If Chris can prove that he killed his roommate because he feared the roommate was going to seriously harm or kill him, his actions might be considered justifiable because they were in self-defense. Battered women who kill their abusive husbands have used self-defense to justify their

actions, and they were found not guilty. This is further discussed in a later chapter on syndrome testimony.

Historical Overview of the "Insanity Defense"

The insanity defense or pleading Not Guilty by Reason of Insanity has historical roots extending back to the thirteenth century in England. Over the years there have been different ways to determine if someone should be excused for their otherwise criminal behavior. One of the earliest concepts involved the so-called wild beast test. It was believed that an individual who had no more control over her or his behavior than a wild beast should not be held responsible for criminal behavior. Another somewhat picturesque test is called the 'begat test', which indicated that if an individual were capable of procreation, then they should be held responsible for criminal behavior.

M'Naughten Standard to Determine "Insanity"

The beginning of the 'modern era' in terms of these concepts can be traced to 1843 in England. At that time, an individual by the name of Daniel M'Naughten (sometimes spelled M'Naghten or even McNaughten) according to the historical documents appeared to have an extensive delusional system. He attempted an assassination of a member of the British cabinet, but instead shot and killed the secretary of one of the cabinet members. Daniel M'Naughten was tried under the then existing insanity defense law, which was the wild beast test and was found Not Guilty by Reason of Insanity. It is a common misconception that M'Naughten (10 CL And Fin. 200 8 Eng. Rep. 718, 1843) was acquitted under the standard that bears his name rather than the wild beast standard, but the M'Naughten standard was passed into law following his acquittal. At that time, there was a huge public outcry over M'Naughten being found Not Guilty by Reason of Insanity with many people complaining that the wild beast test was too liberal and "coddled" individuals by not making them take responsibility for their actions. The House of Lords met to debate this issue and passed a more restrictive standard for an insanity defense, which became the M'Naughten test.

The M'Naughten standard consisted essentially of three components. It spoke of an individual of (1) unsound mind (what we would call having a mental disease or defect), who, by reason of this defect, was unable to know either (2) the nature and quality or (3) the wrongfulness of his or her actions.

Therefore, for an individual to be found Not Guilty by Reason of Insanity under the M'Naughten standard, they would have to establish some fairly extensive ramifications of the underlying mental illness (defect of reason). Not knowing the nature of the act essentially meant that they did not know what it was that they were doing. An individual, for instance, who is strangling someone but believes that they are squeezing a lemon rather than strangling somebody, might meet this prong of the standard. Not appreciating the quality of the act would refer to an inability to understand the consequences. In other words, an individual who might behead someone because of the belief that it would be interesting to watch that person wake up the next morning and look for their head, would not appreciate the quality of the act.

The second prong of M'Naughten referred to the inability to appreciate the wrongfulness of the act. In the House of Lords there was a great deal of debate whether wrongfulness referred to legally wrong or morally wrong. That is, could someone who knew that the act was legally wrong, that is, against the law, but at the same time felt that it was justified because of some delusional belief, fall under this prong of the test? The general interpretation was the broader one that it was moral wrongfulness rather than a mere knowledge that it was against the law that was required. The defendant, therefore, can meet the

insanity test if they demonstrate an inability to understand the fact that his or her actions offended the mores of society.

It is important to note that the M'Naughten test is mostly a cognitively based standard. The standard spoke about *knowing* the nature and quality of the act and *knowing* the wrongfulness of the act. It did not take into account broader dimensions of dealing with the person's ability to control his or her impulses at the time of the act. This is often referred to as volition because it relates to the concept of free will. There has always been a controversy over whether or not people's behavior is under their total control or if other factors interfere with their 'free will' to control themselves. M'Naughten does not deal with this issue. Despite this apparent absence of a volitional component, the M'Naughten standard became very popular. It was adopted in many countries in Western Europe and rapidly spread across the United States.

Irresistible Impulse Standard for Determining Insanity

It was not until the end of the nineteenth century that questions started to arise regarding the volitional component, namely the issue of impulse control. Around this period of time, several states in the U.S. adopted a so-called *irresistible impulse test*. This added a component to M'Naughten that dealt with the strength of an impulse to do a particular act, even if the defendant 'knew' that it was wrong. Varieties of disorders of impulse control, as well as the large majority of actions that were based on delusional beliefs, come under this definition. In other words, even if a defendant knew the wrongfulness of their actions, they could be found Not Guilty by Reason of Insanity if they were acting under a delusional belief so powerful that it rendered their controls ineffective.

The irresistible impulse tests quickly fell out of favor because there had not been sufficient attempts to define exactly how strong an impulse had to be in order to be considered irresistible. What was the difference between an irresistible impulse and an impulse that was simply not resisted? Obviously in the first one a person ***could not*** control his or her behavior, while in the second the person ***chose not*** to do so. Informally, a number of states adopted the concept of the 'policeman at the elbow test', using as the criterion whether or not someone would have committed this act had there been a police officer standing there and watching. The question, of course, is how could this be determined? In other words, unless there actually had been a police officer present at the time of the offense it would be virtually impossible to determine whether or not the offense would have been committed had there been a police officer standing there. Merely asking a defendant during the course of the evaluation whether the presence of a police officer would have deterred them certainly has major problems with validity.

The irresistible impulse standard, when it existed, was used as an add-on to the M'Naughten criteria. That is, someone could be found Not Guilty by Reason of Insanity if they had a mental disorder and they either could not know the nature and quality of the act, the wrongfulness of the act, or that they were irresistibly impelled to commit the act. No state that we are aware of ever implemented the irresistible impulse test on its own as its legal definition of insanity. Therefore, most states were left with a rather strict cognitive standard.

Using such a strict cognitive standard, however, leaves out a large number of mentally ill individuals, who commit acts based on emotional disorders including delusional thinking. They may well have known that the act was wrong but may somehow have felt that they needed to commit the act as part of their mental illness. Under a strict interpretation of this standard, there could really be no alternative except conviction for such individuals. Obviously, this would send many individuals to prison rather than the psychiatric hospital where they might be able to get some treatment for their mental

disorder. In fact, prisons all over the world have so many mentally ill inmates today that many have begun to provide treatment similar to the psychiatric hospital. We discuss these services more fully in a later chapter on psychological interventions in forensic settings.

The Durham Standard Requiring Causation or Product of Mental Illness Test

With the moving of psychoanalytic theories from the consulting room into the courtroom in the 1940s and 1950s, a number of influential jurists became convinced of the need for a new and more flexible standard for assessing criminal responsibility and the use of the insanity defense. In 1954, the Chief Judge of the United States Court of Appeals, Judge David Bazelon, authored a decision called *Durham v. the United States* (214 F. 2d. 962, D.C. Circuit, 1954). Durham provided for a much broader definition of an insanity defense than had been previously used. Judge Bazelon noted in his opinion that there was a need to extend the widest possible latitude to expert evaluation and to expert testimony. The Durham standard therefore simply stated 'an accused is not criminally responsible if the criminal act was the product of a mental disease or defect'.

Initially, the Durham test was expected to expand the range of mental health professionals' input into the criminal justice system and help the law account for previously ignored aspects of human behavior. Unfortunately, the Durham test had a number of assumptions that could not be validated. For instance, it was based on the premise that the concept of mental disease or defect is something that could easily be agreed upon by any group of mental health professionals. Clearly, this does not often occur. The second assumption was that the concept that *the act was a product of mental disease* could be easily proven. There was an implicit assumption that once a person's mental disease or defect was determined, then it could be agreed that there was a clear causal link between that mental disorder and the person's actions. In fact, this is very rarely the case.

Different professionals use different criteria to determine whether or not a particular act is caused by a particular mental disorder. In actual practice, the concept of *a product of the mental disease or defect* ranged all the way from considering a person's entire life history as possible motivators for the crime to a very narrow definition which approximates the civil litigation definition of proximate cause; that is, had the mental disorder not been present, then the crime would not have been committed.

The result of the Durham standard was that large numbers of people who had serious personality disorders were being found Not Guilty by Reason of Insanity and were being sent to psychiatric hospitals to be treated. These people were not eligible for release as their personality disorders were untreatable and so they remained in the hospital, sometimes for longer than if they had received a prison sentence as punishment for their crimes.

McDonald Modification of Durham with Definition of Mental Illness

In an attempt to address this problem, in 1962 the United States District Court for the District of Columbia issued an opinion in a case called *McDonald v United States* (*312 F. 2d 844 D.C. Circuit, 1962*). McDonald attempted to restrict the definition of mental disease or defect to any abnormal condition of the mind which substantially impaired behavioral controls. In other words, under the McDonald definition, not every mental illness could rise to the level of one that could be used as the basis for an insanity defense. Only those mental illnesses that could be demonstrated either in the definition of the illness itself or from the manifestations of that illness in a particular individual to have 'substantially impaired behavioral controls' could be considered as the basis for an insanity defense.

While McDonald successfully narrowed the definition of mental illness, it did not deal with whether the mental illness caused the person's

behavior or 'product of mental illness' as it was called in the Durham decision. In fact, the definition of 'product' never was made by the courts which may have been what led to further narrowing of the mental health professions' influence in judge's decisions about criminal responsibility. In the decade following Durham there was a growing dissatisfaction on the part of the courts about the influence of mental health professionals on judicial decisions. A psychiatrist, for example, would render an opinion that someone's crime was a product of mental illness without giving the court the basis for these conclusions. This prevented the court from making its own decision about the credibility of the mental health professional's statements. The trier of fact, the judge or jury, could only rubberstamp that conclusion rather than using the mental health professional's opinion as just one factor to reach its own opinion.

Washington Product Test and Ultimate Issue Opinion in Federal Courts

Justice Bazelon opined in the next case that many judges believed that the mental health professional was usurping the role of the trier of fact (*Washington v. United States* (*129 U.S. App. D.C. 29, 1967*)). In that case, the U.S. District Court issued an opinion stating that the mental health professional was no longer allowed to render an opinion regarding the causal connection between the mental illness and the criminal behavior. The mental health professional could only describe the development of the mental illness, the adaptation of the individual to that illness, and could state whether or not the person was suffering from that mental illness at the time of the offense. However, the mental health professional would not be allowed to address the so-called *ultimate issue*, namely whether or not the behavior in question was caused by the mental illness. That had to be a role for the judge or jury. The Bazelon opinion was only applicable to Federal Court cases, and most state courts still allow mental health professionals to give an expert opinion on causation or whatever is referred to as the ultimate opinion under their law.

ALI/Brawner Modifications Including Diminished Capacity Defenses

Even with the restrictions imposed by both *McDonald* and *Washington*, there was still great dissatisfaction in the courts with the Durham standard. Five years later, a new standard emerged in a 1972 case in Federal Court entitled *U.S. v. Brawner* (*471 F 2d 969 D.C. Circuit, 1972*). *Brawner* essentially incorporated a standard proposed earlier by the American Law Institute (ALI). This standard essentially consisted of three parts. First, as in earlier standards, there had to be the presence of a mental disease or defect (in this case, defined according to the criteria in *McDonald*). Secondly, as a result of this mental disease or defect, one of two criteria was met: (1) an inability to appreciate the wrongfulness or the criminality of one's behavior or (2) an inability to conform one's behavior to the requirements of the law.

What distinguishes this from earlier standards is that rather than it being an absolute inability to appreciate wrongfulness or an absolute inability to conform behavior, the phraseology referred to the lacking of 'substantial capacity' to do so. In other words, while the basic concepts are the same as those embodied in M'Naughten and irresistible impulse, it does provide for somewhat more flexibility because of the concept of ***substantial*** capacity. Once again, however, what exactly constitutes substantial capacity remains undefined. As a result, there have been critics of the ALI/Brawner decision that refer to it merely as 'new lyrics for an old tune', indicating that it is nothing more than M'Naughten and irresistible impulse in somewhat more modern language. There are, however, two important components in Brawner (ALI) that do not appear in earlier standards and are quite important.

The first is the statement that any mental disorder in which the exclusive manifestation is repetitive criminal activity is excluded from this standard. This, of course, addresses itself to the concept of antisocial personality disorder and the fact that under Durham people with this diagnosis were being found Not Guilty by Reason of Insanity, were being sent to psychiatric facilities,

and were basically found to be untreatable, in contrast to a mental disorder which could respond to medication and possibly to psychotherapy.

The other important contribution of ALI/Brawner was an extensive discussion of the concept of diminished capacity. In this decision, diminished capacity was regarded as some sort of condition, which could possibly include a mental disorder that resulted in a defendant's inability to form the requisite-specific intent to commit a particular offense. In other words, the mental disorder did not rise to the level required in an insanity defense in which there would be a ***complete*** absence of criminal responsibility but merely by negating the specific intent, it would essentially make the defendant responsible for a less serious crime, sometimes referred to as a lesser included offense which did not require a mental state which encompassed intent.

There has been a great deal of controversy surrounding the concept of diminished capacity. While it remains an option that may be used in federal cases, states vary widely in whether they allow it or to what extent they utilize it.

As all too often happens, bad law follows public misperception. A good example of this is the so-called Twinkie Defense in the state of California. A defendant by the name of Dan White who had been defeated for reelection in the city of San Francisco blamed the Mayor, George Moscone, and Board of Supervisors member, Harvey Milck for his defeat, and shot them to death in city hall. Testimony revealed that White had been suffering from depression and mood swings and attempted to cope with this depression by ingesting large numbers of the cupcakes called Twinkies. The media jumped on this issue of cupcakes and dubbed it the 'Twinkie Defense', when in fact it was a defense of diminished capacity based on depression, not on Twinkies. White was convicted of voluntary manslaughter rather than murder which triggered a public outrage resulting in the abolition of the diminished capacity defense in California. Several other states followed suit. In sixteen states, no offense culpability element may be negated by expert testimony regarding mental illness. Thirteen states allow testimony about mental illness only to negate a specific intent (such as in the above example of first degree murder being reduced to second degree murder or manslaughter). The remaining twenty-three states allow testimony about mental illness to negate any element. Therefore, in twenty-nine of the fifty states, testimony about diminished capacity is either not allowed or is severely limited (Shapiro & Walker, 2019).

For instance, if a defendant could be shown to suffer from a condition in which they 'fly off the handle' or over-react to minor stimulation, such as in an intermittent explosive disorder, one could argue that this individual did not intend to assault or kill someone else but that they suffered from a diminished mental capacity. These defenses of diminished mental capacity could be used in cases in which a particular mental state is a necessary element of the criminal charge. For example, a first degree murder charge would require the presence not only of malice but premeditation, also. If it could be shown through a diminished capacity defense that this crime was committed by someone who was perhaps in a rage that was related to an explosive disorder, then one might argue that there was no premeditation and that therefore the person could only be convicted of second degree murder. If the same argument could demonstrate that neither the premeditation nor malice existed, then the person may only be convicted of manslaughter. It should also be noted that these particular mental states are a subset of a larger group of conditions that could include matters such as addiction and substance abuse. In short, it would refer to any condition that would reduce the ability of an individual to form intent or to premeditate (Table 4.1).

Hinckley and Its Aftermath

With these modifications, the Brawner standard worked relatively well until 1981, when John Hinckley stood trial for the attempted assassination of President Reagan, a Secret Service officer, Press Secretary James Brady and a district of

Table 4.1 Status of insanity defense

State	Standard	Burden
Alabama	M'Naughten	Defendant
Alaska	M'Naughten	Defendant
Arizona	M'Naughten	Defendant
Arkansas	ALI	Defendant
California	M'Naughten	Defendant
Colorado	M'Naughten and irresistible impulse	State
Connecticut	ALI	Defendant
Delaware	ALI	Defendant
District of Columbia	ALI	Defendant
Florida	M'Naughten	State
Georgia	M'Naughten	Defendant
Hawaii	ALI	Defendant
Idaho	Abolished insanity defense	
Illinois	ALI	Defendant
Indiana	ALI	Defendant
Iowa	M'Naughten	Defendant
Kansas	Abolished insanity defense	Substitutes *mens rea* test
Kentucky	ALI	Defendant
Louisiana	M'Naughten	Defendant
Maine	ALI	Defendant
Maryland	ALI	Defendant
Massachusetts	ALI	State
Michigan	ALI	State
Minnesota	M'Naughten	Defendant
Mississippi	M'Naughten	State
Missouri	M'Naughten	Defendant
Montana	Abolished insanity defense	
Nebraska	M'Naughten	Defendant
Nevada	M'Naughten	Defendant
New Hampshire	Durham	Defendant
New Jersey	M'Naughten	State
New Mexico	M'Naughten and irresistible impulse	State
New York	ALI	Defendant
North Carolina	M'Naughten	Defendant
North Dakota	ALI	State
Ohio	M'Naughten	Defendant
Oklahoma	M'Naughten	State

(continued)

Table 4.1 (continued)

State	Standard	Burden
Oregon	ALI	Defendant
Pennsylvania	M'Naughten	Defendant
Rhode Island	ALI	Defendant
South Carolina	M'Naughten	Defendant
South Dakota	M'Naughten	Defendant
Tennessee	ALI	State
Texas	M'Naughten and irresistible impulse	Defendant
Utah	Abolished insanity defense	
Vermont	ALI	Defendant
Virginia	M'Naughten and irresistible impulse	Defendant
Washington State	M'Naughten	Defendant
West Virginia	ALI	State
Wisconsin	ALI	Defendant
Wyoming	ALI	Defendant

Columbia police officer. Hinckley was found Not Guilty by Reason of Insanity in Federal Court, but many of the background pieces of this are not well known.

In most state laws, the burden of proof in establishing an insanity defense is on the defense. That is, the defense must demonstrate by a preponderance of the evidence (slightly more certain than not) that a given defendant met the criteria for an insanity defense. This is what is known in the law as an affirmative defense. Until the legislative reform that occurred in 1984, federal law and the laws of some states such as Colorado presented somewhat of an anomaly.

Prior to Hinckley, in federal law, once the 'threshold' was crossed and a judge ruled that there was enough evidence that an insanity defense could be raised, the burden of proof shifted to the prosecution, that is, to the government to prove *beyond a reasonable doubt* that the defendant was sane. This became an almost impossible burden to carry when there was any kind of conflicting expert testimony. In other words, a jury would have to be totally convinced that everything that defense expert witnesses said was totally without credibility in order to find a person sane under the law because beyond a reasonable doubt is an exceedingly high level of proof. Therefore, many legal scholars have suggested that Hinckley's acquittal, Not Guilty by Reason of Insanity, was, in fact, an artifact of federal law at the time of the trial, rather than really being indicative of Hinckley's actual mental state.

Following the Hinckley verdict there was a public outcry that bore striking similarities to the public outcry following the acquittal of Daniel M'Naughten almost 140 years earlier. There were assertions that we were coddling criminals and that vast numbers of people were 'getting off' by reason of insanity. In fact, several studies done immediately following the Hinckley trial revealed that many samples of the American population believed that anywhere from 45 to 75% of criminal defendants were found Not Guilty by Reason of Insanity. This is a remarkable misperception in light of the fact that the figures remained quite consistent; only one out of one hundred criminal defendants raised the insanity defense, and of that one percent only one-quarter are successfully found Not Guilty by Reason of Insanity. What makes this misperception even more remarkable is that the vast majority of this group are defendants who are so

mentally disordered that the state usually agrees to a *stipulated* or uncontested insanity defense. In other words, a very tiny percentage of defendants are successfully acquitted in a contested insanity defense. Nevertheless, the public misperception led to a variety of congressional hearings, legislative proposals, and attempts at legislative reform of the insanity defense.

At this time, the United States Congress held hearings in the hopes of being able to reform the insanity defense. This led to a variety of position papers from different professional organizations. The American Medical Association had a rather simple position paper which recommended the abolition of the insanity defense. The American Bar Association proposed two different concepts: the first to change the level of proof and the burden of proof in insanity cases. As will be recalled from the previous discussion, in the Federal courts (and in some state courts), the burden of proof was on the government to rebut insanity beyond a reasonable doubt. This proposal from the American Bar Association suggested that the burden of proof be placed back on the defense and that the level of proof that someone meets the insanity test be at clear and convincing evidence. The second component from the position of the American Bar Association was that the volitional prong of the ALI/Brawner standard should be eliminated. This meant that the part of the ALI/Brawner standard that required an inability to conform one's behavior to the requirements of the law should be deleted.

The American Psychiatric Association proposed the elimination of the volitional part of ALI/Brawner standard because they believed that there was insufficient empirical and scientific knowledge that could address the strength of impulse control. It is, of course, somewhat curious reasoning since this did imply, restricting the insanity defense to the cognitive prong, that we do, in fact, have empirical and scientific ways of measuring appreciation of wrongfulness. However, given the public misperception about the overuse of the insanity defense as discussed earlier, there is no way to know how much politics played a part in this decision. The second part of the American Psychiatric Association's position was that the definition of mental illness must refer to a 'severe' mental illness which they defined as one that substantially and demonstrably impaired perception and judgment. The American Psychological Association (APA) also was approached for a position paper, but it never did produce one, contending that more research needed to be done before the question could be adequately addressed.

Insanity Defense Reform Act of 1984

In 1984, the United States Congress passed the Insanity Defense Reform Act [18 USC 20 (a)(b)] which in essence embodied the major components put forward by both the American Bar Association and the American Psychiatric Association. In this act, a defendant was considered not criminally responsible if, by reason of a severe mental illness, the defendant lacked the ability to appreciate the nature and quality or the wrongfulness of the criminal act. This is, of course, a return to a very strict M'Naughten standard and, in fact, could be seen as even more narrow than the original M'Naughten, because it requires the presence of a "severe mental illness". The Insanity Defense Reform Act also accepted the position of the American Bar Association that insanity should be an affirmative defense, that the burden was on the defense, and that the level of proof that the defendant is insane needed to be "clear and convincing evidence". It reiterated the prohibition against mental health professionals rendering an opinion on the ultimate legal issue in Federal court. Interestingly, the law established parity between psychologists and psychiatrists in conducting clinical forensic evaluations by specifically referring to psychiatric or psychological evaluations and testimony.

As a result of this new and highly restrictive insanity defense in Federal court, coupled with the public misperception of insanity acquittals being on the rise, approximately two dozen states have now changed their statutes to reflect this more restrictive standard. As in the past, large numbers of mentally ill individuals are now being sentenced to prison terms rather than

Table 4.2 Major cases and their significance

Case	Legal outcome
M'Naughten	Origin of the right/wrong test for insanity
Durham	The product case: Insanity occurs when a crime is the product of a mental disease or defect
McDonald	Legal definition of mental disease or defect
Washington	Ruling that experts could not address ultimate issue of causation in insanity cases
Brawner	Restatement of M'Naughten and irresistible impulse combined
Jones	Court ruled that length of prison sentence is unrelated to length of treatment
Foucha versus Louisiana	Cannot keep a person in the hospital once mental illness has been successfully treated even if still dangerous due to a personality disorder

receiving adequate treatment in psychiatric facilities. Studies have indicated that approximately 18–25% of the prison population is composed of people with severe mental illness diagnoses. These numbers are much higher if we include people who have substance abuse disorders in those who need mental health treatment. Consider the following example of an actual recent case in Federal court:

> The defendant had developed an extensive delusional system about his neighbor, who happened to be a Federal judge. The defendant believed his delusion that the judge was pursuing him sexually and, when he "rebuffed" the judge's advances, the judge set out on a campaign to destroy the defendant. The defendant, in fact, was becoming progressively more psychotic, resulting in his being fired from his job and his girlfriend ending their relationship. He became convinced the judge had engineered his job loss and the dissolution of his relationship. He decided that he had to stop the judge before the judge destroyed him. He attempted to firebomb the judge's house. However, he waited until nightfall, dressed himself in black and took a circuitous route to the judge's home to avoid detection. Under the new law, this psychotic young man was held criminally responsible because his attempts to avoid detection indicated that he "appreciated the nature and quality and the wrongfulness of his actions". The fact that the crime was clearly motivated by a psychotic delusion was not relevant to the criteria used in the change of the law from 1984.

Of some note, in 2012, the United States refused to grant a *writ of certiorari* in a case called Delling, which argued that the state's elimination of the insanity defense was unconstitutional. In March of 2019, the Supreme Court did grant *certiorari* to a case from Kansas entitled Kahler, arguing essentially the same constitutional issues; at the time of the preparation of this chapter, Kahler has not yet been ruled upon. In short, twenty-five states follow M'Naughten and four have abolished the insanity defense, three of them allowing Guilty Plus Mentally Ill pleas. Twenty-one states have ALI, and one state has Durham. The majority of states use preponderance of evidence for the level of proof with the burden of proof being on the defendant. Ten of the fifty states have the prosecution carry the burden beyond a reasonable doubt. In the federal jurisdictions and in Arizona, the defense must establish insanity by clear and convincing evidence (Table 4.2).

Length of Confinement When Found Not Guilty by Reason of Insanity

Another intriguing issue was the length of time that people could be held in a state hospital when found Not Guilty by Reason of Insanity. In a 1983 USSC ruling (*Jones versus U.S.*, 463 U.S. 354, 1983), Michael Jones' attorney suggested that a defendant who had been found Not Guilty by Reason of Insanity should not be kept in a mental hospital any longer than the maximum time of sentence had they been convicted of the same underlying offense. Michael Jones had been found Not Guilty by Reason of Insanity of a

misdemeanor charge and eight years later was still psychotic, so he remained in a mental hospital. Had Michael Jones pled guilty or been convicted of his charge, which was petty larceny, he probably would have been released within a year.

The USSC ultimately ruled that there was no necessary connection between the length of his possible sentence and the length of the treatment, since one was for punishment and the other for treatment. Therefore, according to the USSC, the length of time of the underlying sentence was irrelevant to the length of time of the commitment for treatment of the mental disorder. In Jones, the USSC also spoke of the fact that there was a "continuing presumption of dangerousness" when anyone is found Not Guilty by Reason of Insanity, and therefore the burden had to be on the defendant to demonstrate that they were no longer mentally ill and no longer a danger to self or others.

In 1992, the USSC, in a case called *Foucha v. Louisiana* (112 S.C. 1780, 1992), dealt with the issues of remission from a mental disorder in an individual who was found Not Guilty by Reason of Insanity but who still had an underlying personality disorder that made him dangerous. The USSC ruled that such an individual could not be kept within a mental hospital and would have to be released, even though regarded as potentially dangerous. Immediately, there was concern that many dangerous people would be released from mental hospitals and commit further crimes. To avoid this possibility, at least two states, California in *People v. Superior Court* (*Williams*, 284 Cal. Rptr. 601, Cal. Ct. App. 1991) and Colorado in *Colorado v. Hilton* (902 P.24, 883, 1993), redefined antisocial personality to be a mental illness, which would then justify keeping such individuals in a psychiatric facility even if the mental illness went into remission. In another case, in the state of Wisconsin (*Wisconsin v. Randall*, 532 N.W. 2d, 94, 96 N.2, 1995) the state argued that their statutory scheme was distinct from Foucha as, unlike Louisiana, it had a treatment program which addressed the defendant's dangerousness and therefore they could justify keeping the person in the mental hospital until the treatment program was complete.

Guilty but Mentally Ill Laws

As noted above five states abolished the insanity defense and approximately twelve states added a new possible verdict to their criminal law entitled *Guilty but Mentally Ill*. Here the jury needs to make two independent findings: first that the defendant was mentally ill and second that the defendant committed the offense. The jury would not be called upon to state that there was a causal connection between the two. A defendant who is found Guilty but Mentally Ill would be sentenced to a fixed prison term related to the offense itself, but then would serve part of that prison term in a psychiatric facility until such time as the mental illness was determined to be in remission. Then, the defendant would be transferred back to the Division of Corrections to serve the remainder of the sentence. In practice, meaningful treatment was rarely provided and therefore, those found Guilty but Mentally Ill were kept warehoused in the mental hospital until their sentences were completed.

The Guilty but Mentally Ill concept was first incorporated into law in Michigan in 1975. This law came about as a result of a court ruling in which sixty-four patients who had been found Not Guilty by Reason of Insanity, were released because, according to the psychiatric evaluations, they had regained their sanity. Two of these patients committed violent crimes shortly after their release. This led to the formation of the Guilty but Mentally Ill plan. The Michigan statute was followed by similar statutes in twelve other states.

Certainly, the law came about in the wake of violent acting out by insanity acquittees who had been released. However, many mental health professionals believed this to be a positive turn of events because defendants who were mentally ill, but did not fit the narrow criteria for being found Not Guilty by Reason of Insanity, could now

receive some treatment. Unfortunately, this rarely worked out as the treatment programs were often ineffective, and in fact, these individuals were not provided treatment to the same extent as the other patients in the hospital. Furthermore, three of the twelve states that adopted Guilty but Mentally Ill also had capital punishment and someone found Guilty but Mentally Ill could in fact be executed.

In light of the concern about the insanity defense some rather striking differences emerged from these controversies.

As noted earlier, in the post-Hinckley era, several states also abolished the insanity defense: Kansas, Montana, Idaho, and Utah. In Kansas there does not appear to be a mental health plea available at trial, but issues surrounding mental illness (such as inability to form intent) may be able to be introduced at the time of sentencing. Montana abolished the insanity defense, but allowed a plea of Guilty but Mentally Ill. This was also true in Idaho and Utah. Utah also allows testimony regarding inability to form intent. Nevada followed suit, but the law was found to be unconstitutional by the state supreme court (Finger v. Nevada 27 P. 3d, 66, 68, Nevada 2001).

In Idaho, a defendant named Delling challenged the constitutionality of the state's abolition of the insanity defense. This challenge was denied by the state supreme court, largely based on the fact that the state retained a *mens rea* defense even after they abolished the insanity defense. Delling appealed to the USSC which denied *certiorari* (meaning that it would not review the case (133 S.Ct., 504, 2012). Currently another similar case was argued in the USSC, and the decision is pending *(Kahler v. Kansas*, 2019).

Finally, in *Clark v. Arizona* (*126 S.Ct. 2709, 2006*) the defendant challenged the overly narrow definition of the insanity defense in Arizona. Arizona had adopted McNaughten but narrowed it by only allowing testimony about knowledge of wrongfulness, eliminating the prong dealing with inability to appreciate the nature and quality of the act. Clark argued that this restriction violated his due process rights under the U.S. Constitution. The USSC ruled, however, that this restriction did not violate due process reasoning that inability to understand the nature and quality of the act was subsumed under inability to appreciate wrongfulness.

What Is the Meaning of Wrongfulness?

Ever since the acceptance of the M'Naughten standard, there has been discussion in legal, judicial, and psychological writings about the meanings of the terms 'knowledge of wrongfulness' and 'appreciation of wrongfulness'. The language used in the original standard was 'knowledge' though later issues of the standard (e.g., Insanity Defense Reform Act of 1984) used the words 'appreciation of wrongfulness'. Knowledge is often used to connote the actual cognitive knowledge, e.g., Is this wrong? Is it against the law?, while appreciation is most frequently used in a broader sense, including a discussion of mental conditions that might impair the strict cognitive knowledge, for example, an individual who knew that killing someone was against the law but felt that they had to do it because of a delusion that the other person was trying to kill them. It could be said that while they ***knew*** the wrongfulness, they could not ***appreciate*** it because in their delusion they were acting in self-defense. In fact, even in the original formulation of the M'Naughten standard, the broader definition was hinted at because there was a discussion of the fact that there was a difference between knowing that something was illegal and knowing it offended the mores of society.

Despite this broader interpretation, we still observe the widespread use of the more narrow concept of knowledge of wrongfulness. For instance, in the recent trial of James Holmes in Colorado (the man who shot and killed twelve people in a movie theater) the prosecution essentially conceded that Holmes was severely mentally ill. Even the experts called by the state agreed that he suffered from a profound mental illness. The essence of the prosecution's

argument made in opening and closing statements, as well as in the examinations of the experts, was that Holmes had criminal intent, despite his mental illness. He carefully planned his actions and carefully planned an escape route, knowing that the police would be pursuing him. The prosecution never challenged the fact that Holmes' actions were based on severely distorted and delusional thinking, only that he knew that his actions were wrong.

The fact that different interpretations of the same basic facts can result in radically different opinions regarding criminal responsibility was also illustrated by the trial in 2004 of Andrea Yates, who was charged with drowning her children in a bathtub due to extensive delusions and hallucinations that the devil was in her and that she had to kill her children in order to get them away from the influence of the devil. The expert for the defense, Dr. Phillip Resnick, opined that the delusional motivation was a substantial enough issue that Ms. Yates could not appreciate the wrongfulness of her behavior, believing that it was necessary and actually beneficial to protect her children from the influence of the devil. Dr. Park Dietz, the expert for the state, laid emphasis on the fact that it was the devil and not God who was the center of the auditory hallucination and for that reason, knowing that she was responding to an evil influence, she must have appreciated the wrongfulness of her behavior. Dr. Dietz was also a consultant to the television show, *Law and Order*, which had, he testified, an episode in which a woman with a postpartum psychosis killed her children and was found Not Guilty by Reason of Insanity. In fact, this episode was never aired, so Ms. Yates having gotten her ideas about killing her children from a television show (as Dr. Dietz asserted) could not have been accurate. Her conviction was reversed on appeal and remanded for a new trial based on the Texas appellate court's ruling that allowing such faulty testimony could clearly have influenced the jury. At her second trial, Ms. Yates was found Not Guilty by Reason of Insanity.

While there could be many other examples of cases in which there are differing expert opinions, the question arises whether this 'battle of the experts' sometimes over the finest of minutiae is the best way of dealing with mentally ill defendants. Clearly, in the examples given, both Mr. Holmes and Ms. Yates were severely mentally ill. Does it really make any rational sense to say that the disposition of the rest of their lives should really be left to a difference of psychological or psychiatric opinions regarding whether or not they could appreciate the wrongfulness of their actions? Clearly, mental illness is far more complex than this one issue, so why restrict the final opinion on criminal responsibility to just 'appreciation of wrongfulness'? There is a clear need, in the opinion of the authors, to consider a far broader array of mental health factors when dealing with cases in which crimes are committed by those suffering from a serious mental disorder.

There is essentially a "lack of fit" between the legal criteria and what we know about the complexities of severe mental illness and mental disabilities. For example, there has been a growing acceptance of neuroscience in court determinations as we learn more about how the brain develops. As noted in the later chapter regarding assessments of juveniles, the USSC took notice of a brief submitted by the APA regarding the limitations of brain development in adolescents. However, this more sophisticated understanding of neuroscience has not carried over into determinations regarding the insanity defense. There is no part of the human brain that deals with knowledge (or even appreciation) of wrongfulness. Yet the legal criteria for a finding of Not Guilty by Reason of Insanity rely on outmoded notions of how mental illness affects the brain. These criteria do not correspond to the clinical evaluations on which we base our opinions. This is compounded by further problems as well.

When an expert tries to present the full picture of mental illness to the jury, they are often prohibited from doing so. For instance, one of the authors (LW) had diagnosed a defendant as suffering from post-traumatic stress disorder and was attempting to describe to the jury the diagnostic criteria for this PTSD, including, in this

defendant's case, episodes of dissociation. The prosecutor objected to this testimony, arguing that the state did not allow any testimony regarding *diminished ability to form intent*. While that was not the purpose of LW's testimony, the trial judge sustained the objection noting that description of dissociation would come too close to *diminished capacity* and would therefore confuse the jury. Later the judge's ruling was overturned by the state appellate court. In a similar manner, DS had diagnosed an individual as suffering from paranoid schizophrenia. The prosecutor used stereotypes of mental illness in his cross-examination of DS, noting that the defendant was not foaming at the mouth and his eyes were not bugging out of his head. Based on this inaccurate description of mental illness, the defendant was convicted. These examples unfortunately are all too common and tend to hamper any attempts to present an accurate view of mental illness in courts.

Summary

The identification of those who commit antisocial acts as either 'mad' or 'bad' has troubled the legal and mental health professionals for quite some time as we discussed in this chapter. Although only a very small percentage of those who commit these crimes are found Not Guilty by Reason of Insanity and even fewer of those who are successful are ever released from the forensic psychiatric facility, the general public believes that many more are 'getting away with murder' by using this defense. Yet, our legal system is based on *mens rea*, or what is in the mind of the actor. In most cases, the insanity defense fails as the burdens imposed by the law are so difficult to meet. If the definition of who is eligible to be excused for their crimes becomes broader, more criminals would be sent to psychiatric hospitals rather than prisons. As the definition becomes stricter, more mentally ill criminals remain in the prison system. Rarely do those who are mentally ill get appropriate treatment whether in prison or the psychiatric hospital. For those for are eventually released from prison, the risk of recidivism remains high especially in those individuals whose mental illness contributed to the commission of their crime.

Questions to Think About

1. Should the insanity defense be abolished? Why or why not?
2. Describe your concept of the ideal insanity defense that will guarantee that mentally ill people will receive treatment yet does not "open the flood gates" to a variety of less serious conditions.
3. If a defendant were found Not Guilty by Reason of Insanity, how long should they be confined in a psychiatric hospital?

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5 Competency to Stand Trial

In the last chapter we learned how the criminal justice system provides for someone who commits a crime without having the requisite mental state. In this chapter we shall learn about what happens to someone who is mentally ill and cannot understand their charges or the court proceedings or cannot help her or his attorney provide a defense. While this is a separate issue from mental state at the time of the offense, sometimes a person who is found to have been insane at the time of the offense had also been found incompetent to proceed to trial at an earlier time. Assessing the person's mental state at a particular time after being charged with a crime is called "competence to stand trial," and we have developed some basic rules that must be followed so that the person is treated fairly. Remember, in the Common Law legal system the U.S. and other countries have adopted, a person must be considered innocent until proven guilty. This process cannot occur if the person cannot assist the attorney at trial.

The individual's competence to stand trial, then, is perhaps the most basic question the criminal justice system must first determine. This concept grows out of the belief that an individual cannot be tried "in absentia." In other words, a defendant is entitled to be present at their trial. This is understood to mean that the person has to be mentally as well as physically present. However, what constitutes mental presence can differ from one examiner to another, especially if a person is seen at different times. One well-known example is Colin Ferguson.

> Colin Ferguson, shot 19 people on the Long Island Railroad train in which he was riding because he believed white people were plotting against him. Of course, this belief was the product of a delusional disorder. His behavior during the televised trial indicated that he was responding more to his own peculiar delusional internal stimuli than to reality most but not all of the time. This is the nature of many severe mental illnesses; the illness is not always observable. Mental health professionals who were appointed by the court performed a competency evaluation and based on their findings, the judge found him competent to stand trial despite the delusional disorder. As part of his delusional disorder, he believed his attorney was also plotting against him and he petitioned the court to represent himself. The trial court ruled that he was entitled to serve as his own attorney (pro se). It was clear that his cross-examination of witnesses, (many of whom were shot by him) observers, or were family of those killed, both caused these people great harm and did nothing to provide himself with a reasonable defense. Was he really competent to represent himself or even assist an attorney so he could receive a fair trial? Can a person with a severe mental illness such as a delusional disorder that interferes with thinking and judgment be expected to make reasonably competent decisions such as whether to choose to

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use insanity or some other type of defense? These are questions mental health experts are often asked by the court.

Dusky Criteria

The basic criteria for competency to stand trial were elaborated in a United States Supreme Court case in 1960 entitled *Dusky v. U.S.* (*362 U. S. 402, 1960*). The *Dusky* criteria for competency were essentially quite straightforward. A defendant had to have both a rational and factual understanding of the proceedings and be able to assist counsel with a reasonable degree of rational understanding in order to move forward to trial. Prior to the setting down of the *Dusky* criteria, there were no firm criteria and often a simple mental status examination had been used to determine a defendant's competency. This is inadequate because someone whose behavior is related to their mental illness may seem rational and factual one minute and psychotic the next. However, many jurisdictions still do not specify the criteria that can cause the defendant to be declared incompetent to proceed to trial (ITP), relying instead on the mental health professional's opinion. Without having to meet specific criteria on which to base a psychological opinion, mental health professionals are in danger of being considered "hired guns," offering opinion based on what the state or defense want to hear, depending on who hires them.

In the *Dusky* criteria, *factual understanding* refers only to the defendant's understanding of the charges against him or her. That is, can the defendant tell the examiner what the charges against him or her are? Assessing whether the defendant has the rational understanding of his or her charges is somewhat more complex as it involves an understanding of such concepts as the role of various people in the courtroom setting (defense attorney, prosecutor, judge and jury), the different pleas available and their consequences and a general appreciation of the seriousness of the charges.

Ability to assist counsel refers to the quality of relating to one's attorney and whether or not there is evidence of any significant mental disease or intellectual or organic impairment that would interfere with effectively being able to assist one's attorney in one's own defense. For instance, if a defendant believes that defense counsel and prosecutor are part of a plot against them, it would appear that there should be serious doubts regarding that individual's ability to assist that attorney due to a delusional disorder. In a similar manner, if the defendant's mental illness is of such a severity that the defendant is constantly distracted by hallucinations and is unable to follow the chain of evidence, then this also would raise issues regarding the defendant's ability to assist counsel. If there were some sort of organic impairment, such that the defendant could not "shift mental set" and thus, constantly perseverated on one piece of information, this again would raise questions regarding ability to assist counsel.

Clearly, from the above discussion, one can see that the ability to assist counsel is one of the most difficult to evaluate in conducting a competency to stand trial examination. Many defendants possess both a factual and rational understanding, but because of their mental illnesses, have great difficulty assisting counsel in their own defense. If a defendant is found competent to stand trial, that is usually the point at which the examiner would cease having contact with that defendant, unless, of course, a sanity evaluation was also performed and there was need for further testimony regarding defendant's mental state at the time of the offense.

Restoration of Competency

If the judge finds the defendant incompetent to stand trial, then another mental health professional may be asked to determine if competency can be restored and how that should be done. In some states, such as Florida, the second part is performed at the time of the first evaluation by the same mental health professional as part of the opinion about competency. In some jurisdictions the defendant is automatically committed to a state psychiatric facility and a mental health team

there may opine about the possibility of restoration to competency. In many jurisdictions, the numbers of mentally ill defendants declared incompetent to proceed have strained the system so that those who have been charged with committing non-violent crimes and are not deemed to be a danger to themselves or others, may be released into the community and required to attend competency restoration groups there. Many of these individuals are seriously mentally ill and may never be restored to competency. Depending on the jurisdiction, the period of treatment in order to restore the individual to competency can vary rather significantly in terms of length of time. Generally, if a treatment program is successful and the defendant is restored to competency, the individual is returned to the jail and proceeds to trial. If, on the other hand, the report is that the defendant remains incompetent to stand trial, then the defendant will either remain locked up or under court supervision for further treatment, depending on his or her dangerousness. After a specified period of time, usually five to seven years, charges may be dismissed and the defendant is released back into the community. Again, if the defendant still meets the criteria for civil commitment, they can be remanded back to the hospital until such time that person is found no longer to be a danger to him or herself or others.

An important question to consider is whether a mentally incompetent defendant could be held indefinitely within a psychiatric facility solely because they are not competent to stand trial. Remember, our legal system guarantees everyone a constitutional right to a speedy trial. If, in fact, a defendant can be kept indefinitely in a mental hospital, we are essentially creating what is called a "separate class of individuals" who are not entitled to their constitutional rights because of their mental illness. These individuals were accused of committing a crime but must still be considered innocent because they had not had a trial. It was only time before the question of how long an individual may be retained in the hospital would come to the attention of the U.S. Supreme Court (USSC) which, as we have seen before, reviews cases with issues that represent possible violations of the U.S. Constitution.

In 1972 that case finally came before the USSC. In *Jackson v. Indiana* (*406 U.S. 715, 1972*), the USSC ruled that a defendant who was mentally incompetent could not be indefinitely hospitalized solely on the grounds that they are incompetent. The defendant could remain in the hospital only for that period of time necessary to determine whether or not they would regain competency within the foreseeable future. If, in fact, this can be determined, the Court will generally grant an extension of the period of treatment. If it is the hospital or clinician's opinion that the defendant is "*unlikely to regain competency in the foreseeable future*," the defendant should then either be committed to a secure facility in the civil system or released from confinement. That is, if this individual satisfies the criteria for involuntary commitment (danger to self or others as a result of mental illness), then that individual can be civilly committed. If, on the other hand, this individual, while perhaps psychotic, has not acted in any violent or self-destructive manner, even if the person's behavior is controlled by placement in maximum security confinement on heavy medication, then that individual must be released.

This, of course, poses some rather troubling questions for the criminal justice system in which an individual who has serious criminal charges may have to be released and never stand trial on those charges because of a mental illness. While it is rare, there are certain cases in which such individuals have, in fact, been released and have committed further criminal offenses based on the very same mental disorder which was rendering them incompetent to stand trial.

An example of this was a defendant seen by one of the authors (DS) several years ago. The defendant had an elaborate delusional system about satanic rituals and black masses. This delusional system interfered with his ability to assist counsel since he had incorporated his attorney into the delusional system. The defendant was declared incompetent to stand trial and unlikely to regain competence within the foreseeable future. Several attempts to medicate him had been unsuccessful, with the delusional

system remaining intact. The defendant then informed the staff that he had "discovered" that the Catholic Church was behind all of his problems and that as soon as he left the hospital he was going to bomb churches and kill priests to "get them before they get me." The case was presented in front of the Mental Health Commission who was to decide if the defendant could be released or continue to be held in the secure hospital, emphasizing that this individual represented a danger to others because of his delusional system. Nonetheless, the Commission ruled that he had not, in fact, acted on the basis of this delusional system and therefore he did not constitute an imminent danger to self or others. He was released from the hospital. Six weeks later he slit the throat of a homeless individual whom he perceived in his delusional state to be a paid assassin from the church.

Treatment for Restoration to Competency

There are different treatment models that are popular in terms of restoring an individual to competency to stand trial. The most popular method is administration of anti-psychotic medication which usually will alleviate the symptoms of severely distorted psychotic thinking and allow the individual to more rationally process information needed in order to be considered competent for trial. Another method, often used in conjunction with medication, is attendance at a competency restoration group. A third method is individual psychotherapy with a specific goal to help the individual regain competency rather than simply treat his or her mental illness. Some individuals are recommended to all three of these options.

Competency Restoration Groups

Jails, out-client settings, and forensic psychiatric hospitals all utilize competency treatment groups in which the basic elements of competency to stand trial are in essence "taught" to the mentally incompetent defendant. These groups may also be utilized by mental health professionals in outpatient settings if the charges are not serious and the defendant is not found to be a danger to him or herself or others. Unfortunately, it is common for defendants in these groups to learn to state the elements of competency through pure rote memory without any true *rational or factual* understanding. So, when asked what the prosecutor's, defense attorney's or judge's job is, they can name them but not really understand what it means. Typically, these defendants do not understand the adversarial nature of the court system so all the players seem likely to either help or hurt him or her. It is the job of the forensic examiner to go beneath the surface when such individuals have been in these competency restoration groups to determine whether there is a true understanding or whether the defendant is merely repeating words heard in the group.

As noted earlier, the preferred mode of treatment is with anti-psychotic medication even when treatment groups are utilized. Interestingly, psychotropic medications are readily available in the jails and prisons, often used to control the growing mentally ill population. Unfortunately, the choice of drugs is usually from a formulary that is chosen primarily for cost effectiveness. The use of psychotropic medication raises problems in some courts in which judges are concerned that they are dealing with "drug-induced competency." Others believe that it is not "drug-induced competency" but rather the alleviation of the psychotic symptoms that were interfering with a defendant's competency that represents the central issue. As soon as the defendant stops taking the medication, their mental illness will return and competency may again be at issue. Obviously, some defendants do not want to be restored to competency so they can remain hospitalized or even out of custody while attending treatment groups until the time lapses for their prosecution. In some cases, their defense attorneys want to get the case to trial as the penalties may be less time served in jail than spent in the forensic hospital. Or, the defense attorney may be concerned that the defendant may not be able to stay off street drugs or otherwise stay out of trouble if placed on probation and in the community. Thus, it is important for the forensic expert to conceptualize all methods of restoration to competency without the interference of politics.

Right to Refuse Medication

The use of medication to assist a defendant in regaining competency poses some other problems as well. The defendant may, on some occasions, refuse the medication. There is, in fact, a long body of case law that supports a patient's right to refuse treatment. However, until the late 1980s, these cases dealt exclusively with civil commitment as opposed to criminal commitment patients. In 1987, the first case of right to refuse treatment of a mentally incompetent patient with criminal charges was reviewed by the Fourth Circuit Court of Appeals. In a case entitled *Charters v. United States,* (*829 F. 2d 479, 4th Circuit, 1987*) the trial court initially ruled that the defendant had a right to refuse medication. This caused a great deal of consternation among not only mental health professionals who felt that their hands would be tied in terms of their treatment efforts, but also by the criminal justice system. Recall in our discussion above that under *Jackson v. Indiana*, if a defendant were unlikely to regain competency within the foreseeable future they would have to be civilly committed or released.

If one were to follow the *Charters* reasoning to its logical conclusion, a non-violent, psychotic defendant who refused medication would remain incompetent to stand trial. This defendant would be unlikely to regain competency but as long as they did not act out in a violent or self-destructive manner, they would not qualify for civil commitment. In fact, under *Charters* a defendant could be released from the hospital without ever having to fact trial on the criminal charges. Obviously, civil libertarians would applaud this outcome while those with a prosecutorial mind would find it objectionable. The difficulty here is the room for a competent defendant who feigns mental illness to manipulate the system. *Charters* was ultimately reversed on appeal citing deference to professional medical judgment provided that there were procedural safeguards in place.

Another intriguing issue, which went as far as the USSC, dealt with a defendant's right to refuse medication during the course of a criminal trial. In a case entitled *Riggins v. Nevada* (504 U.S. 127 1992), the USSC ruled that a defendant had a right to refuse medication at the time of trial unless taking the person off medication would render her or him an imminent danger to self or others. The Court noted the adverse side effects that anti-psychotic medication can have including irreversible tardive dyskinesia, a movement disorder. The issue of whether or not refusing medication might result in the defendant's continued incompetency was not addressed satisfactorily by this Court. One of the opinions, in fact, stated that medication might be forced on the defendant to restore her to competency only if there were no other treatment methods that could possibly restore the competency. It was clear that this particular jurist did not feel that medication was the only means of restoration to competency.

A case heard during the 2003 USSC term was *U.S. v. Sell* (*282 F. 3d 560, 8th Circuit, 2002*). Sell was a dentist charged with criminal fraud for misfiling Medicaid reimbursement requests. He was found incompetent to stand trial due to what was diagnosed by mental health professionals to be a delusional disorder. The doctors at the forensic psychiatric hospital where Sell was in custody sought to place him on anti-psychotic medication but Sell refused. The government's position was that the newer atypical anti-psychotic medications such as Risperdal have far fewer side effects than the older traditional anti-psychotics such as Thorazine and Haldol and therefore, do not put the defendant at greater risk for incurable disorders such as tardive dyskinesia.

The USSC has consistently rejected the idea that forced medication could be used merely to restore competency. Rather, in order to force medication on an unwilling defendant, who was also psychotic, there had to be evidence of dangerousness to self or others (as discussed above in Riggins). However, in Sell, the Court reached a somewhat different conclusion. Let's look at the facts of the case.

Sell was being evaluated for competency to stand trial at the Medical Center for Federal

prisoners in Springfield, Missouri. When Dr. Sell refused his anti-psychotic medication, the trial court ruled that he could be involuntarily medicated in order to restore his competency to stand trial. However Dr. Sell was not violent and had never been violent. Therefore he did not reach the necessary threshold to be involuntarily medicated as a danger to self or others. The case went through several hearings and eventually the USSC agreed to hear the case. Ultimately the Court ruled that Dr. Sell could be involuntarily medicated, even absent a finding of danger to self or others, but that several criteria had to be met. Several of these criteria had been discussed previously in *Riggins* in 1993: (1) that medication was substantially likely to restore competency (i.e., was medically necessary), (2) that the likelihood of side effects was minimal, and (3) that other treatment options had been ruled out. What was distinct to the Sell case, and had not been discussed in previous cases, was that there had to be a "compelling state interest" in restoring Dr. Sell to competency. This meant that the "medical appropriateness" of the medication was necessary to further the interests of the state.

However, what was the "compelling state interest" in this case? Was it to have Dr. Sell incarcerated, serving time, and not be in a position in which he could continue to defraud Medicare? In essence, all of these criteria had already been met because Dr. Sell was in a hospital, which was located in a Federal prison. It is therefore difficult to argue that there was a compelling state interest in medicating Dr. Sell against his will. While the state ***could*** medicate a defendant against his or her will, the furtherance of state interests are unlikely to be attained in this particular case.

In summary, then, while the Sell case suggests that he and others like him who are delusional, and incompetent to stand trial, as well as non-violent, could theoretically be involuntarily medicated, the steps necessary to reach the threshold are so stringent that it is unlikely that forcible medication would be used. In fact, to our knowledge, there have not been any cases subsequent to Sell which have indeed met all of the necessary criteria.

Slobogin (2012) expressed a concern Sell may have had unanticipated and unwanted effects. Defendants would be more likely to claim that they were mentally ill and would then be more likely to refuse treatment. To counter this, Slobogin fears, prosecutors may take advantage of the dangerousness exception to the right to refuse treatment, and assert that danger exists more frequently than it actually does, resulting in their bringing the highest possible charge against defendants to make sure that it is "serious enough" to justify forcible medication.

McMahon (2013) provided an analysis that at least in part supports Slobogin's concerns. She noted that the court must determine if the government interests are important enough. Moreover, these state interests, according to Sell, must be evaluated on a case-by-case basis and that "special circumstances" may diminish the compelling nature of the state's interests. She noted that in only 4 of 77 cases have courts found that the crime was "not serious" and that courts have largely ignored "the facts of the individual case when determining whether the compelling interests of the state "are sufficient to justify forcible medication" (cite ref). We do not currently know how many cases there have been since Sell in which non-violent mentally ill individuals have been forcibly medicated, nor has there been a careful analysis of the circumstances of any further case.

Is Competency the Same in All Legal Situations?

Over the course of several years, courts appear to have recognized that different tasks in court require different levels of competency. In other words, while there is one level of competency necessary to stand trial, a different level of competency, judged by other criteria, may be necessary to determine competency to confess, competency to plead guilty, or competency to

represent oneself in court. However, in a rather surprising decision in 1993, the USSC ruled that all competencies were the same.

In *Godinez v. Moran* (*509 U.S. 389 1993*), the USSC considered the case of a defendant, David Moran, who had initially pled guilty to several homicide charges but later withdrew his plea and decided to represent himself in court. The trial court had ruled that since Moran had been found competent to stand trial, he was also competent to represent himself. This is similar to what happened with Colin Ferguson, described in the beginning of this chapter. The appellate court reversed, indicating that a higher standard should be used in order to determine competency to represent oneself. However, the USSC agreed with the trial court, stating essentially that all competencies were the same. The majority opinion indicated that the decision to represent ones-self is no more complicated than the decisions that a defendant would have to make during the course of a criminal trial in assisting counsel. The Court deemed it irrelevant to consider the issue of how well that person could conduct the process. In other words, the USSC rendered the opinion that only the decisional competency (i.e., the decision to represent oneself) was at issue. The functional competency (i.e., how well the individual could represent themself) was irrelevant to the issues at hand and so, the USSC ruling supported the trial court's view that at least in this case all competencies were the same. However, it is important to note that the Court was describing the most basic level necessary to protect due process. A trial judge, in any given case could insist on a higher standard for one kind of competency than for another but does not have to do so.

In actual practice, forensic examiners should be aware that there are different criteria to be satisfied for different kinds of competency and, in fact, representing oneself does require skills above and beyond assisting one's attorney at the time of trial, even if a consulting attorney is supplied by the court.

Colin Ferguson's trial was an excellent example of what happens when, in fact, the court treats all competencies the same. As was mentioned earlier, Ferguson terrorized and shot to death a large number of people on the Long Island Railroad. The case received a great deal of press coverage and, in fact, Colin Ferguson's ramblings during trial convinced even the most skeptical members of the lay public that he was, indeed, quite psychotic. Nevertheless, since he had been found competent to stand trial, the judge allowed him, pursuant to the USSC decision in *Godinez v. Moran*, to represent himself. What followed and was seen on live television even before Court T.V. was a bizarre demonstration of the extent of Ferguson's psychosis and delusional thinking. However, observers at the trial have stated that like many with a similar mental illness, Ferguson was able to conduct part of a cross-examination in a coherent and articulate manner but then in the middle of it, would lapse into psychotic-like behavior such as asking a police officer if he had conducted blood alcohol tests on the bullets that were found. The ability of a psychotic individual to go in and out of mental competency in a close time period is an important phenomenon for an expert to help juries and judges understand when testifying about competency. Part of the appeal in this case had to do with whether the trial court judge had to insist on a higher standard of competency for Mr. Ferguson to represent himself than for his ability to stand trial. As noted above, there was no reversible error here since although the trial judge could have imposed a higher standard, he did not have to do so.

Conducting a Competency Evaluation

As noted above, in the section dealing with restoration to competency, very often defendants appear to have learned the right "buzz" words but really have very little understanding of the legal components needed in order to be regarded as competent to stand trial. In the course of a forensic evaluation regarding competency, the examiner must be careful to go beyond the

apparent surface understanding that a defendant may have and probe for their true understanding of some of the concepts. It is important to consider that competency, as we have been discussing, can vary from moment to moment. That is the nature of most severe mental illnesses, including psychosis. Sometimes the mental health professional may need to perform the evaluation more than one time. Even if a defendant appears to be manipulating during the examination and faking or malingering some symptoms, it doesn't mean that person is competent. If the defendant has a mental disease or defect and cannot meet the legal criteria set by that jurisdiction, the examiner must find the person incompetent.

While some maintain that traditional psychological testing is irrelevant to the determination of competency, others find that psychological testing can be of great assistance, not only for directly answering the competency questions but for providing the clinical basis that underlies such opinions. In other words, if a defendant does not appear to understand the charges against her or him or does not appear to be able to assist counsel, the mental status examination and psychological testing can be of great value in terms of explaining what is causing the defendant's competency problems. There are a number of factors that can render someone incompetent: Is it that the defendant is psychotic and has disordered thinking, is intellectually impaired and developmentally disabled, shows brain damage that impairs their abilities, has a disease such as epilepsy that affects the central or peripheral nervous system, etc.? In other words, standardized cognitive, personality, trauma-specific, and neuropsychological tests may provide a scientific basis for the opinion in providing information regarding the clinical state that may result in the lack of competence. Of course, the exact opposite can be found as well, that the testing reveals no impairment, no psychosis, and therefore nothing that could interfere with a defendant's ability to stand trial. In such cases, if a defendant may be feigning incompetence or malingering, the psychological testing may actually reveal that there is no underling impairment which interferes with the ability to understand the charges or to assist counsel.

In addition to this traditional use of psychological testing, more specialized forensic assessment instruments have been developed to assist the examiner in these examinations. For instance, one of the tests currently in use is called the *MacArthur Competency Assessment Tool for Criminal Adjudication* (*MACCAT-CA*) (Hoge, Bonnie, Poythress, & Monahan, 1998). This instrument allows the examiner to evaluate, through a description of a scenario and the defendant's responses to that scenario, the defendant's cognitive abilities to understand various situations, the reasoning abilities and the capacity to appreciate the nature of the legal system. This test goes into far more depth than the traditional interview that many forensic examiners currently use. Grisso whose work we discuss below and later in Chap. 18 on juvenile justice has published several other such instruments. Certainly, there are some cases where a brief clinical interview will suffice, especially when there are no questions regarding the individual's competency. On the other hand, in more subtle cases, where the ability to assist counsel may be in question, it is recommended that one of the more in-depth forensic instruments be used.

Other Competencies

The forensic clinician may be asked to evaluate a defendant in reference to competencies other than the ability to stand trial or represent her or himself. As noted above, the criteria for these are, in fact, different than competency to stand trial and while the USSC has ruled legally that all competencies are the same, the clinician should approach the task as if all different kinds of competencies need to be evaluated on their own merits.

Competency to Waive Miranda Rights and Give a Statement

One of the tasks which the forensic examiner may be asked to do is to evaluate whether or not the defendant understood the components of their civil rights, called a Miranda warning, after the case that established these rights, when they chose to waive them and talk to the police without an attorney present. A fundamental concept in U.S. law is the defendant's right to remain silent and right not to incriminate themself. The test for whether a defendant "knowingly and intelligently" properly waived her or his rights is purely a cognitive one. The examiner may do a detailed, in-depth interview to attempt to ascertain the defendant's true understanding of the concepts listed in *Miranda*. If the defendant is given a card with their rights written on it, can they read and comprehend the words? For instance, the examiner may ask the defendant what the phrase, "You have the right to remain silent" means; what the phrase "Having the right to an attorney" means; and so forth. What is essential is that the defendant understands the right not to incriminate herself or himself. Very often, when a defendant agrees to waive his or her Miranda rights, the defendant does not know exactly what it is that they are doing. They may be frightened or anxious or even high on drugs or alcohol. In some cases, the detectives doing the questioning will deliberately confuse the person using information that they have gained either from the defendant him or herself or from others. Analysis of police interrogations is a task that the forensic psychologist may be requested to perform. The examiner, through an in-depth evaluation, can ascertain this. Consider this example:

> A defendant seen by one of the authors (DS) indicated, when asked what the right to remain silent was, that it means "You have to keep quiet." When asked why he had to keep quiet, the defendant responded, "My mother always told me that it was impolite to talk when other people were talking. Here, the police were talking, so I had to remain silent." It is clear that this individual had no recognition of the fact that the right to remain silent was for his protection against self-incrimination. A defendant, of course, need not use the words "self-incrimination" but there needs to be a basic understanding that that is the reasoning behind the right to remain silent.

Another approach to a competency evaluation, other than the in-depth clinical interview, is to utilize assessment instruments developed by Grisso regarding the comprehension of the actual Miranda rights read to the defendant by the detectives. Grisso has a series of structured interview protocols which deal with the comprehension of the usual Miranda rights and the comprehension of Miranda vocabulary. The Grisso evaluation actually describes courtroom and interrogation scenes which are presented on cards to determine the defendant's true level of understanding. These tasks are very helpful in that they tend to go beyond the surface understanding that may appear when they are asked merely what the right to remain silent means. Some forensic examiners obtain the actual Miranda forms used in their jurisdictions and carefully question the defendant to see if they truly understand what they are being asked.

Competency to Confess

While the competency to waive Miranda rights and the competency to confess are clearly significantly intertwined, the competency to confess also involves an emotional component sometimes conceptualized as whether or not the defendant's will was overborne by the authorities. Here, the clinician doing forensic work can be of valuable assistance in assessing what the individual's mental state is at a particular time, whether they are highly susceptible to influence, whether they may in fact be confessing to charges which they may not have committed, or whether there is some mental disease or defect that would make the person unduly susceptible to the influence of the interrogating authorities. This issue regarding "police coercion" is highly relevant to the admissibility and credibility of a defendant's statements. In a case entitled *Colorado v. Connelly* (479 U.S. 157 1986), the USSC ruled that a psychotic defendant who gave a confession which he maintained was motivated

by “the voices” could not have his statement suppressed unless it could be shown that the police somehow engaged in some misconduct or misused their influence. Certainly, the fact that the confession was motivated by auditory hallucinations would go to its credibility at the time of trial but could not, in and of itself, absent police misconduct, be used as a basis for voiding or negating the confession.

In a case seen by one of the authors (LW), the defendant had been horribly beaten by the father who had been found murdered at his girlfriend’s house. The 20 year old defendant, who was of limited intelligence although not below the mental disability standard, had been beaten by his father until he admitted doing things he had not done. His mother and sister were also victims of his sadistic abuse as was his girlfriend. Any of them could have had a defense for killing him had it occurred in the middle of a beating. This defendant learned to lie in order to stop the father’s beatings. During the interrogation, the police played “good cop, bad cop” with one detective playing the role his father took, threatening the frightened defendant and the other one encouraging him to confess so he (the ‘good policeman’ could protect him against the ‘mean’ detective. As might be expected, the defendant confessed and was immediately arrested. As soon as he saw his court-appointed public defender attorney, he recanted the confession. As the only evidence against the defendant was his confession to the detectives, the major legal battle was fought around the admissibility of his statement. The defense argued that the police officers exploited the defendant’s weaknesses and therefore, the confession was not obtained voluntarily.

LW was called to testify about her findings that the man’s current psychological state was consistent with the witness reports that he had been a victim of child abuse and how that could be expected to impact on his state of mind at the time of his waiver of his civil rights when he gave the statement, making what he said in it unreliable. Eventually, the statement was admitted by the judge but under a plea arrangement, the defendant who was not in custody during the three-year legal battle, accepted a manslaughter conviction with prison time suspended while he was on probation. Interestingly, the judge later admitted he was never sure of the defendant’s guilt or innocence. However, the defendant never committed another criminal act that we were aware of for at least the next 20 years of his life that we were able to follow.

Another case seen by LW also demonstrates the coercive nature of the use of a polygraph examination by a recognized examiner on a battered woman who had been sexually abused by her now dead husband who was murdered by her new boyfriend. At first, the woman denied having any part in the plot to kill him. The polygrapher tried to establish rapport by being very seductive, stroking her hand and looking into her eyes for long periods of time. Although the woman was very uncomfortable being confined to a small room with this man for so many hours, he persuaded her not to leave until the examination was completed. She agreed and then he placed the wires for the machine under her blouse, stroking her gently as he did so. She did not protest but later said she was so distracted by his behavior that she could not think clearly. The results of the examination were “inconclusive” as might be expected given the conditions under which it occurred. The examiner, who was a law enforcement officer, promised to let her leave if she would confess to her role in what happened when her husband was killed. She told all that she knew, implicating herself in the plan to kill her husband. Legal issues unsuccessfully focused on getting both the confession and the polygraph examination thrown out. Her lawyers were successful in making sure the polygraph examination was not admitted but the 5th District Federal Courts did not accept the argument that a physically and sexually abused woman was more vulnerable to not comprehend her right not to confess.

Competency to Represent Oneself

As we previously discussed, it is rare that a defendant will petition the court to represent themself. In those cases where the court must make the difficult decision, the examiner will most likely be dealing with a psychotic individual. Examination of this individual needs to determine to what extent the defendant’s belief that they can adequately represent him or herself is in fact a product of the psychotic and distorted thinking. Like in the Colin Ferguson case discussed earlier in this chapter, it is possible that even individuals with severe mental illness will have some periods of lucidity. However, it is the extent to which the individual can reasonably know that they can adequately be their own defense attorney throughout the entire legal proceedings, not just the trial, that is at issue here. Rules of Evidence must be followed, evidence must be gathered and presented properly, some evidence must be appropriately challenged to keep out of the trial, and witnesses must be

interviewed. The defendant must also be able to prepare an adequate cross-examination. These are just some of the areas that the defendant must competently deal with in order to be properly represented. In some cases, courts may appoint an attorney to assist the defendant and sit with him or her at the defense table during the trial. However, it is questionable whether a delusional or psychotic defendant will permit that attorney to actually assist them.

Competency to Be Executed

In 1986, the USSC ruled, in a case entitled *Ford v. Wainwright* (*477 U.S. 399, 1986*), that a mentally incompetent or "insane" defendant could not be executed, as this would represent a violation of the Eighth Amendment to the Constitution which prohibits cruel and unusual punishment. It would be inhumane, reasoned the Court, to execute an individual who could not comprehend the reasons for their execution. There was not, within this decision, any extensive discussion of how to recognize this person's "insanity" or what the threshold for such a finding might be. Several states conceptualized their insanity itself as the defendant not knowing the reason they were being executed. What was unclear was the level of understanding necessary to be found competent. In other words, if a defendant had a delusional belief related to the pending execution but at the same time knew that the death sentence was related to conviction of a homicide, would that be regarded as sufficient to call the defendant competent? This was not addressed until many years later.

A defendant would have to be competent enough to recognize why the sentence of death was about to be carried out. This requires, of course, a very minimal level of competency but even so, a mental health professional may be called upon to perform such an evaluation or even prescribe medication to make the person competent. There are clearly many ethical concerns raised if a psychologist were to do such evaluations or prescribe medication under those conditions. A psychologist can raise concerns regarding ethical principles that call for avoiding doing harm or the potential misuse of one's data or one's influence to cause someone to die. Essentially, the examiner would be asked to determine whether or not the defendant's mental disorder, if it exists, interferes with his or her capacity to understand why the sentence of death is about to be carried out.

Many psychologists have expressed concern that performing this type of examination would make the forensic examiner a party to the state's machinery of death and they choose not to involve themselves in such evaluations. Other forensic examiners feel that a finding that the person is incompetent will save the person's life. Clearly these are moral dilemmas for a forensic psychologist to ponder. Another troubling choice is for a forensic mental health professional to participate as part of other treatment efforts to restore that individual to competency for execution. It is certainly beyond the scope of this volume to discuss the legal, philosophical, and moral issues involved here. Suffice it to say, it is a highly controversial area and if a psychologist chooses to involve him or herself in such evaluations, they need to carefully think through all the implications.

In addition, many mental health professionals were concerned that 'competency to be executed' was a concept that did not capture the complexity of mental illness. In 2004, a joint task force consisting of members of the American Psychological Association, American Psychiatric Association, and American Bar Association in a rare unified Brief argued against the concept of competency for execution as a standard when we are dealing with mentally ill defendants. The Brief argued, rather, that there were reliably diagnosable severe mental disorders and instead of needing to evaluate competency, people with named mental disorders themselves should be sufficient to bar execution.

Unfortunately, this Brief appeared to have only limited impact on case law. The state of Indiana recently barred execution of individuals diagnosed as severely mentally ill. In a similar manner, the Ohio House of Representatives passed a bill to bar the death penalty for defendants with serious mental illness. A similar bill was passed in Virginia, and Arkansas has struck down the death penalty competency law. Several

other states have introduced similar legislation banning the death penalty for people with severe mental illnesses including Idaho, North Carolina, and South Dakota. Texas also recently passed a prohibition of the execution of mentally ill individuals.

In the interim, several other cases are worthy of note. In 1988, The USSC in *Thompson v. Oklahoma* ruled that the state could not execute someone who was a juvenile (below the age of sixteen at the time of the offense) because such individuals lacked the moral and cognitive development to be found truly blameworthy. In a subsequent case (*Roper v. Simmons*, 2005), this was increased to eighteen years. Curiously, during the same term as Thompson, the court refused to go so far as to ban execution of those found mentally retarded. In *Penry v. Lynaugh*, (cite) the court acknowledged the limitations in the range of mitigating circumstances in the capital sentencing statute in Texas, that mental retardation was not specified as a statutory mitigator. The court remanded the case back to Texas for further consideration of mental retardation as a mitigator. Of some interest is that in the following decade, sixteen states on their own passed laws prohibiting the execution of mentally retarded defendants.

In 2002, the USSC ruled that execution of the mentally retarded was unconstitutional, a departure from its previous stance in *Penry* that it was not prohibited but needed to be considered as a possible mitigating factor. The court in 2002 cited "an evolving sense of decency" in society leading to the conclusion that it was cruel and unusual to carry out such an execution. The court, however, did not define mental retardation, leaving it up to individual states to do so, which did lead to some further problems regarding idiosyncratic definitions of retardation. Most states, however, adopted a definition that was identical or similar to the DSM-IV definition, mainly a significantly subaverage intellectual functioning (below an I.Q. of 70) and significant impairments in adaptive functioning. Several states varied in their definitions of impairment in adaptive functioning. Questions were also raised concerning variability in I.Q. scores over time.

The Flynn Effect notes that I.Q. scores increase slightly over time, approximately one point every three years. If a person has been incarcerated for many years, this could conceivably result in a score going from below 70 to over 70, raising the question of which score should be used in court determinations. In addition, the test used most frequently for determination of intelligence, the Wechsler, has gone through several revisions, and the scores vary somewhat from one revision to the next.

Also of concern is how immutable these test scores really are. In a recent case, *Hall v. Florida*, 2013, the defendant, Mr. Hall, had been sentenced to death because his I.Q. score was 71, one point higher than the recognized cutoff for mental retardation. Florida law did not take into account what psychologists call "the standard error of measurement," the variability of a given I.Q. score, which could be as much as three points. Rather, Florida adopted the I.Q. score of 70 as a "bright line" test. Persuasive argument in front of the USSC, bolstered by an *amicus* brief from the American Psychological Association, led the court to conclude that I.Q. scores are not fixed and immutable and that courts need to consider the standard error of measurement. An amusing excerpt from the oral arguments by the Attorney General of Florida supporting the bright line notion was that if legislators had intended to consider standard error of measurement, they would have put it into the law. This presumed legislators would have understood that statistical concept. Also, Justice Scalia, during the oral arguments before the USSC, raised concerns that A.P.A. was just meddling again with this concept of standard error of measurement, just as they did when they declared that homosexuality was not a mental disorder. An unfortunate outcome of much of this litigation regarding mental retardation is the profusion of various idiosyncratic ways of dealing with the concept.

More recently one of the authors (DS) has reviewed cases where psychologists have raised the I.Q. scores of defendants to make them eligible for the death penalty claiming ethnic adjustments were necessary due to their defendant's upbringing. While it is possible that some

defendants who were subjected to poverty, abuse, poor nutrition, and other factors negatively impacting their development their cognitive limitations could not be automatically raised by adjusting I.Q. points on a standardized test such as the Wechsler Adult Intelligence Scale as these psychologists did, using such non-existent 'ethnic adjustment' factors that would then make them eligible to be put to death (see Shapiro & Walker, 2019).

In addition, there is no unified approach when a defendant is found incompetent to be executed. In *Perry v. Louisiana* (498 U.S. 38, 1990), the Louisiana state supreme court ruled that a psychotic inmate who had been found incompetent to be executed could not be forcibly medicated in order to restore him to competency for execution. However, several years later, in *Singleton v. Norris* (992 S.W. 2d, 768, Arkansas Supreme Court, 1999), the Arkansas Supreme Court ruled that a defendant found incompetent for execution could not be forcibly medicated if the sole purpose of the medication was to restore him to competency for execution. However, the court further ruled that if the primary purpose of the forcible medication was something else, such as controlling his dangerous behavior, and the restoration to competency for execution was merely a beneficial side effect of the treatment, then the forced medication could be justified. This could, of course, without careful procedural safeguards in place, result in forcibly medicating such individuals in order to execute them but justifying it in terms of rendering them "no longer a danger to self or others." The court ruled in Singleton that the state had an interest in carrying out a legally imposed sentence and that this outweighed Singleton's liberty interest. They based this decision on the evidence that there was no less intrusive treatment and that doctors had testified that the psychotropic medication was "medically justified."

Pannetti v. Quarterman

A recent case still in the courts at the time we are writing involves a chronically schizophrenic individual named Scott Pannetti, who was convicted of two homicides and was sentenced to death by a Texas trial court. The central issue here was whether or not Pannetti was competent for execution. He had previously fired his attorney and insisted on putting on his own defense. He appeared in court dressed in a purple cowboy suit and a ten-gallon hat and presented bizarre material, such as his wanting to call Jesus Christ as a witness. As might be expected, he was convicted and sentenced to death. When asked why he was about to be executed, he responded that he was convicted of killing two people. This appeared to be a clear factual understanding of the reason for his impending execution. However, he went on to say that "the real reason" was that the state was persecuting him and was trying to stop him from preaching the gospel, a clearly delusional belief. Therefore, the intriguing issue legally is whether a factual understanding of the reason for execution is sufficient or whether a rational understanding and an ability to assist counsel are also necessary. All three elements are required, as noted earlier, in order to be found Competent to Stand Trial. Why should there be a lesser standard for competency to be executed? The USSC reversed and remanded the Texas court's decision and asked for a re-evaluation of competency. As of the date of this writing, which is twelve years since the USSC first heard the case, no decision has yet been made. Mr. Pannetti sits on death row and, to further complicate matters, continues to be offered anti-psychotic medication which he has consistently refused. Remember that the USSC has not rendered an opinion on whether there can be involuntary medication of a defendant who is incompetent to be executed, either.

Madison Versus Alabama (2019)

Vernon Madison was a defendant on death row in Alabama, who suffered from vascular dementia after a series of strokes. He presented with slurred speech and a lack of memory for many details during his court ordered evaluation. He was convicted of capital murder and sentenced to death. The appeal to the USSC involved whether an individual with vascular dementia (which is incurable) who demonstrated the symptoms Mr. Madison displayed could be

regarded as competent in order to be executed. The law in Alabama had been constructed around symptoms displayed by psychotic individuals, not by those who had brain impairment. The legal argument, therefore, was whether Madison met those same criteria. In February of 2019, the Supreme Court reversed the trial court's findings and remanded for further proceedings in Alabama. As of this date, no final decision has been made in Alabama and Madison continues to be confined on death row.

Summary

As you can see, we have dealt with the legal and psychological complexities of a defendant's competency at various points in the criminal justice system. Although the legal system treats competency as a unitary construct, in fact, the human mind is quite complex and somebody can be competent for one task and not another, depending on what mental illness or defect they demonstrate. In fact, someone can have a "good day" and appear to comprehend more than they can on a "bad day." We all know people who are more competent in the morning than later in the day because of the fatigue factor. Mental illness has variable symptoms that are sometimes more pronounced at one time than at other times. This is especially true for those diagnosed with severe affective disorders, such as bipolar depression, when someone would fare differently on a competency evaluation given during the manifest phases. So, too, for someone with a delusional disorder which is dependent upon when someone becomes part of his or her delusional system.

The issue of civil rights for those who are adjudicated incompetent is one that is beginning to receive attention from civil libertarians, such as Michael Perlin, a civil rights attorney and professor emeritus at New York Law School, who has written and lectured extensively on mental disability law. The new mental health courts for seriously mentally disabled persons who are charged with misdemeanor crimes focus attention on the discrepancies between someone who is declared incompetent to proceed to trial and locked up for five or more years when they could be treated in the community without losing their liberty. At the same time, USSC appears to be moving toward a more conservative position that might reverse its previous decision to allow the psychopharmacological restoration of competency to be between the person and his or her doctor if self-destructiveness or other violence is not an issue. As we all know, these medications all have side effects and the benefits of taking them may not outweigh the dangers for different individuals.

Questions to Think About

1. What might be the consequence of *not* forcibly medicating a patient to restore his or her competency to stand trial?
2. What might happen if a defendant successfully argues that they should be taken off medication at the time of trial?
3. Would you participate in the evaluation of an individual to determine competency for execution or in the treatment program to restore competency? Why or why not? (Table 5.1).

Table 5.1 Major cases and their significance

Dusky v. U.S.	Defined basic criteria for competency to stand trial
Jackson v. Indiana	Prohibited indefinite confinement of mentally incompetent patients
U.S. v. Charters	First case to discuss mentally incompetent defendant's right to refuse treatment
Riggins v. Nevada	Right of defendant to refuse medication at the time of trial
Godinez v. Moran	USSC case ruling all competencies were the same
Colorado v. Connelly	Confession that is "coerced" by a person's mental illness is not in and of itself inadmissible. Rather, there must be evidence of police misconduct
Ford v. Wainwright	An inmate on death row must be competent to be executed
Perry v. Louisiana	An inmate has right to refuse medication designed to restore him or her to competence to be executed
Singleton v. Norris	Forced medication of an inmate is permissible if for some other reason even if such medication will secondarily result in restoring his or her competence to be executed. Some other reason is defined as if medically appropriate and no less intrusive treatment is available

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6 Self-Defense and Syndrome Testimony

Self-Defense Laws

In Chap. 4 on criminal responsibility it was stated that some behaviors that might be considered a crime could be excused by reason of mental health or even justified by law. One type of justification is if the act occurred in self-defense. The laws of self-defense or defense of others are fairly standard from state to state in the U.S. and in other countries around the world. The basic elements are that a person must have 'a *reasonable perception of imminent danger* of serious bodily injury or death' before use of excessive force can be justified. Some statutes actually define what is meant by 'reasonable' or 'perception' or 'imminent' or 'danger'. Others leave it more general and case law with its changing interpretations suffice. As we will see in this chapter, when we discuss the development of 'the *Battered Woman Syndrome*' to justify or excuse the use of force to defend oneself or another person, as social mores change, they are reflected in what is and is not considered justified under the law. An act is not a crime until it is adjudicated as such.

Definitions of what is a reasonable perception of danger for any individual have been left mostly to individual cases rather than codified laws to define. For a psychologist, however, we probably would break down these concepts into many more different parts than legislators or courts that are less well trained in psychological constructs. For example, is a perception the same as a thought or feeling or both? We learned in a previous chapter (4) that insanity has been defined legislatively in various ways although the current M'Naughten standard is limited to cognition or thoughts only. Is it subjective, that is inside the head of the individual person knowing everything he or she knows, or it is objective, that is something anyone in the same situation would perceive as dangerous? Or it is a mixed definition of both subjective and objective standards which is what most states have now adopted?

Reasonable Perception

Does the perception of danger have to be reasonable to everyone or just the average person? If so, how do we know what an average person might think is dangerous? This is especially important in self-defense cases as the laws were originally developed using male standards because historically it was the responsibility of the man to defend himself, his family, and his honor. Would we expect what is a reasonable perception of danger for a woman be the same as for a man? When battered woman syndrome was first introduced it became clear that men did not perceive danger in the same way as a woman or even more specifically as a battered woman. How should we measure what is reasonable, then?

The research on the psychological effects of living with intimate partner violence had begun

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to be published in the early 1980s when several cases caught the attention of the media. Public policies began to develop around new understanding of women's rights at around the same time. Self-defense classes that were popular among women who were healing from rape and sexual assault gained popularity as prevention models (Bandura, 1971). Not all men were following the social prescription of protecting women; some were physically, sexually, and psychologically assaulting them. Women were encouraged to protect themselves, even if it meant killing the man. But exactly what would be a reasonable perception of the need to use such violence needed more definition. In New York state, the *Goetz* case (*People v. Goetz, 58, N.Y. 2d. 96 (1986)*) was a good example.

> Bernard Goetz traveled the New York City subways and often was faced with various African American men who robbed and otherwise terrorized passengers. Goetz, who was also prejudiced against Black people, was both frightened and angered by these episodes. During one such event, he took out his gun and shot at four of these men who were unarmed and denied any intent to physically harm him. He claimed self-defense at his trial. The state argued that his racism made him angry and fearful while he argued their behavior caused him to be frightened and it would have caused any reasonable person to also be frightened. In the end, the jury instruction given defined reasonable perception as a combination of the objective standard (anyone would be frightened of danger) and subjective (anyone who knows and experienced what Goetz did) would have reasonably been frightened of bodily harm.

Bernard Goetz was a man. What about a woman in a similar position? In Washington State, the *Wanrow* case that went up to the State Supreme Court clearly illustrated that point (*State vs Wanrow, supra 559 p. 2d 548 (1977) 558.59*).

> Yvonne Wanrow was a Native American woman who was in a friend's home babysitting several young children. She had a broken leg that limited her ability to move. The next door neighbor had the reputation of being a child molester. He called her, drunk, saying he was coming over. She told him, "no" and warned she had a gun. She then got a rifle and placed it next to her as she sat on a chair guarding the front door in case he came in despite her warning. He broke into the house anyhow, and she shot and killed him as he entered. At trial she said she feared he would assault her and sexually assault the children, so she shot him to protect herself and them. The state claimed she knew he was coming in and she just sat there waiting to shoot and kill an unarmed man instead of doing something else such as calling the police. She claimed she didn't believe the police would come in time to protect them due to her previous experiences as a woman of color. Was it self-defense or defense of others? The jury disagreed and convicted her of manslaughter but the Washington State Court in an important Opinion agreed with (error, leave in) granting her a new trial. In fact, the state then offered her a plea to manslaughter with no additional jail time and she accepted it, ending her legal battle.

Imminent Danger

The term 'imminent' danger also gives us different possible interpretations. Many people believe imminent means immediate but in fact when going back to the records of the debates by legislators when creating the new law, called legislative history, they point to the meaning as 'about to happen' rather than happening at that very moment. This permits a time period of anticipation building up, where an individual has time to feel scared, think there is danger, and take some action to protect him or herself. How much time can be taken is usually left undetermined which has helped broaden the use of self-defense as a justification for those with distorted time perception from disorders such as post-traumatic stress disorder.

One of the cases in the 1970s that helped define what is meant by imminent was the *Inez Garcia* case in California.

> Inez Garcia was a young woman who lived in a high crime neighborhood where there were a lot of drug dealers. Two men who(m) she knew there raped her at gunpoint one day. When they left her lying on the streets where the rape occurred, they warned her not to tell anyone what had happened, or they would find and kill her. They knew where she lived. She went home, showered and cleaned up, but couldn't stop thinking about what had happened to her. She was hurt and her emotions bubbled up. Both angry and terrified that they would continue to harm her, she grabbed a gun and

> went out looking for them. She found one of the rapists and shot and killed him. At her first trial she claimed the rape caused her to develop temporary insanity; her mental state fit the state's definition of insanity at that time. The jury rejected it and found her guilty of second-degree murder. She appealed the conviction and won a new trial on legal grounds. At her second trial, she claimed self-defense stating that the time between the rape itself and her going out to find the rapists fit the state's definition of her fear of another 'imminent' attack, since she intended to report the first crime. Her attackers had threatened to find and kill her if she did so.

At the time, Garcia's defense was novel. It broadened the definition of self-defense to cover what was about to happen even if it wouldn't have been at that exact moment. Women have a different fear of imminent rape argued her attorneys at that time, given their socialized fears of gender violence. It was one of the foundational cases of a new form of law called *Feminist Jurisprudence* or legal analyses that specifically affect women.

What would scare you so much that you would think you are about to be seriously harmed or die? Would it be the same situation that would scare your friend? Does gender matter here? Would you be able to take some actions in certain situations and not in others? If someone had a gun pointed straight at you, would you be justified in picking up a gun and shooting that person? How do you know that person really was going to shoot you? These are the questions jurors will ask and forensic examiners must try to assess someone's reasonable perception of imminent danger of serious bodily injury or death. If a juror had knowledge that someone with a certain psychological state of mind, or syndrome, perceived danger differently from other people that might make it easier for the juror to determine what is and is not self-defense for that person. In the case of battered and abused women, one of the different perceptions of danger has to do with timing; the battered woman perceives danger more rapidly when there are specific cues present that have accompanied danger previously. It is not that what is called 'battered woman syndrome' itself causes the woman to have a mental illness that excuses her actions but rather, she is able to accurately perceive danger faster and with fewer cues than others who may not have experienced what can cause the syndrome. This is where expert witness testimony by a mental health professional may be helpful for a juror.

Think about what happens to animals who have been in a forest fire. Even after the fire has been put out and re-growth has begun, animals that were around during the fire still behave as if it were reoccurring especially if someone just lights a match there. They begin to run around in circles showing their distress or even may try to run away. This is the same behavior we see in combat veterans who have experienced enemy fire. Consider the Vietnam veteran who is just relaxing at an outdoor festival when a helicopter passes overhead. The greenery together with the noise from the helicopter may cause the person to think he is back in the Vietnam jungle facing enemy fire. He may take out a gun and start shooting people while in that state of mind, which psychologists usually call '*a dissociative state*". The definition of PTSD suggests people may re-experience a trauma event and believe they are right there again, needing to protect themselves from the danger. Let's look at Yvonne Wanrow's case again. Wanrow was sexually assaulted herself when she was a child. Would her fear that the neighbor would harm the children in her care be increased by that prior experience? What about the fact that she is a woman and not well trained to defend herself as men usually are? The Washington State Supreme Court in the *Wanrow* decision suggested that was an important factor in deciding if using a gun against an unarmed man is a reasonable amount of force. The justices opined:

> The instruction (as given by the trial court) leaves the jury with the impression the objective standard to be applied is that applied to an altercation between two men. The impression created – that a 5'4" woman with a cast on her leg and using a crutch must, under the law, somehow repel an assault by a 6'2" intoxicated man without employing weapons in her defense, unless the jury finds her determination of the degree of danger to

> be objectively reasonable – constitutes a separate and distinct misstatement of the law and, in the context of this case, violates the respondent's right to equal protection under the law. The respondent was entitled to have the jury consider her actions in the light of her own perceptions of the situation, including those perceptions which were the product of our nation's long and unfortunate history of sex discrimination …. Until such time as the effects of that history are eradicated, care must be taken to assure that our self-defense jury instructions afford women the right to have their conduct judged in the light of the individual physical handicaps which are the product of sex discrimination. To fail to do so is to deny the right of the individual woman involved to trial by the same rules which are applicable to male defendants. (State v. Wanrow, supra 559 p. 2d 548 (1977) 558.59)

Imminent Danger and Inez Garcia

In fact, self-defense has been codified into law mostly through cases that challenged the male image of two men outside a barroom having a fight with guns drawn. In the old days, when the U.S. was being settled and there were few rules to govern behavior, one of the earliest rules was that a man could defend himself or his property, which usually was limited to his home, his women, and his children. If another man challenged him to a fight, he had no choice but to defend himself and his honor. Just look at the behavior of Aaron Burr and Alexander Hamilton in the current Broadway play, Hamilton. These social customs went back as far as history records them and not just in the U.S. Usually the weapons chosen had to be the same for each and it was assumed that each had around the same level of skill in using the chosen weapon. The barroom fight described above where two drunks beat each other up until one is dead is often played in old Western movies like *High Noon* with Gary Cooper or those of the *Knights of the Round Table* in the Middle Ages. They glorified these men who fought to their death to defend their honor or property.

Laws still exist today, in some Western U.S. states such as California, Colorado, Wyoming, Arizona, and Montana and others like Florida that permit someone to shoot and kill another person if the shooter has a reasonable belief that the person was going to harm him or herself or their property. In this case, the reasonable perception has to be proven by the dead person's behavior—usually if the person enters the shooter's property without permission and does something that triggers the shooter's reasonable belief of harm. If these conditions exist, then the law in some states does not even allow the shooter to be charged or prosecuted because he or she did not commit a crime. What they did was automatically justified. This law was demonstrated in a Clint Eastwood movie some years ago when he goaded a man to come on to his property without his permission and "make my day". Since then, these laws are sometimes called "Make my Day Laws".

Although these laws have been helpful to both women and others who are actually defending themselves, they have been misused by others with racist attitudes that may be a trigger for shooting and killing someone, particularly African Americans. The very same law that was helpful to understanding a battered woman's behavior could be used to justify a racially motivated act. For example, let us look at two different cases where the law has been used in Florida: Trayvon Martin (*State of Florida v. George Zimmerman, 18th Judicial Circuit, Seminole County, July 13, 2913*) (2013) and Kathy Weiand (*State v. Weiand, 732 Ao 2d. 1044. FL. SUP. Ct (1999)*).

> Trayvon Martin was a young African American boy who was visiting his father in a mostly White neighborhood in central Florida. George Zimmerman, a self-styled vigilante, was wandering the neighborhood one night and saw Trayvon Martin out walking in a hooded sweatshirt eating a candy bar. Zimmerman confronted Martin and what followed is in dispute, but in any case, Zimmerman shot and killed the unarmed teenager. Charged with murder, he claimed self-defense, stating he was afraid he would be hurt or killed by Martin. Appealing to the racist fears of the jurors in that community, he was acquitted to the great consternation of the African American community.

Was it a reasonable perception of imminent danger to a White man in a White neighborhood to come upon a strange Black man there? Would Trayvon Martin have to do anything to justify Zimmerman's fears? Or like in many of the cases where police officers shoot and kill young Black

men whom they believe are committing a crime, does race alone count? These are important questions as society tries to integrate and accept people of diversity into our communities. How does the same law, then, that was designed to protect people who are defending themselves get used in one way in cases involving race and in another more positive way with women protecting themselves from impending violence. Both attempt to define reasonable perceptions of imminent danger. Let's look at the Weiand case, also in Florida.

> Kathy Weiand was a battered woman who was in the middle of an acute battering incident by her husband when she shot and killed him. Although she had called the police, their history was that they didn't usually get there in a timely manner to protect her. She took her gun and fled into the bathroom, locking the door and screaming at her husband not to come in. He started banging down the bathroom door. She shot through the door and the bullet killed him. She claimed she only shot to stop him from hurting her; she didn't intend to kill him. At the time there was a 'make-my-day' type of law in effect for non-married or cohabitating couples but not for those who lived together. The state claimed that the batterer might just have wanted to talk with her and besides, he had the legal right to stay in his home. Since (he) didn't have a gun in his hand when his body was found, they claimed she shot him unnecessarily. At her trial she claimed self-defense stating that given the long history of abuse, she had a reasonable fear that he would seriously hurt or kill her if he came through the locked door. She also claimed that she did not have a 'duty to retreat' or a 'cooling off period' which had previously been a requirement before shooting someone in self-defense. Although convicted at trial, she appealed and won. The Florida Supreme Court stated that it was unfair or disparate treatment for those who lived together not to be protected by the same law as those who lived separately.

The Weiand case gave battered women and rape or otherwise abused persons the right to use self-defense to protect themselves or others no matter where they lived, whether or not it could have been proven that the abuser was not going to further hurt the person. It was seen as justification when a woman killed her partner after being terrified that she or her children would be seriously harmed or killed. How can the woman's reasonable belief in facing imminent danger be demonstrated if she kills her partner before the current incident reaches the lethal stage? Most battered women act to protect themselves and their children before or after an acute battering incident. They know that during the explosive acute battering incident, the batterer's rage and aggression might be too much for them to stop. For many battered women who have developed battered woman syndrome, each new battering incident results in their re-experiencing fragments of earlier incidents together with the current one. The combination of the current incident and memory of prior incidents result(s) in an accumulation of fear well beyond what would be expected from the actual behavior observed or what the evidence might have shown. Thus, evidence of the presence of battered woman syndrome has been admitted into testimony as a short cut to describe what would be the expected state of mind of the battered woman at the time she committed a particular act.

Not everyone agrees with using the term battered woman syndrome in these cases. Many feminists believe that it unnecessarily suggests that a battered woman has some form of mental illness. However, it is useful in explaining why a woman might feel as if she were in danger even before someone who did not have the same history did not recognize the danger was serious enough to use deadly force. It helps clarify what is a reasonable perception of danger and the timing of what might be imminent to a battered woman sooner than a non-battered woman or a man. We do not have similar data for men who are battered by their spouses which is why we continue to call it battered woman syndrome rather than the more gender neutral term, battered person syndrome.

Mental Health Syndromes

What Is a Syndrome?

A syndrome is simply a collection of observable or known factors that occur in a pattern. A mental health syndrome is a group of psychological

symptoms that occur in a pattern and are usually found together in a particular disease or behavioral disorder. It is popular to give a syndrome a name and then everyone who knows about that syndrome can understand what to expect if it occurs, even if some things are not observable at a particular time. Use of a syndrome to explain how a person's state of mind might be impacted if they have those symptoms can be very helpful in meeting some of the general concepts of the law and the syndrome can explain many counter-intuitive scientific facts that challenge well-known myths and beliefs. Knowledge about a syndrome may be useful in identification and assessment of thoughts and emotions that are thought to accompany certain observable behaviors. It can help make a diagnosis but all syndromes are not necessarily diagnosable mental illnesses. Sometimes syndromes do not include all the possible behaviors to explain what is or is not observed and then, may be controversial when used. Some syndromes have been studied using scientific methods while others are simply convenient names given to phenomenon that are not very well understood. It is important to differentiate those that have scientific reliability and validity from those that do not have the research to back them up when using them in legal cases, given the admissibility standards.

Mental health professionals have attempted to use psychological syndromes in the courts to try to explain people's behavior Those without sufficient scientific research usually cannot meet the admissibility standards. Examples include premenstrual stress syndrome, parental alienation syndrome, psychological Munchausen-by-proxy syndrome, and urban stress syndrome. Indiscriminate use of syndrome testimony to infer that certain thoughts and emotions must have occurred in a person's mind at the time of an act or as a result of certain situations is not appropriate and may raise ethical concerns that conclusions are not based on adequate data sources. It is always a risk to use proof of the existence in someone's mind of that which is not observable. But, if we know that in a particular syndrome we can expect certain behaviors usually will occur in a pattern, this gives us more confidence in our opinion.

What Is Battered Woman Syndrome?

Battered Woman Syndrome is one of several subcategories under the diagnosis of post-traumatic stress disorder (PTSD) along with battered child syndrome, child abuse accommodation syndrome, rape trauma syndrome, and combat war syndrome. These all occur in a pattern that has many elements in common with PTSD and can help explain both the difficulty in perception of time (imminency) and the reasonableness of the perception of danger (given the re-experiencing of prior memories) triggered by the current event. It can be expected to raise the person's level of fear during the current event because of memories of cumulative danger that impacts their response. Research has shown that battered women who develop BWS experience symptoms in eight categories (Walker, 2017) including the four groups of criteria under PTSD and four additional ones found after studying women who have experienced intimate partner violence. These eight categories are:

1. Re-experiencing prior abuse with or without triggers.
2. High levels of arousal and anxiety.
3. High levels of avoidance behavior including depression, repression, minimization and denial.
4. Cognitive distortions including attention and concentration problems.
5. Disruption in interpersonal relationships from isolation and the abuser's power and control.
6. Physical health and body image problems.
7. Sexual dysfunction including intimacy issues.
8. Dissociation.

Not all battered women develop BWS. Research into why some abused women develop BWS while others do not is ongoing (Millen, Kennedy, Black, Detullio, & Walker, 2019; Walker, 2017). It is currently believed that factors that have occurred in childhood as well as those occurring in the abusive relationship itself put women at risk to develop the syndrome. Others may develop different mental disorders. Major depressive disorder and other mood and

anxiety disorders are also common. Still others use other different coping strategies. The most protective factor known at this time is the access to resources, particularly a strong support system.

Cycle of Abuse

The legal system has defined battered woman syndrome differently than has psychology. Since the admissibility of battered woman syndrome came mostly from case law rather than legislation, as described further below, it included parts of the research showing the dynamics of an abusive relationship in addition to the psychological results of having been abused. There is often a three-phase cycle of violence that reinforces the woman's belief that the abuser really will stop the abuse and revert back to the loving behavior originally seen during the courtship phase. However, decades of research show that abuse rarely stops, even with intensive psychotherapy. Instead, the abuse usually becomes worse, sometimes in a slow trajectory while other times, erratically jumping from verbal and psychological control into physical and sexual violence. Other times, the trajectory is rapid, almost like a brush fire out of control. The cycle of violence can be measured showing the tension-building period, the acute battering incident, and then the loving-contrition or absence of tension period with it repeating itself over and over. Very serious life-threatening incidents may produce battered woman syndrome with just one incident, much like rape and sexual assault does but usually it takes at least two such cycles (Walker, 2017). The typical cycle of abuse can be seen in Figs. 6.1, 6.2, 6.3, and 6.4.

Theory of Learned Helplessness

Originally the theory of learned helplessness was used to help explain the psychology of why someone would not be able to terminate the relationship (Walker, 1989). The theory states that someone who is subjected to random and variable punishment could eventually learn how to minimize the pain from the abuse by developing coping strategies, but this is at the expense of escape strategies. Based on animal studies, it

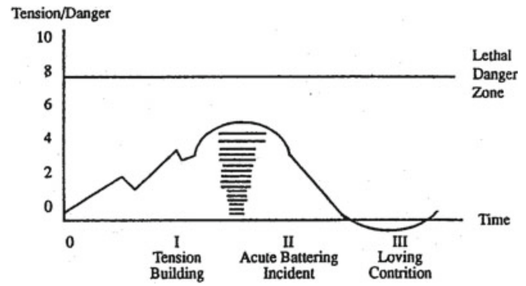

Fig. 6.1 Typical cycle of violence

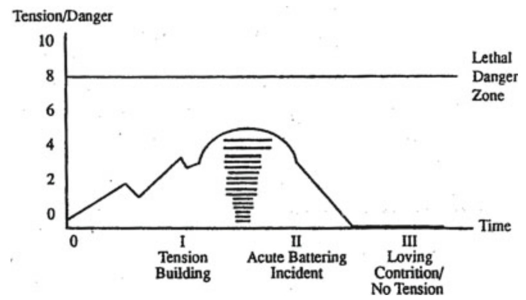

Fig. 6.2 Modified cycle of violence

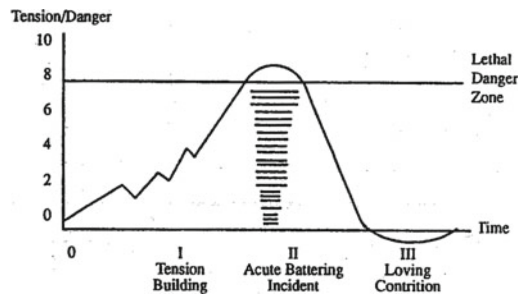

Fig. 6.3 Life-threatening cycle

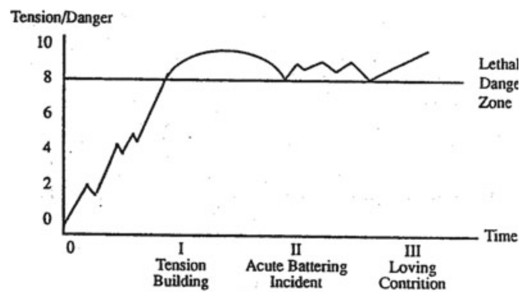

Fig. 6.4 Life-threatening cycle in which the woman believes she could die at any time

was found that the animal or person loses the ability to perceive that if you make a response it will have a particular outcome. Learned helplessness is based on learning theory; once something is learned it can be unlearned. It really isn't about helplessness but rather the loss of contingency between response and outcome. Once a battered woman learns about the inevitability of the cycle of violence, by showing her how to predict her own cycle in psychotherapy, she can re-learn the response-outcome paradigm and be able to better protect herself from further violence. Often it will mean terminating the relationship as she learns she cannot control the batterer's violent behavior. However, since leaving the relationship is dangerous, the goal of treatment is to be safe while helping her figure out ways to live violence free. Many battered women have survived other forms of violence including child abuse complicating the symptom picture. Healing may be a long and slow process, but eventually most battered women become successful at living without violence in their lives. Trauma treatment with battered women uses a combination of psychoeducation as well as psychotherapy techniques. Since there is similar psychological impact from other forms of gender violence such as sexual assault and rape, sexual exploitation and harassment, sex trafficking and child abuse, treatment for all forms of trauma is usually most successful.

Clinical Syndrome Testimony

The courts may allow syndrome testimony to be used to explain someone's state of mind if our scientific experiments demonstrate that a particular pattern of symptoms are more likely than not to occur under certain circumstances. But, what about clinical findings? When we talk about feelings or cognitions, we are in the clinical psychology realm and need to look at commonalities found by treating psychotherapists outside laboratory studies. Psychologists themselves argue about the credibility of clinical versus empirical findings so it is not surprising that the legal world finds them questionable. What level of confidence do we need to reach before we can state a syndrome exists beyond a reasonable doubt (the criminal law standard), clear and convincing evidence (the standard in juvenile parental termination and other civil cases) or more likely than not (the preponderance standard most often used in civil and family law cases)? Can you base testimony on one person's clinical cases that might give rise to some common symptoms seen? Two therapists' cases? Three? Fifty? Of course not. However, if we had a representative number of cases from therapists in a defined sample, then we might be able to make generalized statements to everyone in that sample. As scientists we must be careful not to base our conclusions on data that do not meet our standards. This means acceptance of standard and structured clinical interviews, results of standardized tests that give us good samples of behavior, and our carefully drafted observations may also meet scientific tests of reliability and validity even if we have not calculated an error rate as the original *Daubert* criteria on admissibility. Appropriate methods of such data collection in individual cases have been described in the recent book, *Forensic Practice for the Mental Health Clinician by* David L. Shapiro and Lenore E. Walker (2019).

When we do go too far, it leaves us vulnerable to criticisms of people such as Dershowitz (1994), the famous appellate attorney from Harvard who wrote about the *Abuse Excuse* in his book of the same name or Hagen (1997) who criticized all expert witness testimony in her book, *Whores of the Court*. They both took the most extreme examples and based a whole theoretical argument on them, rather than attempting to look at the issue more broadly. Hagen, an experimental psychologist with obvious disdain for clinicians, based her arguments on admissibility of testimony that she believes unjustifiably accused her brother of sexual abuse charges against his child. We will discuss this issue in the later chapter on child abuse. Dershowitz, on the other hand, approached his argument from the legal field without seeming to understand the differences between the scientific underpinnings of some types of syndrome testimony and the

lack of science in other similarly labeled phenomena. This emphasizes the need for some consistency in the mental health field when we take our findings and use them in another setting, such as the courts of law.

How would someone judge whether or not a syndrome has credibility? There are different scientific methods to choose to test hypotheses and form conclusions based on scientific facts. Each type of test requires a different experimental design depending upon the kind of relationship that is being tested. Advances in statistical techniques that can analyze for different inferences permit the use of quasi-experimental designs that get psychologists into the field and out of the laboratory setting. Adequate sampling techniques will determine the generalizability of findings from one group to others. For example, when a randomly assigned group is impossible to obtain (such as when studying battered women), it is possible to stratify the sample with people in equal demographics so the results will still be generalizable to the groups in the stratification. Although telephone surveys are an efficient way to collect epidemiological data, the sample will not be representative of those who do not have land telephones or only have unlisted or cell phone numbers. In addition, family members who answer the telephone may not want to reveal abuse data or other embarrassing information if others are nearby and able to listen to what is being said.

These are some of the important factors to consider when researchers or clinical psychologists are presenting scientific or clinical data in the courtroom. Laboratory research does give you better control over the variables to be studied, but it is less helpful if the variables occur in a context outside of the laboratory that cannot be replicated. It may yield better scientific results to control variables measured in field or in other studies that include variables-in-context by sophisticated statistics that can hold one or more variables constant while manipulating others. Clinical research may give less reliable group data as it is difficult to generalize from one sample to another, but it yields more reliable data about the individual and the context in which the individual's thoughts, emotions, and behavior interact to produce a particular state of mind at the time of an incident. Anecdotal studies may be less reliable in generalizing outside of the context in which they are collected but can give us ways to generate hypotheses that can then be measured with more reliable techniques.

Battered Woman Syndrome and the Law

Let's take a look at the concept of Battered Woman Syndrome that has been used to broaden what actions are permissible to defend oneself or others as an example. Since the late 1970s, the pattern of symptoms similar to what has been described earlier in this chapter has been used to help judges and juries in criminal courts determine whether a battered woman is justified in killing her abusive partner by meeting the criteria for self-defense or defense of others such as her children. Later the battered woman syndrome was expanded to help understand the state of mind of a woman who may commit other criminal offenses at the demand of her abusive partner such as financial fraud, stealing drugs, or even failure to protect her children. These women commit a crime so as not to get beaten. Sometimes they may falsely confess to committing that or another crime. A recent study located over 100 such false confessions by women serving long prison sentences for violent crimes such as murder of a child that their batterer committed.

Battered woman syndrome also began to be used as part of personal injury cases in civil courts to demonstrate the pain and suffering women experienced at the hands of their abusive partners. We describe this in the chapter on civil cases in personal injury. Often, these civil cases were used in conjunction with divorces in order to provide a better financial settlement. The presence of the syndrome may be used in individual cases simply to corroborate the veracity of the women, especially if there are no other witnesses who saw the abuse.

The case law admitted battered woman syndrome into the criminal courts developed first, as opposed to statutory changes, as many attorneys believed that the self-defense laws could adequately handle cases needing this type of testimony. However, admissibility issues became an obstacle in some jurisdictions and by the early 1990s legislators in those states began to codify what became known as "the battered woman syndrome self-defense" into law.

The use of a syndrome such as battered woman syndrome created problems for some feminist psychologists and advocates who believed that the term battered woman syndrome itself did not account for enough of the impact on different women who killed their abusers in self-defense. In particular, the criticism focused on the need to better understand the larger social context in which abuse of women occurred. All women experience discrimination from sexism that still exists in various forms in all societies today. It is dangerous to consider that a diagnosis of mental illness is what impacts on their state of mind when it is a justified perception of imminent danger that motivates them to protect themselves and their children or other loved ones. Although this is a compelling argument, the courts are not yet ready to accept it. Instead they were ready to accept the argument that a different state of mind existed in women who killed abusive intimate partners rather than in those who were battered but were able to terminate the relationship in other ways. In fact, our research suggests that those who get away often do so because of factors with the batterer and the relationship, not just the woman. Clinical experience also tells us that the violence and abuse does not stop just because the relationship is terminated, especially if there are children involved. This is further discussed in later chapters on family law, custody, and child abuse.

History of the Case Law

Do battered women perceive danger differently from other people? Is it because they are mentally ill to the point of meeting the definition of 'insanity' meaning that their perception is not accurate or reasonable? Or do they perceive danger accurately but differently than others? Is a reasonable perception of imminent danger the same for a battered woman than for another woman, a man, or any person? If it is in a syndrome then it might be the same for all who have the syndrome. Is there something about the impact from domestic violence that creates a particular state of mind changing a reasonable person's perception of imminent danger? Perhaps they are like the animals in a forest fire discussed earlier in this chapter who afterward perceive the danger from the smell of smoke faster than those who were not previously in a fire. What is considered dangerous for a battered woman? Would it be a certain look the man gives? Repetitive verbal abuse? Or even a flashback to prior abuse replaying in their mind? Does every battered woman have the same psychological experience? Of course not. Can we identify whether or not people who have experienced intimate partner violence have a particular mindset that leads them to believe they are in danger of serious bodily harm or death even when the abuser is sleeping or has stopped the beating and walked out of the house? Can a psychologically abused woman fear serious bodily injury and/or death from threats alone? Can someone be driven into madness by being psychologically terrorized? These are some of the specific questions that may be asked before a battered woman's reasonable perception of danger can be defined in the law.

The courts began asking questions of mental health professionals before they were allowed to testify case by case. Are there certain characteristics to the dynamics of a domestic violence relationship identified by research that can guide our hypotheses about the state of mind of someone experiencing it? Does a psychologist have anything special to teach jurors or the judge about domestic violence that the average layperson could not understand on his or her own? Once these questions were satisfactorily answered, courts began to permit expert testimony on Battered Woman Syndrome as evidence for jurors to could consider.

Let's take a look at the history of the cases that changed the law as we knew it:

Francine Hughes

> Francine Hughes had been abused by her husband, Mickey for over thirteen years when she struck back and killed him after a battering incident in 1977. In the middle of the incident, she called the police who came and left after saying they could do nothing. He continued the beating. Later, after he fell asleep, she poured gasoline around the bed and set him and the house on fire. He died of smoke inhalation. She then drove herself and their three children to the police station and told them what she had done. At her trial she was found not guilty by reason of insanity but when examined by the state, she was found to have had her sanity restored. Thus, she was released and able to raise her children in the community. In the book, The Burning Bed, author Faith McNulty explains the law in Michigan at that time did not permit self-defense as he was sleeping.

Interesting, Michigan law in 2019 still does not permit a psychologist to testify on whether a woman has battered woman syndrome although they can talk about battered woman syndrome in general. An advocacy group, Justice Thru Storytelling (www.jtsadvocates.com) continues to raise awareness in that state trying to change the law. It is difficult for the average person to understand whether or not a particular person meets the criteria to have killed someone in self-defense. In Nancy Seaman's case, one of the authors (LW) testified as to battered woman syndrome but was prohibited from testifying that Nancy Seaman met the criteria. However, others testified that her husband was a nice guy. Most people do not understand that men who batter women can be seen as nice guys by others who do not witness the abuse. One son testified he saw his father abuse his mother while the other son denied it ever happened. Jurors didn't hear testimony that the son who denied knowing about his father's abuse behavior was accused of also abusing his wife, because it had not been proven in a court of law. Perhaps had the jurors been able to see how Seaman fit the criteria of others who used self-defense, they would have had more evidence to help their decision. Instead, she was found guilty and with mandatory sentencing, she is now serving a life sentence.

Inez Garcia

Inez Garcia's case discussed earlier occurred around the same time as did Francine Hughes'. As mentioned earlier, her attorneys used a self-defense strategy in the second trial. They emphasized that she acted with a reasonable perception of imminent danger for someone whose assailant knew where she lived, had just physically and sexually assaulted her, and threatened to find and kill her later. This had to be defined as constant fear and terror, which met the definition of 'imminent danger'. The new jury found her not guilty.

Joan Little

Emboldened by the admissibility and success of the self-defense argument in the California *Garcia* case, publicized by the newly developing theories of feminist jurisprudence, Joan Little's attorney decided to use the same strategy in her New Jersey case. Little stabbed-to-death the warden with an ice pick in the jail where she was being held on other non-related charges after he started molesting her. She grabbed the ice pick he was using to force her from his hand at the time. Testimony of Little's fear of this man's aggressive behavior proved helpful in convincing the jury that she was justified in stabbing him to keep him from harming her further. As she was in custody, he knew where he could find her even if she got away from him that time. She used the argument that there was no escape possible from this man.

Yvonne Wanrow

A few years later, in 1977, Yvonne Wanrow shot and killed a neighborhood man as he disobeyed her orders not to enter the home in which she was alone babysitting young children. We discussed this case earlier in this chapter as the Washington Supreme Court reversed her conviction stating that the jury instruction on self-defense did not allow for understanding her fear as a woman who due to "the long and unfortunate history of discrimination against women" needed to use a weapon against a man armed with parts of their body trained to defend themselves.

All three of these cases, Garcia, Little and Wanrow, involved self-defense against a non-

related person but they broadened the definition of self-defense so it could be used by battered women who killed their abusive partners. First, they were women and used self-defense in an anticipatory matter, although Garcia admittedly was raped and beaten first. However, she had already escaped to the albeit temporary protection of her home and she was the one who got the gun, went out, and looked for the men before they had a chance to come back and make good their threats of further harm. Secondly, they defined the term 'imminent' in a way that was different from 'immediate' like in the example of the two men in a bar room fight where the odds were more evenly matched. Even in *Wanrow*, they defined what was a 'reasonable woman's perception' as different from a 'reasonable person's perception' of danger and redefined equal force to include the presence of a separate weapon for a woman even if a man only has parts of his body to use as a weapon. It is a question if that would still hold today when many more women work out in a gym and take self-defense instruction. Nonetheless, *Wanrow* also defined as acceptable self-defense for a woman to experience what some legal scholars have termed 'anticipatory' or 'imperfect self-defense'—she shot and killed the man when he entered her home, albeit without her permission, and didn't wait to see if he would or would not molest the children or harm her.

Using these cases as a foundation, the next important case, *Ibn-Tamas*, was directly relevant to battered woman syndrome where the man lives in the same house as the woman. Since it was in D.C. which was part of the Federal Court system at that time, the admissibility findings could be applied to other federal circuits as well. This may then be adopted by state courts in their evidence codes.

Beverly Ibn-Tamas

> Also, in the 1970's, Beverly Ibn-Tamas was married to a highly respected neurosurgeon in their Washington, (D.C.) community. They lived on what was called the 'Gold Coast' in a lovely home with their two-year-old daughter. Dr. Ibn-Tamas had battered her on several occasions previously but this time, pregnant with her second child, she feared for both her and her unborn baby's safety. He came swinging at her as she fled down the stairs and ran into the room where she knew a gun was kept in a cabinet. Grabbing the gun, she described crouching in fear, waiting for her husband to come and make good his threats to kill her as he was shouting he would do while chasing after her. He came screaming into the room where she was hiding, and in her terror she shot him one time in the forehead. Although she was a nurse and should have known the bullet would be fatal from where it landed, she was angry that the police took her to the homicide division. She like many battered women, believed her husband was omnipotent and would not die.

Ibn-Tamas was charged with murder and at her first trial she was not permitted to introduce any testimony about their long stormy abusive relationship. At that time, in 1977 in Federal Court, testimony was only permitted about the incident that caused his death– not past incidents that led up to her fear. As we saw earlier, this is a problem as it is expected that fragment memories of prior battering incidents as well as the current incident will raise the level of fear in the battered woman's mind. The jury convicted her of the lesser charge of second-degree murder apparently believing she did not premeditate shooting him but shouldn't have had the loaded gun to defend herself. The appellate courts granted Beverly Ibn-Tamas a new trial and her attorneys tried again to present one of the authors (LW) as the mental health expert to provide evidence that *Ibn-Tamas* was acting in self-defense. The judge did not permit the expert testimony before the jury stating it did not meet the Frye standard in effect at that time because there was no evidence of general acceptability of battered woman syndrome as a mental disorder by the psychological or medical community. Before he reached his decision, the judge requested testimony from the expert (LW) outside the presence of the jury. This is called a '*proffer*'. The judge was impressed with the description of Ibn-Tamas' state of mind at the time she shot her husband given by the expert, so although she was again found guilty of second-degree murder by the jury, he sentenced her to only two years in prison. There were no sentencing guidelines to constrain him at that time. She had already served part of that sentence and within several

months she was released and went home to raise her two children while the legal issues remained for another six years before they were settled.

Interestingly, LW had contact with her daughter, now an adult, who read an account of this case in another book LW published in 1989 (*Terrifying Love: Why Battered Women Kill and How Society Responds*) and told of the loving home her mother created afterward including preserving the memory of the positive aspects of her father for both children by not discussing the facts of the case with them.

As mentioned, the appellate courts held onto this case for over six years, issuing their final opinion in 1983, ultimately supporting the court's exclusion of the testimony for very narrow reasons. In between, however, *Ibn-Tamas* helped set the U.S. admissibility standard in a 1979 interim ruling that there needed to be a three-prong basis for permitting this novel testimony. First, it had to be proven that the information was 'beyond the ken of the average juror', which legal scholars had thought would be the most difficult prong to meet. However, the *Ibn-Tamas* court ruled that the proffer did meet that criterion since there were so many myths that the layperson had about battered women, especially why they didn't leave the relationship after they were abused. Unfortunately, this is still the most important question that must be answered for the average juror despite the incontrovertible fact that leaving a battering relationship is the most dangerous time for serious bodily harm or death.

The second prong was that the expert who was to offer testimony had to be 'properly qualified' in his or her own profession. As the court had not acquired sufficient information from the proposed *Ibn-Tamas* expert in the proffer, that question was sent back to the trial court to answer and the judge found the expert so qualified without taking further testimony. Third, 'the testimony had to be accepted by the scientific community', which was part of the original *Frye* standards at that time. In this case, *Ibn-Tamas*' attorneys did not put on the witness stand other psychologists to answer that question as occurred later in the Joyce Hawthorne and Gladys Kelly cases pending around the same time and described below. However, because neither PTSD nor Battered Woman Syndrome diagnosis was in the DSM-III at that time, the judge ruled it "novel" and therefore, inadmissible.

In the two later cases, *Hawthorne* and *Kelly*, the American Psychological Association submitted an *Amicus Curiae* (friend-of-the-court) brief reviewing the psychological literature and offering its opinion that the psychological community accepted the reliability and validity of what was known about battered women at that time. This was in 1981 and although there was certainly not as much research as there is today, what was there was pretty consistent. Others have since used those Amici briefs when the issue of scientific community acceptance was raised trying to get the testimony into cases later on. In most jurisdictions, testimony in a criminal case was very limited to the incident in question, not the history of the entire relationship as is necessary to demonstrate why a woman might be so frightened by the man even beyond what the facts at that final incident might show that she needed to use deadly force. This prohibition against using prior "bad acts" was designed to prevent the trier of fact from being biased, but in so doing, it excludes the history that is so essential in understanding a battered woman's fear. As you probably can see by now, the job of changing rules of evidence is difficult as it must be done state by state. For changing the definition of what constituted a reasonable perception of imminent danger or self-defense for battered women, most was done by case law but in some states actual legislative changes needed to be introduced. Advocates grouped together in these states encouraged by the community organizations to protect battered women by creating shelters and counseling centers, change hospital and doctor responses, remove difficulties in obtaining restraining orders that would be enforced by police arrests, and eliminating other barriers that were identified. A national agency to provide assistance to lawyers and mental health professionals was formed, battered woman self-defense organization.

Other Relevant Cases

Following the 1979 interim decision by the *Ibn-Tamas* court that Battered Woman Syndrome was admissible because it was beyond the knowledge of the average juror, other state appellate courts also ruled to admit the psychological testimony of the expert in different cases. Some of the early cases were in Florida (*Hawthorne*), Missouri (*Martin*), New Jersey (*Kelly*), Ohio (*Kelly*), Washington State (*Allery*), and Wyoming (*Burhle*). Let's look at a few.

Joyce Hawthorne

> Joyce Hawthorne, a Pensacola Florida shot her husband Aubrey multiple times when he woke up in the middle of the night and started to beat her as she was giving their younger son medicine after he told her not to do so. She saw him reaching for a gun on his night table and at the same time reached for the one on hers. She started shooting him to stop him from killing her as he had threatened. The commotion woke up her mother who entered the bedroom with her gun in hand and her oldest daughter who the father had been molesting. By the end of the incident, Aubrey lay dead and nine guns were in the middle of the floor.

Joyce Hawthorne had three trials, each of which was overturned by the Florida appellate court, each time ruling on a different issue. In the first, the court found that exclusion of evidence of her husband's abuse beyond the last three weeks of his life was error; rather, all the abuse must be admitted for a jury to understand her belief that she and her children were in danger. In the second *Hawthorne Opinion*, the Court ruled that the psychological testimony should be admitted but following the insanity statute instructions, the state had the opportunity to have the defendant examined by an expert of their own choosing. Other states soon followed this rule. In addition, the Court also ruled that testimony by the daughter that she had told her mother of her father's incest just a short time prior to the homicide was also admissible as its probative value was more important than its prejudicial value. By the time of the second trial, the attorneys almost came to a fist fight in the hallway outside the courtroom; emotions were running very high.

In the third *Hawthorne* trial, with the same state and defense attorneys and judge, the expert's testimony was still not admitted. The Third Hawthorne Appellate Court Opinion reversed her conviction of manslaughter (she had been convicted of first degree murder in the first trial, second degree murder in the second trial, and manslaughter in the third trial) and remanded it back to the trial court again, again ordering expert testimony to be admitted if there was a fourth trial. Instead, the judge who had kept the first three trials passed the case to a new judge who dismissed it stating that nine years after Aubrey Hawthorne's death, a fourth trial would be cruel and inhuman punishment. In fact, Joyce Hawthorne had been released on bond during this entire time and was able to raise her five children even with her uncertain legal status.

Another important issue that was raised but not settled in *Hawthorne* even though the case lasted until 1986 was whether a person using self-defense had a 'duty to retreat' or a 'cooling off period' before using deadly force. Florida's statutes (as well as in other jurisdictions) had a 'man's home is his castle' doctrine which suggested that a man did not have the duty to retreat in his own home. In 1999 this issue was finally settled in Florida by reversing the *Weiand* decision where the trial court had excluded a jury instruction on self-defense because the defendant was held to the duty to retreat in a marital relationship where in a non-related self-defense homicide no such duty was required.

Gladys Kelly

> Gladys Kelly, a New Jersey woman, stabbed her husband with the scissors she was holding as he began to come after her during an abuse incident. She had been demanding he repay the money he forced her to lend him the night before as he had just gotten paid. She needed the money to feed herself and her seven-year-old daughter. Thinking he had taken the daughter in the middle of his beating her, she took out the scissors to protect them both. He didn't die right away as the doctors in the busy Newark emergency room where they both were taken failed to treat the small wound from the scissors. They didn't realize the scissors had pierced the heart membranes and he bled to death on the gurney being monitored for a

suspected heart attack. This abuse incident followed her trying to get the money she desperately needed from her husband as he had promised. Like the other early cases, the Kelly court refused to permit expert testimony to describe the history of the abuse to give the jury an understanding of Kelly's fear of her husband's violent behavior. A Newark, NJ jury, made up of many other poor African Americans, obviously understood her desperation for the money and convicted her of voluntary manslaughter rather than the first degree murder the prosecutor asked for. She was sentenced to five years in prison.

The American Psychological Association used a similar rationale to Hawthorne and submitted an Amicus Brief in the Kelly appeal. In overturning the conviction, the N.J. Supreme Court Decision opined that the fact that the state legislature had passed laws to protect battered women indicated that battered women were entitled to be treated as a special group in special danger, and thus, entitled to have an expert witness explain their reasonable perception of imminent bodily danger to a jury to bolster a self-defense case.

Gladys Allery and the AKE Decision

As expert witness testimony on battered woman syndrome was slowly being allowed into the courts, the question arose "What about women who couldn't afford an expert witness to evaluate or testify on their behalf?" In 1984, the U.S. Supreme Court in a case called *AKE*, ruled that defendants were entitled to an evaluation by a mental health expert if they raised the issue, even if they could not afford to pay for it themselves. Then the state, which was charging them with a crime, would have to provide such an expert at the state's own expense. Also in 1984, in Washington state, a defendant named Gladys Allery was accused of killing her husband. She raised the issue of self-defense because she was abused by him, but her lawyer did not obtain an evaluation to determine if she had developed psychological problems such as battered woman syndrome, that led to her reasonable perception of imminent danger at the time she killed him. The Washington State Supreme Court Opinion when overturning Allery's conviction made it clear that lawyers would be guilty of malpractice if they did not obtain an evaluation for their clients who raise the issue of domestic violence as part of their defense.

Battered Woman Syndrome Legislation

Despite the rapid changes going on in various state appellate decisions redefining self-defense so that women's behavior would be included, some states were unable to obtain favorable appellate opinions and resorted to trying to pass new legislation. Maryland was one of those states. A group of lawyers and advocates there prepared a short video of several women who told their stories of what made them kill their abusive partners together with an interview of an expert (LW) stating what such testimony would provide. Eventually an addition to the self-defense law was passed authorizing expert testimony on battered woman syndrome that included both the history and dynamics of a battering relationship with the cycle of violence and the psychological impact on their state of mind at the time they used violence to protect themselves or someone else.

This defense was then extended to commission of other crimes under the duress from a batterer. This was sometimes referred to as choosing the 'lesser-of-two-evils defense' rather than just simple self-defense. Crimes involving drug or human trafficking, burglaries or even child abuse might use such a defense presenting battered woman syndrome to help bolster the defendant's credibility with judges and juries. As you will see in Chap. 11 on civil cases, battered woman syndrome began to be presented as evidence for people who claimed personal injuries from the abuse or even to bolster claims to void a contract signed under duress due to fear of further harm by a batterer. Prenuptial agreements in marital settlements have been broken with expert testimony documenting the psychological effects of abuse.

Battered Child Syndrome

The legal case law began to use similar psychological data to help prove other claims of abuse, especially those against children. New research from a major study of the health consequences from child abuse and other adverse childhood experiences [Adverse Childhood Experiences or ACEs (Felitti et al., 1998)] provided scientific evidence of the effects from such abuse at different times during childhood. We describe this study further in Chap. 16 on child abuse. Other research on neurological and neuropsychological damage from child abuse has also become available and admitted into courtrooms to assist judges and juries in making their decisions.

Mitigation and Downward Departures from Sentencing Guidelines

In criminal cases the psychological data on the effects of abuse have been used in mitigation in death penalty cases described in the earlier chapter on criminal law. Both battered child syndrome and battered woman syndrome have been admissible to lessen the person's responsibility and therefore, lower their sentence in other types of criminal cases. A judge has certain sentencing guidelines, and a 'downward departure "from those guidelines may be justified if a particular defendant has a condition or experiences some event(s) which contributed to the offense.

Prison Reform and Clemency

As battered woman syndrome became more common in the criminal courts, many women who were denied the use of this defense in their cases began to petition the courts to lower their sentences through clemency or give them new trials where they could present a complete defense. Governors and other state officials have handled this problem in various ways, often using psychology experts and advocates as consultants to help guide them. For example, in California the legislature authorized women's petitions to be reviewed and many were either granted clemency on the basis of their reports or granted a new hearing in front of judges who heard the new evidence. In Maryland and Ohio, several women were released by their governors and became spokespersons for others left behind. To the best of our knowledge, none of these women committed another violent crime after release.

This effort is ongoing as mental health services are being provided to the women who are serving time in prison. Research shows that as many as 50–85% of incarcerated women have experienced abuse in their lives and could benefit from trauma treatment (Walker & Conte, 2017). Many have been convicted of crimes that involved alcohol or other drug dependency, often used as self-medication for the psychological effects of trauma. Treatment for substance abuse should include trauma-specific intervention to be successful. Newer criminal justice programs such as found with *therapeutic jurisprudence* offer a way to avoid the destabilization of prison and instead use the mental health system as an alternative.

Summary

We have discussed the issue of how syndrome testimony can justify the use of deadly force in order for people to defend themselves. The laws in most jurisdiction define self-defense as a reasonable perception of imminent danger. In order for battered women to claim self-defense in most cases where they were not in the middle of a physical fight, a reasonable battered woman's perception of imminent danger or fear of harm about to happen is necessary. The re-experiencing of parts of other traumatic events makes that fear of imminent harm continuous in women who have been physically, sexually, and psychologically abused by an intimate partner. We described the research on battered woman syndrome and how psychologists are able to draw the connection to their fear of harm in cases other than criminal such as signing an unfair

prenuptial agreement or committing a crime under the duress of their abuser. We also traced the development of syndrome testimony with the important cases that have occurred changing the laws to better protect women.

Questions to Think About

1. What would scare you so much that you would think you are about to be seriously harmed or die? Would it be the same situation that would scare one of your friends? Does gender or race matter here?
2. Do you think women should have a different standard of self-defense than men? Some people have suggested that using deadly self-defense in anticipation before the other person has actually used deadly force is not really conforming to the self-defense statutes. What do you think?
3. What are the reasons battered women do not leave their abusers?

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7 Death Penalty Cases

The U.S. is one of the few countries that charges people who commit certain crimes where death may be one of the sentences. These are called *capital cases* and often the circumstances include crimes which are called *heinous, atrocious, and cruel*. These could be where a victim is tortured or made to suffer great pain before they are killed. Additionally, murder committed during the course of another felony might be so charged. Killing certain classes of people such as police officers, the elderly, children, or other vulnerable people might also be eligible for the death penalty.

Overview

Approximately 29 states still have the death penalty today. It is usually the prosecutor's discretion whether or not to charge it as a capital crime. Because the defendant's life is at stake, there is the belief that many resources should be available for the defense in the investigation and the trial periods but unfortunately this is not always the case. The Innocence Project, for instance, has been able to clear a number of defendants based on new DNA technology. There are also Death Penalty Information Centers located in different regions that provide assistance to some defendants and their attorneys at various stages of proceedings.

These cases are quite controversial and there have been debates within the U.S. and other countries about moral issues involved in taking someone's life as punishment. Laypersons who are called for jury duty are permitted not to serve if they state that they are morally or religiously opposed to voting to put someone to death. Thus, a jury is usually made up of people who are called *death qualified.* There have been some arguments that this policy results in a biased jury especially since many minorities will be disqualified from serving due to these deeply held beliefs. Nonetheless, the USSC has continued to rule that it is not unconstitutional to have a *death qualified jury*, although in a recent case (*Hurst v Florida6*) the justices have decided that the judge can only pronounce the death sentence if the recommendation is from a unanimous jury. In *Batson v. Kentucky (1986)* the USSC ruled it was unconstitutional to dismiss someone on the basis of race from serving on the jury but has not yet taken up the issue of how *death qualified juries* may result in the same thing. This may make the next case where minorities are excluded from sitting on a case of a minority defendant ready to go up to the USSC on new charges of racial bias. Haney (2005) has conducted studies that have suggested that minority defendants are more likely to be charged with or convicted and sentenced to death for the same crime that Caucasian defendants in a different location may have committed.

The proceedings in a *death penalty case* usually have several stages. They begin with the investigation that often includes a psychological

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evaluation. The *trial* is usually in two parts with the first part being a *merits trial* on the facts of the case. If the jury comes back with a guilty verdict of a capital crime, the *penalty stage* will follow in which mitigators are presented by the defense and *aggravators* are presented by the prosecution to help the jury decide between *life without parole* and *death*. We discuss them below as psychologists are often involved in that stage, also. If the jury comes back with a *unanimous verdict of death*, then the defendant is entitled to automatic reviews. The first is in the state court and if that is unsuccessful, the defendant may seek review by the federal court in what is called a *Habeas* petition. Once the case is in federal court, it may go through several stages over many years until the state sets an execution date. If a constitutional issue is raised, then the case may go up to the USSC at any point. Most convicted people may sit on death row for many years while the legal process takes place. When mental health issues have not been previously addressed, this process after conviction may be quite lengthy and new psychologists may be asked to review data or examine the inmate in prison. In addition, some mental health issues may arise while the person is housed on death row. This is important since the USSC ruled in 1986 that you cannot put to death someone who is *insane.* The USSC based its ruling on the concern that executing a person who did not appreciate the reasons for the pending execution would be *cruel and unusual punishment* and therefore a violation of the Eighth Amendment to the U.S. Constitution.

Assessments in Capital Cases

Psychologists who work on death penalty cases must conduct a comprehensive forensic assessment as outlined in the models noted in previous chapters on evaluating criminal responsibility and competency. In addition, testimony in capital cases may present to the jury the presence of what are called *aggravating* and *mitigating* circumstances. Most states have *statutory* and *non-statutory* aggravators and mitigators. *Statutory aggravators* are specified by the law, such as the defendant having committed another homicide, the homicide of a police officer or committing actions during a crime that are designed as *heinous, atrocious and cruel*. *Statutory mitigators* are also specified by the law and include factors such as youthful age of the defendant, his or her having a minor role in the crime if others were involved, substantial impairment of cognitive or emotional processes and extreme emotional distress. These last two mitigators often permit the introduction of testimony about the person's mental health history. Non-statutory mitigators refer to anything else in the person's history that may be relevant and *probative* (meaning they will probably help the *triers of fact* make their difficult decision.) Juries in capital cases are asked to weigh aggravators against mitigators. In theory, if aggravators outweigh mitigators, the jury is more likely to recommend the death penalty. If mitigators outweigh aggravators, then it is more likely that they will recommend the defendant spend the rest of his or her life in prison without the possibility of parole.

Case Law on Mitigation

Mitigation issues specifically have been considered by the USSC as far back as 1978 in *Lockett versus Ohio* (1978) where it was decided that in all but the most rare of capital cases, the sentencer (usually the judge) could not be precluded from considering mitigating factors. The court defined these as "any aspects of a defendant's character or record and any circumstances of the offense that the defendant proffers as a basis for a sentencing less than death". The general reason behind this was found in an earlier case, *Woodson versus North Carolina* (1976), in which the state's death penalty statute had excluded from consideration "the possibility of compassion in mitigating factors stemming from the frailties of humankind".

These precedents were expanded in 1982 in *Eddings v. Oklahoma* (1982) in which the USSC instructed the sentencing judge to consider any mitigating factor, including youth, lack of

maturity, family history, abuse, and emotional disturbance. It appears that this was the first time that the high court explicitly addressed the concept of emotional distress. More recently, in *Penry v. Texas* (2001), the court ruled that a jury in a capital sentencing proceeding must have specific instructions and mechanisms regarding mitigating factors when determining a sentence. This case had originally come to the attention of the court in 1988 where it was argued that Penry's mental retardation should bar his execution. The court at that time refused to bar it but did send the case back to Texas for consideration of how mental retardation should be incorporated into the sentencing rules.

In the case of *Atkins v. Virginia* (2002), the court did, in fact, prohibit the execution of the mentally retarded, citing an "evolving sense of decency" in society. More recently, in *Tennard versus Dretke* (2004), the court ruled that a causal nexus between the crime committed and the mitigation did not have to be established. In other words, it did not have to be as strict a test as one that would define a lack of criminal responsibility. It should be used to explain the etiology behind the crime, rather than offering an excuse for the crime.

Going hand in hand with several of these cases is the concept of ineffective assistance of counsel, since some of the cases involved attorneys who did not effectively argue the mental health mitigation. In *Wiggins v. Smith* (2003), the court ruled that for a finding of ineffective assistance of counsel in capital proceedings, it must be demonstrated not only that the trial counsel's performance was deficient but that the deficiency unfairly prejudiced the defendant; in other words, the outcome would have been different had counsel not been ineffective. Therefore, there must be evidence that trial counsel failed to investigate information relevant to mitigation, rather than it just being a trial strategy to not present mitigating evidence.

As an example, in a recent case in which one of the authors (DS) was involved, defense counsel failed to pursue any investigation into possible mental health mitigation, despite the fact that the defendant had been treated for a seizure disorder, had Post-traumatic stress disorder, showed evidence of psychotic thinking and had been previously psychiatrically hospitalized. Counsel's only effort to pursue mitigation was to call the defendant's mother the night before the sentencing, ask her what kind of boy her son was, called her as a witness the next day to testify to the fact that her son was "a good boy". In other words, defense attorneys in capital sentence proceedings must conduct a complete background investigation and failure to do so must be evaluated in terms of how reasonable that decision was Williams v. Taylor (2000).

Different states have different list of statutory mitigators though the non-statutory mitigators can essentially be anything relevant to whether the defendant should be sentenced to death. Among these are youth, minor level of participation in the crime (e.g., being a getaway driver), that the defendant acted under extreme duress and that there was no record of previous convictions. Other states speak of the defendant committing the crime while under extreme mental or emotional disturbance, having the victim consent to the behavior, having the defendant under substantial domination by another person or evidence of substantial impairment of the defendant's appreciation of the criminality of conduct or substantial impairment of the ability to conform conduct to the requirements of the law. Of some interest is that the last of these factors is the same language found in the insanity defense statutes of some states. Presumably then, if the defendant pled Not Guilty By Reason of Insanity and was unsuccessful in pursuing the plea, the same criteria could be used as a mitigating factor in capital sentencing.

Mental health professionals may be called in to opine on this factor but also whether or not the defendant was under severe mental or emotional distress at the time of the crime. Other states have broadened the criteria, such that there may be a wider range of areas in which the mental health expert may testify, including a

reduced mental capacity and extreme emotional or physical abuse in their background. For example, Fabian (2009) suggests the following areas in which a forensic mental health professional may want to focus in a capital sentencing proceeding: humanizing the defendant, stressing prior risk factors and deficits in protective factors, explaining how a defendant's mental illness, and neurological deficits may have contributed to (not caused) the crime, explaining the history of substance abuse, providing evidence of extenuating circumstances such as battered woman's syndrome, rebutting prosecution arguments regarding aggravating factors and negating jurors' perceptions that the defendant will pose a danger to society in the future.

This last factor is particularly important since some mental health professionals exaggerate their ability to predict future violence with an extremely high level of accuracy. Psychologists who have researched death penalty convictions, such as Mark Cunningham, have found no credible science behind these predictions and their level of accuracy and objective reporting of what the research literature does, in fact, say about the limited ability to accurately predict future violence can serve to deflate these claims.

Fabian also points out many commonalities in defendants that may serve as a guide for the examiner to make sure to cover all these areas. These include limited intelligence, poor academic history, neurological disorder, attention deficit/hyperactivity disorder and mental disorders, such as schizophrenia and affective disorders, a history of abuse and neglect, birth complications, parental substance abuse, family separation and history of substance dependence.

Some other aspects of mental disorders that need to be explored are paranoid thinking or diagnosis of delusional disorder or paranoid personality disorder, psychopathy, attachment deficits, problems with anger or impulsivity, possession of weapons, social alienation and lack of insight into mental illness. As we encourage many times throughout this book, there should be a concerted effort to gather as many records as possible, e.g., police reports, military records, school records, employment records, family interviews, prior jail and prison records and mental health and substance abuse records. Frequently, a defense team will employ a mitigation specialist to help gather these data and the mental health professional can work with that specialist.

Psychological testing in capital sentencing cases should include all of the assessment instruments we have previously discussed, including intelligence testing, objective and projective personality testing, trauma testing, assessment of malingering and neuropsychological assessment. This neuropsychological assessment is particularly important in capital cases because the prevalence of organic impairment in capital prisoners is dramatically higher than the base rate in the general population. The base rate in the general population is estimated to be 8–10%, while in capital prisoner populations between 60 and 70% (Lewis, 1998). Mitigating environmental factors, such as maternal substance abuse, domestic violence during pregnancy and poor nutrition and medical care, can also result in neuropsychological impairment. In addition, well-validated risk assessment instruments need to be used, since the potential for future violence will always be an issue in these cases.

According to Fabian (2009) "The expert witness testifying to future dangerousness, and violence risk in capital sentencing proceedings, must be very mindful of the research addressing specific rates of violence within contextualized incarceration settings." (p. 30). They must not mislead the trier of fact by providing violence risk assessment methods with other non-capital offender populations and should not use risk assessment instruments that have been not normed on or relative to capital defendants. A similar argument can be made for the assessment of malingering, which to this time has not been validated on a capital sentencing population.

The mental health professional should be aware, however, of misuse of these assessments by some professionals and be prepared to rebut arguments that are based on non-standardized administration of, for instance, the Psychopathy Checklist, Revised (PCLR), which Bersoff discussed at the 2012 APA Annual Conference, which has never been validated on a population

of death row inmates. In addition, the clinician needs to look carefully at whether or not other tests are properly used.

Intellectual Disability

A psychologist was disciplined by a State Board of Psychology in 2011 for finding death row inmates (two were in fact executed) intellectually competent to face the death penalty. The Texas State Board of Psychology issued a reprimand against this psychologist who came under scrutiny by other psychologist and defense attorneys who believed that his testing methods were unscientific. The psychologist in question allegedly used unscientific methods that artificially inflated scores on intelligence tests to make defendants eligible for the death penalty. Recall that the USSC had already ruled that people with an intellectual disability could not be executed. He had used a non-standardized interpretation of the Wechsler Adult Intelligence Scale-IV, contending that the test did not compensate for social and cultural factors, and that those from lower socioeconomic status did poorly on the test. For that reason, the psychologist added several points to their scores based on what he called 'clinical judgment'. For instance, he contended that people from impoverished backgrounds may not have learned basic skills, such as using a thermometer and maintaining hygiene, because these skills were not valued in their community, but this did not mean that their intellectual functioning was, in fact, limited.

In states that have a rigid definition of mental retardation (an explicit statement that an I.Q. of 70 or below indicates mental retardation), artificially inflating these scores could mean the difference between life and death. The psychologist indicated, in other words, that failing these items did not reflect a lack of intellectual functioning. In evaluating the adaptabilities of the individual, he also departed from standard test procedures which required interview of family members. He reasoned that they would understate the intellectual abilities of the defendant because they did not want to have the defendant executed. Instead, he interviewed the defendant, a feature that the American Association of Intellectual and Developmental Disabilities cautioned against. There essentially is no scientific or empirical support for his position. Based on this unorthodox approach, one court has commuted a defendant's sentence to life in prison and another stayed the execution of a different defendant. If this psychologist really wanted to do this properly, he would have to take a group of defendants from a poor background and those from a middle-class background, do a Wechsler item analysis, calculate the mean, standard deviations, standard error of measurement of the items and only if significant findings emerged could he utilize this analysis in his findings. Even then, he could not change the I.Q. scores but merely indicate that the I.Q. scores do not fully reflect the individual's functioning. One of the authors (DS) further discussed these problems in an article that appeared in *Practice Innovations* (Shapiro, Ferguson, Hernandez, Kennedy, & Black, 2019).

Although the USSC in 2002 ruled that states could not execute individuals who were mentally retarded, they did not provide guidelines for this determination, leaving that determination to the individual states. While most states have adopted a three-part definition of mental retardation (significantly subaverage intellectual functioning, impairment in adaptive skills and the existence of this problem from an early age), the implementation of these guidelines may vary widely. For example, while some states understood that intellectual testing had a standard error of measurement (a statistical variation below a particular score), the state of Florida utilized what they called *a bright line test*. An I.Q. of 70 or below indicated that the person could not be executed while 71 and above meant that they could. When this was appealed to the USSC in *Hall versus Florida* (2013), the USSC ruled that the standard error of measurement was an important variable that needed to be taken into consideration in determining the level of intellectual functioning. The court rejected the contention of the state of Florida that if the legislators had intended that standard error of measurement be part of the determination, the legislators would have

indicated this. Further, the decision cited the *amicus* brief of the American Psychological Association, reflecting a growing awareness on the part of the court of the importance of psychological factors in making these determinations. In fact, the APA noted that the standardization on the WAIS test gave a range in which the actual score would fall, called the *standard error of measurement*. Thus, a bright line point was an inappropriate interpretation of the defendant's I.Q. score which would fall within a range.

Impairments in Adaptive Functioning

Another USSC case of some interest is from 2016. In *Moore versus Texas* the USSC considered the fact that in mental retardation cases, the state of Texas was using a highly idiosyncratic description of the second prong of intellectual disability, *impairments in adaptive functioning* rather than those enumerated in professional testing manuals. As noted earlier, the impairments in adaptive functioning needed to be demonstrated along with the subaverage intellectual functioning. In Texas, at that time, the criteria for impairments in adaptive functioning had little to do with the descriptions in professional manuals and, in fact, were, according to the A.P.A. *amicus curiae* brief, based on the character of the mentally retarded individual in the novel *Of Mice and Men*. The United States Supreme Court found that this was deficient and directed Texas to revisit its definition of impairments in adaptive functioning.

Race

In another Texas case, *Buck v. Texas*, (2017) the defendant, an African-American male, had been sentenced to death. The testimony of the psychologist who examined Mr. Buck for the defense included the observation that race was a risk factor for future violent behavior. Several appeals followed, based at least in part, on the apparent misuse of racial factors. The USSC reversed and remanded the case, noting the inappropriate use of this racial practice. The psychologist in question was condemned for being a racist and a bigot in several professional newsletters and listservs in 2017 but early in the research regarding risk factors for future violence, it was believed that race was a risk factor (see Meloy, 2000). It was only later that further research demonstrated that this alleged racial factor was really one of socioeconomic status. Thus, the psychologist relied on outdated research and failed to keep up with more recent research developments.

More recently in a 2017 trial in Idaho, *State v. Renfro*, there was a great deal of debate and controversy over the defendant's brain functioning. In 2015, the defendant had shot to death a police officer and the defense attempted to present the testimony of two experts to explain his behavior. The first described Renfro's history of hyperactivity, parental neglect, head trauma, alcohol abuse, poor peer relations, and learning disabilities and how it impacted his development and behavior. The second, relying on quantitative electroencephalogram (EEG) results, discussed traumatic brain disorder (TBI) and its impact on Renfro's behavior. This expert described degeneration of white matter, shrunken portions of the brain and hemispheric asymmetry. A 1997 article attacking the use of this quantitative EEG was used by the state to argue that the testimony was based on *junk science*. Other physicians, using different kinds of MRIs, found a normal brain. Of some interest is that the prosecuting attorney chose to emphasize a different point: He kept asking the experts whether or not Renfro could make a choice. yham, who was one of the defense experts, sought to clarify this after answering that while Renfro could make certain choices they would be dependent on what had been loaded into his system, what it is that he is making his choice with. The other defense expert, Adler, concurred, stating, "If you have an impaired nature, the choices are not the same as a normally constituted person."

Background and Other Factors

Other factors that need to be carefully considered by a psychologist are family factors such as parental criminality, parent–child separation,

poor family bonding and family conflict. Academic failure, as noted before, is highly relevant to mitigating factors, as are delinquency, poverty, and community disorganization. Child abuse and other forms of victimization by adults have been shown to be relevant as well. The psychologist retained by the defense in such cases needs to walk a narrow line, educating the trier of fact about the commonality of many of these risk factors in the offender population, but not suggesting to a jury, for instance, that they should accept, condone, or excuse the behavior. The state will often cite what has been called *the abuse excuse* and focus on the fact that whatever abuse the defendant has suffered, or whatever impairments they have had, should not detract from the fact that people have free will and should control their behavior. Whatever the evidence of serious dysfunction that the defendant has, the expert witness should not allow himself/herself to be drawn into a debate about free will. Rather, stay with the findings of the evaluation.

Impact of Mitigation Testimony

Research regarding the impact of expert testimony about mental health mitigation is mixed. Brodsky and his colleagues conducted a study in which mock jurors were less likely to recommend capital punishment when there was mental health mitigation testimony indicating that the defendant was diagnosed with schizophrenia, not medicated, suffered from severe delusions and hallucinations, was drug addicted and high at the time of the murder or was seriously physically abused by his parents during childhood. On the other hand, other research suggests that the role of mitigating evidence is a minor factor in jury deliberations in capital cases (Bentele & Bowers, 2000).

More recently, research from Nova Southeastern University (Shapiro, Ferguson, Hernandez, & Akl, 2016), based on a multiyear review of actual court transcripts, revealed that testimony regarding mental illness had little appreciable impact on jury decision-making. Rather, the most frequent factor was attorneys who never hired a mental health expert, hired one but failed to utilize their testimony or allowed faulty mental health testimony to be presented. This needs to be distinguished from cases in which the defense for strategic reasons chose not to utilize expert mental health testimony. For instance, in *Darden v. Wainwright* (1986), the USSC opined that it was a reasonable strategy for the defense to not allow a psychiatrist to testify to prior violent acts based on the diagnosis of sociopathic personality disorder. The following year, the USSC ruled in *Berger v. Kemp* (1987) that limited investigation by defense counsel was reasonable, given strong aggravating circumstances and very minimal evidence of mitigation.

Shapiro's research at Nova Southeastern University posited some reasons that triers of fact often rejected mental health mitigation issues. The current research reviewed in excess of 150 cases in which mental health mitigation was offered. The first study revealed that there was no diagnosis significantly related to a recommendation of life imprisonment rather than death. People with severe mental disorders were sentenced to death just as frequently as those with personality disorders. Subsequent analysis attempted to examine the reasons behind this and revealed four main categories: Failure of the legal system (e.g., court refusing to listen to expert testimony), denial and minimization of mental illness by the trier of fact (comments indicating that little weight was given to those), poor expert testimony where the testifying expert gave testimony that lacked credibility due to lack of experience or incomplete evaluation, and ineffective assistance of counsel (an attorney failing to utilize mental health mitigation or after hiring an expert, failing to use him or her at trial). By far, the largest portion of the variance was accounted for by ineffective assistance of counsel. While it would be easy to blame lawyers for not utilizing the skills of mental health professionals, we also need to look at the reasons that

attorneys do not see mental health professionals as valuable assets in capital sentencing. Do they not understand our areas of expertise? Do they understand them but not value them? Or do they fail to consider them at all? We as mental health professionals can reach out to attorneys and demonstrate the areas in which we can be of service.

Competency for Execution

Should all the appeals be denied, psychologists may be consulted to evaluate the person's competency for execution. As we discussed in Chap. 5 on competency to stand trial, the USSC found in *Ford v Wainright* that it is unconstitutional to put someone to death who is not fully aware of the reasons for the execution. Under the Eighth Amendment to the U.S. Constitution it was found to be *cruel and unusual punishment.* Some psychologists refuse to become involved in this type of evaluation fearing that if they find the defendant competent, they will be participating in putting them to death. Think about what you might do should you be asked to perform such an evaluation. Would you be willing to participate knowing you might also find them to be incompetent and therefore save them from execution? Or, would you recommend some form of treatment knowing that the treatment, usually medication to restore them to a condition in which they can be executed, would be short lived?

Summary

We have attempted to describe the ability of psychologists to be useful in assisting in the defense of those whose mental health issues are important in mitigating circumstances when a defendant is charged with a capital crime. Psychologists are most often involved in the investigation and trial stages of capital cases. However, we may also be helpful in reviewing the case once an appeal is filed both in state court and habeas cases in federal court.

Questions to Think About

1. Should mental illness be a mitigating factor in capital sentencing?
2. Should testimony about future dangerousness be allowed in capital cases?
3. Should ethnic adjustment of I.Q. scores be allowed?

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8 Clinical and Forensic Assessment

ATTORNEY: *Doctor, in your opinion, is this defendant mentally ill?*

PSYCHOLOGIST: *Yes*

ATTORNEY: *Doctor, would it change your opinion if I showed you this letter that the client wrote stating he was going to 'play' crazy for the doctor?*

If you were the psychologist here and you only had a clinical interview to support your opinion, you may have some credibility problems no matter how you answer this question. However, if you had standardized test results, your answer might be something like this:

PSYCHOLOGIST: *No, that would not change my opinion because my opinion is based not only on my clinical interview but also on the results of the standardized tests that I administered.*

ATTORNEY: *But, doctor, can't all these tests be faked?*

PSYCHOLOGIST: *It is always possible but there are scales that control for validity in several of the tests that I administered. I also administered tests that are designed specifically to assess for someone who is trying to look more crazy than they actually are.*

If you also reviewed forensic documents concerning the actual facts of the crime you could also respond to the cross-examination like this:

ATTORNEY: *Well, doctor how do you know that he didn't become this way after the crime from being held in jail. After all, jails aren't nice places, are they?*

PSYCHOLOGIST: *I was able to compare other people's reports of the client's behaviors both before and during the crime with the current test results and my interview. I found the client's behavior to be consistent across all these data sources.*

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The above cross-examination is typical of what a forensic expert witness can expect to face when testifying to the conclusions about a person's behavior being consistent with what is expected for someone with a particular type of mental illness. If you only used a standard clinical evaluation as your data source, which may be sufficient in an initial clinical interview to develop a treatment plan, a forensic examiner is at a disadvantage. If you also administered several clinical tests to assess for mental illness, the forensic examiner can more effectively deal with the obvious question of the client's inconsistent behavior, such as outright lying or pretending to feign psychopathology. However, if you also review documents such as police reports and witness statements that describe the client's behavior at the time of the incident, then you can make even more statements that support your opinion. The more data sources you have, the more credible is the forensic opinion.

There are two main differences between a clinical and forensic assessment. First is the different interpretation of the data gathered through traditional clinical means. Administration of the clinical interview, history taking, mental status, and psychological testing might be the same whether for a clinical or forensic evaluation, but their interpretation must deal with the answers to the legal questions being asked. Second is the need for more than one data source. This may include witness statements and other discovery in a criminal case, other reports about the person's health in a civil personal injury case, police records in an abuse case, or collateral interviews in a custody evaluation. Psychologists can also use standardized tests on which they have been trained to augment clinical judgment and other information. In clinical settings these assessments are used for developing a diagnosis and treatment plans. In forensic settings, the evaluator must interpret the clinical material not just for diagnosis and treatment purposes, but also as a way of generating hypotheses relevant to important forensic issues in the case itself. The clinical data are important but do not represent all that is needed for a forensic assessment. They are, in essence, only a jumping off point and clinicians unfamiliar with forensic procedures may make many errors when they try to overgeneralize from these clinical data to legal or forensic conclusions. It is here that the forensic clinician must address the other forensic issue—the integration of multiple data sources. While the use of several data sources is important in clinical settings, it is even more critical in a forensic evaluation.

The first part of this chapter will deal with the forensic methodology involved in interview and history (including record review, when possible), and the second part with the use of psychological testing in forensic cases.

Clinical Forensic Assessment

The goal of forensic assessment is to come to a professional opinion within a reasonable degree of psychological certainty, which is the legal standard. This means that your opinion is more likely than not to be accurate rather than the higher standards psychologists use for rejecting the null hypothesis in research. The final forensic conclusion must represent an integration of multiple data sources representing analysis of the consistencies across these data sources and explanations of where there were inconsistencies. If there are inconsistencies, which frequently occur, these may qualify rather than invalidate your professional opinion. A fair and ethical opinion will report any data that may indicate such reservations. However, once on the witness stand, you are only required to answer questions posed to you by each attorney. Here trial strategy is important to develop with the attorney with whom you work.

Conceptually, it is necessary to use this integration and consistency model because in forensic evaluations the answers to legal questions usually require data other than that just obtained in a clinical interview. These parameters will be detailed in the other chapters outlining procedures for evaluations in each type of legal proceeding in this book. However, there are some general procedures that will be presented here in different types of cases.

Competency to Stand Trial

The issue of competency frequently comes up in criminal cases although competency to make other types of decisions including entering into a contract may also require a clinical forensic evaluation. While the primary focus of a competency exam is on how the person appears at the time the forensic examiner performs the evaluation, some dimensions require necessity for input from sources other than the clinical interview. The clinician may well be able to determine the defendant's ability to understand charges, court proceedings, and important people in the court process, but ability to assist counsel and susceptibility to deterioration may require input about charges, court proceedings, and important people in the court process. For example, an interview with the attorney to determine how the defendant relates to them, and a review of psychiatric records could be helpful. Learning if the person has been placed on medication and analysis of what the medication(s) is/are, the intended effects, the possible side effects, and the consequences of changing or stopping the medication are all relevant issues. As noted in the chapter on competency, defendants have the right to refuse medication at the time of trial if they choose. Were this to occur, a careful review of the mental state of the individual when not on medication, coupled with a consideration of the stress of trial proceedings would be an important addition to an opinion about the defendant's current competence to go to trial.

In reviewing psychiatric records it is important to note typical behaviors when the defendant is actively psychotic compared to those times when the illness is in remission. If the defendant is in jail, a careful review of behavioral observations made by staff can be helpful in determining the validity or lack of validity of certain symptoms the defendant may be presenting.

> A case examined several years ago by one of the authors (DS) revealed that a defendant, who appeared to have severe cognitive impairments, such that he had difficulty answering the simplest questions, in fact was the "champion chess player" on the ward. Clearly, the concentration necessary to play chess was inconsistent with the severe cognitive impairment observed on the clinical tests.

Criminal Responsibility

In the evaluation of criminal responsibility, the necessity for integration of data outside of the clinical evaluation becomes even more critical, because we are dealing with the defendant's mental state at the time of an offense, not her or his current mental state. Without careful consideration of other sources of data, the clinician has difficulty knowing whether the mental state at the time of the evaluation is the same as, or different from, the mental state at the time of the offense. The defendant may have been mentally intact at the time of the offense but deteriorated by the time of the evaluation, perhaps due to the stress of being incarcerated. On the other hand, a defendant may have been overtly psychotic at the time of the offense and have reconstituted, or gone into remission, by the time of the evaluation.

Defendants in remission may attempt to reconstruct their behavior to appear nonpathological, to make it more acceptable. The clinical evaluator is trained to accept the client's descriptions of an event as therapists work with a client's perceptions of events. The forensic evaluator should not accept automatically the defendant's description of his or her mental state at the time of the offense as necessarily accurate. In general, a criminal responsibility evaluation requires a careful review of police reports, witness statements, hospital, employment, and school records, and interview with family, friends, witnesses, and police officers. In some forensic evaluations it is necessary for the examiner to interview some of these people personally while in others a review of an investigators interview, a statement of a sworn disposition will suffice. An integration of all of these sources of data will help the psychologist determine the defendant's state of mind at the time of

the offense to a reasonable degree of psychological certainty, and whether it was different from the defendant's mental state at the time of the forensic evaluation.

Police reports and witness statements sometimes provide the best contemporaneous evidence of behavior at the time of an offense. While these lay witnesses are generally not mental health professionals, they can often provide descriptions of behavior that can assist in the reconstruction of a mental state. In one case seen by DS, the defendant was charged with an apparently unprovoked assault on a police officer, after the officer had seen him shoplifting a jar of peanut butter. Upon interview, the officer recalled that as he approached the defendant, the defendant's eyes "rolled back in his head" and "his body got all stiff." The behavioral description made it clear that the apparently unprovoked attack was in fact the random striking out seen at times during a seizure. Subsequent neurological evaluation confirmed the diagnosis.

It is also possible that the reports of police officers and detectives who do not record the events in a timely or clear manner will not be helpful. Confusion at a crime scene can interfere with the reports as can other factors described in the later chapter on eyewitness testimony. Battered women, rape victims, and others with PTSD may not tell the police all that influenced their behavior for a variety of reasons including shame and embarrassment. They may also have difficulty separating out what actually occurred from fragments of other similar trauma events that were being re-experienced in their mind at that time. So, caution is advised in the weight given to those reports.

> In one case seen by LW, the defendant kept describing her husband throwing a telephone at her that broke. However, no broken telephone was found at the scene. During the evaluation it was discovered that he had thrown the telephone in another similar battering incident that occurred shortly before this one. It could be inferred that the current incident triggered memories of the previous one so she was responding to both at the time of the incident. This information can be helpful in supporting a self-defense hypothesis and testimony to its accurate context can make her statement more credible to the jury.

Personal Injury Cases

In a personal injury lawsuit the integration of multiple sources of data is also critical. The legal standard is whether the accident or injury was the proximate cause of the current condition. Proximate cause is sometimes measured as a 'but for' test: But for the accident or injury (i.e., had it not occurred), the current mental/emotional condition would not exist at all or in the intensity noted. Obviously, this question cannot be answered without a careful consideration of the plaintiff's prior condition and subsequent behavior since the time of the accident or injury. The prior condition is usually determined by review of records and interview with family, friends, and employers. This is important to establish a baseline of what was the plaintiff's pre-existing condition.

Even if the plaintiff had a pre-existing psychiatric condition, it does not eliminate the possibility of recovery in a tort action. In Chap. 11 on civil law we describe what lawyers call the 'egg shell theory' of personal injury tort claims. This is often explained by using the nursery rhyme involving 'Humpty Dumpty' who was a cracked egg when he sat on the wall, but if someone pushed him, then they must take responsibility for all the prior damages, not just the subsequent ones. Others state the theory as 'you take your plaintiffs as you find them', meaning if the defendant injured the person beyond what his or her condition was before, then the defendant is responsible for the person's entire current condition. However, often personal injury cases are settled by apportioning the amount of money to be recovered to prior and current condition. In any case, the clinician must determine how much worse the current condition is, or in what way the accident or injury exacerbated the prior condition.

A review of records since the time of the accident or injury is also important because it will help provide substantiation or lack of substantiation for the deficits the plaintiff is claiming. If, for instance, they are claiming severe anxiety or depression, but a therapist's notes reveal that the symptoms are mild, this can be

important information. If a plaintiff claims that they are experiencing a phobic reaction since the injury such that they avoid certain areas, but an investigation reveals frequenting of such areas, this is highly relevant data. It should also be noted that sometimes a plaintiff will seize upon an accident or injury to justify symptoms they have been experiencing for many years, and not consciously acknowledge that the symptoms have pre-existed the accident or injury. Careful history gathered from outside sources will help illustrate this.

DS examined a young man who had been in a minor motor vehicle accident when a postal service truck had hit him from the rear, while stopped at a red light. The impact occurred at approximately 5 miles per hour and caused only minor dents to the plaintiff's car. He was claiming that, in addition to Post-Traumatic Stress Disorder, he was suffering organic brain impairment which resulted in a marked decline in his grades in college. A review of academic transcripts revealed no drop in his grade point average. Sometimes, however, prior conditions may be present but not visible and a minor car accident can cause a cascade of injuries not usually seen.

It is also necessary to integrate the data with what mental health professionals know about the expected behavior of someone with similar experiences or diagnosis. For example, LW had a case where a sexually abused woman began a clandestine sexual relationship with a co-worker while her husband claimed that she was refusing to have sex with him as part of the damages. The insurance company that was representing the party being sued discovered their secret relationship after putting her under video surveillance, not unusual in highly contested cases. Testimony included a discussion of the behavior known to occur in rape victims which sometimes includes sexual acting out or experimenting to see if they still can function normally.

Child Custody and Parental Fitness Evaluations

As a final example, let us consider child custody and parental fitness evaluations. It is well known that parents in a contested custody situation or those whose children have been removed from their care will be 'putting their best foot forward' when they are examined by psychologists. They typically believe that they can 'play the part' and make themselves look free of mental illness or appear to be highly competent and responsible parents. Reliance on the clinical interview and psychological testing alone will give an incomplete picture. Again, careful history taking, structuring parental interactions with the child, interviewing friends and family, and obtaining outside records such as school, medical, and treatment records can be very important in helping to provide a more complete picture. If there has been an allegation of child abuse, a careful review of social service records is critical; even here, the records may not be available or complete. If there are allegations of domestic violence, once again, record review is critical, along with a careful consideration of the research literature that details the effects on children of witnessing domestic violence.

Comprehensive Forensic Assessment Model

The following is a suggested comprehensive forensic evaluation model which provides the general parameters that are necessary to include in a report of a comprehensive forensic assessment in criminal and personal injury settings. We discuss details of how to conduct these evaluations in other types of cases in our recent book *Forensic Practice for the Mental Health Clinician* (Shapiro & Walker, 2019). A similar outline to be utilized in custody evaluations can be found in Chap. 15. The exact order of this outline need not be followed strictly, and it may be adapted to different circumstances. Table 8.1 summarizes the outline and details are discussed below.

Clarify Purpose and Parameters of Exam and Obtain Informed Consent

As early as possible, there has to be a clear statement reflecting the defendant's or plaintiff's informed consent to the evaluation, and their

Table 8.1 Summary of steps in a forensic evaluation and report

I.	Informed consent
II.	Reason for referral and legal questions
III.	Basic demographic data
IV.	Procedure
	• Documents reviewed
	• People interviewed
V.	Statements of facts
	• Charges in criminal case
	• Details of injury in personal injury
VI.	Plaintiff's or defendants description of the facts
VII.	Relevant histories
	• Medical and/or psychiatric records since time of crime or injury
	• Social history
	• Vocational history
	• Sexual and marital history
	• Educational history
	• Military history (if any)
	• Drug/alcohol abuse history
	• Criminal history (if any)
	• Psychiatric history
	• Neurological history
	• Consultations

understanding of the conditions under which the results of the evaluation will not be kept confidential. While this may seem self-evident to the examiner, it may not be clear to the defendant or plaintiff. People who have had experience with a psychologist previously may assume this interview will be confidential, too. The fact that this is a different kind of evaluation needs to be clearly explained. The details of the informed consent will vary depending on the jurisdiction, and depending on the nature of the examination, but generally it should contain a statement of who the examiner is, who retained the examiner, what the purpose of the evaluation is, confidentiality issues as noted above, and the person or persons to whom the results of the evaluation will be released. The examiner needs to indicate, in some manner, that the person being examined is competent to understand the above dimensions and consented to the examination. If there are questions regarding competency to participate, the attorney or judge should be notified before proceeding.

Gather Basic Demographics

The examiner should begin gathering basic demographic data along with the reason for the referral. In criminal cases, the referral question usually refers to the legal issue at hand (e.g., competency, criminal responsibility, and mitigation.) In civil cases, especially in personal injury settings, the referral usually has to do with the extent of psychological or neuropsychological impairment and whether that impairment can be related to the accident or injury. The psychologist must consider the different facets of the plaintiff's claims in order to relate the findings to the referral question. Some parts of relationship to the injury, what is legally referred to as *proximate cause* may or may not be within the

psychologist's expertise. In those cases, the psychologist can only render an opinion on how the cause of the injury related to the psychological findings. For instance, let us assume that the legal action has to do with some allegedly improper medical treatment. Not being a medical doctor, the psychologist cannot testify to whether or not that treatment was improper. But, the psychologist could testify to the probability that such treatment could reasonably lead to the psychological condition we found in our assessment. Of course, if the issue had to do with allegedly harmful effects of some kind of psychotherapy, then the expert could respond to the entire proximate cause issue as well.

Review of Documents

As mentioned earlier, one of the distinctions between a clinical and forensic evaluation is the need to review various documents. These documents will need to be listed in the report, and comparisons will need to be made of the various samples of behavior revealed about the defendant or plaintiff. In criminal cases, these are usually called the *discovery* and will usually consist of police reports, witness statements, transcripts of interrogations, transcripts of pre-trial hearings, as well as motions filed by both sides regarding certain legal issues and whether certain testimony will or will not be admitted. In civil cases, one should review what are called the *pleadings,* which list the allegations regarding the causation of the injury and the nature and extent of the injury in addition to the documents reviewed in criminal cases.

It is also helpful to keep a careful log of all other people interviewed. In doing the comprehensive assessments described earlier, it is important to look for consistency across data sources. If the attorney permits, given time and money available, it is often helpful to interview as many people as possible to gain insight, from a layperson's perspective, just how the individual functioned on a day-to-day basis. In some cases, an investigator does the interviewing and you may be given written reports of what they have found. Sometimes they may even consult with the psychologist before they conduct the interview to make sure they ask questions critical to what you want to know. In a criminal case, of course, we want as much information as possible about functioning at the time of the offense. As noted earlier, interviewing arresting officers and witnesses can be very valuable here. In civil cases, we want to pay particular attention to differences in functioning, pre- and post-injury. In cases where abuse is claimed, we want to know what any witnesses may have seen or heard that might relate to violence.

Details of the Incident

In a forensic evaluation, it is important to obtain a detailed accounting of the crime or injury both from official documents and from the examinee. Careful attention should be paid to similarities and discrepancies in any different accounts. In criminal cases, the defendant may, upon advice of counsel, not want to discuss the offense. This is acceptable as the defendant has the right to remain silent under the Fifth Amendment to the U.S. Constitution and we are cautioned not to interpret this as meaning they are guilty of doing what they are charged. A plaintiff in a civil case may also decide not to respond to certain questions during what is called an *independent medical* or *psychological evaluation* that defendants are usually entitled to request from the court. This should be noted in the report. The degree of disclosure necessary varies with the reason for the referral. If the examination is for competency alone, then the defendant does not need to discuss the incident. They only need to understand the charges and the legal process. If the examination is for criminal responsibility, then the need for the defendant to describe their actions, thoughts, and feelings at the time of the offense becomes much more important. In personal injury cases, it is important to obtain the plaintiff's accounting of the incident and their perceptions of how their daily functioning has been affected by the injuries experienced. In parental fitness cases, an examinee may not wish to discuss the incident that led to their children's removal or sheltering, but it is beneficial to hear their side of the story in order to assess their level of insight as a parent and how much they may have learned about how to improve.

Gather Relevant Histories

Once the sources of information and referral questions are understood, it is important to review the information gathered in the history taking part of the evaluation and compare it to the reports that were reviewed by others. Some examiners like to begin with a summary of any medical or psychiatric records since the time of the crime or injury, while others prefer to begin with their own assessment and then compare it to the reports of other medical and psychological findings. In a criminal case, this is helpful because it may give some insights into the defendant's behavior around the time of the offense and the severity of symptoms if any are present. In a personal injury situation, it gives additional sources of data to evaluate degree of impairment in daily functioning. Understanding how the injuries have impacted the person's emotional well-being and quality of life is also important here by comparing prior history to current functioning.

Mental Status Evaluation

A mental status examination should be performed, paying attention to speech, affect, and any evidence of serious psychopathology. If the plaintiff or defendant is responding to internal stimuli, then their reality testing may be poor which probably will impact the credibility of the information obtained in the interview itself. If there is a history of head injuries or other neurological symptoms, it may be important to assess for neuropsychological impairment also.

Childhood, Social, Educational, and Work Histories

A detailed social history is important to obtain from the plaintiff or defendant. This should include early childhood history, nature of family relationships (including possible abuse or losses), and history of any serious illnesses or injuries. A similar history should be taken for early school years, adolescent, young adulthood, and adulthood—varying—of course, with the age of the client. There should be questions detailing nature of peer interactions, romantic relationships, degree of academic success or failure, and nature and duration of employment including military service and possible citations for misconduct or psychiatric problems. All of these can provide information relating to deficits or mental illnesses pre-existing the crime or injury. Sexual and marital history should be obtained as well as the issues that may have led to divorce or separation.

Alcohol and Other Drug Use

A history of alcohol and other drug abuse is critical because its use or abuse impacts on many different areas of the person's behavior and functioning. It is also important to learn if there is a family history of substance abuse. The plaintiff's or defendant's drug-of-choice or polysubstance abuse should be ascertained including when the abuse started, how long it lasted, and whether there has been any treatment for it. This is particularly important for a variety of reasons including giving insight into possible dependence or addiction, its ability to lead to organic impairment or to the presence of certain psychiatric symptoms. If a client presents such symptoms during mental status examination, it is important to determine whether or not they are related to alcohol and other drug use. A history of substance abuse can also have a major impact on the legal issues involved. For example, if a person claims to be suffering serious depression from an injury, but also has a history of substance abuse that can cause depression, this issue would need to be factored into an assessment. If a defendant in a criminal action appears to have been suffering from a drug induced psychosis, it is important to know whether the drug exacerbated a pre-existing psychosis. There appears to be a high incidence of those who were exposed to drugs and alcohol while a fetus who have committed major crimes so it is important to attempt to assess for fetal alcohol syndrome and other similar effects.

Prior Criminal History

In criminal cases it is important to obtain a criminal history, both from official records and from the defendant. This will provide an ability to assess patterns of behavior and whether or not punishment appears to have deterred subsequent criminal

activity, an important diagnostic consideration. This information may also be important if asked to give an opinion on adjustment in a prison population or even, a risk of re-offense if placed on probation. In civil cases, a history of repeated claims might also be important to assess.

Summaries of Other Data

The examiner may choose to write separate sections on the different histories, especially if issues are identified that are relevant to the nature of the legal questions and hypotheses that have been developed. For example, any history of learning disabilities and the impact of such disability on behavior could be important in better understanding the person's current mental state. Others prefer to put all the histories in chronological order rather than separate the information into the different categories. This is a matter of personal preference and should be determined by what makes the report most readable and conveys the best picture obtained of the individual evaluated. Consultations from other professionals and the opinions obtained from them should be detailed and identified as such in this section, too.

Findings

In this section it is important for the forensic examiner to state his or her own opinions, integrating the relevant histories, the clinical and test findings from the current evaluation, what the literature says about the particular issues being assessed, and how it all answers the legal questions asked in the referral. The examiner's opinions must be linked to the sources of the data from which they are obtained. In some cases relevant literature might be cited when discussing the opinions, if it might help educate the judge. Sometimes cases may even be settled on the basis of the report rather than going to trial either with a dismissal which is rare or an acceptable plea offering.

Psychological Test Results

The results of psychological testing should be presented, with a focus on their relevance to the legal issues as hand. Not all findings need to be discussed, only the relevant ones. There is some degree of subjectivity in determining what is relevant, but certainly the following should be considered as a bare minimum. There should always be a statement regarding the validity of the test results since it is important to acknowledge the precautions taken to account for self-interest in the favorable outcome of any forensic evaluation. Although psychologists are often cross-examined specifically about the possibility of a client's malingering, the issue in a forensic examination is much broader as both clients and attorneys sometimes have a lot invested in the results of this examination.

Cognitive Tests

Psychological tests can measure current cognitive functioning, critical judgment, degree of impulse control, and the various intellectual skills that are necessary to understand concepts that are important for legal responsibility. The degree to which a person's current performance on a test is related to his or her capacity to perform intellectually can also be inferred. Comparisons of his or her performance with others at the same age or developmental level can be made when standardized tests are used. If the cognitive abilities were assessed at an earlier time, the examiner can compare the current performance with the previous test results. If impairment on the cognitive test is noted, it may be important to refer for further testing to find out what is causing the impairment. This could be due to neuropsychological deficits or emotional problems or other unknown factors. Since a person's judgment is often at issue, some cognitive tests can be analyzed to factor in the impact that emotional distress may have on the person's cognitive abilities. This is important in that many legal questions are based on what a person *knows* or *should have known* which is a cognitive factor, not on the person's feelings. However, how feelings impact on cognitive ability may also be relevant.

Personality Tests

Personality tests are usually administered in addition to cognitive tests. It is typical to use

several different measures in order to assess for any pathology using a variety of data sources. For example, an objective measure might ask for just one answer to a true or false question or permit several forced choices such as in a Likert scale where numbers might range from 1 to 5 in level of severity. It is called an objective test because the examiner does not have any flexibility in how to score the answer. However, there may not be one right or wrong answer in those tests that have created scales made up of groups of answers. Again, a person's responses can be compared to others on whom the test has been standardized or with his or her own previous responses, if available.

Projective tests have more flexibility in the range of possible responses and how they are scored and interpreted. They are very useful in those clients who are trying to present a particular image of themselves as there are no right or wrong answers nor does social desirability play as important a role, particularly in naïve clients. Comparisons of test results from projective and objective tests give a better understanding of the plaintiff or defendant's total personality and how it may have impacted on the legal questions. Many of these test results also conform to the diagnostic categories that are used in clinical and legal evaluations so they can be used as checks and balances with each other and the clinical interview findings.

There are now standardized tests that assess the psychological impact from trauma. These can be useful if psychological problems are being attributed to one or more traumatic incidents. Some of the test results give specific data about the precise areas of functioning that have been significantly impacted and like the cognitive and personality tests, can permit the comparison of one person's responses with others on whom the test has been standardized. Others measure the criteria that must be met to make a PTSD diagnosis.

There are many other kinds of assessment instruments that are not standardized but assist in the collection of more objective information or at least gather data in a systematic way to avoid leaving out important components of the evaluation. Actuarial instruments are now being used to assist in assessing risk of violence. These actuarials are based on statistical probabilities and can be useful as guidelines if the population on which they will be used is similar enough in demographic and cultural and ethnic backgrounds. Often forensic evaluations must make sense of a lot of information so the use of structured interviews, actuarial instruments, assessment instruments of specific cognitive, affective domains in a particular client may help organize the important data.

Integration of Results

The integration of the results from the entire evaluation includes the degree of cognitive impairment, the extent of serious psychopathology, the degree of impulse control, and the capacity for stress tolerance that may have been found. These areas are of particular legal relevance. Opinions about the acuteness or chronicity of the condition should be made if possible. If neuropsychological assessment has been done, the nature of impairment and its similarity to or differences from pre-existing impairments should be detailed. Once again, bear in mind that the test results do not answer the actual legal question, but need to be integrated with other data.

Diagnosis

In some legal cases it is important to give a diagnosis, if one is found. Use the appropriate nosologies, such as the *Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-V)* or the *International Classification of Diseases, 11th Edition (ICD-11),* and simply list the diagnosis with the designated code. If it requires an explanation, that should be in the interpretation or discussion section of the report. Be prepared to defend how you made the diagnosis in testimony. This requires knowing what data support the criteria required to make the diagnosis.

Summary and Recommendations in Reports

In the final section of the evaluation, a summary and recommendations for further evaluation, if

any, should be made. Table 12.1 summarizes the steps in an evaluation that we have been discussing. Careful attention again needs to be paid to the legal issues, and how the psychological issues impact on them. It may be appropriate to repeat the examiner's psychological opinions relevant to the legal questions here. Often citing the recommendations in list format helps the reader better understand what is needed as a follow up to the evaluation.

The Use of Clinical Psychological Tests in Forensic Settings

Traditional Clinical Test Battery

There are differences of opinion among forensic psychologists about the usefulness of traditional clinical psychological tests in a forensic setting. Some maintain that the tests may be misleading since they were designed to measure constructs that are unrelated to legal criteria. This is often true in child custody evaluations as we discuss in Chap. 15 on custody and access to children. Others maintain that the tests provide valuable insights about the very dimensions that *are* important to evaluate legal criteria in court related proceedings. Still others maintain that only test instruments that have been specifically validated in forensic populations should be used. The latter would invalidate most of the clinical psychological tests currently in use.

Our approach takes into account the above arguments but still finds clinical psychological tests important if used properly in forensic settings. We have stressed, throughout this volume, the necessity for the forensic psychologist to integrate multiple data sources, to look at each source as generating hypotheses that will be subject to verification or disconfirmation from other data sources. Traditional psychological tests can assist in both the formulation of these hypotheses and in their confirmation. This helps the clinician avoid overgeneralization from one or more data sources by providing different samples of behavior. Traditional psychological tests also provide important insights into, but not explanations for legal constructs. In other words, for example, if we were to conclude that a defendant was incompetent to stand trial, because of an inability to assist counsel, psychological tests may tell us *why* this particular defendant may have such difficulty.

Cognitive Tests

As discussed above, the individual tests measuring cognition can give information within a range of I.Q. scores that may have relevance to the legal question being considered. For example, if competency is being questioned, an I.Q. score below 70 may be consistent with intellectual disability such that they do not have the capability of understanding the concepts that the lawyer is trying to explain. This is different from saying that the defendant is incompetent to stand trial merely because she or he is intellectually disabled. Of course, as we discussed earlier, I.Q. tests such as the Weschler Adult Intelligence Scale (WAIS-IV), which is the most widely used test of intelligence, are not the total measure of cognition. Some clinicians avoid using real-world data as part of the cognitive findings, and this can present a major problem in some forensic cases. For instance, clinicians have been heard to say that a person has an I.Q. of 65 and for that reason is incapable of understanding and waiving their Miranda rights, or that the person only had a fourth-grade reading level as measured by a standardized reading test and since the Miranda rights were written at an eighth grade reading level, by definition the individual could not have been competent when they waived the right to an attorney or their right to remain silent. Sometimes, of course, this may be true, but in other cases the person may have been arrested many times, watched many television shows or had previously spoken to their attorney, such that they were perfectly capable of understanding their rights. In short, the results of the psychological testing cannot be removed from the context in which they were administered. Another variation may involve a defendant that demonstrates, on neuropsychological testing, significant

perseveration which may make it difficult for the defendant to follow the chain of evidence presented at trial. The important issue is to demonstrate how the inferences and scores derived from testing are relevant to the underlying legal constructs.

It is important to remember that a standardized psychological test can only be compared to its norms if it is administered correctly according to the standardized instructions. This includes filling out the forms accurately and completely and administering all items on the test. Attorneys may consult with other psychologists to check that the test was administered correctly and the scoring is accurate. It can be embarrassing and damaging to a forensic expert's credibility if any errors are pointed out during cross-examination. In some cases, judges have not allowed testimony about a test that is not administered, scored or interpreted appropriately. If an unauthorized administration of a test is used, it must be carefully defended, usually because of additional information that cannot be obtained elsewhere or as a way of adapting the test to an unusual context or individual. For example, you may decide to use the formal I.Q. test with someone from another country even though there are no norms on which to compare that person, but it may give you an estimate of their current intellectual functioning. This could be important in a personal injury case where a person is claiming difficulties in learning new things.

Neuropsychological Screening and Assessment

In addition to the use of cognitive tests, there are other specific neuropsychological tests that can be used to help understand areas of the brain and nervous system that may not be functioning properly. These may be particularly helpful in criminal cases and in personal injury torts, as the results may be relevant to Competency and Criminal Responsibility, as well as in determining the sequelae of traumatic brain injury. In addition, since some of these tests are sensitive to current impairments, as opposed to long-term impairments, they may be helpful in helping to determine the legal issue of proximate cause, whether the accident or injury was the direct cause of the impairment, whether the impairment pre-existed the accident, or whether the current symptomatology represents a combination of pre-existing and current difficulties. Screening tests may be used by the clinician, but more specific tests are usually administered and interpreted by a neuropsychologist and, in some cases, a neurologist, who may also need to be consulted.

Personality Tests

The use of objective testing [Minnesota Multiphasic Personality Inventory-2 (MMPI-2 RF), Millon Clinical Multiaxial Inventory (MCMI) or the Personality Assessment Inventory (PAI)] is widely used in forensic cases to compare one individual's emotional functioning with others who have been diagnosed with specific mental illnesses in the population on whom the test was normed. The MMPI and its progeny have been used for so many years and have such a large database that these are often considered the gold standard. Though the PAI is newer, it does not have questions that load on more than one scale (a problem in the MMPI) and the trauma scales appear to provide more information about post-traumatic stress disorder and impact from a wider variety of stressors. The PAI also has community norms in addition to those who have diagnosed mental illnesses. Few of these tests have ever been validated in different forensic populations, most notably pre-trial evaluations within jail settings. However, the PAI does have some limited research on pre-trial populations. It is important, therefore, to make sure that the test chosen is valid for interpretation with pre-trial, as well as incarcerated criminal populations, civil populations who have or have not been previously diagnosed with a mental illness, or those who come from another country or speak another language. For example, some norms on the MMPI had been developed for correctional populations but these may be very different from a database consisting of pre-trial defendants. The MCMI was validated on people in the early

stages of psychotherapy, and usage of the norms in other populations such as custody cases could well lead to inaccurate conclusions.

Ethically, we are required to use only assessment instruments that have been validated in a population that is identical to or similar to the one from which the examinee comes. Therefore, if we use any of these instruments, we need to clarify the limits on validity and reliability of the interpretive statements. Unfortunately, all too often, forensic psychologists merely use the computerized test printout without realizing that those statements have been generated in a clinical, rather in a forensic, population. Therefore, such objective tests need to be used judiciously and the test results interpreted with caution. The APA *Code of Ethics* speaks about taking into account the context in which the test was administered (Standard 9.06). The *Specialty Guidelines for Forensic Psychology Guideline 10.2* (APA 2011) makes it even more explicit that we must consider situational variables in our interpretation because the test results generated in these different populations may have vastly different meanings.

Projective Testing

There is a debate in the field of forensic psychology regarding whether projective testing should be used as its interpretation is often seen as subjective, varying from one examiner to another. While it is true that there is more flexibility in interpretation, if the Exner Comprehensive System is used in scoring, we believe that it may be of assistance in providing different kinds of information regarding level of emotional functioning than objective personality tests. These norms have actual empirical data to support the interpretations and are not as subjective as were earlier scoring systems. However, projective testing should be used judiciously and cautiously, preferably with well-validated norms. Initially, projective testing had no normative data and the interpretations were largely intuitive and subjective. In fact, some of the early work stressed the need for an experiential contact between the personality of the client and the personality of the clinician. Within the past twenty-five to thirty years, this has been dramatically altered, at least with some of the projective assessments, such as norms for Exner's Comprehensive System. Unfortunately, other projective instruments, such as the Thematic Apperception Test and the Human Figure Drawings, have not been validated in this manner, and their routine use in forensic settings should be discouraged unless absolutely necessary. Some of these instruments are well suited for clinical practice, as they give information about major areas in need of exploration, but they do not have the normative data behind them that would allow a clinician to testify about their scientific validity in court.

Trauma Testing

There are several standardized tests that measure impact from trauma in adults and children, such as the Trauma Symptom Inventory, Second Edition (TSI-2). This test lists many symptoms typically associated with trauma on a four-point Likert Scale. It provides results compared to ten typical symptom groups, such as anxiety, depression, intrusive memories, and dissociation. This may be helpful in formulating treatment plans or in validating other reports of symptoms. It may also capture some symptoms that the individual did not mention in the clinical interview.

The detailed assessment of post-traumatic stress (DAPS) is another standardized test that assesses for a variety of traumatic events that could produce symptoms. One of the parts of this test assesses the stress experienced at the time of a traumatic incident, as well as post-traumatic stress and current adjustment. This yields a report which comments on the validity of the profile and goes on to opine about whether or not the symptoms described are consistent with an acute stress disorder or with post-traumatic stress. It also comments on whether the profile may be consistent with complex post-traumatic stress disorder (a current trauma reaction superimposed on a previous one).

There are other tests that measure symptoms associated with specific traumatic events such as rape and sexual assault and domestic violence.

There are other scales that measure specific issues such as child abuse potential, risk assessment of lethality, or other dangerous or self-injurious behaviors. We discuss the use of structured clinical interviewing and other techniques for collecting forensic data below and in Chap. 12 on risk assessment and involuntary hospitalization.

Specific Forensic Tests

A number of tests have been constructed by forensic psychologists to assist in the assessment of questions that are specific to forensic settings. Some of the more popular ones will be discussed below.

Tests of Malingering

The issue of malingering or deliberate deception is highly relevant in a variety of forensic contexts. In criminal contexts, a defendant may have motivation to successfully fake a mental disorder in order to be found incompetent to stand trial or not guilty by reason of insanity. In a personal injury context, a plaintiff may have motivation to successfully feign a mental disorder in order to recover substantial compensation. On the other hand, patients attempting to obtain release from a psychiatric hospital may emerge in 'negative' malingering or denial of psychopathology that does exist. Similarly, in child custody evaluations, it is expected that parents seeking custody will want to deny psychopathology even though that might not even be the ruling factor in the final decision. Within the past ten years, a variety of instruments for the assessment of malingering have been developed. A few examples will be discussed.

The Structured Interview of Reported Symptoms (SIRS) consists of a series of scales which assess Inconsistent Symptoms, Blatant Symptoms, Exaggeration of Symptoms, Improbable Symptoms, and others. Decision rules are provided for the probability that a particular pattern is consistent with malingering.

Tests such as the TOMM (Test of Memory Malingering) used a forced-choice format in which patients are asked to recall a series of very simple pictures. Norms are provided for patients with genuine memory impairment, as well as for those with normal memory, and those who have something to gain by feigning memory deficits.

The validity indicator profile (VIP) also uses a forced-choice format to illustrate malingering on cognitive tasks. It produces interpretations of valid, irrelevant, careless, and malingered performance.

Other Forensic Assessment Instruments

In recent years, a variety of instruments have been developed to measure specific functional legal capacities. Unlike the traditional psychological tests described above, these instruments are developed around certain legal standards. Some examples follow.

The Function of Rights in Interrogation (FRI) (Grisso, 1997) consists of a series of sketches outlining police interrogation of a defendant, consultation with an attorney, and participation in a courtroom proceeding. Structured questions are asked, with specific probes, to elicit a defendant's understanding of the ability to waive Miranda rights. Companion instruments are the Comprehension of Miranda Rights (CMR), Comprehension of Miranda Rights-Recognition (CMR-R), and Comprehension of Miranda Vocabulary (CMV).

The Macarthur Competency Assessment Tool-Criminal Adjudication (MAC-CAT-CA)(1998) presents a series of scenarios and structured interviews, with scoring criteria to assess three different areas of functioning relevant to competency to stand trial adjudications: understanding, reasoning, and appreciating. This instrument demonstrates the degree of impairment, if any, in each of these domains and provides a much finer discrimination of various legal capacities relevant to competency than does a clinical interview. This test has been further discussed in Chap. 5 on competency to stand trial.

The Rogers Criminal Responsibility Assessment Scales (RCRAS) are a series of scales developed essentially to code the information necessary for a determination of criminal responsibility. The scales include an assessment of malingering, a determination of the presence

or absence of a mental disorder, and an assessment of the degree of impairment demonstrated at the time of an offense.

Violence Assessment Instruments

The problem of assessing the potential for future violence behavior will be more fully discussed in Chap. 12 on risk assessment and involuntary commitment. At this point, we should just note that there is an ongoing controversy between those that advocate purely actuarial assessments based on static factors and those that advocate a clinical approach. A compromise approach is sometimes referred to as the *structured clinical interview* where there are questions prepared in advance that should be asked in order to collect information about dimensions identified by the research. These too are discussed in Chap. 12.

Assessments in Capital Cases in the Death Penalty Phase

Psychologists who work on death penalty cases must conduct a comprehensive forensic assessment as outlined in the model noted above and further discussed in Chap. 7. In addition, testimony in capital cases must present to the jury the presence of what are called aggravating and mitigating circumstances. Most states have statutory aggravators and both statutory and non-statutory mitigators. Statutory aggravators are specified by the law, such as the defendant having committed another homicide during a different felony, the homicide of a police officer, or committing action during a crime that are designated as *heinous, atrocious, and cruel*. Statutory mitigators are also specified by the law and include factors such as the youthful age of the defendant, their having a minor role in the crime as compared with that of others who were involved, substantial impairment of cognitive or emotional processes and extreme emotional distress. These last two mitigators often permit the introduction of testimony about the person's mental health history. Non-statutory mitigators refer to anything else in the person's history that may be relevant and probative.

Expert Witness Testimony

Once the comprehensive assessment is completed, the question arises just how the assessment is to be used. The expert must always bear in mind that his or her role is to assist, not determine, the judicial process. Not all the material that emerges in an assessment can be utilized by the attorney, and, in fact, some of it may undermine a given legal strategy. Therefore, one should always consult with an attorney orally and share the results of an evaluation fully before putting anything into writing or agreeing to testify. In fact, it is preferable for the psychologist to accept a forensic case in two parts; first, to do an objective and comprehensive forensic evaluation and second, to testify as an expert witness.

The comprehensive forensic evaluation includes an oral report of the results to the attorney. The attorney in consultation with the client and psychologist will determine whether and to what extent the findings may be utilized. This is always a strategic decision because once the name of an expert is revealed as a potential expert witness, all the material and data upon which that expert's opinion is based may be subject to legal discovery. Attorneys as well as forensic mental health professionals like the two-stage approach as it permits the expert to be totally honest with their opinions. If the objective evaluation is not consistent with the attorney's legal strategy, then the psychologist is paid for their time and does no further work on the case. This avoids trying to fit the findings into a strategy that does not really work and keeps the forensic mental health clinician from getting a reputation as a *hired gun* or someone who will say anything to work on a case.

Summary

The forensic assessment of a criminal defendant or a plaintiff or defendant in a civil personal injury lawsuit is a complex process that takes a great deal of time and expertise to complete. A variety of sources of information must be

utilized in forming a professional opinion that can withstand the rigors of the Rules of Evidence and the cross-examination process. Clinical assessments are insufficient for forensic purposes but clinical assessment instruments can be used if they are supplemented by review of documents and forensic assessment techniques and interpretation. It is important to know what are the legal questions that the clinical forensic psychological evaluation must answer before deciding what data sources to consult. A comprehensive forensic assessment model can be adapted to different forensic situations that give rise to these legal questions.

Discussion Questions

1. A defendant, from a foreign country, commits a brutal triple homicide. Clinical interview and psychological testing reveal no evidence of a mental disorder. What additional sources of information would you want to consult and why?
2. A plaintiff has suffered a serious fall and has become severely depressed. She presents with a prior history of depression and treatment with E.C.T. What sources of data would you want to consult in order to do your evaluation?
3. Someone who is not a psychologist has obtained an outdated personality test that they administered to your client. They computer-scored it and wrote sentences from the printout in their report. How would you critique what they said? What are the important elements in the proper use of forensic assessment instruments?

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9 Therapeutic Jurisprudence and Problem-Solving Courts

Historical Perspective

The concept of *therapeutic jurisprudence (TJ)* began in the late 1980s as an interdisciplinary scholarly approach arising from the criticism of how various aspects of mental health law were actually producing 'antitherapeutic' consequences for the very people it was designed to help. Two legal scholars, Bruce Winick and David Wexler, are credited with TJ's formal development (Wexler, 2008; Winick, 2003, 2009) although others have joined them and other early proponents as many grassroots movements do across the world. The impetus for its inception came mostly from those in the legal community understanding that "legal rules and the way they are applied are social forces that produce inevitable, and sometimes negative, consequences for the psychological well-being of those affected" (Winick, 2003, p. 1062). The pioneers recognized that the application of the law can also have a positive impact. Winick and Wexler led the movement within the law to study the therapeutic impact the court could have if it would use a social science and especially a mental health approach to help solve the problems that underlie the behavior that brings people to the court's attention.

As the field began to grow, it became clear that it is not only the rules and their application in the legal setting that were problematic, but also the people who are involved; judges, lawyers, police, parole officers, and others working in the criminal justice system who could make a positive difference in people's lives by acting in a therapeutic manner. Defining what acting in a therapeutic manner means has been a major part of the study of TJ and its application which has now spread to many different countries and legal systems throughout the world. It is designed to teach judges and others in the criminal justice system to act more humanely and with dignity toward people using insights from psychology and the behavioral sciences. As the concepts of TJ began to resonate within certain sectors of the legal system, it spread to other areas outside the criminal justice system such as dispute resolution in civil matters and disability law. Later in this chapter, we describe where it may be going in the future.

The TJ movement is said to have several areas that have a common goal of a more comprehensive, humane, and psychologically optimal way of handling the legal matters that come before the court (Daicoff, 2006). They include a variety of different types of specialty courts designed for a variety of reasons as well as integration into mainstream courts. Initially, drug courts began when it was demonstrated that arresting and putting people addicted to alcohol and other drugs in jail or prison would not cure their addictions nor stop rearrests. Proponents began successfully experimenting with a treatment-oriented approach that engaged people in their own recovery in Miami Florida. This then followed with domestic violence courts although

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the approach was somewhat different as the victim's safety was seen as critical to its success. In some cases, jail time was seen as therapeutic for the offender as it got their attention to participation in their own treatment.

Another area was the development of problem-solving courts where people's mental health issues were the basis for committing petty crimes. Far too frequently people with severe and persistent mental illness were continuously being arrested, sent to the state hospital, stabilized on medicine, and returned to the community with little or no follow-up. Without monitoring or supervision, they stopped taking their medicine and were back in the court again for similar issues. Judge Ginger Lerner Wren (2018) started the first U.S. mental health court in 1997 in Broward County Florida where instead of a revolving door, people could get access to and monitoring of a treatment program. Not only was mental health treatment made accessible but so was help in solving other social problems such as food, medical care, housing, financial stability, family support, and the like. The court was designed to decriminalize mental illness rather than punish people for committing crimes spurred on by their mental illness.

Michael Perlin (2001) a lawyer who represented clients with disabilities provided another vector where their legal and civil rights were examined and applied in a dignified manner. Perlin decried what he called '*pretextualism*' or pretending to engage in providing some service when in fact it is only 'window dressing' like providing treatment when in reality it was not known to be helpful at all. As we shall see in Chap. 10 on interventions in forensic settings, this was common in competency restoration training programs. Think about it being like pointing out that the emperor really was not wearing any clothes, as in the fairy tale. Perlin defined another concept called '*sanism*' where people have an irrational bias against people who are mentally ill or who meet the legal definition of insanity. Special courts other than the mental health court were not as frequently established as those who had mental disabilities that needed legal attention; these other courts were more often seen in regular or probate settings. The new veterans' courts are helpful as they have dealt specifically with the problems of soldiers returning from war to get assistance in solving their needs for drug, mental health, and other treatment. Felony mental health courts have also been established where those people who were sent to the state hospital to have their competency restored and those people with mental health problems being released from prison on parole could come back into the community and have their recovery be monitored in a more humane way. This meant training parole officers in mental health and therapeutic ways of working with their clients so they do not continue to punish people for not following orders due to their mental illness.

Another area under the TJ umbrella is termed *procedural justice,* or meeting the individual's due process rights. Research has been shown that people feel that they have received justice when three factors occur. First, they feel they have been given an opportunity to speak and be heard. Second, they feel that they have been treated with respect and dignity by the judge and the other legal personnel. Third, they perceive the judicial authorities as trustworthy based on a number of factors including an explanation of how the decision was made. Wexler (2008) has also applied Meichenbaum and Turks empirical research on patients' compliance with health care professionals' directions to those following the legal recommendations such as required on probation. Patients also are more likely to follow doctors' orders when they are given a voice, are treated with dignity and respect, and receive logical reasons for why compliance is necessary (Daicoff, 2006, p 19).

Role of Psychology

Forensic psychology has begun to interact with TJ courts although there are fewer articles and books written from the psychological perspective. A bibliography can be found on the website for the International Society for Therapeutic Jurisprudence (www.intlstj.com). Yet, a number of psychological concepts are part of the TJ

foundation. These include an analysis of interpersonal skills that are needed by the actors who dispense justice in a TJ manner. Winick (2003) suggests that judges need to have a particular temperament that permits establishing a true collaborative experience while at the same time keeping public safety in mind. Thus, the individual must be treated with dignity and respect, and with a special sensitivity to the person's feelings about their emotional problems. It is important to be able to separate the person's behavior from the complexity of who the person actually is. An interdisciplinary team of professionals who work closely with each other, respecting their different viewpoints, is usually seen as the best way to provide the support needed for TJ to function. The goal is to get the person to recognize and acknowledge their problems and agree to seek help in resolving them.

The TJ movement suggests that empathy and warmth are important interpersonal skills for those who work in the justice system. The judge is seen as an important leader in conveying these qualities which is a change from the neutrality often suggested. A sense of caring, sympathy, genuineness, and understanding must be conveyed by the judge while at the same time helping the person understand the wrongfulness of the actions that brought them to the court. These courts usually begin with an agreement between the prosecutor and defense attorneys that if the person is unsuccessful in following their treatment plan, there probably will be sanctions. Sometimes they are applied on a graduated basis, such as when a mentally ill person violates a part of a probation or parole plan. Or, they may be returned to regular court and information revealed about their innocence or guilt gained in the mental health court is not used in the subsequent proceedings. A defendant's legal rights and due process issues need to be respected. Several areas must be avoided including the judge acting in a paternalistic manner by ignoring the racial, social, cultural, or gender issues raised or becoming emotionally involved in the client's situation. These skills are all taught in graduate psychology programs and need to be taught in law schools, also.

It is also suggested that treatment or rehabilitation should be discussed in a persuasive manner rather than a coercive mandate although for some more serious criminal behavior, there may not be a choice other than going to prison. We describe the rise of treatment programs in prison in Chap. 10. One of the difficulties in domestic violence court where treatment is an alternative to jail or prison, is that the victim must agree and the court must follow-up to be sure the offender attends the treatment and stops the violent behavior. Whether or not he changes his abusive behavior, however, is difficult to know even when he does attend the assigned program. Research suggests that only a small proportion of those who go to treatment actually stop all their abusive behavior, and in some cases they actually become more psychologically abusive when stopping their physical violence (Harrell, 1991). It is important to remind the person that while they may dislike all of the choices presented, it was their behavior that got them into this predicament in the first place.

Wexler (2008) and Winick (2003) describe basic principles that may be used in TJ or problem-solving courts similar to those used by mental health professionals in motivational interviewing. These include the expression of empathy while listening to the person's feelings and perspectives without judging, blaming, or criticizing them. It is important to avoid confrontation yet explore discrepancies between the person's behavior that brought them to the court and the person's personal goals in life. This may help the person recognize how their current behavior will not get them to their own personal goals. Arguing with a person will only make them more defensive and is not productive. If there is resistance, then the interviewer should go along with the resistance but provide new information that may help the person see the issue in a different light. This is difficult to do especially if the interviewer does not know the person very well yet. Helping the person to feel some power to reach a goal will provide some motivation to

move on and change. As we all know, change is very difficult and it is important to overcome the inertia that staying the same, even if it is not productive, exerts.

The goal is to motivate the person to utilize the resources provided by the person conducting the interview. Sometimes it is the judge directly in the courtroom while other times it may be one of the other team members in a less public setting. Often, a team member, such as a mental health consultant, may speak with the defendant while waiting their turn for their case to be heard. Rarely is there much privacy. These interviews may take place while the defendant is sitting in the jury box or elsewhere in the courtroom area including in a hallway. Rarely are attorneys present especially if it is the person's first appearance after an arrest was made. High levels of anxiety may prevent the person from hearing, processing or understanding what is being discussed. Repetition is always helpful in these high stress situations. Although voluntariness is an important part of the TJ philosophy, there have been discussions on how these conditions actually limit the amount of voluntariness possible. Picture sitting in a crowded courtroom with other cases also being called, having just been arrested and perhaps having spent the night in a jail cell. You are being offered a diversion program to go for mental health or other treatment instead of going to trial and possibly prison. If you make up your mind quickly and take the deal, you go home and stay there as long as you go to treatment. You don't know exactly what treatment will be like, but you'd rather take a chance on it than going to trial and maybe prison. Is this really full informed consent for true voluntary acceptance of the offer?

In any case, psychology has been providing special programs for diversion into rehabilitation or treatment instead of jail or prison. Some of the programs are based on theoretical principles and have been assessed for efficacy or considered evidence-based. Others are not but provided by communities as the best they can do given their budgets. In the chapter on interventions in forensic settings, we discuss some of the problems with quality control over the programs given the separation between the mental health and corrections departments. For example, the Federal HIPAA laws protecting the privacy of health care information prevent the justice department from getting records to determine a person's treatment progress. There are some ways of obtaining de-identified information for research purposes, but these are often cumbersome and difficult for underfunded and understaffed programs to utilize. Even knowing whether or not someone attends a program has been complicated, often requiring elaborate cooperation agreements among different community-based services. Learning about services from private providers is even more complex.

Problem-Solving Courts Using TJ

Drug Courts

Drug courts that would handle those with misdemeanor and sometimes felony charges provided they were just using and not selling drugs were among the first therapeutic courts established in the U.S. As in mental health court, defendants are offered treatment rather than jail time for drug offenses if they agree. However, once they agree, they are usually more closely monitored with random drug testing. Usually, those with alcohol and other drug addictions are sent into local outpatient treatment programs with close supervision by the court. Case managers or probation workers who have been trained in alcohol and drug treatment are assigned to these courts, the judges usually volunteer for duty there, and in some cases there are psychologists and social workers who are available for further evaluation and referrals. Understanding that alcohol and drug treatment is difficult and often has many reversals before the individual is finally off all substances, these courts are patient with relapses and continue to hold the case provided the defendant goes back into treatment. Abstinence and continuation in an Alcoholics Anonymous type of model is the typical treatment protocol that the courts usually

recommend. The AA model is not as useful for women who have been trauma survivors as healing requires taking back their power or empowerment and the AA model requires giving your power to some higher being. Some courts try different and innovative treatments, such as acupuncture. Others have tried a controversial controlled drinking approach where abstinence is not required as long as the individual carefully controls the amount and use of the substance as she or he is taught.

In some cases, special legislation, such as the Marchman Act in Florida, is activated, which provides for involuntary hospitalization of the defendant. If the arrest includes more than possession of alcohol or other drugs, then it is rare that drug court referral will be made. This is especially true if there is any violence involved in the charge or if selling drugs is involved. Sometimes it is difficult to make this assessment quickly, especially if there is possession of a large quantity of drugs that will most likely be sold rather than used personally. Once in drug court, the defendant's records are available to the judge and attorneys, who all act in concert rather than being adversarial, with the goal being to help the defendant to become drug-free. Obviously, the goal of the court is to keep the defendant from reoffending. Thus, careful supervision of the defendant is required with frequent appearances scheduled before the court for monitoring of his or her progress. Usually the social workers or case managers from the drug treatment program are also present at these follow-up court times.

One of the difficulties with drug court referrals is that some programs do not require participants to engage in formal psychotherapy for mental health problems. Or, if there are mental health counselors available, they are not well trained in methods of healing from trauma. Since many trauma survivors use alcohol or other drugs as self-medication, it is important to help them heal from these traumatic experiences in order to remain drug-free. This is especially needed in certain populations such as sexual assault and domestic violence survivors and veterans who experienced combat. Disparities in how people are treated within communities often marginalized are also a problem in the way the court deals with drug offenses. For example, powder cocaine often used by people who can afford it is treated differently than those using crack cocaine.

Mental Health Courts

Broward County was the first community in the U.S. to set aside a therapeutic court that is dedicated to working with the seriously mentally ill who are arrested, usually for non-violent misdemeanor crimes such as shoplifting, loitering, intoxication in a public case, minor theft and robbery, and the like. Many of these people are also homeless, poor, without family contacts, without resources, and floridly psychotic at the time of their arrest. They have previous diagnoses of schizophrenia, paranoid, bipolar, and major depressive disorders, they may have neuropsychological disorders, and they may be HIV positive or have other disorders. Most of them have experienced abuse at one of more points in their lives. A day in this courtroom will seem like spending time in a psychiatric ward in a hospital with all the attending drama and chaos. In one corner, the psychology interns and social workers are gathering more information from the defendants, in the back families and friends are conferencing with attorneys, social workers, and case managers, and the judge and her court staff are hearing cases in front of the bar. When each case is called an array of support staff are available to assist the judge and the client in making referral decisions.

Broward County designed this new therapeutic court after several high publicity cases where poor mentally ill defendants fell through the 'cracks' and spent long periods of time incarcerated in jail awaiting hearings on minor charges. In many of our urban cities, the jails are overflowing because defendants cannot pay even the lowest charges to be released on bail. If they are also homeless, they will have to remain in jail despite eligibility for pretrial release. In Florida it is possible to hold a defendant for up to 21 days without a formal charge—and an extra week

might be granted if the prosecutor requests it. (Under the new homeland protection legislation passed at the 9–11 terrorist acts, suspected terrorists can be held indefinitely, often without being able to meet with their attorneys.) Determining that it would better serve the community interests to rehabilitate by mental health treatment rather than incarcerate and punish these defendants, a judge with considerable training in mental health treatment was assigned to this special court along with representatives from the local mental health community. Students from the doctoral psychology program studying forensic psychology also were available in the court to assist the judge in making appropriate referrals.

Diversion to mental health courts is controversial in some ways. For example, there is a conflict between the individual's rights to liberty and rights to obtain adequate treatment for a problem. This may mean giving up their right to remain silent in order for the court to understand the problem. Once the referral is made, the defendant usually is brought to mental health court that convenes later that day. There may be difficulty if the defendant would be eligible to bond out or the sentence on the charges is fulfilled by time served in jail prior to the first appearance. A conflict between the therapeutic jurisprudence goal for the defendant to obtain treatment and the court's goal to discharge the case can occur and it is usually the defendant's right to make the final decision. Sometimes the defendant is so psychotic and dangerous to him or herself that he or she must be sent for involuntary hospitalization to be stabilized. This occurs most frequently when someone either forgets or intentionally does not take his or her medication and then gets into trouble and is arrested for some minor infraction. Other times psychotic individuals are not dangerous but still may need treatment but can't be expected to make their own decisions. There are patient advocate groups that monitor how mental health courts are functioning to protect the rights of the mentally ill not to be forced or coerced into treatment that they do not need or want.

Treatment is provided by others in the community although it is clear that the resources for treating the seriously mentally ill are quite limited. The seriously mentally ill usually need intensive case management to coordinate their many different needs. For example, they usually need medication to manage their illness but first, they need comprehensive psychological and neuropsychological evaluations to see what medications might be the most useful in reducing symptomology. In many cases, if the right combination of medications is found, the individual is able to stop substance abuse if it is related to controlling their symptoms. If they continue to substance abuse, then a separate drug program might be recommended. Housing is often a big issue for this population, so case managers need to be familiar with obtaining federal, state, and local housing grants for them. Often they are eligible for disability and medical benefits and need assistance in obtaining them. Day treatment centers are also an important option, especially for women who are at high risk for further abuse either at home or on the streets. Many of these women have young children who are being cared for by relatives or are in the custody of the child protective services. It is important to provide intervention so that these women can better parent their children and prevent the cycle that is so often seen in the criminal justice system. Model programs are described in Chap. 16 where we discuss children who are in the child protection system.

Approximately 25% of the caseload in mental health court are women which is an overrepresentation in the criminal justice system where women are less than 10% of the total population (Lerner-Wren, 2018). In Broward County, approximately 20% have had between one to nine prior arrests for misdemeanor and 10% have had prior felony arrests. Approximately one-third have had between one to nine prior hospitalizations for mental health problems while almost one-quarter reported no prior mental health treatment. The most common diagnoses were schizophrenia, bipolar disorder, major depression, and schizoaffective disorder. These data are

similar to reports in programs in other states. In fact, one study showed that 70% of women who were convicted for a felony were first arrested for prostitution. Today, many of these women would be seen as having been sex trafficked as they are in the most vulnerable group. Over half of those women were sexually abused as a child in homes where their mothers were also abused. Most were also battered by a male partner. If correctly identified and encouraged to participate in intervention programs, perhaps we could have averted their later criminal behavior.

In 2002, the U.S. Congress began passing legislation to authorize these new mental health courts across the country. Although funds were authorized to accompany this legislation, they are not easy to obtain and rarely enough to either fund the court or the expansion of community services that must accompany them. As helpful as mental health courts are, however, the process will only work if clients are motivated to voluntarily attend community programs once they are stabilized. In Broward County the psychology interns report that for every client who accepts a referral into mental health court, approximately four defendants refuse the services. Therefore, other ways of helping these individuals must also be found.

Some communities have established separate mental health courts for those who have committed non-violent felonies. In Broward, some who have prior violent felony convictions and are mentally ill are also included in that court. Many who are served by this court are returning to the community from referrals to restore competency at the state hospital or on parole from prison sentences. Finding appropriate services for them is a major job of the court. As more people were being identified as having mental illness, there were not sufficient numbers of hospital beds. Outpatient services were developed so that treatment and competency restoration could occur with people remaining in the community. A research study of the first four years of felony mental health court showed a decrease in recidivism in this group. However, some interesting results were seen in those who were referred for competency restoration. Over 50% of them could not have their competency restored at all while another 25% had restoration while in treatment but as soon as they were returned to the legal system, they decompensated back to their original non-competent status. In Chap. 10 we discuss competency restoration more fully.

Domestic Violence Court

The third type of specialty court that we will discuss here is the domestic violence court. Here both defendants and victims are seen with defendants being deferred into psychoeducational types of 'offender-specific treatment' and victims provided with an advocate who helps describe the court process and the community resources available to victims of domestic violence. Special victim advocates can assist the victim in obtaining an order of protection in most jurisdictions today. Some jurisdictions do not have a special court that hears domestic violence cases but have made the process of obtaining a civil order of protection easier and less costly. This provides some additional safety from law enforcement officers should the accused offender be released prior to the criminal case being heard.

Law enforcement officers have been trained to deal with domestic violence disputes in different ways. Today, law enforcement officers usually are made aware of the special danger that can occur when responding to a domestic violence call while they are training and at the Police Academy. Sometimes the abuser is still battering the victim when the officer gets to the house or other location. Other times, things calm down immediately and the officer has difficulty in figuring out who is the perpetrator. In some cases, the man quiets down and is quite responsive to the officer while the woman is still agitated and angry, sometimes even screaming and yelling at the officer. In these cases, it is tempting to arrest them both, especially if the man as well as the woman has physical marks on his body evidencing the woman's aggression against him, too. Although it is difficult to sort out who is the aggressor, and if the wounds are defensive rather

than offensive ones, most of the time, it is the man not the woman who is the perpetrator. Even when the woman is arrested by mistake, she often pleads guilty just to get released in time to prevent her children from going into foster care. Although she is the victim and not the aggressor, she will agree to attend the offender-specific intervention program. These facts usually come out in the treatment programs and present a challenge for the system.

The typical model is to arrest the perpetrator, usually the man, for domestic violence if the law enforcement officer has 'probably cause' to make that arrest. This means that the law enforcement officer believes that domestic violence did occur and that the person arrested was the perpetrator. It is on the officer's sworn statement that the arrest goes forward. No longer does a victim have to sign a complaint which, of course, makes it less dangerous for her but also prevents her from being able to 'drop the charges' which was so common in domestic violence cases prior to the new 'proarrest' laws.

Once the arrest is made, in the model suggested, the perpetrator is placed in detention to wait for the next regularly scheduled domestic violence court session. In most jurisdictions, this is later in the day, usually around 12–24 h after the arrest. On weekends, it might be longer as domestic violence arrests have been taken off the bonding schedule. Research has shown that the wait in jail is a helpful deterrent for some perpetrators, particularly those who have never had contact with the criminal justice system previously. Once before the judge, the perpetrator has the option of pleading guilty or no contest (which is treated as a guilty plea) and agreeing to go into a special 'offender-specific treatment program'. Like the drug court treatment, the domestic violence treatment program is cognitive-behavioral with an emphasis on changing attitudes and behaviors toward women, especially this woman. Often the treatment program is offered or monitored by the local battered woman's shelter but in another location so that the perpetrators and victims are not forced to see each other, either intentionally or accidentally.

The court monitors the defendant's progress in the treatment program through the use of special probation officers who have direct contact with the counselors who run the treatment program. The research suggests that approximately 25% of the batterers who attend a treatment program (and some research suggests that less than 10% of all batterers ever get to attend the program) will stop their physical and psychological abuse of the victim, 50% will stop their physical abuse but continue their psychological abuse, and 25% continue to physically and psychologically abuse the victim even while attending the treatment program. There are no data on the cessation of sexual abuse unless the offender is also sent to a special sex offenders program, which is rare in domestic violence cases. However, there may also be concomitant treatment in drug court programs if alcohol or other drugs were found at the domestic violence site.

These treatment programs are unique in several ways. First, there is no promise of confidentiality nor does the defendant have 'privilege' which is accorded to others who seek mental health treatment. This means that the treatment provider must communicate information about the treatment to the court, usually on a regular basis. Most important is regular attendance at the program since it is still difficult to measure whether or not the actual program is successful in changing attitudes, values, thoughts, feelings, and behavior other than reoffenses. Secondly, the treatment provider may not be well trained in other issues besides domestic violence or drug abuse. Unlike psychologists and other doctoral level mental health professionals who are trained in the broad spectrum of human behavior, both abnormal and normal, these providers who are not well paid are trained in the specific program to be administered. Thirdly, the treatment program, which is often a psychoeducational model, may not be able to deal with any mental illness or other problems that the defendant demonstrates and thus, is insufficient to stop all violent behavior. Even so, there is a lot of support for

these domestic violence offender-specific treatment programs, especially from victims who believe that the batterer may well stop his violent behavior once he is in a special treatment program. Unfortunately, this does not appear to be the case, but it may well be important to try in order for victims to be willing to take the next steps in order to ensure their safety and that of their children.

The Future for TJ and Problem-Solving Courts

The TJ movement has gained traction in countries across the globe with Australia, New Zealand and the U.S. taking the lead in publications. In the U.S. there have been many outcries to reform the entire criminal justice system to make sure minority communities are not overrepresented. Interesting, in the research on felony mental health courts done in Broward County, minorities were actually underrepresented suggesting they were more likely to go to prison than into treatment. It is unknown whether this is voluntary or if judges are not referring them there. The numbers of women are increasing in the criminal justice system and it can be assumed they will need more trauma specific treatment given the large numbers of those arrested with histories of trauma. As we have described in the next chapter, more treatment programs focusing on mental health and trauma issues are being conducted in women's prisons.

There has not been coordination with TJ programs in child welfare and family court referrals in the U.S. although there are some TJ programs reported in Canada (Gal & Duramy, 2015). This is especially true for the communities where a presumption of shared parental responsibility force children into being parented by an abusive parent. Children's legal rights have not been adopted in the U.S. courts as they have in other countries which we discuss in Chap. 20. As was shown with adults, children who have a voice in what happens to them when their family splits apart do better in school and are mentally healthier than those who are forced into new arrangements without a say in where they live or go to school. They may not get what they want but being heard helps in their adjustment. This is different from being represented by a guardian ad litem who must deal with what is in their best interests. We also discuss this further in Chap. 15 on child custody.

TJ has also been used in attempting to resolve civil lawsuits, particularly when there are disagreements between parties that may be able to be settled without litigation. Mediation techniques utilize many psychological techniques to assist in finding common ground to resolve disputes as varied as landlord–tenant dispute, divorce settlements, financial arguments, and personal injury cases. Many lawyers utilize the training in dispute resolution to enhance their own practices. It may result in less litigation and more positive relationships between people.

Finally, we believe that all courts should adopt some of the TJ principles including positive attitudes and respect for those who appear before them. Economists can compare the costs of housing someone in jail or prison versus the cost of mental health treatment to encourage communities to fund the services that must accompany TJ courts. Training programs at the university level for people in mental health and the law can identify and provide more people willing to work in this arena. In the end, the goal is to serve people by providing safety and justice in a positive and life-affirming way.

Questions to Think About

1. Do you think it is fair for someone who is mentally ill or disabled to get away with not going to jail if they commit the same crime as someone who isn't disabled or ill?
2. Do you think a person who beat up his partner should be allowed to go into a batterer's treatment program instead of going to jail? What if you knew the person would not spend more than one night in jail? Would that change your mind? What if that person's partner came to bail them out? Would you still feel that the batterer should be court-ordered into treatment?

3. Can you think of other things you know about that exhibit 'pretextualism' as defined by Michael Perlin in this chapter? Describe them. How might they be exposed or should they?

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10 Psychological Interventions in Forensic Settings

> Tom is an inmate in the state prison system. He has been diagnosed as suffering from PTSD. One day he refused to come out of his cell for recreation. Officers sprayed him with mace and forcibly dragged him out. When he returned to his cell he slashed his wrists seriously enough that it required 10 sutures to close the wound. Tom requested a transfer to the mental health unit. The request was denied because the prison staff regarded his behavior as manipulative and not genuinely suicidal.
> If you were the staff psychologist in the prison what would you do? What if your only choices were to refer him to the mental health unit or place him on lockdown? Is his behavior a product of his mental illness or a desire to manipulate the system? These are some of the dilemmas faced on a daily basis by psychologists who work in correctional settings.

Introduction

In the previous chapters, we have discussed various mental health issues that can arise after a defendant is charged with a criminal offense (e.g., are they competent to proceed to trial, were they lacking criminal responsibility due to a mental disease or defect). In this chapter we will discuss some of the ways the criminal justice system can intervene in prisoners' lives. The above vignette about Tom unfortunately is a common response by prison staff, many of whom do not appreciate the desperation of a mentally ill inmate. Some question the ability of some prison officials to ever adequately understand or provide for the needs of the mentally ill, especially those that believe the goals of the prison system are to punish the offender and protect society rather than rehabilitate and reform. Yet, look at the statistics of who ends up in prison; certainly most are from the underbelly of society. This fact lends support to the classical thinkers who believe that crime is based on 'weak' genes or other failures of strong will to avoid temptation as juxtaposed with the reformers who want to treat them more kindly given their backgrounds filled with poverty, cultural bias, abuse, and despair. Prisons have the largest population of adult illiterates suggesting that both education and psychological treatment might reduce recidivism and produce better citizens when offenders return to society.

We will begin by looking at some of the characteristics that define the mentally ill population in the criminal justice system. Then, we will review some of the issues facing 'first responders' who include police, fire, and other rescue workers who could try to keep from criminalizing the mentally ill as described in the chapter on therapeutic jurisprudence and problem-solving courts. Best practices in the criminal justice system involve helping the mentally ill find treatment rather than jail (Walker, Pann, Van Hasselt, & Shapiro, 2015), but in some communities there is no other place for the homeless and mentally ill to get a meal and roof over their head. Even in communities where first responders have been trained in crisis

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intervention, they may not be able to identify or provide treatment for someone who is mentally ill and is not eligible for diversion or treatment back in the community. For them, treatment programs have begun to be developed in prisons. Perlin and Dlugacz (2008) have reviewed the law and variety of programs identified in forensic settings for the mentally ill in greater detail than possible in this chapter.

In theory, of course, the issues we have raised before (competency and insanity evaluations) should target those individuals with severe mental illness and divert them from the criminal justice system. In practice, too many people who are mentally ill have slipped into the system. Estimates suggest about 25% have had prior mental health diagnoses, add to them another 50% who have substance abuse problems, and 50–85% have symptoms from trauma in their backgrounds. There are no good data on how many people's mental health worsens while in jail or prison so that it might be many years of confinement before prison officials even notice their condition. None of these conditions protect them from behaving badly although some will regain better judgment after treatment. Unfortunately, once they are adjudicated, sentencing guidelines give judges very little flexibility in how much time to give in a sentence. There are so many mentally ill in pre-trial detention facilities (jails) and post-conviction places of confinement (prisons) that they have, de facto, become the new mental hospitals of the twenty-first century.

> Andrea is a good example. She was stopped by a police officer for Driving
> Under the Influence and resisted arrest. A sexual assault victim, she told her
> lawyer that she thought the policeman was trying to molest her as he was
> putting her in handcuffs. Not until the psychologist who was asked to see her by the lawyer did she reveal that it was the anniversary of the shooting incident where her fiancé was killed and she was almost drowned. She had gotten
> a letter that the killer was about to be paroled and she ended several years of
> sobriety by drinking and driving that day. Had she not been able to describe what
> had led to her unfortunate behavior, she would have gotten a felony charge for a
> battery on the police officer. Instead, she was placed on probation and entered into
> a treatment program for sexually abused victims.

Identifying Mental Disabilities in Inmates

Over the past twenty years, there has been a steady increase in the percentage of inmates with serious mental illness. In 1980, less than one percent of prisoners had diagnosable mental illnesses. In 1999, it was estimated that it increased to between 16 and 24% of inmates. Today the numbers of inmates who have been diagnosed and/or treated with a mental illness, trauma, and/or substance abuse problem are even higher as noted earlier. More women and people from marginalized communities including the poor, Black and Brown people are arrested and end up in jail and prison. The U.S. Department of Justice (DOJ), who works within Departments of Corrections (DOC) in each state and the U.S. Department of Health and Human Services (DHHS) where the Substance Abuse and Mental Health Administration (SAMHSA) is located have been authorized by Congress to fund joint programs to deal with this large and still growing population.

The reasons for this dramatic increase are not well known. Some maintain that it is a result of a 'get tough on crime' attitude, prevalent in the last 20 years, in which the mentally ill get 'swept up' along with other people charged and convicted of crimes. Others point to the drastic restrictions placed on the insanity defense by federal and state laws as resulting in more mentally ill people convicted and sentence to correctional facilities. Some have suggested that in the 1960s and 1970s there was more concern about treatment issues and deinstitutionalization resulting in a new class of homeless mentally ill people who previously had been cared for in state mental hospitals. In fact, the fastest-growing 'homes' in the U.S. building industry have been said to be for new prisoners, and they are far

more expensive to build and maintain than a long-term care facility for the chronically mentally disabled. These people now face a more punitive attitude landing them in jail and prison. There has not been any one answer or any controlled research that has clearly pointed out the reasons for this dramatic increase.

Despite the percent of inmates who have substance abuse problems, drug treatment is available at less than one-third of correctional institutions. Even Alcoholics Anonymous (AA) and Narcotics Anonymous (NA) groups that are volunteer-run are difficult for inmates to attend, usually because of space and management problems. Then, add to this mix the large numbers or prisoners who have been abused in the past, some studies estimate over 80% of men and 90% of women have untreated PTSD symptoms; it is almost the entire population who needs services. If we also count the numbers who cannot read or write, (and in some facilities this includes those who cannot speak English), we are doing inmates a disservice not to provide educational and therapeutic programs all day long. It is also important to remember that in the past 20 years, there has been 200% + increase in the male prison population and a 300% + increase in the female prison population, so overcrowding is a problem despite all the new prisons that have been built.

The legal issues regarding treatment within correctional facilities are also, at present, very confusing as they are unclear and contradictory. For example, in 1998, a state court in Pennsylvania ruled that the Americans with Disabilities Act (ADA) also applied to inmates in prison. As we discuss in Chap. 21 on discrimination law, the ADA specifies that institutions must make "*reasonable accommodations*" to address a person's disability. However, the Pennsylvania court decisions did not address whether or not this would apply to mental illness, although other employment case decisions do mandate the ADA's applicability to make accommodations for severe mental illness if it does not interfere with the individual's ability to do a particular job. Since it is a stretch to call the inmate's role in an institution 'work,' it is difficult to understand how to apply the law other than in public accommodations areas. If it did apply, then what would "reasonable accommodations" in a correctional facility mean? Would it mean a separate unit in which the mentally ill would live, would it mean group or individual psychotherapy, or having the right medication and not a formulary available? What diagnosis, if any, would be considered a disability? See Perlin and Dlugacz (2008) for further discussion. All of these questions have yet to be answered.

Legally, the Department of Corrections is responsible for the care of its inmates. There are various federal laws that provide for adequate medical and psychological care in addition to other appropriate standards of living like food, shelter, space, bed, blanket, and hygiene. One interesting area has been the impact of *seclusion* or *isolation* on the prisoner's mental health. Research suggests that deprivation of activities or human contact may create serious psychological conditions although the studies are equivocal about how much isolation constitutes such deprivation. Nonetheless, isolation or seclusion is a popular method for punishment when a prisoner commits a violation of the rules while incarcerated. Isolation may be used to protect a prisoner from other inmates, also. There are advocacy groups attempting to stop this practice or at least further define what is permissible and what is not, such as deprivation of light so as to be unable to tell the difference between day and night.

A further legal problem regarding treatment in correctional settings is that the bar is set too high to force officials to meet the inmates' needs. The standard for what is called '*a right to treatment*' lawsuit states that the institution must be proven to have been '*deliberately indifferent*' to an inmate's treatment needs. If such a standard cannot be met, the defendant (i.e., the state or federal prison) could be granted a summary judgment and the case would never go to trial. For instance, a state could demonstrate that they performed a psychological assessment and determined that the inmate was not in need of treatment. The mere fact that they performed an assessment would demonstrate that they were not

'deliberately indifferent'. The burden would then be on the inmate as plaintiff to show that the assessment was so deviant from accepted professional standards or that it was not performed in good faith that it did indeed constitute deliberate indifference. Clearly, then, the odds would be "stacked against" the inmate.

Think about the recent case with Jeffrey Epstein, being held in New York City's Riker's Island jail while awaiting trial on child molestation charges. It is said that he threatened to kill himself and was placed on round-the-clock suicide watch. No one knows why he was taken off that intensive watch after two weeks nor why his guards were allegedly asleep when he supposedly hanged himself in his cell. Lots of questions surround his death, and lawsuits are being threatened at this time.

The American Civil Liberties Union (ACLU) has filed a number of class action lawsuits against prisons and jails to force them to upgrade conditions for prisoners, but most of them are settled with only minor changes occurring except for those corrections made in the most egregious areas of violation. Occasionally there is a monitor appointed to oversee the implementation of the promised change. However, many of those monitors have dual allegiance to the system that appointed them and the institutions rather than the inmates' best interests at heart. Usually the only remedy to non-compliance is to continue the monitoring rather than any major sanctions.

Training Police and First Responders

The first contact an individual usually has with someone who represents the criminal justice system is what we now call a 'first responder', that is someone who is trained to make a crisis or emergency call. This includes police and law enforcement officers, fire rescue workers, emergency medical technicians (EMT), trained Red Cross and other crisis workers, and other community volunteers (Dorfman & Walker, 2007). First responders are trained to recognize serious mental illness and learn how to respond to them, so the person's symptoms are not exacerbated, and they can be diverted out of the criminal justice system to the health system for intervention if it is needed. In the past, it was not unusual for untrained police officers to approach someone who was responding to his or her internal world and, unaware of their mental condition, frightened them, provoking a violent reaction. This person then would be arrested for their original misconduct and for an assault on a law enforcement officer, which in many jurisdictions is a felony. These new charges will make the person ineligible for mental health courts that only deal with misdemeanors.

We describe a typical scenario in Chap. 18 on delinquency where the youth was injured, but sometimes it is the police officer who can be badly hurt, too. Obviously, training police and the first responders to identify behaviors that are consistent with certain mental illnesses can avoid many of these scenarios. Dorfman and Walker (2007) have published a short description of the major mental disorders specifically for the first responders to recognize.

Communities that have developed a coordinated response train the first responder to first try to ascertain if the individual is safe. That usually means, does the person have a place to stay? Can he or she meet the basic needs? Does the person have enough food and money to live? Does the person seem to be medically stable? Is the person on any medication and has she or he taken it? Is the person high or intoxicated and needing care? Is the person suffering from dementia rather than another diagnosable illness? Is the person living in an assisted living facility (ALF) or other care facility? Is the person dangerous to her or himself or others?

Depending on the first responder's answers to these questions, the person can be linked to the proper community resources rather than being taken to jail. Unfortunately, many communities do not have other resources except perhaps a hospital which is just a temporary stabilization facility. Obviously, medically unstable people should be taken to the hospital or urgent care center rather than to jail. Some communities are linking police computers with names of citizens who are under care for mental illness. While this

Table 10.1 Effective qualities of a first responder to crisis

Effective crisis workers have the following characteristics:	
1.	Successful resolution of their own life experiences
2.	Professional skills such as attentiveness, listening, congruence, ability to be supportive, think analytically, and problem-solving skills such as assessment and ability to make appropriate referrals
3.	Stability and poise
4.	Creativity and flexibility
5.	Energy
6.	Quick mental reflexes
7.	Multicultural competencies

may be an invasion of their privacy, it may also prevent inappropriate arrests and get the person necessary psychological or medical care quickly. Another solution is to have the person wear a medical tag that specifies the medications and types of treatment the person needs. However, many mentally ill or homeless people are bothered by these bracelets or necklaces and 'lose' them.

Crisis Intervention Programs

Police and other first responders are being trained in providing immediate crisis intervention to those who have experienced some kind of critical incident or trauma. Critical incidents can cause psychological crisis. Critical incidents could be homicides, rapes, robberies, assaults, serious accidents, acts of terrorism, and natural disasters. They are usually specific incidents that are time-limited and may involve loss of threat to personal goals or well-being. Often the usual coping mechanisms fail individuals exposed to critical incidents. Experiencing a critical incident could be a turning point in someone's life. Although it is experienced by direct or primary victims, a critical incident can also cause trauma to witnesses to these painful incidents, which can produce secondary victims.

Research suggested that there are certain qualities that make for effective crisis workers. Effective crisis workers usually have been able to successfully resolve their own problems, have skills such as the ability to listen carefully, be supportive, attentive, analyze and help solve problems, and make referrals. They have lots of energy, quick mental reflexes, are pretty stable themselves, demonstrate flexibility, and are creative. They can relate well to people of all ethnocultural groups and demonstrate compassion. These characteristics are outlined in Table 10.1.

Critical Incident Stress Management

A popular technique used by police and other first responders is called critical incident stress management. It is a step-by-step approach that encourages the intervention with victims of a crisis whether it is a single incident or a large-scale tragedy. The first responders are trained in listening skills and trained to both help the victim to talk about their feelings and reflect them back. Offering consolation and comfort may include providing a blanket or cup of hot coffee and just sitting with the person to help them stabilize. During the rescue efforts at the former World Trade Center in New York City and the Pentagon in Washington, D.C., many psychologists who were trained as first responders were surprised to find that during the initial period after a crisis people were more likely to be comforted by sharing hot chocolate and cookies rather than talking. They needed time to absorb the shock

Table 10.2 Stages of crisis resolution

Basic crisis theory and intervention	
1.	Identify grief responses to loss, which can be tangible or intangible such as loss of quality of life, different internal feelings, or self-image
2.	Assess impediments, if any, to attaining life goals
3.	Recognize and correct temporary distortions produced by crisis such as those in the cognitive, affective, and behavioral domains
4.	Help the client reorganize and resolve the crisis
5.	Assess for residual effects even after the crisis is resolved
Six-step crisis model	
1.	Defining the problem
2.	Ensuring client safety
3.	Providing support
4.	Examining alternatives
5.	Making plans
6.	Obtaining commitment

and gain some perspective on the situation. Many communities took this opportunity to train their own first responders and sent them to New York City to relieve those who have been on the front lines. Typical interventions used in critical stress management are presented in Table 10.2.

Debriefing

An important part of critical incident stress management and crisis intervention is the ability of the first responders to prevent their own secondary victimization responses by participating in debriefing sessions. Psychologists working with first responders found that they were more likely to develop the same symptoms as their clients just from listening to the horrible stories without taking care of their own mental health needs. In addition to coming to work with a positive attitude and having their own problems under some control, it was found that crisis workers needed to talk to each other about what they were hearing and seeing. Most first responders now use the same kind of group psychological debriefing techniques that intentionally were developed to assist crisis workers in lowering their own reactions to job stress. The goals are similar to other forms of crisis intervention which is to prevent maladaptive responses to critical acts and stabilize, restore feelings of mastery, and develop support networks. It is based on the goals of immediacy, proximity, and expectancy. First responders are expected to participate in debriefing sessions at regular intervals immediately after their work, so that they can share the horror and other feelings they may have experienced together. If the first responder has his or her own personal problems, it may make it more difficult to recover their own resiliency after intervening in crisis situations. Debriefing usually follows a step-by-step approach, and a model is presented in Table 10.3.

Hostage Negotiation

Hostage negotiation in a particular crisis may find a trained police officer working together with a psychologist and other first responders. Usually law enforcement officers are taught to take charge and act quickly with authority. However, the principles of hostage negotiation

Table 10.3 Critical incident stress management

Core elements of CISM include:	
1.	Pre-crisis preparation (individuals and organizations)
2.	Large-scale mobilization and demobilization procedures for large-scale disasters
3.	Individual acute crisis counseling available
4.	Small group discussions for the acute phase that are brief are the primary means of dissemination of information and discussion of feelings
5.	Small group discussions that are longer including Critical Incident Stress Debriefing (CISD) which is a trademark of this intervention especially with crisis workers to prevent further emotional harm to them
6.	Family crisis intervention techniques when entire families are involved
7.	Follow up procedures and referral for long-term therapy where needed

run counter to those strategies. The negotiator must overcome the urge to 'act' while using words to defuse a critical life and death situation. Negotiators must use active listening skills to successfully resolve a crisis. These skills include: emotional labeling, paraphrasing, reflective mirroring, effective pauses (silence), minimal encouragers, 'I' messages, and open-ended questions. These techniques help stall for time, lower subject's expectations, and help the subject feel powerful and in control.

By utilizing these techniques, it is hoped that the subject will begin to realize that he or she is not in control, nor does he or she have all the power. This may give the subject more motivation to initiate 'give and take' bargaining. Through the use of active listening skills, the negotiator is able to bring the subject from an emotional, irrational state to a rational, goal-directed state. The success of crisis negotiation allows for the building of trust and rapport while encouraging a peaceful surrender. The FBI has one of the most successful training programs for law enforcement and first responders to learn how to become a hostage negotiator. Psychology and criminal justice students find their courses helpful adjuncts to their other skills.

Diversion from Jail After Arrest

If the mentally ill person is not diverted before arrest, many communities attempt to get them out of jail as soon as possible after the arrest. This may involve training the jail staff to screen when they are placed in holding cells, similar to the attempts to remove alcoholics and send them directly to detoxification centers to dry out. In some communities, the local mental health center reviews the names of those arrested before they make a first appearance in court, and these individuals can be diverted into new specialty courts such as mental health court, drug court, or domestic violence court. We describe these courts in Chap. 9 on Therapeutic Jurisprudence. In other communities, the cases are sent to judges who are knowledgeable about mentally ill people.

In Broward County (Ft. Lauderdale), Florida, we sent our practicum students into Magistrates Court each morning to screen all those arrested for misdemeanors and felonies for mental illness prior to their making a first appearance. The psychology intern can then testify before the magistrate recommending that the individual be diverted into one of the specialty courts available. Obviously, these are voluntary programs so if the individual refuses treatment, then he or she will remain in jail and go through the usual procedures until his or her case is resolved. In these cases, the psychology intern will notify the attorney who is selected to represent the person (usually in the public defenders office) and the jail authorities so that the appropriate intervention can begin as soon as possible. In the Broward County Detention Center this usually means that the inmate can be placed on medication, sent to the medical or psychiatric unit, or

kept in general population. The person can also be transferred to the crisis hospital unit for stabilization if he or she is deemed dangerous to him or herself or others. The attorney can request competency and sanity evaluations quickly, often preserving evidence that might not have been available without this speedy response. Sometimes these evaluations are also used by judges when sentencing the person to prison to support a request that mental health treatment be provided. In communities where there are no psychologists conducting intakes, these requests may be the only notice that the prisoner needs such intervention.

Intervention in Jails and Prisons

As noted earlier, there has been a dramatic increase in the percentage of inmates with serious mental disorders. These require a variety of treatment approaches utilized in jails and prisons including medication, crisis intervention and suicide precautions, drug treatment, anger management and domestic violence prevention, sex offender programs, and special programs for women (Fagan & Ax, 2003). Most of these programs take place in the mental health unit. Many of the groups only meet for a short time, like six weeks while others are ongoing, usually on a weekly basis. Medication is often available, especially for anxiety to calm them down or keep them from going into deep depression. Trauma treatment is mostly unavailable. Rarely do people get seen in individual psychotherapy although suicidal inmates may be sent to the mental health unit to be watched for a period of time. But jails are busy places with people going in and out for court hearings all the time, so there is little real psychotherapy available there. Prisons, where people are sent once they are adjudicated, are more stable, but many are underfunded and located outside of major urban areas, so psychotherapists to run programs are not easily available. Even where there is a mental health professional available, their first priority is to handle crises.

Sometimes inmates in general population form their own self-help type of groups that might be overseen by the psychologist from time to time or when a problem arises. LW helped form groups with battered women to support each other. Today, we use the manualized STEP program to help trauma survivors begin to heal while awaiting trial or finishing their sentence (Jungersen, Walker, Kennedy, Black, & Groth, 2018; Walker, 2017). There are voluntary groups that prisoners can attend including those with a religious focus, AA and NA types of groups, and family integration groups for those inmates about to be released. Education programs are commonly offered in jails and prisons including vocational training and programs leading to the Graduate Equivalent Diploma (GED) and college-level courses. As education programs become more available on the Internet, computer-assisted education may become even more popular in prisons.

Medication

The most common treatment in jail or prison is the provision of medication for the amelioration of severe symptoms such as hallucinations, delusions, and extreme agitation. One of the most challenging issues here is to provide enough training for the correctional staff, so that they can recognize the symptoms of a mental illness in an inmate's behavior, and not respond to that inmate in a way that will further exacerbate the problem. One of the authors (D.S.) recalls giving a lecture to a group of correctional officers on identifying symptoms of mental disorder in inmates. One of the officers responded that it was all very interesting, but with the inmates for whom he was responsible, "I will respond to force with force!" While management of large groups of known offenders may be a daunting task, the old adage, 'violence begets more violence' is true in prisons, especially when prisoners are stripped of all dignity and power to regulate their daily activities of living. Medication is often misused by the staff as a way of keeping everyone calm and

under control but also by the inmates to just vegetate and do their time. However, let's look at the proper use of psychopharmacology first.

In addition to the use of both traditional and newer atypical antipsychotic medication, doctors in institutions have begun prescribing antidepressants and mood stabilizers, which appear, in some circumstance, to assist in the control of disruptive behavior. The newer atypical psychotic medications such as Risperdal, Seroquel, Abilify, and Zyprexa have fewer side effects such as movement disorders called 'tardive dyskinesia' and do not make people feel as groggy or sleepy when taking them. However, they are very expensive as they are new, and many are not available in less expensive generic forms or injectables to prevent 'cheeking' or not swallowing them. Some psychiatrists use them in combination with small amounts of the older antipsychotic medications such as Haldol and Thorazine to get maximum relief of delusions and hallucinations, which can produce some of the more violent behavior.

There is a high incidence of bipolar affective disorders where people move back and forth between manic and depressive symptoms. People with bipolar disorder may lose the ability to form good cognitive judgments when cycling back and forth into these moods and commit crimes that they might not have done otherwise. Mood stabilizers and anticonvulsant drugs may be helpful here along with some of the new selective and non-selective serotonin reuptake inhibitors. Medications such as Prozac and Zoloft are popular on prison formularies as they are available in generic form and, therefore, less expensive.

Some recent neuropsychobiological research has also pointed to the fact that some (but not all) antisocial individuals seem to have deficits in certain neurotransmitters in the brain (e.g., serotonin, norepinephrine, and dopamine). Some physicians are considering treating these individuals with such medications as Prozac or Wellbutrin which serve to regulate the reuptake of these different neurotransmitters in the brain.

A particularly troubling problem exists when an inmate who is in need of medication refuses to take it. Are the legal rights of an inmate the same as a defendant who is awaiting trial? In 1990, the United States Supreme Court considered the case of an inmate in the Washington State prison system (*Harper v. Washington* discussed in Chap. 12). Harper had taken antipsychotic medication for six years, but then refused any further medication stating the side effects could be permanent such as in tardive dyskinesia. The U.S. Supreme Court stated that the inmate did have a 'protected liberty' interest in avoiding the unwanted administration of antipsychotic drugs but tried to balance this against the state's interest in the prisoner's medical status. The court ruled that if treatment was in the inmate's best interests, and there was a genuine mental disorder, then medication could be administered over his objections. This was to be distinguished from the use of medication for purposes of control or prison security. Certain procedural safeguards were put in place. Determination to override the inmate's refusal of medication was to be made by a committee within the prison. The inmate was not entitled to a full jurisdictional review which is what Harper requested. These procedural safeguards were just reaffirmed in *U.S. v. Sell*. Obviously the right to refuse treatment as we discussed in Chap. 5 when competency restoration is at issue under certain circumstances does not apply to those who are already adjudicated guilty of a crime.

Crisis Intervention Programs in Prisons

Crisis intervention programs exist in most correctional institutions because of the high potential for destructive and self-destructive activities of inmates. Crisis intervention techniques such as those for first responders that are outlined earlier in the chapter are commonly used inside jails and prisons when a crisis occurs. The most common crisis is when an inmate attempts to or successfully commits suicide. Suicide is the third leading cause of death in prisons, following behind natural causes which is #1 and AIDS which is #2. The prison rate of suicide is twice the general population rate, and the jail rate is nine times the general population rate. In jails, suicide and

suicide attempts occur most frequently within the first month of incarceration. The most popular method is hanging which usually occurs when the inmate is alone or the cellmate is sleeping. Self-mutilation is also common, but it is often treated as manipulative and punished by isolation as we described in Tom's case when this chapter began. If, of course, it was not manipulative, but an expression of profound depression or a desperate cry for help, such punishment would be highly inappropriate, ineffective, and counterproductive.

A need for careful assessment by well-trained professionals is critical. Suicide prevention programs can identify the potentially suicidal inmate ahead of time, e.g., at the time of arrest (prior to jail) or at the time of classification (prior to being committed to a prison facility). As noted earlier, staff must be well trained, must monitor the potentially suicidal inmate, must establish special housing units for them, and must refer them to trained mental health professionals for assessment and treatment. The correctional staff and mental health staff must be in continual communication about the status of the inmate. There needs to be a coordinated plan, made in advance, regarding the handling of a suicide attempt in progress, as well as administrative procedures for reporting and notification to appropriate authorities and family members. Fifteen-minute observations are standard, sometimes using closed-circuit TV.

In practice, these procedures are rarely followed especially with the introduction of medical contracts to private- for- profit health service agencies who are supervised by people different from the regular prison staff. Inmates are constantly being referred for medical or psychiatric treatment, long waiting lists develop, and by the time an inmate is seen, he or she is returned to general population as quickly as possible. Here, turf issues sometimes become predominant with each assigning responsibility and ultimate blame to the other agency. It gets even more complicated when private prisons are managed by profit-making companies whose ability to provide competent medical services is at a level similar to managed healthcare companies run by business people rather than those with medical knowledge. In some cases, untrained staff have been given suicide check lists with little or no training in how to obtain the information or what it might mean.

A spotlight has been on suicide with the recent death of Jeffrey Epstein in NYC's Riker Island jail while awaiting trial. Although it was ruled as a death by suicide, he had been on 'suicide watch' several weeks earlier. Reports indicated he had been making lists of things he wanted to give away, often a clue preceding someone who is contemplating killing themselves. There were rumors that many high-level people did not want him to reveal their names as engaging in his alleged sex trafficking crimes and had special interest in his death, but nothing has been proven. News reports stated that he had been taken off suicide watch after an evaluation by a psychologist in the jail, but no further details were forthcoming.

Inmates who receive disturbing news while incarcerated may also decompensate and become suicidal. Rarely will the staff be told about this, and unless careful attention is paid to the signs of decompensation, it will go unnoticed unless the inmate requests special attention or does something dramatic. It is even more unusual for medical and housing staff to confer about an inmate's need for protection from him or herself or others. The small local jails where a defendant is usually well known to local officials are being replaced by 'state-of-the-art' centralized detention facilities which tend to be technologically sophisticated but lacking in personal warmth and attention. The panic and confusion experienced by a mentally ill person are intensified in such a setting frequently leading to acts of desperation such as suicide attempts.

Special Programs for Abuse Survivors

Recognizing that many inmates have had histories of abuse and trauma, especially female inmates, some mental health professionals have suggested a need for trauma-specific treatment programs such as "Survivor Therapy Empowerment" programs

(STEP) , designed by Jungersen et al. (2018) and LW (2017). Trauma treatment is different from psychotherapy in that it incorporates the healing needed from trauma as well as any impact it may have had on mental health. While a number of battered women shelters have such treatment programs, correctional institutions have not yet incorporated many of these programs based on feminist and trauma theories. Given the large numbers of abuse survivors in prisons, it would be prudent for these programs to be found in all prisons especially for those women who will be released after short sentences. There have been some attempts at psychoeducational programs that help prisoners about to be reintegrated into society deal with difficult past relationships, but most of the leaders are not trained psychotherapists and cannot deal with the re-exposure to trauma situations and memories that can trigger PTSD responses. The STEP program is manualized and has been tested for efficacy (Jungersen et al., 2018).

The survivor therapy model calls for treatment using a 12-unit program:

1. Label the abuse, described the details, and assess for the psychological impact. Develop a crisis intervention plan to deal with safety issues.
2. Teach relaxation training techniques to reduce anxiety and avoid non-helpful ways of reducing tension.
3. Develop awareness of cognitive messages that prevent healing from trauma.
4. Build assertiveness and reduce anger and compliance with abusers' demands.
5. Understand and identify your own cycle of abuse.
6. Reduce PTSD symptoms and trauma triggers.
7. Identify and eliminate non-helpful tension relievers such as alcohol and other substance use.
8. Review your own childhood and patterns of child raising with own children.
9. Strengthen your control over emotional responses and develop mindfulness and other emotional re-regulation skills.
10. Learn the legal remedies available to abuse survivors and how to use them.
11. Let go of old relationships and build healthy new ones.
12. Build resiliency to move on to wellness and happiness.

Special Programs for Women Prisoners

Jean Harris, the former principal of the fashionable girls' preparatory school in Virginia, shot and killed her lover, Dr. Herman Tarnover, the author of the successful Scarsdale diet program. Obviously it was a big media scandal. Tried and convicted of manslaughter, she was incarcerated at Bedford Hills Reformatory for Women in Westchester, New York. She writes about her experience there in *They Always Called us Ladies*, decrying the lack of consistent programs for women in that prison and others today. For example, she states that almost 10% of the women incarcerated are pregnant. In the previous times, babies born to incarcerated women were permitted to remain with their mothers for up to two years. Today that is rarely done, although infants can stay for short periods of time to encourage emotional bonding so critical to their own development. Large numbers of women are single mothers, and most of their children are placed in foster care while they are in prison. Placement of prisons outside the urban areas where most of the prisoners lived makes it almost impossible for mothers to remain emotionally and physically connected to their children while doing time.

One of the authors (LW) has visited battered women in prisons in many different states and around the world. The conditions vary from state to state with those who have women managers trained in psychology providing the best programs, including individual therapy where possible. Legislators are reluctant to fund mental health and psychosocial support programs in prisons fearing they will look like they are soft on crime in their home districts. However, the women need support, care, and the opportunity to rebuild their ability to connect with a variety of different individuals. Some call this 'self-esteem,' but in fact, it encompasses a whole set

of social skills that many women raised in chaotic and abusive environments either never developed or no longer have available to them (Price & Sokoloff, 1995). The cottage atmosphere popular in the middle of the last century, still observable in some prison sites, served women better than the stark modern buildings where doors are monitored electronically and hallways separating one area from another seem to go on for miles with twists and turns that even breadcrumbs sprinkled on the floor wouldn't permit an easy return. Women with problems are either sent into medical units or placed in isolation, which is terrifying for most women who prefer to be with others than alone. PTSD symptoms from abuse experiences are constantly with the women, often filling their thoughts as they re-experienced parts of the past events whenever they feel threatened anew (Walker & Conte, 2017).

Sex Offender Relapse Prevention Programs

Programs for convicted sex offenders exist in a number of correctional facilities. They usually follow what is described as a "relapse prevention model." These are often done in a group format, with the inmate given homework assignments to recognize various stages of relapse prevention—stopping the behavior before it happens. The model is based on teaching the person several different components to committing an offense, so it can be prevented or stopped at an early stage. The steps used in the model are as follows:

1. *Abstinence*: Agreeing not to commit any offenses and not to think about or plan to commit any offenses.
2. *SUDs*: Seemingly Unimportant Decisions—Identify everyday decisions that appear reasonable, but can create problems because they may place the individual in a situation that may result in re-offense, e.g., agreeing to babysit a child when a neighbor has an emergency.
3. *Dangerous Situation*: Know what are the situations where the person has the *opportunity* to re-offend.
4. *Lapse*: Behaviors or fantasies that bring the person close to committing an offense.
5. *Giving Up*: The person believes that he or she has violated one of the other principles, so therefore, since there is no turning back, the person may as well commit the offense.
6. *Offense*: Committing an actual re-offense.

The treatment program teaches cognitive exercises that the inmate can use to change her/his behavior at each stage. This is done both with hypothetical situations and with the inmate's actual criminal behavior. In other words, the inmate is asked to detail what he/she could have done differently at each stage. Texts and workbooks using this model are available commercially.

Anger Management Programs

Anger management programs have also been used in a variety of correctional settings. The first few sessions concentrate on educating the inmates about anger and its components while the remainder of the sessions concentrates on building skills to better handle angry feelings. Early sessions center around what causes anger (e.g., stress, frustration, fear), looking at maladaptive responses to anger, and how anger can be helpful. This is followed by learning intervention techniques to keep anger from getting out of control (e.g., progressive muscle relaxation, anger logs detailing conditions before the anger is felt, and consequences of acting out). This stage is similar to the behavior modification technique called reciprocal inhibition; the relaxation will inhibit the angry response. Subsequent sessions focus on communication skills, both verbal and nonverbal assertiveness training (learning the difference between assertive and aggressive), problem-solving, and role-playing.

Other Treatment Approaches

Other programs, somewhat more general, focus on development of the cognitive skills to solve problems, rather than responding impulsively to

the situation. By identifying the problem when it first occurs, an escalation of the problem is avoided. The therapist helps the inmate identify areas in which the inmate has not handled a situation appropriately or wished that she or he had handled it differently. The therapist and client develop a hierarchy of problems to be solved and focus on alternative strategies to the way the situation was previously handled.

More recently, some correctional programs have started looking at a treatment technique called Dialectical Behavior Therapy. This approach was originally developed by Linehan for the treatment of borderline personality disorder. The technique is used to address the client's experiencing one emotion and expressing a different one. The client becomes aware of the emotional conflict and is assisted in balancing the emotion. Inmates are taught skill modules. The first is core mindfulness which includes developing a balance between thinking driven by logic and thinking driven by emotion. Interpersonal effectiveness is the second skill module. Inmates are taught to reduce their distorted sense of entitlement and become more respectful of and sensitive to the rights of others. The third module is emotional regulation, learning to identifying and label emotions appropriately, increase emotional attachment, and increase empathy for others. The fourth module, distress tolerance, teaches the inmate to learn and accept distress through the recognition that it is a fact of life.

All inmates go through the skill training modules twice and then have to apply Dialectical Behavior Therapy to the crime they committed by completing a behavior chain analysis. The inmate must give a nonjudgmental description of the crime, review the consequences for the victim, and describe the crime through the eyes of the victim. The inmate then creates a relapse prevention plan using the skills acquired and examines what, if anything, can be done to correct the consequences.

Another approach that was strongly endorsed earlier, in the 1960s and 1970s, was the therapeutic community begun by psychiatrist Maxwell Jones from the Tavistock Institute in London. The entire "community," i.e., a ward or cellblock, was designed to be a therapeutic milieu. Staff would be trained to observe and intervene in all day-to-day interactions where beneficial interventions could be made, not just in a structured therapy session. Patients or inmates would be trained to respond in a therapeutic manner to one another on a daily basis. With the general shift to a less therapeutic and more punitive orientation, such programs are rarely seen these days.

Many states do have provisions for short-term, crisis-oriented mental health treatment if an inmate becomes mentally ill while serving a sentence. Some of these units are within the prison complex, and others transfer the inmate to a correctional mental health center, a facility that serves all of the prison facilities in a given state. Unfortunately, these facilities are usually understaffed and overcrowded, resulting in a pressure to return inmates to their original setting. In one setting in which one of the authors (DS) worked, staff would diagnose 60% of their patients as malingering and return them to their original prisons. Considering the fact that most research on malingering suggests that between 15 and 25% of an inmate population are malingering, this figure of 60% seems somewhat inflated.

Finally, recent research on psychopathy (Hare, 1993) points out that these individuals, who constitute perhaps 15% of inmate populations, may actually experience pain differently from others. Due to defects in their brain structure, psychopaths will seek out stimulation, even painful stimulation. Clearly, repeat punishment with such an individual would be ineffective. Yochelson and Samenow (1975) in their work *The Criminal Personality* propose a different approach that might be more in line with the treatment approaches more acceptable in the corrections field today. They identified a number of "errors in thinking" utilized by antisocial individuals to justify and rationalize their behaviors. Their treatment focused on confronting inmates with their thinking errors and resocializing them into more adaptive ways of

thinking. As there are few successful treatment programs for psychopathic individuals today, the prisons are an ideal place to begin testing some new models. The Federal Maximum Security prison in Florence, Colorado, reportedly has used some innovative treatment approaches with violent and psychopathic individuals by placing them in individual cage-like structures with three to four together with one psychotherapist. If acting-out behavior becomes disruptive, the person can be easily removed from the session while the others who are interested can continue to participate. There are no data available on whether the program is successful.

Public health models for dealing with large scale-epidemics of diseases may have some promise in the prisons today if there were sufficient public support. As public health models point out, jails and prisons represent an opportunity for tertiary prevention as inmates are isolated from the community for a period of time and rarely turn down an opportunity to attend activities, especially if they are credited to reduce prison time. Public health models also describe primary and secondary prevention strategies. Primary prevention models try to utilize education and the identification of high-risk populations to build in protective factors. Secondary prevention is designed to intervene when the symptoms have developed, but are still in their early stages. Through outpatient therapy and various other therapeutic activities, the attempt is to contain or prevent the 'disease' from spreading. Again, funding for these primary and secondary prevention programs is often very difficult to obtain.

Limitations to Traditional Treatment

Even if ongoing treatment programs existed in correctional facilities, many limitations exist. The very basic issue of "Who is the Client" has been debated for several decades (Shapiro & Walker, 2019). In a correctional setting, the therapist cannot promise the inmate confidentiality because correctional authorities can have access to records on a 'need to know basis'. Privacy does not exist in a prison. While therapists are generally aware of limits to confidentiality, e.g., for suicidal and homicidal threats and child abuse, they often do not know how to grapple with the fact that an administrator can view the record at her/his discretion. This raises, of course, a related issue: How much material can be entered into the chart and in what kind of detail? If an inmate, for instance, is experiencing angry fantasies about another inmate or an officer, should this be entered into the chart? If it is, someone can gain access to it, treat it as a threat, put the inmate in confinement, and destroy the therapeutic relationship. If the therapist chooses to keep the material private, and the inmate does in fact act out, the therapist is in the difficult position of concealing information that led to a security breach. Some institutions utilize a therapist/administrator split in which the therapist maintains the confidentiality, but the unit administrator need not be bound by this. In practice, this does not work out very well when the situation is a critical one. If the therapist tells the inmate at the outset of treatment that material revealed by the inmate is not confidential, will that have a "chilling effect" on therapy and result in the inmate holding back material. The issue of the impact of punishment on a mentally ill person is one that has created much debate with mental health advocates pointing out the strong possibility that solitary confinement or other punishment may exacerbate the prisoner's decompensation and create even more illness and behavior problems. This becomes especially problematic because parole boards frequently look at the extent of the inmate's cooperation with treatment programs as one of their criteria for parole, so inmates who enter treatment might be signing up for more punishment when revealing their innermost thoughts.

Summary

In summary, this chapter has looked at the issues of intervention in the criminal justice system first by keeping mentally ill individuals from being arrested for nonviolent, misdemeanor acts,

secondly, to divert them into community treatment problems where possible, and thirdly, to develop and implement treatment programs in jails and prisons as the mentally ill offender is there. Specialty courts that practice therapeutic or restorative justice were described here as one way to divert those who need treatment rather than incarceration. In jails and prisons, medication is often the first line of intervention in most jails and prisons today. While defendants awaiting trial do have a legal right to refuse or demand medication or other treatment, inmates already convicted and sentenced to prison do not generally have such rights. Many institutions have limited availability in group support programs with voluntary inmates as the leaders and in psychoeducational programs with educators as the leaders. Some have specific treatment programs that deal with special issues. We have described some model programs that have been adapted to prison conditions. In general, however, individual psychotherapy is not available in prisons, and given the cost and other administrative issues, it may not become available despite arguments in its favor. The double bind that agreeing to treatment puts some prisoners in who reveal their thoughts and fantasies or actually become so agitated during treatment that they act out and then get written up or punished for it, is a real problem even when therapy is available. However, it is clear that the mentally ill are in prison and do need intervention to prevent their further deterioration.

Questions to Think About

1. Do you think that prisons that provide mental health counseling to inmates are too 'soft' on them and should only be punishing them for doing bad things?
2. If you were a police officer, do you think you would volunteer for training in the new crisis intervention management programs offered in your district? Why or why not?
3. If you only had enough money for one program, either work with prisoners diagnosed as psychopaths or having bipolar disorder, which would you choose? Why?
4. Would you like to work in a jail or prison program as a psychologist? What do you think would be most and least rewarding tasks? Why?

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Part III

Can Psychologists Measure Pain and Suffering?

11 Civil Law: U.S. Personal Injury Torts

Dr. Jones is a psychologist in the independent practice of psychology who had been treating Herman Smith, a 38-year-old Caucasian man, because of violent outbursts of anger since a pipe fell on his head and injured him the previous year. During the therapy process, Dr. Jones has consulted with a neurologist, neuropsychologist, and psychiatrist. During one therapy session, Mr. Smith tells Dr. Jones that he feels he is being tormented by several people and he doesn't know if he can control his impulses to assault them. Dr. Jones attempts to involuntarily hospitalize Mr. Smith but the hospital refuses to admit him. As the only medical insurance that Mr. Smith had was Workers Compensation, they refused to pay for the hospitalization. Shortly after, Mr. Smith commits suicide. His family files a malpractice lawsuit against Dr. Jones for failure to assess Mr. Smith's suicidal potential and failure to take appropriate strategies to prevent the suicide. If you were a psychologist retained by the family's attorney, how would you perform your assessment?

Introduction

The civil law is different from the criminal law in a variety of ways. Many civil cases or torts in which psychology can be helpful in resolving involve two parties that need to settle a dispute arising from a formal or informal contract. Rarely is the state involved as in criminal cases. Formal contracts are those that are created by people and consistent with the laws in their state or country. Informal contracts are often called expected duties or obligations that come with certain situations or legal issues. Examples of a formal contract might be a real estate contract to purchase a home, a prenuptial agreement when getting married, or an employment agreement. Informal contracts may include getting married, seeking medical advice, walking on a safe bridge, or purchasing a safe product. The case of Dr. Jones and his treatment of Mr. Smith is an informal contract dealing with an implied standard of care. In some civil lawsuits the defendant is the state who allegedly deliberately failed to provide a promised service that caused an injury. In some federal cases, someone allegedly broke a law and caused the party harm, such as gender or racial discrimination, which is a violation of the plaintiff's civil rights. We will deal with these last two situations later in this chapter. The remedy for a failed contract is to withdraw it and if there is a cost associated then an attempt to reclaim it. In some cases, a broken civil contract may cause physical or psychological injuries and psychologists may be called in to do an assessment by either party.

The legal question that is being asked in most tort civil cases is to assist the judge or jury to figure out *liability* or if an alleged action actually occurred (e.g., was there a legal contract or an obligation on the part of the defendant toward the plaintiff), and if so, did that action cause the complaining party (*the plaintiff*) *damages* or to suffer any injuries, including psychological injuries. Most importantly, if so, was there a *nexus* or relationship between those injuries and what the plaintiff claims the defendant did. That

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is to say, did the defendant cause the injuries to the plaintiff. To prevail in a lawsuit, the plaintiff must prove *causation*. This is called the '*burden of proof*', and in most cases it must be more likely than not or approximately 51% likely that it was the defendant's fault. The '*standard of proof*' is often referred to as 'but for', or perhaps even, if the defendant didn't do what is claimed, then the plaintiff would not have suffered this injury or would not have worsened an existing condition. This is called '*proximate cause*' in civil litigation. There is also a theory in most of these cases that the last person to cause an injury is responsible for the damages or the 'eggshell theory' after the old nursery rhyme, Humpty Dumpty. Although his egg shell was already cracked, if someone pushed him off the wall, they are responsible for all or at least some of his damages. If someone placed Humpty Dumpty on the wall knowing something could harm him, they could be held liable for placing him in a '*zone of danger*'. Some of the newer cases on exposure to toxic substances fall into this category of tort.

Tort law, then, deals with private injuries to parties from wrongdoings or breaches of contracts. The law actually defines these breaches into several reasons: *negligence, malpractice*, or *deliberate indifference*. In cases where there is an alleged duty to someone, that is called a '*standard of care*' and mental health experts may be able to help discern if that standard of care has been met or breached in some types of cases. If it can be proven that someone knew or should have known what the standard of care was and breached it anyhow, then that could be considered 'negligence'. In most negligence cases, a person or company may know that something is defective and didn't fix it but did not deliberately intend to harm someone. If that person deliberately fixed it with a cheaper part that turned out to be inferior and caused another person to be hurt, then that may be an *intentional tort*. If the person knew the part was inferior and deliberately used it anyway, it could be a '*reckless tort*' or one of '*deliberate indifference*'. Different penalties are awarded if a plaintiff wins their lawsuit. '*Compensatory*' *damages* would be reimbursement for all that their injuries and suffering cost them financially. But in cases where a defendant acted recklessly or with deliberate indifference, they could also be charged with '*punitive*' *damages* designed to punish them. We discuss these issues more fully later.

The lawsuits against tobacco companies that continued to manufacture cigarettes while denying smoking caused cancer when they had scientific data showing otherwise were considered 'deliberate indifference'. They knew it would harm people who smoked their cigarettes and did it anyway for their own profit. Since so many people were affected, the lawsuits were grouped together and called '*class action*' *lawsuits*. This can occur when all the people affected can be defined as a special class. In that case, the special class was those people who smoked cigarettes. Plaintiffs were awarded both compensatory and punitive damages. In fact, in some settlements, the punitive damages amounted to millions of dollars that were used to reverse their misleading advertising by providing community anti-smoking prevention programs. We will discuss these concepts later during this chapter.

Forensic experts often perform psychological evaluations in various stages in civil personal injury cases to assess the emotional harm that often accompanies physical injuries. In some communities, it is possible to sue for psychological harm even when a physical injury doesn't occur. Case law often called the 'impact rule' in various jurisdictions broadened the ability to sue for specific psychological injuries as well as pain and suffering. Other cases broadened the liability to when a bystander is involved in witnessing a negligent injury to someone else, like a mother who witnesses her child be harmed by a defective bicycle brake that does not stop it in time. She too may be eligible to sue for emotional or psychological damages.

Case law in cases where emotional injuries are claimed has been evolving over the years in different states. Historically there was skepticism about proving psychological injuries, and legislators feared without limiting large awards, exaggeration and malingering would occur. Further, there was also the belief that

psychological injuries were not as serious as physical injuries despite research that found among plaintiffs, psychological injuries were rated as even more severe than the physical injuries and took longer and were even more difficult to heal.

What do you think about this? Are psychological injuries the same as physical injuries? Should they be compensated the same in financial verdicts? A recent Oklahoma case deals with many of these issues (*Beason v. I.E. Miller Services, Inc., 2019*) in overturning a cap placed by the law on what a psychological injury was worth.

> Todd Beason was a worker on an oil rig in Oklahoma who lost his arm when a crane used in the construction project he was working on fell on him in 2012. A jury awarded him $14 million with $5 million for his" mental anguish and pain and suffering." The Oklahoma law at the time limited non-economic damage to $350,000, so the trial court judge reduced the $5 million portion to that limit. The Plaintiff won his appeal to the USSC stating that the trial court's reversal was unfair as the Oklahoma statute was unconstitutional because it "targets for different treatment less than the entire class of similarly situated persons who sue to recover for bodily injury".

In these personal injury tort cases, an individual (or group), who is called the plaintiff(s) files suit against another individual (or group) who is called the defendant(s) alleging that the defendants breached some duty or obligation to them and that, as a result of that breach of duty, some harm or injury has occurred. The plaintiff will file with the court '*pleadings*' or a list of 'causes of action', which are allegations of what the defendants did to (or failed to do for) the plaintiff. The defense will usually file *motions* trying to dismiss the claims based on both legal and substantive reasons. Sometimes the defense will file for '*summary judgment*' to dismiss the lawsuit if it contends that there is no legal basis for the claim or claims. If summary judgment is not granted, then the long process of civil litigation begins.

There are usually two parts to a civil lawsuit, proving 'liability' and 'damages'. In most of these civil personal injury torts, the forensic psychologist is involved in assessment of a plaintiff's claim for damages. These damages may be physical, mental, emotional, and economic. If there are no damages, then even if the defendant is liable for a bad act, the lawsuit cannot go forward. The remedy to a civil tort or malpractice action is a sum of money. Once the plaintiff puts their mental or emotional state at issue in the litigation, this gives the defense the opportunity to hire their own experts and conduct their own examinations. Quite frequently, then, in these cases, there will be psychological evaluations done by both a plaintiff's expert and a defendant's expert, with each expert reviewing the work and conclusions of the other. If psychological testing is performed by either side, the psychologist is obligated by statute to turn over the raw test results to the psychologist on the other side. This avoids the plaintiff having to retake psychological tests especially since repeating certain tests within a certain period of time can skew the results.

Roles of the Expert

The mental health professional may play important roles in civil litigation both in the realm of 'liability' and in the realm of 'damages'. Liability refers to whether the plaintiff has a right to recover under the applicable law. Although this is usually a legal question, if there is some psychological question, such as whether or not sexual harassment was committed, a consultation or even evaluation by a mental health expert might assist the trier of fact, the judge or jury. Damages, as discussed above, refer to the amount of money necessary to compensate the plaintiff for injuries suffered at the hands of the defendant. Expert testimony may be necessary to define what the relevant standard of care might be. As an example, let us look at Mr. Smith's family who are suing his psychologist (defendant), Dr. Jones, for failing to protect him from his own suicide. This would be an allegation of substandard psychological services against Dr. Jones. In this case, the expert will have to start with a review of Dr. Jones chart notes. Here is

where making notes in a chart or file is of critical importance, not for the specifics of what is discussed but to see if Mr. Smith's committing suicide occurred as a result of some alleged substandard psychological services. Expert testimony may be utilized to establish what the appropriate standard for those psychological services ought to be. If it is found that there was a deviation from a standard of care, and the deviation causes the plaintiff's harm or injury (this is what is called the 'nexus', the 'proximate cause' or the 'but for' that is essential in a civil case, the mental health professional may then be called in to evaluate the extent of the injury and what kind of treatment would be necessary to restore the plaintiff to the previous level of functioning.

The wrong that one party commits against another is called a tort and is the basis for the civil lawsuit. It is legally improper conduct that causes harm to someone else. There are four basic elements of a tort, and all four are necessary to prove liability. They include (1) the duty, (2) a breach of the duty, (3) proximate cause, and (4) harm.

Elements of a Tort

Duty

A tort action in the civil law has several parts. The first element is what is called a duty, legally owed by a defendant to a plaintiff. Legal duties to others occur when there is a special relationship (like a professional would have to a client) or the person is a member of a protected class (like a child, the elderly, or someone who is mentally challenged). If such a relationship does not exist, there generally is no duty to any third party. If, for instance, you were to see a person drowning, there is no legal duty to try to save them, even though doing nothing would certainly be morally objectionable. But if you were a police officer and saw someone about to jump in a lake, you might have a legal duty to do something to try to save the person from drowning. Sometimes the court declares a group to be a special class for a particular issue, like all cigarette smokers in the recent tobacco lawsuits. To expand on the example discussed above, a psychologist who is treating a patient in psychotherapy has an obligation to do a reasonably competent assessment of that individual in order to determine the appropriate treatment modality. An important point is that the 'reasonableness' should *not* be inferred retrospectively if, for example, the treatment has an unfavorable outcome. "***Reasonable***" in this case refers to standards or guidelines in place at the time the treatment is rendered, not an after the fact judgment in which the harm was known. For example, a psychologist assessing a patient for psychotherapy needs to rule out any possible physical basis for her or his presenting complaints, e.g., anxiety or depression, by a referral to or consultation with a physician. Assuming that the patient became ill or died for a physical condition that was also causing the psychological problems, the duty is defined not by the fact that there was an unfortunate outcome, but rather by the fact that the standards of the profession require a comprehensive assessment, ruling out possible physical causes of the symptoms.

Breach of Duty

The second element is the dereliction or breach of the duty owed. This may be seen as either an act of omission or an act of commission. In other words, the defendant did something that she or he shouldn't have done, or did not do something that she or he should have done. As noted above, the mental health professional may be called upon to render an opinion on the standard of care and also whether the particular behavior constituted a breach of the standard of care. Usually a standard of care is decided based on local or national customs for particular business or professional actions. There is, however, a growing trend to hold practitioners liable for at least knowing what appropriate assessments and treatments might be, even though the resources for providing them may not be available.

Causation

The third element is causation. The plaintiff must establish that the injury would not have occurred but for the above-mentioned dereliction or breach of the duty. If there were multiple causes, the dereliction or breach had to have been a *substantial* factor in the causation of the plaintiff's condition and the harm was *a foreseeable risk* of the defendant's actions. Expert testimony will most frequently address causation, because forensic experts are expected to render an opinion on whether the particular behavior in question could reasonably lead to the particular kind of injury the plaintiff has sustained. Obviously, psychologists and other mental health experts can testify about what would cause specific emotional damages beyond the layperson's knowledge of pain and suffering.

Causation can become very complex when there are multiple causes of the plaintiff's injuries. In some cases, the injuries may be attributed (*apportioned* in legal terms) to more than one cause. The defendant may then only be liable for a certain percentage of the plaintiff's problems. If there is a *preexisting injury* or impairment that contributed to an unfortunate outcome, the defendant may be liable only for the additional damages caused by his or her conduct. In some cases, if the plaintiff has somehow contributed to the unfortunate outcome, by for instance, not following the treatment plan, there may also be an apportionment of damages. Finally, there may be cases where multiple defendants might share in the liability for the plaintiff's injuries.

Damages or Harm

Harm or injury, the fourth element, must be demonstrated by a significant impairment in the plaintiff's functioning. Theoretically, an injury, which does not result in a *substantial impairment of functioning*, would not be able to be utilized as the basis for civil liability. Here the role of the forensic expert is a complex one, for there need to be multiple determinations: (a) Is there an injury? (b) Is the injury significant enough to cause substantial impairment? (c) Is the plaintiff's current emotional state significantly different from her or his preexisting adjustment? If the answer to (c) is "no," then one cannot argue that there are compensable damages, because there has to be some degree of deterioration from premorbid functioning.

In civil rights claims filed in federal court for discrimination or sexual harassment, there does not have to be a showing of damages once the pattern of discrimination has been successfully demonstrated as the damage is the violation of the person's civil rights. Sometimes the plaintiff chooses to demonstrate damages even in federal court cases to prove how egregious the defendant's behavior was in order to request the jury award punitive damages to punish the defendant above the compensatory damages that pay for lost wages, lost opportunities, medical and other bills, and future losses. They might choose to file in state court in the jurisdictions that permit such claims. In sexual harassment cases, which we discuss in further detail in Chap. 21, many states, like NYS, are eliminating time limits to when a case may be filed opening the way for many more civil claims that had missed the original deadline. Often forensic accountants work together with attorneys and psychologists to estimate the total cost of damages to be compensated.

Models of Recovery for Compensable Damages

When is a claim for emotional damages compensable? As we discussed earlier in this chapter, until recently, it was rare to be able to file a personal tort for emotional damages alone. Now, states have generally recognized four different models for recovery of emotional injuries. These will be presented in decreasing order of difficulty for a plaintiff to establish.

The first rule is called the *physical injury or impact rule*. Here, recovery for emotional injuries is allowed only if the emotional injury is the result of a physical injury. This restriction occurred because lawmakers feared there would be a flood of litigation if the law allowed

emotional injury to be a basis for litigation by itself. It led, however, to its own set of excesses, with plaintiffs 'stretching' the concept of physical injury in order to justify a claim for emotional damages.

One of the earliest recorded cases is a good example. In *Christy Brothers Circus v. Turnage (144 S.E. 680, 1928)*, a plaintiff developed PTSD after some circus horses stampeded toward the bleachers where she was sitting. Because she had to claim physical injury too, the plaintiff asserted damages from fecal matter that one of the closest horses sprayed on her when it defecated. Then, she also claimed emotional damages which were the major injury she experienced. Nevertheless, there are many cases in which genuine emotional injury can be tied to real physical injury, and a mental health professional may be utilized to explain to a judge or jury just what the connection might be.

The second rule is called the *zone of danger* rule. Here, recovery for emotional injuries is permitted without any direct physical impact: However, the plaintiff must be within the 'zone of danger'; that is, even though there is no direct physical impact, there might well have been. Under this rule, recovery is permitted if the plaintiff is also threatened with physical harm due to the defendant's negligence. For example, two people were crossing a street when a motorist ran a red light. The motorist struck and killed one of the pedestrians, but the other jumped out of harm's way. The pedestrian who survived filed a lawsuit for emotional injury, alleging that she or he was in the zone of danger. While the expert may not play a direct role in the zone of danger determination, she or he could give valuable testimony regarding the person's *perception* that she or he was in the zone of danger. Testimony might be given regarding how situations of extreme stress might alter a person's perception of the potential for harm or injury.

The third rule is called the '*bystander proximity*' rule. Here, recovery for emotional damages is permitted, even if the plaintiff is not in the zone of danger and if the plaintiff was (1) physically near the scene of the accident, (2) actually observing the accident, and (3) closely related to the victim. For example, let us take the example noted above, in which the motorist runs a red light, strikes on pedestrian, and almost hits another. Let us assume that the mother of the person who was struck and killed observed the accident from her home, which was twenty feet from the accident scene. The mother could recover for emotional injuries, even though she herself was neither struck, nor in the zone of danger, because she suffered the trauma of seeing her child killed. A forensic expert could clearly testify as to the impact the witnessing of her own child being killed could have on an individual.

A new approach to this rule has recently provided additional areas for psychological input. Several courts have now extended the concept of 'closely related to the victim' to people who have strong emotional ties to the victim, even though they may not be family members. This is similar to the concept of 'transferred intent' when a person is unintentionally harmed when the intent was to assault another person. A forensic expert could help reconstruct whether the nature of the relationship between the individuals had been close enough to fall under this part of the statute.

The fourth rule is referred to as the '*full recovery*' rule. This allows recovery for the infliction of serious emotional distress brought about by certain highly stressful circumstances. These are the cases in which the stress is so intense that it would cause serious emotional disturbance in anyone, even theoretically, an individual who has no preexisting mental or emotional problems. Examples of this would be domestic violence, sexual assault, being a witness to a brutal crime, etc. A mental health professional's role here might have three aspects. First, the expert could describe what the complainant's current mental and emotional state is. Secondly, she or he could explain what the impact of the mental distress brought about by this particular set of circumstances might be on a 'normally constituted reasonable person.' The sexual harassment case, *Harris v. Forklift (1993)*, is an example here.

Thirdly, if the individual had some mental or emotional difficulties that preexisted the trauma,

the expert could render an opinion on how the trauma affected an individual who may have already been fragile. This, in and of itself, could become a challenging legal issue because the defense could assert that the plaintiff already had mental and emotional problems and the distress she or he is now experiencing could not be attributed to the circumstances in question. The plaintiff could rebut that assertion and demonstrate that the trauma exacerbated the preexisting problems and caused deterioration or regression from a previous level of coping ability. The skillful forensic expert would, through careful history taking and review of previous records, determine what the preexisting mental or emotional state probably had been, and render an opinion on how the stressful event affected that preexisting state. The standard here would be the professional's opinion based on a reasonable psychological probability within the legal standard of proof which is usually a preponderance of evidence.

The Nature of Tort Actions

The law recognizes three kinds of tort actions: intentional, reckless, and negligent. Most lawsuits file for all three counts. In some jurisdictions, these types of torts are broken down even further such as actually permitting a separate claim for infliction of emotional distress.

Intentional Tort

An intentional tort is one that is knowingly and purposefully done. An intentional tort occurs when the defendant deliberately commits an act that then causes harm or where the harm should have been reasonably foreseeable. This means the defendant must have a certain state of mind needed to commit the intentional action. It is not necessary to prove that the defendant intended to harm the plaintiff; the intent is to behave in a particular manner. The litigation brought against tobacco companies is pled as intentional torts because the plaintiffs believed the defendants deliberately used a formula with dangerous substances in their preparation of cigarettes and other tobacco. They claimed that the defendants knew that the health risks were recognizably foreseeable and deliberately covered up this scientific knowledge to continue their profits.

Often, the legal issue in the latter prong is what the defendant knew or should have known. In other words, if the defendant knew or should have known that their actions would cause harm to the plaintiff, but the defendant performed the actions anyway, the law would consider this an intentional tort. The most frequent intentional tort action against mental health professionals is sexual misconduct with a client. The defendant, who engages in a sexual relationship with a client, knows (or should know) that these actions will harm the client. There is abundant professional literature addressing the harm that can occur, and the behavior is forbidden by Codes of Ethics. The most common intentional torts are assault, battery, and false imprisonment. Another example of an intentional tort would be an automobile company knowing that the brakes on their cars do not work properly but fail to have a recall and tell the customer to have them fixed. Were the customer to be hurt in an accident as a result of faulty brakes, they could sue the manufacturer and automobile company for an intentional tort. Yet another example is a recent case of drivers who work for Amazon to deliver their orders to customers. They receive an incentive for fast delivery which in some cases has caused reckless driving resulting in accidents. These cases are now in litigation with Amazon attempting to distance themselves from liability by using independent drivers. At this time the results of how the courts will rule are yet unknown.

When a plaintiff is claiming intentional infliction of emotional distress, they must also demonstrate that the breach of the duty by the defendant was '*extreme and outrageous*' using a preponderance of evidence as the legal standard. These terms refer to whether the behavior in question violated the general sense of decency within the community. Certainly, having a sexual relationship with a therapy client meets this

prong of the test for the prevailing community standard. A person seeks help from a therapist for personal problems, the therapy relationship is predicated on trust, and there is a power differential between the therapist and the client in favor of the therapist who misuses his (or her though this rare) power and manipulates the client into a sexual relationship which clearly violates standards of community decency. In these cases, whether or not the client consents is irrelevant; the power difference makes consent a moot issue. Finally, the plaintiff must demonstrate that, as a result of the breach of duty, she or he suffered from extreme emotional distress. The distress has to be of such intensity that it would cause damage to the '*reasonable* or normally constituted individual'.

There are several areas that could be considered intentional torts. These include assault or stalking cases (intentional causing fear or offensive contact), sex crimes, or battery cases (actual infliction of harmful or offensive bodily contact), stalking, false imprisonment, and infliction of mental distress. Intentional or negligent torts (described below) may also include wrongful death in murder or manslaughter cases, often when family members do not want the person who caused their loved one's death to inherit or enrich themselves from the family member's death. In cases where a battered woman's family believes that her husband killed her, but the prosecutor did not believe there was sufficient evidence to obtain a conviction, they can file a wrongful death case as a civil tort or even in probate court to prevent the batterer from inheriting the battered woman's share of property. It is important to remember that the standard of proof in a criminal case is the higher 'beyond a reasonable doubt' while the civil standard is usually 'a preponderance of evidence' or more likely than not that what was claimed actually happened.

The famous civil case against O.J. Simpson filed by Ron Goldman's father and sister and Nicole Brown's parents on behalf of her children is a good example of going to another court and filing for civil damages. The plaintiffs claimed that O. J. intentionally placed Nicole in a zone of danger, not that he killed her. This was consistent with California law at the time. California had certain protections in the tort law that limited the amount of damages at that time so that someone does not become a 'pauper'. Obviously, the state has an interest in making sure it doesn't have to support an individual because someone else got all their property. Like many wealthy men, O.J. had most of his property and his retirement pension from the N.F.L. protected. His civil defense was not as vigorous as was his criminal defense where his liberty was at issue. The civil jury, picked from a different jurisdiction (Santa Monica) than the criminal jury (downtown Los Angeles) was less inclined to believe that O.J. didn't cause Nicole or Ron Goldman to be in harm's way. In this case the plaintiff's burden of proof was different too as it was 'more likely than not' or 51% likely rather than the higher standard of 'beyond a reasonable doubt'. Although he lost the civil case, the plaintiffs did not receive much of his money, most of which went to support his children.

In claims of intentional infliction of emotional distress, the expert again may play several roles. As noted before, assessment of the emotional state of the plaintiff is usually required in order for the tort to go forward. Testimony regarding the standard of care is another area. Here the expert is asked to identify the nexus of harm that the standard of care was breached and the harm was caused by that breach. A final area arises if the defendant is claiming some degree of impairment herself or himself. The expert may be asked to render an opinion whether the defendant suffered from emotional problems or cognitive limitations, such that she or he did not have the capacity to foresee the harm that her or his behavior could cause.

Defenses to an Intentional Tort

Defenses to intentional torts include self-defense, defense of others, defense of property, consent, necessity, and authority of law. Many of these defenses can be used against reckless and negligent claims, also. Let's look at them more closely. Self-defense, as we saw in Chap. 6 on syndrome testimony, includes the reasonable perception of imminent danger. But, as we have seen in this chapter, we have to prove some other elements in addition to determining if an act is in self-defense in the civil arena. Most states require

that the force with which a person defends himself or herself must be in proportion to the actual danger. If it is exaggerated in any way, then it may be considered 'imperfect' self-defense. If there is a fight where both parties live or work, and have a legal right to be there, and then if there is no duty to retreat in the law in that jurisdiction, that could be a part of self-defense.

Closely allied to self-defense is the defense of others. This usually occurs where a child or someone else is in danger and someone gets hurt while trying to protect or defend the other person. In some of the Western states, a defense of property may be another reason why someone took an aggressive action against someone who that person reasonably believed was going to damage the property. The old Western movies used to portray these kinds of gunfights. Clint Eastwood popularized it when he dared someone to 'make my day' so he could fight back in the movies. In some states, such as Colorado, the so-called *make my day law* actually prevents the prosecution of a criminal case, but it still can be used as a defense to a tort claim. A necessity defense may be used when a person knows that they have to take some action that might inflict harm on another person, but it is the lesser of two evils. So, a person who pushes someone out of the way who then breaks his or her leg could not be sued for an intentional tort if they were protected from being hit and possibly killed by a large object that was falling from a window. Finally, a police officer might use the authority given by the law as a defense to shooting a robbery subject.

Reckless Tort

A '*reckless tort*' refers to the conscious disregard of a known risk. In order for such a claim to prevail, the plaintiff would first have to establish that the risk was known at a particular point of time. For example, if a certain drug is being prescribed which is *later* found to be harmful, then a physician prescribing the drug at some time in the past cannot be said to have acted recklessly since the harmful side effects were not known at the time the treatment was being rendered. Tardive dyskinesia is an incurable disabling neurological movement disorder leaving a person without the control of his or her muscles. It is linked to the long-term use of antipsychotic medicine, mostly Haldol and Thorazine. It was not a known side effect of these drugs at the time original dosages were prescribed. In the early 1970s, there were several class action lawsuits filed against state hospitals that were dismissed on the grounds that the risk of tardive dyskinesia was not known at the time it was originally prescribed. However, lawsuits filed against the hospitals in the 1980s when the risk of tardive dyskinesia was already known were successful.

The second element that the plaintiff would have to establish is that the defendant ignored or failed to pay attention to that risk. Defendants often use the evidence of signed informed consent to establish that they considered the risks and discussed them with the plaintiff. In some cases, this suffices to dismiss a claim of recklessness in the absence of evidence that the plaintiff was coerced or mentally incompetent at the time of signing. However, in some cases where the risk is both unnecessary and great, even a signed consent form might not protect the defendant. To avoid medical malpractice cases, for example, doctors should get patients to sign informed consent forms after explaining both risks and benefits of a particular procedure. However, if the defendant used a medication known to have more side effects than another drug that was available, and the patient was seriously harmed, a signed consent form would probably not be relevant. Doctors, like other service professionals, have a fiduciary responsibility to the person who pays for their services, and they are responsible for making competent medical decisions, not the patient. This could potentially become an issue if the provider does 'off-label prescribing' or using a medication for a purpose other than tested or described in the mainstream literature. In such cases, the role of

the mental health professional would be to assess the extent of damages and render an opinion on whether or not the condition was caused by the behavior of the defendant and whether or not the plaintiff was competent to render informed consent to the treatment.

Negligent Tort

The third kind of tort is referred to as negligence. Negligence does not require the level of evidence necessary for a claim of an intentional tort (deliberate wrongdoing) or reckless tort (conscious disregard of a known risk). Rather, to show negligence it is necessary to demonstrate that harm or injury came to the plaintiff (who had a special relationship with the defendant or is in a protected class) as a result of a deviation from the standard of care. Either the defendant failed to do something that she or he should have done, or did something that she or he should not have done. It is negligent if the defendant should have seen the casual connection between his or her act and the subsequent injury and did not. This is called *foreseeability*. Professional liability insurance (malpractice insurance) primarily covers these kinds of issues, excluding for the most part, intentional and reckless torts. Negligence does not rely on the defendant's intent, but rather on the defendant's behavior.

For example, in a malpractice action against a mental health professional, the plaintiff (usually the patient or former patient) will assert that the clinician, by virtue of the professional relationship, had a duty to exercise the skill and care of the average or relatively prudent practitioner (sometimes called the standard of care). The plaintiff will further assert that the clinician in some way breached that duty by doing something he or she should not have done, or not doing something he or she should have done, and that it was that breach of duty (deviation from the standard of care) that was responsible for the harm or injury experienced by the plaintiff. In many negligence cases a separate count might also be claimed for infliction of emotional distress. No physical injury is needed for this claim, but the act that allegedly causes the emotional distress has to be '*extreme outrageous conduct*'. In claims that are filed by men who were sexually abused by priests, one of the claims is usually intentional or negligent infliction of emotional distress as it is difficult to argue that sexually abusing an altar boy is not extreme outrageous conduct. We discuss malpractice claims in more detail in Chap. 25 along with a discussion of the various risk management strategies mental health professionals can take to minimize their risk of being sued.

In such cases, the expert will play one or both of the following roles. First, as in the other kinds of tort actions, the clinician will be asked to render an opinion regarding the plaintiff's mental or emotional condition and whether or not it was caused by the defendant's alleged wrongdoing. Sometimes the psychologist is hired by the plaintiff and sometimes by the defendant because in tort cases, a defendant is permitted to hire his or her own expert to give an 'independent medical or psychological opinion'. This is permitted to give the defense a chance to rebut the charges with a neutral or fair examiner rather than one who was handpicked by the plaintiff. Sometimes, however, the independent expert is known to work for insurance companies who have insured the practitioner from liability and damages (professional liability insurance) and as such, the expert may not be as independent as the law suggests since he or she might have just as much self-interest in delivering a favorable opinion to assure repeat business. Secondly, unlike the other two areas discussed, clinicians may also be asked to render an opinion on what the standard of care might have been and whether the defendant's actions or lack of action constituted a deviation from that standard of care.

With these basic parameters in mind, let us briefly look at some areas in which expert testimony may be requested.

Types of Complaints

Wrongful Death

In what are called *wrongful death complaints*, the plaintiff is alleging that the actions or inactions of someone led to the death of someone else. Someone who murdered another person could be sued in a civil court because murder is considered an intentional crime. Or, it could be someone who is convicted of manslaughter, as manslaughter also is usually an intentional act. In one case in which LW was involved, an 80-year-old man shot and killed his wife in what some might have terms a 'mercy killing' because of her debilitating illness. The state attorney declined to prosecute the man. However, his wife's children from a previous marriage sued him in probate court in order to prevent him from inheriting his share of their mother's property. The court found that he was guilty of manslaughter and gave the children all of their mother's estate.

The person doesn't have to intend to kill but has to have an *intent to act* which results in harm. In malpractice cases, a psychiatrist may be held liable for failing to protect an intended victim of the danger their client was planning if there is an obligation to *protect* third parties. In a famous California case, *Tarasoff v. Regents of the University of the State of California*, mental health professionals were originally found to have a duty to warn intended victims. Several states broadened that duty to warn to a duty to protect (In these states, warning is one of the ways of protecting but not the only one; the choice of intervention is up to the practitioner based on their clinical judgment). Obviously, it is difficult to protect a third party if a therapist is only treating a client once a week for 45 min per therapy session. Even if the client is hospitalized, the doctor is rarely in charge of how long before discharge, which usually is within a very short period of time.

Defamation Lawsuits

In defamation suits, the plaintiff is asserting that the defendant harmed the reputation of the plaintiff by publicizing through writing (libel) or orally (slander), material about the plaintiff that the defendant knew to be untrue. Defamation and slander lawsuits are very difficult to prove, especially if the person is a public figure as there is a higher standard to meet there.

Employment Cases and Arbitration

Employment litigation covers a wide area of injuries in the workplace that are not covered by workers' compensation. Personal injury litigation always requires the attribution of fault, as distinct from workers' compensation, which is a no-fault system. A company which provides workers' compensation insurance to its employees will pay to any worker injured on the job a certain amount. This does not prevent the worker from filing a separate tort action, which, in fact, happens quite frequently. Some examples of employment litigation are wrongful discharge, discrimination (sexual, age-related, or racial), and retaliation against a worker. We discuss civil rights cases later in Chap. 19 on violence in schools and the workplace and in Chap. 21 on discrimination law.

Sometimes employers require arbitration rather than testimony in civil court if there are problems. Arbitration usually occurs in front of a lawyer who is trained to sit in judgment of a case like a regular judge. Sometimes the results of arbitration are binding, while other times it is only used as an attempt to see whether a case might settle. In formal binding arbitration cases witnesses may be called to give sworn testimony that may be cross-examined by the other side. Expert witness testimony is also permitted by mental health professionals. Although the Rules of Evidence may be more flexible than in civil court, they also may be similar. One of the main reasons people prefer arbitration is that a civil case may be disposed of faster than in the civil courts that often have long wait times before a case is heard. Remember, criminal cases have speedy trial deadlines meaning they get preference.

Product Liability Cases

If a company promises to produce a product that has a particular function and it malfunctions, harming the user, that user can sue the manufacturer for abrogating their fiduciary responsibilities by failure to produce a safe product. For example, in one case in which LW was involved, a manufacturer constructed a crib for a baby that had slats in which a baby could get their head caught. In addition, there was a decoration made out of string that could unravel and children could choke themselves on it. In fact, in this case the child did manage to strangle herself with the string after she got her head caught in the slats. She then failed to develop normally probably from anoxia due to the strangling incident. The manufacturer was found liable for making a product that they *knew or should have known* was dangerous for the age group for which it was intended. LW testified as to the psychological damages, while a medical expert testified to the medical and neurological damages. There have been many product liability cases over the years including those that involved health hazards, cars that explode on impact, faulty tires that blow out at normal speeds, and the like.

Third-Party Failure to Protect Cases

Similar to product liability cases, *third-party failure to protect* cases often arise when one party promises, or has a fiduciary duty, to protect a class of people and doesn't do so. These cases became popular after singer Connie Francis was raped in a motel that had broken locks on the windows. A rapist climbed in the window and assaulted her. The motel was found liable as they failed to fix the broken locks. Other cases followed where buildings that promised security failed to provide adequate protection. In these cases, it was important to prove that the defendants *knew or should have known* that there was danger or failed to properly warn potential victims that the security system was broken or fix it in a timely manner. For example, in a recent case, a residential home development advertised that it provided security with gates to the parking lot that could only be opened with a special keycard. Only residents had such keycards. However, a gate to the back entrance had been broken for months and despite reports to management, it was not fixed. Three women were beaten and sexually assaulted by someone who got in through the broken gate. They sued the apartment complex and won a substantial award at trial.

In another case, a child was sexually assaulted by a day care worker. The school system was sued for failure to properly hire or supervise the employee. In another lawsuit against both the school board and the owner of a commercial building where the school board rented space, a woman who was sexually assaulted and beaten successfully sued them for failure to protect because they had prior reports of a suspicious person who tried to harm others and they failed to take precautions or warn students.

Discrimination Lawsuits

Discrimination lawsuits are usually filed in Federal Court although some states do permit them to alternatively be filed in state court. In Federal Court the plaintiff does not have to prove damages, only liability as the damage is to a person's civil rights which is per se harmful. In civil rights violations, it is first necessary to have the case reviewed by the Equal Employment Opportunity Commission (EEOC), where there is an attempt to resolve the situation. If that is not possible, then the EEOC issues a '*right to sue letter*' which permits filing the claim in Federal court. Sexual harassment and racial discrimination cases are typical cases filed under this law. In the states that permit discrimination lawsuits, it is necessary to prove damages as there is no cap on the amount of money awarded. However, since it does require assessment of the person's mental health history there might be other causes to the injury claimed in addition to the discrimination.

Other Types of Civil Lawsuits

There are a number of other types of personal injury complaints on which forensic psychologists might consult here. Some include automobile accidents and road rage, medical malpractice cases, personal injury complaints against husbands for domestic violence, sexual abuse claims against adults in authority positions, among others. Most of these cases are handled in similar ways; first liability has to be established, and then damages must be assessed together with the proximate cause.

Damages

The issue of damages in a personal injury action is almost always a complex one, because, as noted earlier, the plaintiff will try to establish a significant deterioration in functioning, while the defendant will try to say that the impairment, if any, is no different from some preexisting condition. The law recognizes the "egg shell theory" that one takes the plaintiff where you find them, even if they were impaired prior to the accident or injury. The question is how much different or how much worse than the preexisting level of impairment is this individual currently? The degree of impairment at the present time, "subtracting out" the preexisting impairment in functioning, is equivalent to the impairment caused by the accident or injury. This makes for a fine theoretical formula, but in actual cases, the distinctions become highly problematic. Let us say, for instance, that a person who has experienced periods of depression throughout her or his life suffers an accident or injury which also causes depression. How does one "parcel out" what the preexisting depression is? In theory, it is the difference in the degree of impairment, but often the plaintiff may not even recognize her or his previous condition as one which is diagnosable and believes (honestly, but mistakenly) that *all* of his or her current problems are a function of the accident or injury. If there have been prior mental health evaluations, especially if psychological test scores are available, one can determine, with some degree of objectivity, just how much different the condition is. Ultimately, however, the final test is always how the individual functions now, compared to how they functioned before.

(The) law recognizes a variety of monetary damages. The most common are *nominal, compensatory,* and *punitive damages*. The least serious of these is called a *nominal damage*. The damage is "in name only" and is awarded in cases in which there is no real loss or injury, and the trier of fact is awarding a minimal amount to indicate some wrongdoing, even without true injury. These are the cases in which the jury may award the plaintiff one dollar, a symbolic indication.

Compensatory damages are so named because they represent a compensation for some loss suffered by the plaintiff. These are further broken down into *general damages* (sometimes called the pain and suffering award or noneconomic damages) and the *special damages* (sometimes called actual or economic damages, such as lost pay and medical bills). General damages may include loss of consortium (loss of the companionship of a family member) and hedonic damages (loss of the ability to enjoy life). Due to the fact that some juries awarded astronomical amounts in general damages, some states voted to artificially "cap" them at a particular dollar amount as we discussed earlier in this chapter. Special damages may also include future damages (inability to work in the future or inability to work at an occupation that is at a level of skill commensurate with the plaintiff's earlier occupation) and consequential damages (future damages that may come about due to the "weakened" state of the plaintiff.

In addition, *exemplary or punitive damages* may be "added on" to the compensatory damages essentially to punish or make an example of the defendant who has engaged in outrageous conduct. Often, the punishment is calculated as a 'treble damage', i.e., three times the amount of the compensatory damage. In order to obtain punitive damages, a plaintiff would have to demonstrate that the wrongful behavior of the defendant was intentional or willful, wanton, and reckless.

Before leaving the topic of damages, we need to look at an area in which the forensic expert may play an important and helpful role to an attorney: the assessment of contributory negligence, which exists when the plaintiff's own behavior is a proximate cause of her or his own injury. Let us look at a case, as an example, in which a patient of a therapist makes a serious suicide attempt and subsequently files a lawsuit alleging that the therapist's substandard case was the proximate cause of the suicide attempt. The therapist may argue, as a defense, that there was contributory negligence that the patient failed to take the prescribed medication or in some other way failed to follow the prescribed treatment plan. An expert retained by the defense could demonstrate, by reviewing the therapist's treatment plan and progress notes, whether and/or to what extent, the patient failed to follow the treatment plan. Why the matter of contributory negligence is quite important is illustrated by the fact that most states have laws that will 'subtract' from an award the amount for which a judge or jury feels that the plaintiff is responsible. Some states, on the other hand, have an even stricter standard where if contributory negligence is found at all, it totally eliminates the plaintiff from recovering any damages. This is one of the reasons it is good risk management for therapists to keep very detailed notes that reflect whether or not the client/patient is in fact following the prescribed treatment plan.

Methodology

The methodology to be followed in personal injury examinations is detailed earlier in the chapter on clinical assessment. Let us, however, make some additional comments here. We can usually measure accurately a person's current mental and emotional state using our psychological and neuropsychological assessments. We can also compare this performance to group norms that have been established for people of similar age and education. Some of the indices on our psychological testing address themselves to whether the impairment we are seeing is more likely a current, as opposed to long-term condition. For instance, on the MMPI-2, several scales refer to the stability of the profile or whether it is likely to be changeable over time. Another scale measures state (as opposed to trait) indicators of anxiety. The Rorschach has indices that allow one to compare current capacity for stress tolerance to long-term characterological coping abilities. The WAIS-IV has some subtests which appear stable over time and others which are susceptible to situational components and called *fluid intellectual factors*. For example, it is rare for a person's vocabulary which is usually fairly stable to deteriorate over time unless some other factors are interfering with the person's cognitive abilities. Kane and Dvoskin (2011) help us to understand how to integrate these findings and then, most important in a civil case, integrate and relate them to the injury being claimed. Melton et al. (2017) suggest considering the similarities and differences between evaluations for various legal situations as do Shapiro and Walker (2019).

However, even with the results of all these tests and interview data in front of us, it is important not to overgeneralize from them. We need to compare the test results to other objective indices of impairment and contrast them to pre-existing levels of impairment. These data come from interviews with family, friends, co-workers, and employers or employees. The expert must review hospital records, not only the current records relating to the accident or injury, but also prior records of other accidents or injuries to evaluate similarities and differences in the sequelae. Review of employment records pre- and post-accident or injury can reveal whether there is in fact a difference in functioning and, if so, the extent of the difference. Review of school records may reveal whether or not certain cognitive deficits being attributed to an accident or injury were, in fact, there before the accident or injury occurred. In addition, the forensic expert needs to understand the types of emotional conditions that commonly follow similar injuries, common comorbid conditions, and what the prognosis is for resolution of the condition. These impressions must be qualified if the normative data concerning the plaintiff are

significantly different from the normative population on which the assessment instruments were standardized.

In summary, what we are doing, once again, is integrating multiple sources of data. Any one data source should be looked at as a way of generating hypotheses, to be confirmed or disconfirmed by other data sources.

Summary of Important Concepts

1. **Cause of Action**: What defendant did or failed to do to (or for) the plaintiff? Also called **liability** if found by the trier of fact.
2. **Summary Judgment Motion**: The defense may file a statement by defendant that there is no legal basis for the plaintiff's claim. If granted by the judge, the case or part of the case may be over.
3. **Standard of Care**: Level of practice of the average or relatively prudent professional.
4. **Tort**: Civil wrong committed by one party against another.
5. **Proximate Cause**: *But for* test to assess for the *nexus.*
6. **Physical Impact Rule**: Emotional injury directly linked to physical injury.
7. **Zone of Danger**: Emotional injury occurs to someone who was in area where they *could have* been injured, but were not actually physically injured.
8. **Bystander Proximity Rule**: Recovery for emotional injury allowed, even if plaintiff not in zone of danger, was close to the zone, observed the accident, and was closely related to the victim.
9. **Full Recovery Rule**: Recovery for infliction of severe emotional distress, if a normally constituted reasonable person would be so affected by the trauma.
10. **Intentional Tort**: One that is knowingly and purposefully done.
11. **Reckless Tort**: One that occurs due to the conscious disregard of a known risk.
12. **Negligent Tort**: One that occurs due to deviation from standard of care or carelessness, not taking appropriate precautions.
13. **Nominal Damage**: Damage "in name only."
14. **Compensatory Damage**: Award based on loss.
15. **Punitive Damage**: Additional damage added on as a "punishment."

Questions to Think About

1. Do you believe recovery for emotional damages should require a causal link to physical damage? Are psychological injuries equal to physical injuries in personal injury torts?
2. How does one actually determine a "zone of danger?"
3. How closely related to a victim does a plaintiff have to be to recover under a theory of bystander proximity.
4. How would you define the concept of "a normally constituted reasonable person?"
5. How would you determine the amount of damages to award if liability is found?

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12 Risk Assessment and Involuntary Commitment

Andrew Goldstein pushed a young woman, Kendra Webdale, to her death in a New York City subway station in January, 1999. In the two years preceding this attack, Goldstein had been voluntarily psychiatrically hospitalized thirteen times but had frequently been discharged after three to four days. Psychiatric hospital administrators make decisions whether to admit a patient for long-term care if the patient requests it and can afford it, to refer to another treatment facility or, if the patient does not want to remain in treatment voluntarily, to determine whether the patient meets the criteria for involuntary hospitalization which requires a mentally ill person to be a danger to themselves or others. Despite the fact that in the two years prior to Kendra Webdale's death Goldstein had assaulted at least thirteen people, including treatment staff at several of the hospitals, he was NOT seen as meeting the criteria for involuntary hospitalization.

Civil libertarians and patients' rights advocates consistently argue against broad involuntary civil commitment criteria because of the significant deprivation of liberties involved. Where does one draw the line, balancing individual liberties against the protection of society? Did the public hospital system in New York City discharge Goldstein after four days because of concern for his civil rights or did they have a long waiting list and preferred to provide treatment for more compliant, less violent individuals? Did it see Goldstein's violence as a product of his mental illness or rather as a personality disorder that could not be treated? These questions have no easy answer. Under what circumstances should people be hospitalized against their will if they have not committed a crime? Today, it is argued by most states that anyone who has a mental illness and is a danger to him or herself or others, including being unable to care for him or herself would fit the definition. However, assessment and implementation of this standard is variable; many factors impact on it, not the least of which is the availability of resources.

This chapter will look at some of the legal history behind involuntary commitment, as well as some issues involved in the assessment of violent behavior.

When a person is acting in a bizarre or unexpected manner, family members who may be concerned with their behavior may actually ask authorities to override the patient's constitutional liberty interests by detaining them against their will for evaluation or treatment. Obviously, if the bizarre behavior leads to a risk of serious physical injury or death, the decision is easier. However, many times there is neither an imminent risk to others nor to the patient themselves. The family may simply be concerned that the person is suffering from a mental illness, is being tormented by delusions or hallucinations, cares poorly for themselves, and is unaware they have a treatable mental illness. Do we, as a society, have a right to intervene? Most states answer in the affirmative, saying that society needs to help an individual overcome their mental illness that they would not choose voluntarily. How long can the state hold them? What are the provisions for follow-up care? How far into relapse does the patient have to

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go before they have to be involuntarily hospitalized again? These are all troubling questions with no easy answers.

Prior to the 1960s, there was no necessity for judicial oversight over continued confinement if the patient was in need of care. There did not have to be an actual demonstration of harm to self or others but only that non-compliance with a particular treatment would put them at risk of hurting themselves or others. Several states' high courts have upheld this notion of non-adherence to prescribed treatment as being sufficient to justify involuntary hospitalization. Out of this grew two approaches other than danger to self or others, gravely disabled (meaning that the person by virtue of a severe mental illness will not attend to their basic needs and are therefore a risk to harm themselves) and need for treatment (the mental illness prevents the individual from seeking the help they need voluntarily, and without treatment there will be continued suffering on the part of the patient). The statute in the state of Arizona, for example, summarizes this nicely:

> Persistent or acutely disabled indicates that the person has a serious mental disorder that meets the following criteria: (a) if not treated, has a substantial probability of causing the person to suffer severe and abnormal mental, emotional or physical harm that significantly impairs judgment, reason, behavior or capacity to recognize reality; (b) substantially impairs the person's capacity to make an informed decision regarding treatment, leading the person to be incapable of understanding and expressing an understanding of the alternatives to the treatment, after the advantages, disadvantages and alternatives have been explained to them; (c) has a reasonable prospect of being treatable.

As can be seen, this is a very complex definition but it does go beyond the idea that a person has to be suicidal or homicidal in order to justify involuntary hospitalization.

History and Definitions

Mental health professions these days are aware of the presence of involuntary commitment laws but most are not aware that prior to the early 1970s there was no uniform body of case law that dealt with commitment or set forth the constitutional protections against involuntary detention. Prior to the 1970s, civil commitment laws were very informal; relatives could bring family members in for hospitalization with few, if any, court or judicial determinations regarding procedures. Involuntary psychiatric hospitalization was seen as having a benevolent purpose, and for that reason, it was felt that no due process protections were necessary. Courts basically adopted a 'hands-off' attitude. The basis for the commitment was vague and indefinite, such as 'need for treatment'; there were no attorneys present to represent the rights of the person being hospitalized, there were frequently no formal hearings, and there was no assessment of the need for treatment, the efficacy of treatment or of whether or not the patient desired treatment. It was merely assumed that, since it was in the patient's *best interest*s to not be mentally ill, there was no need for these protections and safeguards.

There was an assumption that patients were incapable of making autonomous decisions and commitment was based on a need for treatment. This informal, hands-off attitude toward the rights of the mentally ill changed in the 1970s. General sensitivity toward the rights of the mentally ill began to emerge, advocacy organizations, such as the National Alliance for the Mentally Ill (NAMI) gave voice to families of the mentally ill and courts began to re-evaluate the hands-off attitude. The media exposed the deplorable conditions in a variety of institutions where treatment wasn't even an option and some courts and civil liberties attorneys looked seriously at the need to protect the mentally ill from long unnecessary hospitalization that basically warehoused them. It was during this period that anti-psychotic drugs such as Thorazine became available and despite the side effects, if people would continue taking them, would keep them somewhat functional. Many who had been hospitalized were set free and promised community mental health treatment but rarely was such treatment available.

Danger to Self and Others

A 1972 Wisconsin case entitled *Lessard v. Schmidt* [379 F.Supp. 1078, (E.D. Wis. 1972)] was the first case in which procedural protections in civil commitment proceedings were extensively discussed. These rights included being represented by an attorney, the privilege against self-incrimination, and the need for an evaluation to determine if the person met the criteria for a finding of "danger to self or others". Dangerousness was defined in terms of a recent overt act or an attempt or threat to do harm to oneself or others. The history of how the law defined dangerousness and how it related to whether or not an individual could be involuntarily held in a mental hospital can be found in Table 12.1.

The Wisconsin case was the first time that the issue of the criteria for involuntary commitment was reviewed by the USSC. Prior to that time, however, there had been case law from Washington, D.C. and from California which talked about the criteria being mental illness and an imminent threat to the safety of self or others or being gravely disabled.

As of 2013, forty-four states plus the District of Columbia embraced this essential idea. Some notable exceptions were found in the state of Arizona, previously discussed and in the state of Delaware where the criterion was proof that the person was unable to make 'responsible choices' about hospitalization or treatment. The standard in Iowa was proof that a person is likely to cause severe emotional injury to people and be unable to avoid contact with them (e.g., family members).

Defining Dangerousness

At about the same time that Lessard was being decided in the civil cases, a case in the criminal courts had a major impact on laws regarding involuntary commitment. *Jackson v. Indiana*, which has been discussed in Chap. 5 under Criminal Competency, dealt with the issue of whether a defendant who was so severely mentally ill that they would never regain competency could be confined indefinitely in a mental hospital. The court ruled that such indefinite confinement was unconstitutional and people required due process protections, such as proof that the nature and length of the commitment had to be related in some logical way to the reason for confinement. In other words, the treatment program had to be tailored to a diagnosis and treatment plan, including a specific purpose and specified period of time. This was a far cry from the 'hands-off' approach described above.

Table 12.1 Legal cases asserting rights about involuntary commitment

1. 1972 Lessard v. Schmidt	Case defines dangerousness as a recent overt act and determines it as the criteria for involuntary commitment
2. 1974—Donaldson versus O'Connor	State cannot confine non-dangerous mentally ill individual
3. 1979—Addington versus Texas	Case defined clear and convincing evidence as the standard for involuntary commitment
4. 1993—Keller versus Doe	It is not unconstitutional to have different levels of proof for civil commitment of mentally ill and mentally retarded individuals
5. 1966—Rouse v. Cameron	First case spelling out right to treatment of involuntarily committed patient
6. 1972—Wyatt v. Stickney	Extension of right to treatment
7. 1982—Youngberg v. Romeo	Extended right of treatment to developmentally disabled
8. 1980—Rogers v. Okin	Right to refuse treatment case
9. 1982—Rennie vs. Klein	Right to refuse treatment case
10. 1990—Washington v. Harper	Right to refuse treatment case
11. 1997—Kansas v. Hendricks	U.S. Supreme Court case dealing with sexually violent predators
12. 2002—Crane v. Kansas	U.S. Supreme Court case having to do with sexually violent predators

In 1975, in *O'Connor v. Donaldson* (422 U.S. 563, 1975), the USSC ruled, in a case involving a patient named Kenneth Donaldson, that people with a mental illness had a 'right to liberty'. This is opposite from the previous 'right to treatment' even if they didn't exercise it themselves. The presence of mental illness, in other words, was insufficient to hospitalize someone against their will. There had to be a finding of dangerousness, and the danger had to be causally related to the mental illness. However, the requirement that dangerousness be premised on a recent overt act as suggested in Lessard was far from a unanimous view. Some states rejected the *recent overt act* standard as placing too great a burden on the state. Many mental health professionals feared that this requirement would be too restrictive and that under such a doctrine substantial numbers of patients with serious mental disorders would go untreated. A particularly compelling argument against this approach stated that using dangerousness as a criterion for involuntary commitment was false and misleading and not at all progressive. Individuals advocating this approach suggested discarding dangerousness as a criterion for a commitment entirely. These advocates suggested a well-thought-out, well-documented need for treatment standards (Stone, 1979). They suggested using the following:

1. A reliable diagnosis of a severe mental illness.
2. The immediate prognosis involves major distress.
3. Treatment for the illness is available.
4. The illness impairs the person's ability to accept the treatment voluntarily.
5. A reasonable person would not reject the treatment.

While no states actually adopted these suggestions as a viable alternative to *dangerousness*, several of these concepts have become incorporated into state civil commitment laws, most notably that the mental illness can prevent the individual from voluntarily seeking the treatment. Other recent court decisions also pointed to some of the difficulties involved in using the general concept of dangerousness as a criterion for involuntary commitment and proposed a variety of other criteria. Some courts made it clear that they had no intention of utilizing *recent overt acts* as the criterion for dangerousness but rather they must consider the nature of the mental illness and the pattern of associated behavior. One is able to use the patient's prior criminal history as it relates to the mental disorder in determining the criteria for commitment. That is, if the mental illness from which the individual suffers is, by history, associated with particular kinds of anti-social acting out, then the prior criminal history may indeed be used to justify involuntary commitment. This represents a significant departure from earlier thinking which embraced the rather narrow definition of dangerousness as recent overt acts.

Assessment of Dangerousness

In several cases, patients were denied motions for discharge from hospitals noting that their record of prior criminal activity indicated a high probability of return to a life of violent crime. That is, the likelihood of their injuring others in the future was based on the patient's past criminal activity. This is precisely the argument used in the newer sex predator commitment laws that have been passed in many states. Mental health professionals are instructed to use actuarial assessment instruments where a given score supposedly can predict the likelihood of a prisoner committing another violent or sexual act upon release. Of course, while the actuarial used may be able to predict if a person falls into a particular group, it cannot determine if that person actually will commit another such act. If the score is too high, then the inmate may be eligible to be involuntarily committed to a forensic hospital for treatment until such time as the individual is no longer deemed dangerous. As there still is no known effective treatment for sexual disorders involving violence, it seems disingenuous at the least to suggest that there might be some way for these civilly committed people to be released. Why not just keep them in prison with others who remain dangerous?

> George Cook was a thirty-eight-year-old man, who was admitted to the hospital after he threw a lamp at his wife. During the evaluation, George noted that he had previously wounded her with a pump shotgun. He also gleefully told the interviewer that he fully intended to kill her, cut her body into four parts and put them at the four corners of the district in which they lived. The hospital sought to obtain civil commitment from the court. The civil rights attorney representing George prevailed by arguing that the current assault did not cause serious harm and the previous act was not recent enough to be of concern. Citing psychological literature, the attorney argued that the poor ability of mental health professionals in predicting future dangerousness was well documented. George's attorney won his freedom. Two years later, George successfully murdered his wife. Could this homicide have been prevented? Had George been involuntarily committed, could he have received treatment that would have prevented him from killing his wife?

Least Restrictive Alternative

Other recent cases have dealt with situations in which a patient's delusional system caused the individual to feel persecuted, so a finding of dangerousness was warranted because of the very real possibility that the patient would act out in misguided self-defense. Once again, the courts have reasoned that a number of factors had to be balanced, including how likely it was that the individual would come in contact with situations that would stimulate the paranoid system. As these arguments progressed, a concept referred to as the *least restrictive alternative* began to emerge. This concept stated that given the severity of the person's mental illness and their potential to harm themself or others, there is no less restrictive alternative than involuntary hospitalization that would result in the alleviation of the symptoms and the safety of society. Full-time involuntary hospitalization was seen as a last resort. Eighty percent of states have now adopted some variation of this concept.

Gravely Disabled

Another issue discussed frequently in these cases was active versus passive danger and the concept of being *gravely disabled*. *Active danger*, of course, referred to someone acting violently toward others or toward themselves. *Passive danger* (grave disability) might refer, for instance, to an individual with a delusional belief that their food is poisoned, so that the person refused to eat, placing themself in danger of starving to death. Would this be regarded as a danger to self-substantial enough to justify involuntary commitment? Some states have maintained that the concept of gravely disabled is unconstitutionally vague, while other states maintain it as one of the bases for involuntary commitment. Currently, most states allow an *emergency hold* for a brief period of time, usually up to seventy-two hours, at which time a more formal assessment of the potential for violence and need for treatment must occurs. This is also used as a period of time to stabilize mentally ill people so that they can go back to their previous level of functioning if no other treatment is available. Usually, it involves involuntary administration of medication given intravenously.

Level of Proof for Civil Commitment

Until 1979, the standards, that is the level of proof required for civil commitment, varied from state to state. Depending on the state, the degree of proof needed could vary from *preponderance of evidence* (slightly more certain than not), *clear and convincing* (around 75% likelihood), or *beyond a reasonable doubt* (around 99% likelihood). A case which reached the USSC (*Addington versus Texas*) addressed this very issue.

The trial judge had initially instructed the jury that the state's burden was to prove each of the required standards for civil commitment by *clear and convincing evidence*. On appeal, an intermediate appellate court reversed this, stating that the proper standard was *beyond a reasonable doubt*, which is, as we have seen in earlier chapters, the standard of proof needed in criminal cases. The Texas Supreme Court, however, issued an opinion which required a standard of *preponderance of evidence*, a lower standard

than either of the other two. The matter was then appealed to the USSC which in April of 1979 ruled that the proper standard for civil commitment should be *clear and convincing evidence*. This ruling was basically a middle ground between the two extremes and, in fact, a decision that was in line with the initial court recommendation.

Purpose of Confinement

A very important collateral issue was raised by the American Psychiatric Association (ApA) in an *amicus curiae* brief submitted in *Addington* which argued that the level of due process protection should be measured by "the state's purpose in confinement". That is, since the purpose of confinement for civil commitment should be treatment and not punishment, the ApA argued that there ought to be a less demanding standard than in criminal trials. The USSC rejected that argument, stating that commitment to a mental institution deserves the same due process protection as other types of commitments. The court concluded that commitment for any purpose constituted a significant deprivation of liberty; therefore it required due process protection. It should be noted that the USSC sets a base level that satisfies the Constitution; any state can set a higher standard. Do you think a more liberal or more conservative court might change this standard?

More recently, the USSC considered a case, *Heller v. Doe* (1993), that challenged the *Addington* opinion. In Kentucky, the Commonwealth did, in fact, set a higher standard than required by *Addington* for the commitment of the mentally ill. Kentucky's involuntary commitment statute required the beyond a reasonable doubt standard for the involuntary commitment of mentally ill. However, the lower standard of clear and convincing evidence was used to commit those who were mentally retarded. The challenge was to the constitutionality of this division between mental retardation and mental illness in terms of criteria for commitment. The USSC upheld the constitutionality of the commitment scheme, essentially agreeing with the points made by the Commonwealth of Kentucky in their defense. They argued first that a lower standard was permissible because mental retardation was easier to diagnose than mental illness, making error less likely. Therefore, the confinement of this population required fewer constitutional protections. Second, the argument was that since retardation was permanent and not changeable, predictions of dangerousness could be more accurate for mentally retarded patients. As you might suspect from your other studies, there is no empirical evidence to back up this statement; it is based purely on conjecture which most likely comes from a mistaken understanding of mental retardation. Remarkably, Kentucky did not cite any literature to back up their argument. Finally, they argued and the court agreed that mentally retarded patients receive less intrusive treatment than do mentally ill patients and therefore do not need the same level of constitutional protection.

Outpatient Commitment

In an attempt to deal with some of the concerns regarding the deprivation of rights in involuntary commitment proceedings, some states have adopted the concept of outpatient commitment. A court, in other words, can require a patient to attend outpatient treatment instead of hospitalizing them. While this sounds like a benign cost-saving practice, in practice many problems arise. The voluntary nature of the treatment is often questionable because in most circumstances there are mechanisms for forcing them to take injectable medication if the patient does not follow the treatment regime. Further, failure to adhere to the treatment program may, in many cases, result in criminal contempt findings. The mental health or forensic outpatient center may notify the court of the patient's failure to adhere to the treatment program, the court may find the patient in contempt and commit the patient to an inpatient setting. Sometimes the patient is held in jail until the court can deal with their case resulting in loss of housing, their job, and causing further

decompensation. Rather than being helpful, it becomes another way of criminalizing a person for being mentally ill.

It is also possible that many communities do not have treatment programs needed by some individuals. Sometimes, there is a long waiting list if there are limited resources available. If the person has to travel great distances to obtain special treatment, this can place an undue burden on the mentally ill person and their family. This has created divisiveness between the two different government entities; the court who gives the order and the state mental health agency that is responsible for its implementation. It is not unusual for people to get caught in the middle and not receive the necessary services. As noted above, non-adherence to prescribed treatment is the primary reason that patients in the assisted outpatient treatment get caught in the revolving door of the mental health system.

While there is variability among states, some commonality exists in the criteria to order involuntary outpatient mental health treatment. First, there has to be a diagnosis of a mental disorder; second, the person must be treatable; third, the individual has poor insight regarding their need for care as demonstrated by periods of non-adherence to treatment; and, fourth, they would be unlikely to access psychiatric care on a voluntary basis. It is of some interest that these first four criteria are also the ones in Stone's alternative model to dangerousness for civil commitment. The fifth is that the person is likely to decompensate into a state where they would be a danger to self or others if they did not adhere to treatment. If these five criteria are met, it could then result in a mandated commitment to outpatient care but the individual would not necessarily be forced to take medications, unless they fail to do so voluntarily. It is important to remember that most people found incompetent to stand trial have a psychotic disorder that often responds to anti-psychotic medication. Unfortunately, these medications often have unpleasant side effects making people reluctant to take them especially if they start to feel more in control of their behavior. Some examples of the assisted outpatient models are as follows:

In the state of Maine, there has to be a severe and persistent mental illness, the likelihood of serious harm, availability of community resources, availability of treatment plans, and the finding that the individual would be unlikely to voluntarily follow the treatment plan. The mandatory outpatient commitment would help protect the individual from interruptions in treatment, relapses, or deterioration in his or her mental health and enable the patient to survive more safely in the community without the likelihood of serious harm.

In New Hampshire, the wording reflects the fact that the person must have a mental illness that creates the potential for harm to self or others (defined as self-infliction of serious bodily injury or lack of the capacity to care for their own welfare which would lead to a likelihood of death, serious bodily injury, or serious disability). It must be demonstrated that this individual has had this severe mental disability for at least one year and has had an involuntary commitment within the past two years. There also needs to be evidence of the patient refusing the necessary treatment and a psychiatrist is of the opinion that there is a substantial probability that the refusal of treatment will result in death or serious bodily injury.

In New Jersey, the first criterion is a mental illness that results in a danger to self, others, or property, and the second is that they are noncompliant with the needed treatment. Danger to self is defined as "unable to satisfy the need for nourishment, essential medical care or shelter without assistance and substantial body injury, physical harm or death is probable in the near future".

In New York (Kendra's Law), the criteria are that the individual is at least eighteen, mentally ill, cannot remain in the community without supervision (i.e., would show clinical deterioration, has a history of treatment non-compliance which resulted in one or more acts of serious violence or threats). The mental illness must result in an inability to participate voluntarily in outpatient treatment, and the individual is in need of assisted outpatient treatment to prevent a relapse or serious deterioration that would likely result in

serious harm to self or others and is likely to benefit from assisted outpatient treatment.

Improved treatment adherence is the key to avoiding involuntary commitment but it is not easily accomplished. Many mentally ill cannot recognize their own illness. While outpatient commitment is no substitute for inpatient care, it is an evidence-based attempt to support recovery, increase stability, and avoid the consequences of no treatment. It is not a panacea. In 2011, the United States Department of Justice, Office of Justice Programs certified assisted outpatient treatment as an effective, evidence-based approach to reducing crime and violence. Controversy still exists among many, including mental health professionals, because it mandates treatment that a person might otherwise reject. Coercing an individual to follow a treatment plan is regarded by some as a violation of a person's civil rights.

What do you think? Is it acceptable to let people choose to remain mentally ill and incompetent if they wish? Or should society require people to maintain mental health even if it means forcing them to seek treatment and medication?

The actual focus of such assisted outpatient treatment, if practiced correctly, should motivate patients to comply with treatment, and using the judge's authority, impress upon them the need for the treatment. Clearly, judicial temperament and the ability of the judge to relate to the patient in a respectful manner, supporting their autonomy as much as possible, are key factors. Treatment providers, because the case is court-referred, should be alerted to the fact that they need to provide care and treatment commensurate with high-risk patients. The close monitoring of the patient is also critical so non-adherence is detected early in the process and addressed before the patient deteriorates. Once decompensation occurs people are at high risk to commit another criminal act and it becomes more difficult to intervene in an effective manner. As of 2013, all but five states have enacted assisted outpatient treatment laws. Still, the laws vary considerably in terms of their development and in terms of the quality of treatment.

Flexibility is key. The programs that are most easily implemented have four qualities:

1. A provision for response to non-adherence. The consequences of non-adherence should not resemble punishment but should be oriented toward commencing a re-evaluation of whether outpatient placement is still appropriate to meet the patient's needs.
2. A provision that not only compels the patient to comply with mandated treatment but compels the mental health system to actually provide the treatment.
3. A provision that allows families and others in a position to observe the individual personally to petition the court, rather than reserving the right to petition to mental health officials or the police.
4. Provisions that empower courts to order assisted outpatient treatment of longer duration than the typical six months.

Conditional Release

There also needs to be a provision for what is called *Conditional Release*. This occurs when a person has been committed to an inpatient facility and appears to be stable, competent, and ready to be released. Often, the court will use a step-down approach and will place them on conditional release, which has many of the same characteristics as the assisted outpatient treatment. The only difference is that the person has been hospitalized first.

Right to Treatment

Another issue, which is taken for granted these days, is the *right to treatment* once a patient has been involuntarily committed. Significant case law guaranteeing a right to treatment in this area begin in the 1960s with a case from the Court of Appeals of the District of Colombia called *Rouse v. Cameron* (1966). If a patient was involuntarily committed to a hospital (deprived of liberty), the

state was ordered to provide the means by which the patient could leave that involuntary state (i.e., provide treatment). Denial of treatment was regarded as a denial of due process, and the purpose of involuntary hospitalization was regarded as treatment rather than punishment. The hospital had to be able to demonstrate that it made a bona fide effort at providing treatment, though, interestingly, the court did not make any statements about what the nature of the treatment had to be.

The next major right to treatment case originated in the state of Alabama (*Wyatt v. Stickney*, 1972) and took the reasoning a step beyond the Rouse case. The Alabama court in this case described the right to treatment for involuntarily committed patients as a constitutional right, although, interestingly enough, the United States Supreme Court has never ruled that it was a constitutional right. The *Wyatt* court reiterated that the purpose of involuntary hospitalization was treatment but went beyond Rouse in that it described three fundamental conditions for effective treatment:

1. A humane psychological and physical environment (the court actually discussed how large patient's room needed to be);
2. A sufficient number of qualified staff (the court discussed staff–patient ratios); and
3. An individualized treatment plan.

In 1982, a case entitled *Youngberg v. Romeo* extended the right to treatment to the developmentally disabled population. The decision spoke of the fact that these patients were entitled to reasonable care and safety, freedom from bodily restraint and reasonable training. Previously, there had been various scandals reported in the state institutions for the developmentally disabled and severely mentally retarded that alarmed the nation, especially the television reports by a then young lawyer, Geraldo Rivera, who exposed horrible conditions at Willowbrook, an institution in Staten Island, New York. While this was seen as a generally positive move, some advocates of patients' rights were concerned about repetitive language in *Youngberg* that discussed deference to a *professional judgment standard* which was very vague. Liability could be found only if there were a substantial departure from professional judgment. One of the justifications for this ruling was the observation that effective training of the severely retarded might not even be possible. Justice Burger, in fact, went to far as to say that the state did not have a duty to provide treatment and reiterated that there was no constitutional right to treatment.

The Right to Refuse Treatment

In contrast to the lack of a constitutional basis for the right to treatment, the right to refuse treatment cited privacy concerns and the right to be free of unwarranted intrusions into one's body. Two early cases were *Rennie v. Klein* (1982) and *Rogers v. Okin* (1980). Both cases recognized a constitutional right to refuse treatment and that that right could be overridden only if there were a substantial deterioration in a patient's condition that made her or him a danger to self or others. The primary difference between the two cases involved the manner of resolution of the issues. *Rennie* followed an informal within hospital model. That is, the patient or the patient's advocate informally met with representatives of the hospital and tried to work out a program. The Rogers model is more formal, in which the patient is entitled to a full judicial hearing to address the issues in open court. Subsequent to the Rogers' decision, several other cases considered, in addition to danger to self or others, the issue of whether the patient was competent to make a treatment decision in her or his own best interests. In other words, if the finding was made that the patient was not competent to make a treatment decision in their own best interests, then their right to refuse treatment could be overridden.

In *Washington v. Harper* (1990), a case we discussed in Chapter xx also, an inmate in the Department of Corrections, contended that his civil rights were being violated because he was forced to take medication against his will and he did not have a full judicial hearing as was

required in *Rogers*. The U.S. Supreme Court's ruling basically affirmed that the informal model that existed within the prison (like in *Rennie*) was sufficient, provided that a variety of procedural protections were in place.

In addition to the right to refuse treatment raising many conflicting legal issues, it has also engendered a great deal of debate in the mental health community. Some who opposed the right to refuse treatment argue that exercising this right requires a seriously mentally ill individual, who is under additional stress because of involuntary hospitalization, to make a major decision in a relatively short period of time. The decision is thought to be a major one because a refusal of treatment may adversely impact a patient's life for quite some time. Even psychiatrists who are accustomed to making such decisions routinely admit to difficulties in accurately identifying patients truly in need of treatment. Therefore, to ask a patient who has never made such a decision before to do so while struggling with a mental illness may simply be demanding too much. On the other hand, patient advocacy groups insist that the mentally ill can usually make these decisions and it is the right of an individual to remain mentally ill and without treatment. This is usually because treatment often involves taking medication that could have serious and incurable side effects such as tardive dyskinesia, a severe muscle disorder that appears to be resistant to treatment. However, the newer atypical anti-psychotic medications and new combinations of medications requiring lower dosages do have fewer side effects.

Opponents of the right to refuse treatment also feel that most refusals of treatment are not likely to be made on rational or reasonable grounds, though this, of course, is one of the issues to be decided in each individual case. One of the unfortunate consequences of right to refuse treatment lawsuits is that many patients will be hospitalized without being treated. These are the patients who are severely mentally ill, who are too dangerous to be discharged and yet who continually refuse treatment. A short-term benefit of medication, especially anti-psychotic medication, is the ability to calm down agitated and potentially violent individuals, consequently giving staff tools to protect the patient and others. This raises staff morale and makes it easier to provide needed treatment to everyone. When the patients are adequately medicated, the staff feel less anxious and more willing to interact closely with the patients and this interaction, itself, can lead to important therapeutic gains. Additionally, without medication, the length of a patient's illness could be much longer than in a treatment program that has adjunctive medication.

Advocates of the right to refuse treatment point out that involuntary treatment is generally much less effective than the same treatment voluntarily received. Patients can sabotage the effects of medication much as they can resist psychotherapy. The question as always is whether the potential benefits are worth the risks. The concept of the least restrictive alternative, which has been applied in the issue of choice of custodial setting, has been extended to the choice of treatment in recent court decisions. Alternative less intrusive treatment methods must be tried before the more intrusive techniques can be justified.

The question of exactly what is or is not intrusive has been subject to much debate. Generally, psychotherapy is regarded as a less intrusive type of treatment, but one has to consider various forms of behavior modification as potentially intrusive as well. There have been constitutional challenges, for instance, to aversive therapy. Even if psychotherapy may be a less intrusive form of treatment, how can one perform psychotherapy effectively with a protesting patient? If a patient insists there is nothing wrong with them, no therapeutic alliance can be formed and the treatment is doomed to fail. Many of the court decisions point out that the most effective treatment involves both medication and psychotherapy and that medication cannot be used as a substitute for therapy. Some mental health professionals believe that medication can be successful only within the framework of a good treatment plan; only in the context of a trust relationship achieved through psychotherapy can medicine be employed in a manner beneficial to the patient. While this is true,

patients must regulate their medications themselves and it can have positive effects when administered in a hospital setting. Advocates state, however, that while medication may calm some patients, this fact cannot be used as a rationale to drug all patients. Individualization and individual treatment must be central issues.

Sexually Violent Predator Laws

One of the most controversial areas in the forensic field today is the involuntary commitment of what are called *sexually violent predators*. A relatively new legal phenomenon today, the sex predator laws, actually have a historical background in an earliest set of laws referred to as *sexual psychopath* laws. These laws had their origins in the 1930s and had been adopted by twenty-six states as an alternative to incarceration. That is, if a given offender were found to fit the statutory definition of a *sexual psychopath*, the offender would be committed to a psychiatric hospital for treatment rather than to a correctional facility for punishment. Sexual psychopath laws were based on the assumption, largely grounded in psychodynamic theories, that mental health professionals knew how to effectively treat this condition. However, the laws did allow for indeterminate commitment, that is, treatment until such time as the individual was no longer a sexual psychopath. As these laws were subjected to scrutiny, it was noted that the defendants committed under them had relatively poor treatment success and, by the 1970s, most of these laws were abolished because they were too vague and did not reduce the recidivism rate among sex offenders.

Laws mandating treatment of those found to be sexually violent predators made a resurgence in the early 1990s, but these laws required treatment after the individual completed his prison sentence by civil commitment to a forensic treatment facility. The state of Washington in 1991 was the first state to pass a sexually violent predator law and currently approximately twenty states have legislated similar laws with another five states having them under consideration. The major difference between the current laws and the earlier sexual psychopath laws is that the commitment to the psychiatric facility for treatment occurs after the period of incarceration rather than as an alternative to incarceration. That is, the evaluation to determine whether or not someone is a *sexual predator* does not occur until such time as the inmate is being considered for release from a correctional facility. This is different from the typical civil involuntary commitment statutes as there cannot be a finding of immediate dangerousness due to the fact that the defendants have been incarcerated for a period of time. Therefore, the determination is one of future dangerousness, a prediction that has little research to support any risk factors for sexual reoffending, other than the prior criminal acts for which the individuals were already punished.

In 1994, the state of Kansas passed its sexually violent predator law modeled largely on the one in Washington. Leroy Hendricks, who was committed under the Kansas sexual predator law, challenged its constitutionality, stating that the law violated several constitutional protections, such as double jeopardy (a person cannot be tried twice for the same crime) and *ex post facto* punishment. In 1997, in *Kansas versus Hendricks*, the USSC ruled that Kansas' sexual predator law and, by implication, all other sexual predator laws that were similar, did not, in fact, constitute double jeopardy because the second commitment was for treatment rather than punishment, even though, in the same opinion, the court acknowledged that there was a lack of effective treatment for sexually predatory behavior.

Legal Definitions of a Sex Predator

Most laws define a sexual predator as an individual who suffers from a mental abnormality or personality disorder that predisposed them to commit predatory acts of sexual violence. This definition poses some serious difficulties for psychologists. First, one has to ask the question of what exactly is a *mental abnormality*? It does not exist in any diagnostic manual nor in any

psychiatric or psychological textbook. In short, mental abnormality is a *legislative construct* which is used to confine those designated as sexual predators. The term, in fact, is so broad that virtually any human psychiatric or psychological condition can fit into it.

Another issue regards the second aspect of the definition: "A personality disorder that predisposes someone to predatory acts of sexual violence". There is, in fact, no such personality disorder listed in any diagnostic manual. Predatory acts of sexual violence are not listed as characteristic of any of the personality disorders. It appears that the legal definition permits confinement for mental disorders that would not otherwise result in civil commitment, such as personality disorders, substance abuse disorders and the various paraphilias listed in the DSM V, which, under these new laws, are sufficient to justify involuntary commitment as a sexually violent predator. Most recently, the USSC considered another case from the state of Kansas (*Crane v. Kansas*, 2002). In this case, the court made it clear that it was concerned with the lack of clarity described above in terms of the definition of sexually violent predator. The court suggested that in order for someone to be classified as a sexual predator, the evaluation would have to draw a causal nexus between the inmate's personality structure and the inability to control sexual acting out. The court suggested that if such a causal nexus could not be drawn, the offender would be handled more appropriately in the criminal justice system, rather than in a psychiatric setting.

The third aspect that is still being litigated is the issue originally raised in *Hendricks*, that committing someone for involuntary treatment is double jeopardy as it is further punishment. Although the USSC in *Hendricks* found that commitment for treatment is not punishment, there are other cases demonstrating that there is, in fact, no effective treatment offered in the current facilities. For instance, in *Young v. Weston* (1995), a Washington case, Young demonstrated that he was actually incarcerated indefinitely in the forensic sex predator center and was not receiving any treatment at all. The USSC in 2002 sent that case back to Washington state to demonstrate to the court that treatment was actually taking place. Young appealed again, and the appellate court for the Ninth circuit court affirmed the district court's denial of his petition. As the issue of whether there really is effective treatment for sex predators is still controversial, this issue will continue to be important.

Assessment of Violent Behavior

Much of what we have reviewed in this chapter so far has to do with the assessment of future violence. It had long been assumed that mental health professionals had the ability to predict future dangerousness or violent behavior, and their findings were routinely used in such areas as civil commitment, parole decisions and even in capital sentencing decisions. Clearly, these predictions could have major and serious consequences for the individual's life, all the way from being released from prison to perhaps being executed. It was not until research in the late 1970s that mental health professionals began to question these assumptions. A number of researchers, most notably psychologist John Monahan, challenged the ability of mental health professionals to make such predictions. Monahan demonstrated that mental health professionals were incorrect in these positive predictions of future violence two out of three times. That is, they were accurate in their prediction of future dangerousness only one in three times. This, of course, raised some very troubling questions. For instance, if there are two chances out of three that an individual may not, in fact, be dangerous but a mental health professional declares that they are, then the state may use that rather shaky evidence to justify the imposition of a lifetime of civil commitment or even a death sentence.

Monahan's research launched a series of major initiatives to identify the various risk factors that needed to be considered in these assessments. The focus on risk factors, in fact, represented a major conceptual and methodological shift from earlier work. The early work spoke of *dangerousness* as if it were a unitary

phenomenon and the judgment call was a dichotomous one; that is, the individual being evaluated either was or was not dangerous. The subsequent work was far more sophisticated, recognizing that we could not approach dangerousness with a single focus and the potential for violence was a function both of certain risk factors and of the context within which a given individual would find her or himself. Therefore, it was recommended that mental health professionals use rather a statement of relative probabilities given the confluence of various risk factors, further refined by context.

MacArthur Foundation Study

One of the major research efforts was coordinated by Monahan under the auspices of the MacArthur Foundation. It identified three major deficiencies in the early work on prediction of dangerousness, recognizing that the early work suffered from what they described as *predictor* and *outcome variables*. Essentially, they found that *predictions of dangerousness* were based on impressions derived largely from clinical interview, most often in a limited time period. It did not take into account demographic, sociological, biological or contextual factors, nor did it include data from unreported violent behavior that did not come to the attention of the criminal justice system, such as many incidents of domestic violence. The new research was designed to take all of these other variables into account and was, therefore, far more comprehensive in terms of the number of variables studied. Therefore, consideration of risk factors within a probability model that utilized contextual variables made it possible to consider recommendations of interventions on management strategies to reduce or minimize the risks (e.g., drug or alcohol treatment, domestic violence restraining orders). The previous dichotomous model, i.e., dangerous or not dangerous, did not allow for such flexibility.

One of the most controversial areas in risk assessment had to do with the relationship of mental illness and violent behavior. The media has always been quick to relate the two, speaking of a violent mental patient or a 'homicidal lunatic' when a particularly heinous crime has been committed. Early research suggested no relationship between mental illness and violence. In other words, the base rate of violent behavior in hospitalized psychiatric patients was no higher than in the general population. In the population of all psychiatric patients, this was probably true: The large majority of psychiatric patients did not act in a violent manner. However, more sophisticated research during the 1980s led to an understanding that certain groups of psychiatric patients, those with a particular pattern of disturbance, did present a higher risk of violent behavior. Monahan described this as a modest but significant relationship.

For example, it was demonstrated that paranoid individuals were at higher risk for violent behavior because, due to their paranoid ideation, such patients felt a need to take a preemptive strike (get them before they get you). Most notable as a risk factor in those with paranoid ideation was what came to be called *thought control override*. This particular type of paranoid thinking was characterized by a patient's feeling that her or his thoughts were being controlled by outside forces and that they were powerless against the outside forces. Notably, those with other common delusional beliefs (e.g., the patient's body looks different, the patient has a fatal disease, people who say they are someone well known to the individual are really impostors) did not show any notable correlation with violent behavior. Also, those paranoid individuals who were *confirmation seekers*; in other words, those who would find confirmation for their thought control override delusional beliefs in seemingly innocuous phenomena, were seen as being at higher risk for violent behavior. Substance abuse, especially when it was paired with non-compliance with psychiatric treatment (the client was self-medicating with drugs or alcohol), was also found to be a significant risk factor.

Finally, psychopathy was found to be a significant risk factor. While, according to the current diagnostic nomenclature, DSM-5, this would be classified as a subtype of Anti-social Personality

Disorder and not a major mental illness, its strong relationship with violent behavior cannot be overlooked. The construct of psychopathy, as conceptualized by Hare in the 1990s, consisted of two major factors: One dealt with impulsivity, irresponsibility and anti-social behavior and the other dealt with callousness, lack of empathy, manipulativeness and egocentricity.

Utilizing this risk assessment approach to looking at future violent behavior essentially means studying individuals, seeing how many risk factors they have in common with violent individuals and then making a probability statement about the likelihood of violence in a given individual given a particular context. Current research of the MacArthur Foundation has yielded well over thirty risk factors that may need to be considered in a risk assessment model. It should be noted that while overall certain statements about accuracy of violent predictions are only slightly better than chance, in any given individual that accuracy may be higher if, for example, some prominent risk factors are present.

This point is important because it allows for case-specific phenomena which may be omitted when one looks purely at actuarial data. The findings from the MacArthur research make it clear that it is important to consider the risk assessment of violence from a multitude of perspectives. Some authors note that the early efforts were hampered by looking at the phenomenon of violence from just a psychological or just a sociological perspective, failing to note that we need to study violence from multiple perspectives: psychological, sociological, biological, demographic, and contextual. In the following, we will briefly discuss some of these major variables.

Demographic Variables

Demographic variables refer, of course, to static dimensions. Such variables as age, sex, and socioeconomic status would be included here. On a purely statistical basis, violence tends to occur more frequently in young individuals (ages eighteen through twenty-four), males more often than females and more in lower than in higher socioeconomic groups. Although race was originally thought to be a factor with greater frequency of violence among Blacks than Whites, when those studies were controlled for socioeconomic status, the racial variable washed out. It is not clear, however, if violence occurs more frequently in people who are poor or if they are more likely to be arrested or otherwise come to the attention of the authorities, so they are more likely to be counted.

Psychological Variables

Under psychological variables, violence is more likely to occur if someone has one of the major diagnoses that we discussed earlier. This includes paranoid disorders, substance abuse and psychopathy, as well as affective disorders and Schizophrenia. Compliance with treatment is another risk factor, especially among those who tend to self-medicate with drugs or alcohol. Some authors, such as Meloy (2000), have studied a range of ‘attachment pathologies’, such as erotomania which is when someone has a delusion that a famous person is in love with them. Meloy and others also have studied the risk of violence in people diagnosed with Borderline and Narcissistic Personality Disorders, but they are so frequently confused with other disorders that it is difficult to separate the violence from the mental disorder here. Impulsivity and aggression are other dimensions.

Sociological Variables

The sociological or sociocultural variables include a variety of factors as well. Has violence been taught within the family as an acceptable way of resolving disputes? Does the peer group have values that support or inhibit violent reactions to problems? Is there evidence of economic instability, such as a higher rate of violence among those who are unemployed or under the threat of losing a job? What has been the attitude toward or skill in using lethal weapons, such as

firearms? Meloy observes that many clinicians fail to inquire into an individual's history with weapons. He has developed a structured interview called the Weapons History Assessment Method (WHAM). This interview elicits not only possession of and skill in using weapons but also the degree of a person's emotional involvement in her or his weapons. The available victim pool is also considered, looking at the person's history of violence, who are the likely targets of violence and how large is that pool?

Contextual Variables

Under the heading of contextual variables, we look at the similarity or dissimilarity of future contexts to the context in which violence has occurred in the past. This becomes one of the most critical variables to assess when using the risk assessment model described above because we look at whether we can reduce the likelihood of violence by changing the context such as placing an individual in an environment less likely to result in violent behavior.

Biological Variables

Finally, we need to consider biological variables, specifically those having to do with central nervous system impairment. Many studies have demonstrated increased incidence of violence, especially impulsive or affective, as opposed to predatory, among those who have sustained head injury. Careful neuropsychological history-taking, coupled with neuropsychological testing and possible neurological examination, should be performed in those individuals with a documented history of head trauma. While this violence most often is affective in nature, Raine (1993, 2013) suggests that in some individuals who are prone to predatory violence, there may also be abnormal brain structures, such as marked reduction in the size of the amygdala and deficits in connections between subcortical and cortical parts of the brain.

Approaches to Assessment of Violence

With these broad headings in mind, let us now look at different approaches to the assessment of violence. These usually fall into four categories: *Actuarial, adjusted actuarial, clinical and guided or structured clinical interview*. Each category will be discussed briefly with some illustrations of instruments used.

Actuarial Approach

The purely actuarial approach to the assessment of violence maintains that static variables, those that can be gleaned from a file or chart review, are superior in their predictive power to clinical variables and that clinical input would, in fact, detract from the accuracy of the actuarial. Perhaps the best known of these is the Violence Risk Appraisal Guide (VRAG). This is an actuarial instrument developed retrospectively based on the post-release community adjustment of 618 male offenders referred for pretrial or presentence assessment following a violent offense. It was used to predict violent recidivism. Some of the items on the VRAG, differentially weighted, were: living with both biological parents until age sixteen, elementary school maladjustment, problems with alcohol, failure on previous conditional release, age at index offense, victim injury, victim sex, personality disorder diagnosis and psychopathy.

Adjusted Actuarial

One of the major objections to this approach emerges from those who point out that it does not consider case-specific dynamic data, so a person can never change their original score since you cannot change static variables. To deal with this objection, some examiners utilize what they call an adjusted actuarial risk assessment; they consider non-equation-related variables considered relevant to the particular case. The actuarial

formulated is sometimes called the anchor of a judgment which can be clinically adjusted after the individual clinician reviews other factors. Of course, clinical adjustment contradicts the basic theory of actuarial assessment which maintains that clinical procedures actually detract from the predictability of the assessments. In actual practice, the process is still highly subjective and sometimes politicized. Those who are perceived as dangerous by the clinician will have their actuarial assessments adjusted upward but rarely downward. In other words, if the actuarial assessment yields a high enough likelihood of recidivism, then clinical adjustment downward is not used, even if there are case-specific factors that would argue for their inclusion. If the actuarial assessment is not high enough, then clinicians tend to use clinical adjustment in order to prevent the individual's release.

Clinical Risk Assessment

Clinical risk assessment is the one traditionally and historically used by mental health professionals. The clinician, based on her or his own style, gathers and integrates interview, history and test data, compares it to relevant literature and diagnostic manuals and reaches a conclusion, opinion or clinical impression. While clinical assessment is a flexible approach that takes account of the case-specific information that the actuarial approach does not, it suffers from the problems noted above, including idiosyncratic examination approaches limiting validity and reliability, that accurate predictions are less likely than when using actuarial approaches and that risk rates cannot be specified with any degree of precision.

Guided Clinical or Structured Professional Judgment

The final approach is called guided clinical or structured professional judgment. In this approach, certain variables that have been demonstrated empirically to be relevant to the assessment of violence are used to structure the interview and guide the areas of inquiry utilized by the examiner. The examiner gathers test data, interview information and history according to the structured format and renders an opinion on the probability of future violence. The structure is derived from the research and is used more or less as a 'checklist' for the individual clinician to make sure that they have covered all of the important areas. However, how the individual clinician goes about gathering this data is up to their own clinical judgment.

Interestingly, when the proponents of the actuarial approach speak about the superiority of their approach over clinical, they often fail to mention the structured professional or structured clinical approach. Research described by Heilbrun (2009) demonstrates that the predictive validity of the structured professional judgment is just about the same as the actuarial assessment.

An example of structured professional judgment is the HCR-20 presented here.

> The HCR-20 consists of twenty areas of inquiry, designated as historical (H), Clinical (C) and Risk (R) variables. Again, it is noted that each of the areas is predetermined by various empirically derived factors from the literature and demonstrated to be risk factors. Some of the variables on the HCR-20 (historical section) are: previous violence, age at first violence, relationship instability, employment problems, substance abuse, major mental illness, psychopathy, and personality disorder.

In the Clinical section, we see such dimensions as: active symptoms of mental illness, impulsivity, and lack of insight. In the Risk Assessment section, some of the items are: unfeasible plans, presence of destabilizers, lack of personal support, and stress. Based on the impressions gained, the examiner rates the risk as low, moderate or high. Each dimension is scored as 0—Absent; 1—Partially or Possibly Present; 2—Definitely Present. The individual's clinical style does not detract from the accuracy of the assessment because the relevant variables have been empirically derived.

Psychopathy

The construct of *psychopathy*, which appears in several of the instruments, consists of a "constellation of affective, interpersonal and behavioral characteristics, including egocentricity, impulsivity, irresponsibility, shallow emotions, lack of empathy, guilt or remorse, pathological lying, manipulativeness and the persistent violation of social norms and expectations" (Hare, 1993, p. 188). Psychopathy is assessed most validly and reliably with the Psychopathy Checklist, Revised, an instrument constructed by Hare. It is a twenty-item clinical rating scale based upon data gathered from a semi-structured interview and review of records and reports. Items are scored: 0—Not Present; 1—Possibly Present; and 2—Definitely Present. Those with scores greater than thirty are considered consistent with a diagnosis of psychopathy.

Sexual Recidivism Assessments

There are some parallel developments in the attempts to assess the potential for sexual offense recidivism, though the research is by no means as extensive as the violence assessment research. Some of the actuarial instruments are the Sex Offender Risk Assessment Guide (SOARG), the Rapid Risk Assessment of Sex Offender Recidivism (RRASOR), the Static 99 and the MMNOST and MMNOST-R (Minnesota Sex Offender Screening Tool and its revised version). These are all based, as noted earlier, on static variables that can be derived from a chart review requiring no clinical input. As in the critique of earlier actuarial instruments, clinicians raised the issue of whether purely actuarial assessment should be used when making statements about individuals. An instrument parallel to the HCR-20 is the Sexual Violence Risk (SVR-20). Like the HCR-20, this is a "guided clinical interview", and the dimensions covered are those demonstrated by the research to be relevant to sex offender recidivism.

Potential for Domestic Violence Assessment

More recently, the research has been extended to the assessment of the potential for domestic violence. The most frequently used of the actuarial instruments is called the Domestic Violence Risk Assessment Guide (DVRAG), and the structured professional judgment instrument is called the Structured Assessment of Risk of Assault (SARA). Table 12.2 summarizes the history of risk assessment of violence.

Table 12.2 Major issues in the assessment of violence

1. Shift from predicting dangerousness to risk assessment
2. Deficits in early work
A. Impoverished predicted variables
B. Impoverished criterion variables
C. Failure to consider intervention effects
3. Importance of context
4. Importance of base rates
5. Mental illness and violent behavior: Evolution from no perceived relationship to a relationship between certain symptom patterns and violence
6. Importance of psychopathy as a risk factor
7. Difference of actuarial and case-specific data
8. Multidimensional approach to assessment of violence
9. Approaches to assessment

(continued)

Table 12.2 (continued)

A. Actuarial
B. Adjusted actuarial
C. Clinical
D. Guided clinical

Summary

This chapter has focused on the involuntary commitment of individuals who are violent toward themselves and/or others which is the definition of dangerousness used in most civil commitment laws. The arguments for a high threshold using great precision in assessing dangerousness and risk of future violence were discussed, including a focus on the advocacy of the civil rights of the mentally ill by civil libertarians and the advocacy for treatment of the mentally ill, even if it is involuntary at first. In a society where treatment is available, it is difficult for those who want people to function at their highest capacity to do nothing to help people reach their potential. However, it is important to understand that individuals do have a right to make choices that govern their lives without interference from the government. Research into the prediction of dangerousness and future violence by mental health professionals has been discussed and examples of new methodologies presented. The use of actuarials to predict risk factors associated with physical violence, sexual violence and domestic violence is described with a warning about the need to use caution when interpreting even the newest assessment instruments. Table 12.2 attempts to summarize the major points in this chapter.

Questions to Think About

1. Given the limited state of knowledge in this area, is it ethically proper to offer assessments of the potential for future violent behavior?
2. How would one evaluate the potential for violent behavior in a psychiatric inpatient who is seeking to be released from a hospital?
3. Should a person ever be committed to a forensic hospital against their will? Discuss your answer?

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13 Immigration and Refugee Issues

People who are foreign nationals and come to the United States intending to become citizens are called *immigrants* or *refugees*,[1] and their needs are handled by the U.S. Department of Homeland Security, the newest cabinet department under the U.S. President's authority. The Department of Homeland Security (DHS) was established in November 2002 after the 9/11 terrorist acts which exposed difficulties in coordination among the various agencies tasked with keeping the U.S. safe. The U.S. Citizenship and Immigration Services was one of the departments formed under the DHS and is responsible for processing and examining citizenship, residency and asylum requests from these so-called aliens. The immigration laws permitting people to enter the U.S. are complex, and many agree need updating. More people than ever before are seeking entry into the U.S. while at the same time, after 9/11, fewer people are trusted not to perform harmful acts once they arrive here. Therefore, the ability of people to enter the U.S. and become citizens has been sharply curtailed and prior laws are not being followed. Borders are often blocked and overflowing, children are separated from families, and those refugees who might have legitimately been granted asylum under other conditions are being held in detention centers, denied entry and/or sent back to their countries of origin. Immigrants who have overstayed their visas, those who have previously entered illegally, and others who have lived and worked in the U.S. for many years are being sent back to countries where no family exists any longer. Those who have served the U. S. as soldiers and even children who have been raised in the U.S. are being rounded up and threatened to be returned to countries where they may have been born but never lived nor knew their parents were undocumented.

Badly needed immigration reform has been impossible to achieve politically, and it has become a contentious issue within a country with very divided opinions on the issue. Surveys suggest that about half the country supports a more humanitarian immigration policy especially for those refugees escaping violence and famine in their countries of origin with another half the country wanting no immigrants allowed fearing loss of jobs, security and economic ruin. The rules for entry into the U.S. have been frequently changing, and children have been separated from families, allegedly as a deterrent for others not to migrate to the U.S. Psychology has begun to present research that demonstrates the danger to children's future development when separated from families and placed in cage-like facilities rather than permitted to enter the country and live with relatives while awaiting entry decisions.

The 2012 American Psychological Association (APA) Presidential Task Force report, *Psychology of Immigration 101,* analyzed research to address the psychological factors related to the

[1]Refugees are immigrants who are homeless as they have fled their homes for fear of being harmed or killed.

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experience of immigration. It gave particular attention to the mental and behavioral health needs of immigrants across the lifespan and the effects of acculturation, prejudice/discrimination, and immigration policy on individuals, families, and society. Since that time the APA has been issuing press reports specifically addressing the psychological harm of recent immigration policy changes (www.apa.org). More recent studies have documented the psychological distress caused by the current fears of people and families seeking entry at the borders as well as those already in the country who are undocumented (Garcini, 2017).

In a 2019 report by the U.S. Civil Rights Commission, the inhumane conditions that have been occurring at the U.S. borders, especially those in the Southern area next to Mexico, have been detailed. The situation was found to be much worse than their report in 2015. Overcrowding, inadequate facilities, lack of hygiene, food, medical care, and inability to protect from violence are rampant in make-shift detention centers. Some people are treated worse than others including lesbian, gay, bisexual, and transgendered (LGBT), those with disabilities, and non-English speakers. Migrants trying to seek asylum are taking their chances on being shot or forced to remain in Mexico or other Latin American countries as they flee from where they fear certain violence and death. The psychological consequences including post-traumatic stress disorders (PTSD) are serious, and it is recommended that mental health professionals be involved as soon as possible.

The APA has published research that demonstrates the psychological and economic stability of many former immigrants documenting their contributions to the success of the nation. Data about the true dangers of death and destruction in many countries from where the refugees have fled have been publicized along with attempts to help these countries become more stable so people can continue to live in peace there. Special attention is being focused on a coordinated psychological response. Despite the overt hostility often displayed toward those who come to the borders seeking asylum and a better life, people continue to come to the U.S. overburdening an immigration system that was never designed to deal with such large numbers. Nonetheless, this isn't the first time that the U.S. has been faced with this type of problem. For example, similar hostility was demonstrated toward the Bolsheviks in the beginning of the twentieth century with many of them rounded up and sent back to Europe in ships, fearing they would introduce communism in this country. Other refugees were housed in Ellis Island with long waits to enter legally in barely subsistence conditions. Similar animosity was shown toward Asians, and the Japanese who were put in detention centers during WWII (Hochschild, 2019). History teaches us that these periods seem to have a cyclical pattern especially when the U.S. feels it is under a threat whether it is real or not.

Sorting out who is a potential terrorist and who is a potential exemplary citizen is part of the job of the immigration system under DHS. Working together with the Department of Justice (DOJ) they have formed their own judicial system with their own laws and rules of procedure. DHS statistics indicate the numbers have exponentially increased so that more than 500 people have come before the U.S. Citizenship and Immigration Services (USCIS) in the past few years with over half of them having been adjudicated. Approximately 10% are being held in detention jails while the rest are allowed to await resolution of their case at home without knowing when it will be resolved. As few of them are permitted work permits, most are without funds or means to support themselves. Thus, most cannot afford to hire attorneys to represent them or psychologists to help make their case to remain in the U.S.

The use of psychology to help understand immigration issues is a relatively new area for forensic practitioners primarily because respondents were only recently entitled to an attorney. The types of cases where psychology has begun to play an important role in immigration cases include those people who have been charged with committing a crime in the U.S. that makes them eligible for *deportation* or others who but

for the fact that they are so mentally ill that they are not competent for *removal*; those women and girls who fall under the Violence Against Women Act, those seeking refuge status and those non-citizens who are eligible for removal but claim it would be a hardship for an American citizen to do so.

Those who are citizens are subject to deportation and those who are not citizens are eligible for removal.[2] Generally, the cases of citizens eligible for deportation are often first heard in criminal courts. These are people who have committed a heinous criminal act and may have already served time in prison for it. Once they are about to be released from prison, after serving their sentence, they are transferred to the DHS and its U.S. Citizenship and Naturalization Service (USCIS) courts to be detailed for removal or deportation. Non-citizens who are eligible for removal are also detained without bond if they fall under certain classifications specified in the Immigration and Naturalization Act. There is no requirement of due process in the USCIS courts as there is in criminal courts. Those eligible also include people already convicted of two or more crimes of moral turpitude which by definition include: "Knowingly exerted unauthorized control over the property of another with the **intent** to deprive them permanently of the use" or anyone deportable based on a conviction of an aggravated felony, a drug offense, a firearm offense, espionage, sabotage, or treason, moral turpitude with a sentence of one year or more, and persons involved in terrorist activities. Note the use of the word 'intent' which is what psychological testimony may be used to defend by explaining what the person may have been thinking based on our evaluation. For example, someone who is being abused or extorted by someone else may not be able to form intent. We may be able to demonstrate through the use of a Weschler Adult Intelligence Scale test how someone's judgment is altered by strong emotions such as fear, depression, anxiety and so on.

[2]Throughout this chapter we use the terms removal and deportation interchangeably except where notified.

Someone who is reported to Child Protective Services (CPS) may be eligible for deportation or removal since child abuse is considered a crime of moral turpitude. In some cases, CPS may investigate and find that the person is using discipline techniques permitted by their custom in their country of origin that are considered abusive in this country. Often, referral to a local intervention remediates the problem and no further abuse is noted. However, that person may still be eligible for deportation. One of the authors had such a case where the judge did not want to deport a mother of two U.S. teenagers who were crying and begging her in the courtroom to let their mother stay. But the judge stated that she had no authority since the mother had pled guilty to the abuse even though it was over ten years earlier. The Immigration and Customs Enforcement (ICE) police were in the courtroom ready to remove the mother, the teenagers were screaming, and finally the prosecutor when asked by the judge if he could do something to delay the proceedings came up with a temporary legal solution. These scenes go on in USCIS courtrooms all over the country with families being broken up due to having pled guilty or no contest to a minor infraction without understanding potential later consequences.

Possible Relief from Deportation or Removal

There are different types of relief from removal. The most common one used is called *discretionary relief* which occurs after the person is found to be eligible to be deported. It can be done during a judicial hearing or simply because it is administratively decided they are deserving of such a relief. The burden of proof is on the person to demonstrate how under the law they are deserving of such discretion. Until this point, most people are not represented by an attorney, so they are not usually cognizant of what is needed to prove their case. In some areas there are volunteers who can assist them, many of whom are law students or other volunteers. In 2011 an appellate case began a change in the

courts called *the Matter of M-A-M* which discussed the mental competency of person to be deported. Psychological testimony became more frequent to assist the judge in better understanding the impact of a detainee's mental condition. In 2013 another case, *Matter of E-S-I* pointed out that to have a fair hearing, incompetent persons should have an attorney to represent them. We discuss these cases further under the competency section below.

It is here that the USCIS courts began to permit people who came before them at all stages of proceedings to be represented by an attorney of their own choosing, although the government is not responsible to pay for it. Attorneys began to use psychological testimony to bolster their clients' cases, especially in competency proceedings, requests for asylum, and under the Violence Against Women Act (VAWA) as discussed below. Today, both attorneys and psychologists are commonly seen in the USCIS courtrooms on behalf of persons who are at all stages of removal or deportation. However, for refugees detained in facilities at or near the border, it is still difficult for attorneys or psychologists to participate.

The four USCIS proceedings most often involving psychologists when requesting relief from deportation include (1) those who are not competent for removal due to serious mental illness, (2) relief for victims of domestic violence under the Violence Against Women Act, (3) asylum due to potential harm if returned to their country of origin, and (4) hardship cases where it would be difficult for a U.S. citizen to be without the person scheduled for removal, like a child, elderly mother, or spouse. There are others specifically for victims of sex or labor trafficking and victims of other crimes. Most recently, due to the large numbers of minor children sent to the U.S. without their families, forensic evaluations of them have begun at several facilities. Due to the recent nature of these evaluations we have little information to report on them (Bryne & Miller, 2012). However, we know from research in other countries that such children are easy prey for human traffickers and others who promise them a better life than the one they are escaping (Antonopoulou, 2019).

Competency for Removal Evaluations

One of the important rules of law underlying the U.S. justice system is that people must be competent to understand their charges. This right was extended to non-citizens coming before the USCIS facing deportation or removal charges in *Matter of M-A-M* (2011) where the appellate court extended to them the *Dusky*-like standard (*Dusky v. U.S., 1960*). As discussed in Chap. 5 earlier, similar criteria to determine competency were suggested including a factual and rational understanding of the charges and ability to assist their attorney, if one was available or permitted by the court. In USCIS cases, the judge has had the right to determine competency with or without the presence of an attorney or mental health expert. Many judges were untrained in identifying competency issues. For example, in the 1998 case of *In re: J.G.Z., J.N.Z, and J.B.Z., Minor Children,* the appellate courts terminated the removal proceedings against *J.B.Z.* who was diagnosed as paranoid schizophrenic and couldn't participate in their own representation. A subsequent case, *Matter of E-S-I* (2013), dealt with the difficulty seriously mentally ill people have in presenting their case without the assistance of an attorney and mental health evaluator and gave them the right to be represented. However, it did not require such representation nor pay for it. Complicating the problem is that the U.S. cannot send back someone to a country where there are no facilities to treat a seriously mentally ill person deemed incompetent. The USCIS does not have facilities to treat such mentally ill people who were languishing in detention centers until lawyers became involved and helped them obtain relief, usually a waiver to stay in the U.S. and receive necessary treatment here if available. In many jurisdictions agencies such as Catholic Charities or law and psychology

school clinics have begun such representation (see American Immigration Lawyers Association (www.AILA.org) and Immigrant Legal Resources Center (www.ILRC.org) for further information).

Violence Against Women Act

The U.S. Congress passed the first Violence Against Women Act in 1994 (VAWA) and has been renewing it approximately every five years since then. Originally part of the Violent Crime Control and Law Enforcement Act of 1994, it was a direct response to the United Nations declaration on the Elimination of Violence Against Women resolution passed in 1993. In its reauthorization in 2000, the protection of refugees and immigrant women was added, allowing some victims of domestic violence to attain immigrant status without the petition of their abusive spouse. The USCIS courts handle these applications, usually through an attorney who then may request a psychological evaluation to document the psychological impact such abuse has had on the woman. Sometimes the psychological evaluation is the only other evidence documenting the nature, severity, and frequency of the abuse in addition to the woman's own testimony. The law provides the eligibility criteria and outlines their definitions of battery and cruelty which includes but is not limited to verbal abuse, intimidation, manipulation, sexual abuse, and physical abuse. Within each category it is expected that their impact will be assessed on emotional adjustment, social functioning, mental health diagnoses if any, and long-term impact. There is one resource office located in the New England area where women may file their own petitions without being represented by an attorney. Otherwise, all USCIS courts can hear VAWA applications.

Immigrant and refugee women have barriers that make them even more susceptible to gender violence than citizens. Most of them come to the U.S. without their families or children, are isolated in communities where they do not speak their own language, do not speak much English, and experience social stressors that usually accompany resettlement and acculturation making them dependent upon their spouses. Some women move to the U.S. before they get to know their American spouses very well and are shocked to discover that they are controlling and cruel. Many abusers threaten to revoke their immigration petitions using it as a coercive tactic. These women often fear seeking help from police or other agencies that might upset the abuser or even cause them to be deported. Some have no idea of how to protect their legal status unless they learn about VAWA. Without legal status they cannot work and may be dependent upon their spouse's income, so hiring their own lawyer is difficult if impossible. Public service announcements have been an important source of information for women, sometimes even learning about VAWA before they come to the U.S. Recently the current government administration has taken domestic violence off the list of problems that migrants can claim as hardship or asylum although once they are in the U.S. they may still seek to stay on their own petition through VAWA.

Asylum and Hardship Cases

People seeking refuge status by migrating to the U.S. can petition for asylum at any border where the USCIS is located if they can demonstrate that they would be in danger if they returned to their country of origin. In the past, if they met the initial scrutiny, they would be permitted to enter the U.S. and await the next steps in their petition. However, there are so many people applying for refugee status that the border detention facilities are overcrowded and the courts overburdened so that processing is very slow. These conditions have been deemed traumatic by the U.S. Department of Civil Rights in its recent study (2019) and likely to produce PTSD in the detainees. U.S. President Trump wants to build a

controversial wall to keep out the flood of migrants fleeing from danger in their homeland as he believes the USCIS cannot keep out potential terrorists and drug dealers in any other way. Others point out that drug dealers often arrive via ship or air and terrorists are often already living and radicalized in this country. Nonetheless, the need for U.S. security often gets confused with the acceptance of immigrants and refugees making asylum much more difficult.

Asylum and hardship cases for those non-citizens who are already living in the U.S. are handled in regional USCIS courts through petitions filed by individuals or their lawyers. Someone may petition for asylum if they can demonstrate that they are in danger if they were to be deported to their country of origin. Someone may petition for hardship if their leaving the U.S. would be a hardship usually for a spouse or child who is dependent upon that person. The laws for granting asylum require a showing that if they were to return to their country they would be "persecuted" or have "a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion" (8 U.S.C. #1101(a)(42)(A)). The definition of "persecution" is not defined in the law but other cases such as (*Fisher v USCIS, 1996)* suggest that it is "the infliction of suffering or harm upon those who differ in a way regarded as offensive." Different forms of persecution include physical and psychological abuse including violence and threats, unlawful detention, mental, emotional and psychological cruelty and harm, economic sanctions, and deprivations, discrimination, and harassments that are more than minor or trivial inconveniences. Cases of those who identify as LGBTQI+ who would be discriminated against in their country of origin are often seen as needing asylum. In a different asylum case that one of the author's worked on (LW) a Haitian woman who had been gang raped, beaten, and held as prisoner escaped and was helped to the U.S. by a church group petitioned asking for asylum when her visitor's visa was over. Using a Haitian psychologist as a consultant, LW was able to testify about the lawlessness conditions in that region of the woman's country which was unable to control the gangs.

Hardship cases are similar to the asylum petitions and may also require psychological evaluations. As was mentioned, most hardship cases involve separation of families who are U.S. citizens. If someone has entered illegally or overstayed their visa, there are stiff penalties that usually include a minimum of ten years before they can apply to come back to the U.S. legally. Children born in the U.S. who want to complete school here may be at a hardship if their mother or father is removed. So might spouses who need the support of the person being removed. In some cases the person scheduled for removal might have a particular skill that is needed in the community and may be granted a visa on that basis. Mental health clinicians rarely engage in the latter cases as they may be sufficient with community testimony. In one case, a man who had a temporary work permit was in jeopardy of being deported. His wife was pregnant with their third child, and they already had two other children under the age of five. Although a U.S. citizen, she could not work to support herself and the soon-to-be three children. In addition to the psychological testimony about her depression at her husband's possible removal was testimony from his employer and community friends as to his being an upstanding worker and citizen.

Asylum for Undocumented Children

Given the increasing difficulty for adults to enter the U.S., some families are desperate enough to send their children either unaccompanied or with others whose reliability may be questionable. In some cases, families scrape together whatever money they can to pay people to smuggle their children into the U.S. Often unscrupulous, these 'coyotes' as they are known in Mexico, may also exploit and harm them, sometimes even introducing them into forced labor and commercial

sex trafficking. However, once here the policy about what to do about their status has been problematic. Several authorizations have been proposed by Congress and by Executive Order of the President (Obama) when the proposed laws did not pass. The two most often referred to are Deferred Action for Childhood Arrivals (DACA) and the DREAM act (Development Relief Education for Alien Minors) (H.R. 6 & S. 874).

Petitions were accepted under DACA for those people who came to the U.S. as children under 16 years old, now under the age of 31 and who arrived before June 13, 2012. They were promised that their names and locations would not be used to deport them but rather to protect their status in the U.S. and permit them to work, while the laws were being litigated through the courts and U.S. Congress. Approximately 660,000 people have received protection and work permits under this program but as of this time, it does not allow a path to citizenship. Many of these people have developed psychological issues and physical health challenges from the uncertainty of their status and fear of deportation. The legal case for DACA was recently heard by the USSC in November 2019, and the outcome is still unknown. From the oral arguments, it appeared as if whatever the outcome, those on the DACA and DREAM act lists may be permitted to remain on a path to citizenship. Psychologists who provide treatment for these individuals report the enormous anxiety and trauma responses that they display, fearing their futures that are unknown.

Other Visas

Different applications are required for people who have been victims of serious crimes, but psychological evaluations may also be used to document physical or psychological abuse suffered after the crime. The U visa applications usually require serious crimes such as domestic violence (which may also be filed under VAWA), sexual assault and rape, female genital mutilation, and kidnapping. Psychologist's reports usually include information about the person's symptoms, diagnoses, and other mental health consequences from their experience.

Naturalization

Although most of the people who will need psychological assistance are those who are at the entry or potential removal stage, in some cases people have been living in the U.S. for many years under an extended work visa and decide they want to become naturalized citizens. There is usually a test that they must pass that includes a knowledge of U.S. history and laws. In some cases it is not possible for the person to pass the test due to psychological reasons. They may be mentally incompetent and incapable of being restored or they may not be able to learn to read or write English due to psychological or neurological factors. They may have an anxiety disorder that interferes with them taking the test. In these and possibly other cases, it may be possible for a psychologist to attest to such facts and be granted a waiver so they do not have to take the test. In other cases psychologists may serve as coaches to get them through the anxiety and pass the test.

Battered Women Fleeing Domestic Violence

Another area in which forensic psychologists may be asked to give their opinions is when a battered woman flees across international borders with her children for safety. When found they are subject to criminal or civil actions in U.S. state or Federal courts for child abduction under international legal agreements including the Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Cooperation, a treaty signed in 1994 to protect children who are adopted in different countries. Although the Hague Convention, as it is called, was intended to protect these international adoptions, in 2008, it became extended to include cases where children were abducted from signatory countries. A recent report presented information

from almost 50 U.S. Hague Convention Court decisions and interviews of twenty-two (22) mothers who fled other countries with their children to come to the U.S. for safety from domestic violence (Edleson & Lindhorst with Mehrotra, Vesneski, Lopez, & Shetty, 2010).

Most of those interviewed were U.S. citizens, and almost half were forced to live with their non-citizen partners in other countries. Sadly, they described how they faced U.S. courts that were unsympathetic to their safety concerns and forced their children to go back to unsafe situations in those other countries. Many of the children had been physically or psychologically abused by the fathers who remained in the other countries. All had been exposed to their father's serious abuse of their mothers. Threats of violence from their partners continued whether the women remained in the other country or came to the U.S. and whether or not they obtained legal custody of their children in either country. Most of these mothers tried but were unable to obtain safety and support in the other country multiple times before they left and came to the U.S., and many seeking financial and emotional support from their family members. Despite the evidence presented to the U.S. courts concerning the risk of physical and psychological harm to children forced to live with a violent father, many of these children were returned under the Hague Convention. Mothers then were forced to return to the other country if they wanted to have contact with their children. The barriers that these mothers faced in attempting to protect themselves and their children from further abuse were detailed and included difficulties in finding trained attorneys and mental health professionals even when they could afford their cost. The fathers under the Hague Convention petitions were often represented by attorneys in the U.S. Department of State's Attorney Network with access to more resources. When the researchers analyzed the Hague Convention decisions they were shocked to find that exposure to domestic violence was not given much weight in judge's decisions even if it was detailed in attorney briefs. One of their recommendations to the Department of State and Department of Justice was a call for more training for judges, lawyers, and mental health professionals to understand the risk to these children and their mothers about exposure to domestic violence.

Forensic Psychological Evaluations

Forensic psychological evaluations in immigration cases have similarities and differences from those in other forensic proceedings. Some of the steps to be used can be found in Shapiro and Walker (2019). These include gathering data from the client and their attorney concerning the following: demographic data, court information including the questions necessary to be answered for relief, and information about the person's history concerning the reason for relief. If it is competency, then a full psychological evaluation may be necessary if possible. Other people may need to be interviewed but only with authorization of the attorney. The history obtained should include childhood, schooling, adolescence, adulthood issues, relationship with parents and family, school history and grades including ability to read, write, speak, and understand English or their language, nature of peer relationships, criminal history if any, medical, psychiatric, and neuropsychological histories, and any other relevant information for their petition.

Cautions are important when using psychological assessments in addition to standard clinical interviews and mental status exams especially if an interpreter is being used. It is best to obtain a professional interpreter rather than a family member if privacy is needed. Administering psychological tests that have not been normed in the person's country can be problematic, and results should be written in a way that makes it clear they are no longer standardized and therefore approximate findings. Translating certain terms from one language to another always gives the opportunity for misinterpretations, so cautions must be taken here, too. Customs in one culture may be very different than those in another, so careful questioning will be important to avoid misunderstandings. This is especially important in competency evaluations.

For example, hearing voices or seeing things that are not there may be a function of a custom and not evidence of psychosis. Documentation is important where it is available. Sometimes it will be necessary for the evaluator to become familiar with the person's country of origin in order to support their claims. Often their lawyers may be able to provide some information, too.

Summary

In conclusion, there is an important role for forensic psychologists to work within the Immigration and Naturalization Service (USCIS) courts to assist refugees and immigrants in applying for legal status or discretionary relief from removal or deportation. This is a newer area for forensic psychologists that differs in many ways from traditional forensic psychological evaluations. Immigration laws and rules have been changing during the last few years so keeping up-to-date will be especially important in this area of practice. Those mental health professionals who speak different languages have an advantage when working with people with similar cultural backgrounds. Nonetheless, being current on culture and other issues impacting requests for asylum and hardships especially will be helpful.

Questions to Think About

1. Do you think undocumented children who were promised safety in the U.S. should be allowed to stay here? Why or why not?
2. What reasons should someone be granted asylum or hardship by the Immigration and Customs Enforcement courts? Is this fair to others who are applying to immigrate?
3. How would you treat the refugees who are stuck in detention at the U.S. border? Do you think it is all right to separate the children from their families? What psychological consequences might this policy have and why?

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Part IV

Family Law and Fitness to Parent

14 Family Law: Marriage and Divorce

What Is a Family?

Marriage between two people is one of the oldest social institutions in the world. So why do we need to legally regulate marriage? The answer is simple—marriage is a contract, albeit a special one, between two people that covers many aspects of their lives together. The U.S., like most countries in the world, used to define a marriage as taking place between a man and a woman. This has changed since the landmark case, *U.S. v. Windsor (2013)*, that declared marriage equality for all people, so the gender of the two people no longer matters. But we know that there are many family arrangements where people live in a marriage-like home without a formal marriage ceremony. This includes same gender couples as well as friendship groups often called 'families-of-choice'. Sometimes the law covers them and sometimes it does not.

When a marriage is over, the legal contract needs to be dissolved. In many states the legal contract is only what has been put on paper and filed with the proper authorities. In other areas, living together, buying property together, or having a child together creates a legal contract and obligations that follow must be legally terminated even if nothing was formally registered anywhere. Unfortunately, the legal issues surrounding marriage and divorce are not quite so simple. Complexity is added by the emotions that are attached to marriage and family values—from religion, social mores, and psychological attachment issues. In this chapter, we will attempt to explore the legal issues impacting on marriage, the family, and its dissolution. However, it is important to keep in mind that it is the emotional complexity that makes the implementation of these legal rules difficult.

The U.S. Constitution guarantees the right of privacy to every citizen, including the right to marry and raise a family. In fact, there are laws that are supposed to maintain order and protect family members both from themselves, as well as from undue influence of the state. The state has a compelling interest in keeping the family together, primarily because it is believed that families are the best institution for protecting its members, particularly children. If nothing goes wrong with the marriage, then it is unlikely that any family members will have contact with the courts. The family resolves most legal issues by itself. But, if the couple develops irreconcilable differences and chooses to dissolve their relationship or divorce, then each state has laws that govern that dissolution and continued protection of the children. If there are other domestic disputes, the courts can settle them, also. If relationships within the family need clarification or definition, such as who is related to whom and what, if any, responsibility does that incur, then the courts may get involved. If the members of the family fail to protect each other, then the law may step into assure minimum life standards.

Take the following cases that illustrate some of the complexities that can occur:

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L. E. Walker et al., *Introduction to Forensic Psychology*,
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1. *Julie turned 90 and celebrated her birthday with several friends and Laura, the person who took care of her for the past two years. Although she has two grown sons, they do not come to visit her very much as they have their own lives to live. Julie wasn't angry at her boys for failing to come to her birthday party. She understood they had their own lives and besides, it was Laura to whom she turned whenever she needed anything. The two women formed a close bond and Julie decided that she wanted to leave her entire estate to Laura rather than her children. She reasoned that her sons were very successful and didn't need her money while Laura could make good use of her limited savings.*
2. *Bill and Christina were married for over ten years. They had tried to have a child of their own but were unable to do so. After several failed attempts, they decided to find alternate methods to have a child. They sought legal advice to decide what method they should use to obtain a child.*
3. *Mitchell is a 12-year-old boy who was picked up by the police for stealing a car. He had bruises on his body when he was placed in the detention center. Upon interview, he admitted his stepfather had beaten him. What should happen to him, next?*
4. *Donald Jones is a 70-year-old man who has built a prosperous business over the years. He wants to slow down and let his sons run the business for him. But, one of his sons wants to sell the business while the other one wants to keep running it. How can this dilemma be solved?*
5. *Lisa signed a prenuptial agreement prior to getting married to Luis. Although Luis disclosed that he had over $2 million in assets, the agreement called for him to give her $50,000 if he died or they were divorced. Lisa didn't think it was fair, but Luis assured her that he would give her much more money and the agreement didn't really matter anyhow. He needed her to sign it to please his accountants. He sent her to an attorney who had done work for him previously just to rest her fears. The attorney noticed that Luis didn't list everything on his financial disclosure statement, but when he called Luis to suggest he correct the papers, Luis got angry and hung up the phone. Luis also threatened to call off the wedding if Lisa didn't sign it and reminded her about the 'trouble' she would be in if he was embarrassed by having to call off the wedding. Lisa remembered the violent fight they had the previous week when she asked him to let her parents stay at their house. The wedding was only five days away when she finally signed the papers. Is this a valid agreement?*
6. *Jennifer was 15 years old when she and her 18-year-old boyfriend, Andy ran away to another state and got married. They lived together for 13 years and had three children. Andy came home one day and told Jennifer he wanted a divorce. Jennifer's parents had given them money to purchase their first house where they lived while Jennifer worked to put Andy through college. Now he was earning much more money than she could earn as she never even finished high school. Should Jennifer file for a divorce or an annulment?*

How Law Regulates Families

As we stated earlier, the law gives people the right to marry and to divorce. It defines a person's status to determine if marriage is possible. People must be over a certain age (usually over the age of 18 without parental permission), single, not a close blood relative (to prevent incest), without certain diseases, and honest in revealing important information such as financial status and assets brought into the marriage. They can be two people of the same gender but cannot have a marriage among three or more people even if they live together as family-by-choice. If the specific requirements are not met or there is fraud, then marriage might not be legal and may be considered 'void' if challenged. This can affect laws to inherit and share property as we shall see later in this chapter. It can also affect the

status of any children born during the relationship. Family law also grants members the special privilege to raise their own biological, adopted, and foster children. Family law can maintain order in families, by policing them, protecting them, and defining various familial and legal relationships. There is a belief, particularly in the U.S., that families have a privacy right to close their doors to outside scrutiny; domestic disputes often get settled in courts of law, sometimes airing 'dirty laundry' to everyone. In other countries, extended families are encouraged to get involved with a couple and their children.

The changing role of the family in people's lives may be seen through the evolving family laws in different cultures. In those cultures where the family system is a strong and fundamental part of life, there may be more permissiveness and family litigation, especially in the ease with which a family can be dissolved by divorce because it will not threaten the family as an institution. However, there are other areas of family life besides divorce that are also impacted by family law.

In the U.S. today, family members can sue each other for breaches of these implied or specified contracts especially since it is possible to remove the *interspousal immunity tort* in most jurisdictions, permitting husbands and wives to testify against each other. Previously, if one person did not want to reveal something that they did or told the spouse, then such testimony could be prevented. However, this rule often worked against women more than men by preventing them from testifying about abuse or financial mistreatment. Children can sue parents for divorce, control of a family business, and harm from abuse. Inability to mutually decide access to children during a divorce is perhaps one of the areas where forensic mental health professionals most frequently are asked to give the court their opinion. This area is specifically dealt with in Chap. 15.

The legal basis for the rights that the state maintains in family law doctrine comes from Roman and British Common Law doctrine of *Parens Patriae,* or the state as protector and trustee for those unable to protect themselves.

Table 14.1 Case law establishing family laws in the U.S.

Obergefelt v. Hodges (2015)
• Ruled that marriage is a fundamental right guaranteed by the U.S. Constitution
U.S. v. Windsor (2013)
• Overturned Defense of Marriage Act (DOMA) permitting LGBTQ marriages
Reynolds v. U.S. (1978)
• Declared polygamy illegal
Meyer v Nebraska (1923)
• Case established the right of an individual to marry, have a home and raise his or her own children
Pierce v. Society of Sisters (1925)
• Declared husband and wife 'being of one body'
Popham v. Duncan (1930)
• Declared marriage is a contract for life and can only be terminated by the court after a formal hearing
Skinner v. Oklahoma (1942)
• Case affirmed that marriage is between one man and one woman and includes the right to procreate so the state can't order sterilization
Griswold v. State of Connecticut (1965)
• Affirmed right of marital couples to be free from government interference in a case concerning the right to use contraceptives using the 14th Amendment to uphold privacy laws

(continued)

Table 14.1 (continued)

Carey v. Population Services International (1972)
• Challenged the right of a family to use contraceptives
Planned Parenthood v. Danforth (1976)
• Established the family's right to engage in family planning

A list of the important case laws that help determine our current family laws can be found in Table 14.1.

Usually the threshold to trigger the doctrine of *Parens Patriae* or to involve the state through civil family court occurs when the family cannot take care of its own business, perhaps because some disruption or unsolvable dispute has occurred. The most common unsolvable disruption in an intact family is when abuse of children, women, or the elderly is alleged. Although families typically have special rights under the law such as the right of privileged communication and privacy, when this threshold is crossed, then the court may appoint lawyers and mental health professionals to become involved, similar to what is done when criminal charges are filed. In fact, since the early 1980s, family abuse may be filed as both criminal and juvenile cases. Juvenile court, as we will see in later Chap. 18, is supposed to be a rehabilitative court where family unity is the goal. The criminal court deals with punishment and is unconcerned about family reunification even if rehabilitation is provided unless it is a therapeutic jurisprudence court.

As we mentioned earlier, at one time, family members could invoke the interspousal immunity clause and then were not permitted by law to testify against each other. This made it almost impossible for the state to prosecute crimes such as child abuse or woman battering. Nor could women or children file civil lawsuits for damages from such abuse. However, 'the interspousal tort immunity', which is what that rule was called, has been made possible to remove in most jurisdictions making it possible for wives or husband to disclose what went on inside their homes no matter what the other partner desires.

Roles for Mental Health Professionals

Forensic psychologists and mental health professionals can help courts answer many legal questions that are difficult to answer because of the nature of the family. The cases given earlier demonstrate several situations where an expert opinion may be helpful. In Lisa's case, an expert may render an opinion that their prenuptial agreement was signed under duress. The expert may evaluate a parent's fitness for adoption in Bill's and Christina's case, or determine appropriate interventions in a case of alleged child abuse as in Mitchell's case. Experts may also render opinions about mental competency in cases involving contested wills should Julie's sons decide they instead of Laura should inherit Julie's estate. Psychologists can help resolve cases involving disputes about family businesses, as in the case of Donald, sometimes by referring the family for therapy. In addition, expert opinions may be sought in custody and visitation arrangements, designing treatment plans for juveniles, and assessing allegations of domestic violence.

Psychological Evaluator

To assist the court or finder of fact in these cases, mental health professionals may perform psychological evaluations, administer, score and interpret standardized psychological tests, and prepare oral and written reports. They may also be required to testify under oath and deposition and at trial. Treating therapists may have their records subpoenaed or they may be called into court to provide either factual or opinion

testimony. Certain care must be taken not to violate a client's confidentiality when responding to these legal demands. If the family is the client, then, by law, each member retains their own privilege of confidentiality. Consultation with the client's attorney or the client may resolve that issue while at other times the therapist must consult their malpractice insurance about risk or even hire an independent attorney to represent the legal duty not to violate the client's privilege or other ethical standards and legal rules. Caution is especially needed for family therapists who see various parties who may later be involved in adversarial litigation against each other. We discuss the ways to respond to legal summons in Chap. 24.

Expert Witness

Although some forensic psychologists suggest that treating therapists should only be fact witnesses, it is the judge's prerogative to decide if the witness has sufficient expertise to give an opinion. Sometimes an attorney just wants to establish the fact that a client attended therapy sessions on particular dates. That could be considered factual testimony. However, testifying to a mental health diagnosis that is based on clinical or empirical data is an opinion and not a fact, so if that question is to be asked of the therapist, then he or she must be qualified as an expert. The difference between a fact and an expert witness is that the expert can give his or her opinion about what the facts mean whereas a fact witness must stay with what he or she hears or observes. As we have said earlier in this book, the Federal Rules of Evidence have defined an expert as someone whom the judge decides, has "knowledge, skill, education, experience, and training" (Federal Rules of Evidence, 2000, Article VII), in a particular area that would be of assistance to the judge. This standard applies in family law also.

Forensic Evaluator

Another common role for the mental health professional in family law is as a forensic evaluator to assist the 'trier of fact' in understanding the state of mind or amount of psychological damage in a particular client. In most jurisdictions, family court matters are resolved by a judge rather than jury, although not always. Mental health professionals may offer different opinions in the area of criminal responsibility for child abuse, if marriage is valid or a prenuptial agreement was signed under duress, what custodial arrangement is in the best interests of the child, if a person is fit to parent an adopted child, or whether a particular event that occurred is the proximate cause of the current mental health status of the client. Interesting debates occur among forensic mental health experts about who is their client (the attorney, the court, or the client), what level of psychological knowledge is necessary before testimony should be admitted on a particular topic, or if testimony on the ultimate opinion should be given in these areas. In the end, it is the judge who decides the answers to these issues so it often differs from court to court.

Consultant

Another area that is fertile ground for mental health professionals is to be hired in a family law case as a consultant. If a professional has a particular expertise that can assist the attorney in trial strategy, case conceptualization or even client management, there is need for the consultative services of an expert who may never get to testify. In hotly contested custody cases, reviewing another professional's test data where simple mathematical errors might change the interpretation, critical review of a written report, preparation of deposition questions or those used

in direct and cross-examination of other experts, and commentary on sufficiency of the data base upon which an expert opinion relies, are all examples of where a consultant might be helpful. Sitting with an attorney at counsel table during a personal injury trial in family court may also provide another opportunity for a non-testifying expert to offer consultation. In many jurisdictions, mental health professionals and lawyers are collaborating on various joint projects so that their ability to communicate with each other becomes enhanced. As in any case, it is critical for an expert to be up to date on the family laws and psychological knowledge this area before accepting a referral.

Levels of Proof in Family Cases

In criminal cases, we discussed the need for the total evidence presented to reach the usual level of proof what is '*beyond a reasonable doubt*' in the judge or jurors' minds. In family law, which is usually part of the civil court division (in large cities it may be its own division), the level of proof is usually '*a preponderance of evidence*' which, as we have discussed previously, is the equivalent to 51% or the 'more likely than not' test. In some special cases such as termination of parental rights the level of proof is higher, at the *'clear and convincing evidence' level*, which is around 75%.

Most states settle family disputes using a judge as the trier of the facts, although a few states, such as Georgia, may have jury trials in all types of family matters including child custody. New Jersey has case law that now bifurcates a family law case so that the dissolution of marriage issues are tried before a judge, but if there is a claim of personal injury (called a *Tevis* claim), usually made by a battered women for injuries sustained from the batterer, then that can be tried before a jury. Interestingly, in claims that involve domestic violence, New Jersey case law (*Giovine v. Giovine*) has determined that a tort action is a continuing one from the date of the first abuse incident until the last one claimed. This is a modification of the usual civil law rule that limits how far back in the past a claim of injury can go, which is usually two to four years depending on the type of claim. The rule modification also permits the different incidents to be tried as a continuing tort, recognizing that the psychological injuries are cumulative rather than separate for each battering incident. Other states have now adopted a similar rule making it easier for a battered woman to obtain a fairer share of the marital assets given her injuries.

Tolling of the Statute

In some states, there is case law that permits the *tolling of the statute of limitations* on cases in which children can file lawsuits against parents for personal injury from physical and sexual abuse. Tolling the statute means that the time limitation, usually two to four year statute of limitations, in bringing forth a lawsuit is waived, recognizing that in some cases part of the psychological damage from abuse includes repressing all or some of the information so it is not in the victim's conscious memory all of the time. In addition to family members, this has become an important tissue in many cases being filed against authority figures, such as priests who have allegedly sexually abused children who are now adults. In some states, the tolling of the civil statute begins from the time that the person 'knows' that she or he has been harmed while in other states, lawsuits alleging damages from child abuse must be filled within a certain time after reaching age 18. As might be expected, these cases have been extremely difficult to prove and therapists who have helped clients recover these memories sufficiently so that they become emotionally capable of going forward with a claim, have been under legal scrutiny to be sure that they have not implanted such suggestions in their client's minds. In 2019, after the media exposes of prominent abusers causing the formation of a "me-too" movement and lobby, New York State legislators passed a law eliminating the length of time barring filing of such lawsuits. Other states are following them. Hundreds of old cases have now been filed and the courts will be

sorting them out for some time. Mental health professionals will probably be asked to play a role as they progress through the system.

Recovered Memories

Courts have often been confused by the scientific debate among experimental and clinical psychologists about what kind of evidence is sufficient to make a psychological statement about recovered memories. In one noteworthy so-called recovered memory case, a California case, *in re Ramona,* that was in the courts through much of the 1990s, psychologists who testified for both sides disagreed with each other about the validity of the memories that were said to be recovered after therapy using sodium amytal, the so-called truth serum. Although a psychiatrist administered the drug during therapy, psychologists were concerned about the allegations that memories of abuse could be planted in the client's memory by a therapist even without the use of drugs. Most of the cases that ended up in the courts actually involved inadequately trained therapists, usually below the doctoral level of most psychologists. However, the APA was concerned about the scientific integrity of this area of practice and formed a task force to study the issue with both experimental and clinical psychologists represented.

Experimentalists charged that laboratory research demonstrated that children's memories were so malleable that implanted suggestions of events that did not happen could be recalled as real events. Clinicians demonstrated the large numbers of therapy patients who regained memories of early abuse through talking psychotherapy in their therapists' offices, since the early days of Freud and Breuer. The politics of the situation interfered with the scientific evaluation and the experimentalists could not come to a common conclusion with the clinicians. Each side issued a report that was published and subsequent commentaries keep the issue alive. Newer brain research, such as is reported in Chap. 6 on syndrome testimony, indicates that there may well be two different sites in the brain for memory; cognitive memory which is what experimental psychologists are studying and emotional memory which is stored in the midbrain structures and is not easily accessed through cognitive processes. Psychotherapy, often called the 'talking cure' may be the best way to transfer the emotional memories stored in the hippocampus into words and stored in the cognitive area of the cerebrum. Most of these cases seem to have either disappeared or at least are no longer receiving the publicity and notoriety as they did in the last decade.

Let us now turn to the history of how psychology helped develop laws governing the family.

Historical Case Laws on Marriage and Individual Rights

Some of the early U.S. cases give a picture into the use of the law and psychology to resolve family issues.

Right to Marry and Procreate Laws

Reynolds v. U.S. (1898) is an early case that outlawed polygamy in the U.S. and defined marriage as permissible between one man and one woman.

Meyer v. Nebraska (1923) established that it is the right of an individual to marry, have a home and bring up children.

Skinner v. Oklahoma (1942) reaffirmed that marriage is the basic right of one man and one woman, and it included the right to procreate without interference from the state. In this case the state wanted to order sterilization of Skinner. The rationale the court used to affirm Skinner's rights was that marriage and procreation was basic to survival. Obviously this case was at first strengthened by the *Defense of Marriage Act* which was then overturned by (*Windsor, 2013).*

U.S. v. Windsor, USSC, (2013) where Windsor sued to have her relationship with her domestic partner of many years recognized by the court as a valid marriage so she could inherit her estate within the marital exemption for taxes.

Although a USSC decision usually applies to all states, some still held onto the traditional view of marriage only being permitted between a man and woman, so.

Obergefelt v. Hodges (2015) decision made it clear that the right to marry was a right guaranteed in the U.S. Constitution. Although there are still some outlying jurisdictions that are denying same-sex couples the right to marry, the law is fully established in all places now.

Does Marriage Take Away Other Individual Rights?

Pierce v. Society of Sisters (1925) declared that a husband and wife are of 'one body'. With such a declaration, it becomes easy to understand how interspousal tort immunity laws came about. It also made it possible for there to be abuse of individual rights such as the right to hold property in one's own name—the man's name, the right to obtain credit in one's own name-the man's name, and other areas that gave men civil rights that really belonged to women. The new women's rights movement fought for and won back women's rights to own property and credit in their own names as recently as in the 1970s. Until the return of individual rights under the marital contract, it was not possible for a woman to file a lawsuit by herself or another entity that included the woman as a part of it, for damages under civil statutes. For example, this might be necessary under the laws governing recovery for property or personal damage from an automobile accident with insurers under your own name.

In 1930, a case called *Popham v. Duncan (1930)* claimed that marriage is a contract for life and could not be signed away except by court order after a formal hearing. This ruling made it imperative for a couple to go to the family court for a divorce decree when they wanted their marriage to terminate. Even those who lived under common law marriages were required to get a divorce decree. It also gave courts power to review prenuptial and antenuptial agreements, as individuals were not permitted to contract away the courts' right to rule when marriage contracts were to be terminated.

Marriage as a Contract

When people enter into marriage they are entering into a special contract that gives them certain rights without having to demand them. Distribution of property among family members is one such area governed by the marriage contract. For example, a will is a document that fulfills the intentions of how to distribute a person's property at the time of the person's death. Usually there are witnesses to the making of a will and each state has specific laws that govern the procedure. Marital partners are automatic heirs to a certain percentage of the partner's assets whether or not there is a will, usually one-third to one-half, if there are surviving children. Another way to distribute property is to create a trust that specifies who gets one's assets. There are various kinds of trusts, some of which can be changed and others that are irrevocable. A spouse may be disinherited under a trust more easily than under a will but a trustee who may not follow the deceased person's wishes must manage the assets in the trust. Spouses can also make healthcare surrogate decisions for a partner even if the partner has not officially designated them. This can be very important to a person who lives with a partner without being legally married and becomes mentally incapacitated by illness, accident, or age as in the case of Sharon Kowalsky described below. A marital partner can terminate life support systems or demand heroic efforts as it is assumed under the law that the marital partner knows what the other partner would want done. Obviously, this is not always true and self-interests may rule the ultimate decision so there are provisions for a separate *healthcare surrogate* to be selected. However, the state presumes that until or unless less the marriage contract is terminated, the marital partner has the best interests of the family at heart.

Restrictions to Marriage

To be declared a valid marriage, the parties must have obtained a valid marriage license. In some states, such as Florida, the marriage license must be signed in front of a county court or county clerk's office. In some states, the marriage license is only valid if also signed by someone who is legally designated and approved while in other states, such as Colorado, almost anyone can apply for the right to marry a couple. Although most states require someone to be over the age of 18 to marry, those who are over 16 may marry with the signed consent of parents or guardians unless they have been emancipated. In some states, an underage couple can marry if they are the parents of a child or are expecting one!

On the other hand, family law also restricted who could marry simply for social reasons. Some of these laws are quite outdated, make no sense, and/or no longer represent the social mores like those about race below. Most states like Florida passed laws that prohibited marriage if someone was related by consanguinity (blood) such as a father, mother, aunt, uncle, sister, or brother to prevent spread of serious debilitating diseases common in families with intermarriage. Psychological issues known to occur from *incest* are also limited by these laws. Incest was defined as 'sex with a person so nearly related that marriage is prohibited'. However, you can marry your brother or sister if you were adopted and not biologically related. A stepfather can marry his stepdaughter even if she is below the age of 15 to avoid child abuse charges, especially if she is pregnant.

Racial Issues

Many states have had laws prohibiting cohabitation and marriage between Black and White persons. For example, in Florida, Blacks who lived together were declared as having established a common law marriage while Whites were required to follow the marital registration laws. It wasn't until 1969 that the Florida legislature specifically repealed these laws although in 1968, all common law marriages were outlawed. On the other hand, states such as Colorado have extremely liberal common law marriage laws where if a couple co-mingled assets and held themselves out to be married even for only one day, they could be considered legally married. While most U.S. states have repealed laws that prohibited interracial marriages, social ostracism is still very possible. It follows that interracial adoptions are much more controversial than adoptions within the same race and culture.

Lesbians and Gay Males

Lesbians and gay males also have faced and continue to experience discrimination in all areas of family law even with the changes in marital status laws. Their experiences often invalidated and discounted them as people, especially since they did not have the same legal rights as heterosexuals. When lesbians and gay males were not able to legally marry their domestic partners, they did not have the rights and privileges accorded to married couples. They did not have automatic legal protection if child custody issues arose, could not legally obtain financial support if their partnership broke up, and could not adopt the children they raise. They had little real protection against domestic violence, rarely could obtain health benefits from their partner's workplace, may have had difficulties ties with immigration, may have had tax disadvantages, and may not have been able to inherit in the same way as would a married partner. In some jurisdictions that had passed domestic partnership laws, some of these rights were returned to these individuals, but it still made them second class citizens. Transgendered people and some who are gender non-conforming still have no legal rights in families despite the liberalization of definitions of who are family members. In the states that still have sodomy laws, same-sex partners are prevented from having legal sex with each other even if they consent as adults. Those in the LGBTQ community still face

discrimination in housing, public accommodations and employment in all but the 9 states and 200 municipalities in the U.S. where they are granted the same civil rights as other people. An example was Amendment 2 in Colorado in the 1990s, which, if upheld, would have denied equal protection to gays and lesbians. The law was challenged in state court where the judge declared it unconstitutional. However, the conservative Attorney General of the state filed appeals right up to the USSC. The APA along with many other professional associations filed Amicus Curiae briefs presenting scientific data indicating that homosexuals were not deviant nor mentally ill and deserved their full civil rights. The USSC case, *Romer v. Evans (1996)*, supported the trial court and eventually overturned the legislation.

With these new legal rights granted to LGBTQ members, there have been continued struggles to make life more fair and more free from discrimination due to sexual orientation. More recently there has been a demand to change the language to use more inclusive pronouns or at least those preferred by individuals. So, people are asked to state their name and what pronouns they would like to be called so that their preference can be used in different situations. Some choose gender neutral terms while others prefer the traditional 'he' and 'she' or plural 'they' designations. It is a good idea to ask people for their preferences and try to remember to respect them to avoid microaggressions that can occur from perceived discrimination.

The consequences for discrimination can take its toll in ways that may not always be predicted. Take, for example, the case of Sharon Kowalsky and Karen Thompson, two lesbians who had lived together openly as domestic partners prior to Sharon's total incapacitation. Sharon's parents placed her in a nursing home despite Karen's desire to take her to their home and care for her there. Karen fought a ten-year battle until the courts finally gave her sufficient standing to bring Sharon home. Had they been legally married, Karen would not have had to seek legal redress to do what marital partners do naturally.

Despite the social disapproval, somewhere between 6 and 7 1/2 million children lived with one or more parent identified as LGBTQ. Over 25%% of their parents were previously married to the child(s) other parent, others may have had the child as a single parent, while others may have had the children together with their then non-legal but domestic partners. If the domestic relationship terminated, the non-biological parent had no legal recourse to continue to remain a part of the children's lives unless they had found one of the few places that permitted adoption by lesbian and gay male partners at that time.

LGBTQ and gender non-conforming parents may still lose custody in a divorce if challenged, despite psychological research that demonstrates no adverse effects on children raised by homosexual parents. Even if they obtain visitation rights, they were not always permitted to have their children stay overnight should their domestic partner share the same home. Courts still consistently take children away from the mothers who have raised them and place them with biological fathers who have not been active in their lives or grandparents with whom they have never lived for fear that exposure to homosexual parents will cause them to become LGBTQ themselves. However, research (and common sense) demonstrates that this is not true; after all, most LGBTQ grew up in heterosexual families. Children lose access to the love and affection from a parent, grandparents, and other family members by these unwise and psychologically unsound decisions.

Prenuptial and Antenuptial Agreements

Psychosocial Prenuptial Agreements

Thinking about a prenuptial agreement is a good exercise for a couple to do prior to getting married. Kaslow (2000) in her *Handbook on Forensic Family Psychology* discussed two kinds of prenuptial agreements; psychosocial and legal. To make up a written or oral psychosocial

agreement, the couple should think and talk to each other about at least five basic areas:

1. expectations such as loyalty, fidelity, children, security, and accountability;
2. emotional and physical needs such as closeness, power, and styles of communication;
3. external issues that might impact on their happiness such as families of origin, former in-laws and partners, and friends;
4. attitudes and values about important things like who keeps the home, savings, spending, contributing money to the relationship; and
5. sexuality.

As these are all important issues to the psychological health of the individuals as well as the couple, it may be wise to have a mental health professional or counselor present as the couple discusses their individual ideas and try to come to compromise. It is unlikely that each person in the relationship will agree on each of the items. However, it is important to learn if the differences can be tolerated or if they will destroy the relationship, either at this time or later on when the disagreement must be resolved. Many religious counselors insist on meeting with a couple prior to their religious marital ceremony and use some or all of these issues as a point of discussion. In some cases, it might be a good idea to write down the resolution of the issue, particularly if coming to compromise took some time and emotional energy.

Legal Prenuptial and Antenuptial Agreements

Now, let's go back to the vignette in the beginning of this chapter about Luis and Lisa and the question about whether the prenuptial agreement that Lisa signed was valid or not. Do you think that they honestly talked about the points mentioned above in the psychosocial prenuptial agreement? Obviously not or Luis would not be putting such an agreement in front of Lisa five days prior to the wedding, threatening to cancel the marriage if she did not sign it. In many states, the threat to cancel the wedding would itself constitute duress or coercion. For example, in Florida, the law states that only prenuptial agreements signed a minimum of 9 days prior to the marriage would be valid, so Luis' agreement wouldn't be valid even if Lisa did sign it then and challenged it later.

There are guidelines for prenuptial agreements that were promulgated in the Premarital Agreements Acts of 1983 by the National Conference of Commissioners on Uniform State Laws. Antenuptial agreements are similar but they are contracts entered into after marriage occurs. Ante and prenuptial agreements usually cover financial issues during the marriage and distribution of property afterward, whether it terminates by death or divorce. They can also cover ownership and use of property during the marriage and sometimes afterward, such as permitting a widow or widower to remain living in the marital home after the death of a spouse even if the home is owned by another person. Ante- and prenuptial agreements often cover alimony or past child support payments but cannot govern future child support. There must be adequate disclosure by both parties as to their assets and the terms must be fair, reasonable, and adequate. However, in addition to having the right elements to be held as a valid contract, an ante- or prenuptial agreement must also be signed by a mentally competent person who knowingly signs the contract with adequate comprehension of intent and content and freedom from duress or coercion. It can be declared as unconscionable if these elements are not met and the challenger may be able to prove fraud, duress, undue influence, misrepresentation, and withholding information. This is where the forensic expert may offer an opinion on the state of mind of the signer to offer a court in rendering a judgment should there later be a challenge.

Formal prenuptial agreements are most frequently used by couples who marry when older, often after a previous marriage ends, and one or both have property they wish to keep separate. Since the divorce rate is over 50% in the U.S. and remarriage rate is over 75%, a prenuptial agreement is something that many entering into a marriage should consider. In some cases, an ante-

or prenuptial agreement is demanded by one party who brings much more property to the marriage than the other or who has an interest in family wealth that family members agree is not supposed to be shared with marital partners. It is an attempt to protect from a distribution of property that is unfair in a 'court of equity', as family court is often called.

Some case law helps to define how the courts have interpreted ante and prenuptial agreements that have been challenged. For example, in a 1980 California case, *Pablano v. Pablano*, the court found that it was fraud and duress to make a woman sign a prenuptial agreement by threatening to call off the wedding and send her home in disgrace. In 1979 a D.C. court in *Norris v. Norris* found that a prenuptial agreement was invalid because the man coerced the woman into signing the agreement one hour before the wedding. In a more recent 1995 California case, *Sieg v. Sieg*, the court extended the timeliness challenge to the fact that one witness did not properly sign the document until after the wedding ceremony and declared the agreement invalid.

Lack of proper legal representation for both sides was found to be a reason to invalidate other prenuptial agreements such as in a 1996 Nevada case, *Cook v. Cook*, where the court found that the husband had threatened the wife if she got her own attorney. In addition, he did not adequately disclose the value of his law practice, failed to give her an income, and held her liable for taxes! In a 1997 New York case, *Dobi vv. Matisoff* the court held the original agreement invalid because statutory requirements were not met even though the new antenuptial agreement that was drawn up by the wife's attorney did not claim fraud and gave the wife more favorable terms. These cases were also based on language that stressed the fiduciary responsibility of a husband to a wife requiring proper disclosure of assets. It is no accident that so many challenges are brought by wives against agreements they signed when marrying their husbands as more men have property when entering into marriage than do women.

Dissolution of Marriage

Marriages can be legally terminated in a variety of ways. The most common ways are to dissolve the marriage through death, annulment, or divorce, although sometimes a marriage can be voided if it can be proven that it was between two parties who were forbidden to marry by law. We discussed this earlier in the chapter. The division of property can be affected by how the marriage is dissolved so this sometimes becomes contested. For example, if a marriage is annulled or voided, it is as if legally the marriage never occurred. Thus, any appreciation on property may not be shared equitably by the parties as it would if a divorce occurs. The most common areas in which mental health professionals become involved is when there is a question about the competency of one of the parties to have entered into the marital contract in the first place. This may occur if the person was below the minimum age, if there was duress and coercion, if there was fraud such as failure to disclose some important facts, or if there was presence of a psychological problem that would cause incapacity. A voidable marriage may return the parties to the legal status as if no marriage ever occurred, not only placing property distribution but also access to children in a legal quagmire. Some people want an annulment, however, due to religious reasons and the desire to remarry as a single person.

Although divorce laws vary from state to state, and country to country, there are several major principles that seem to follow no matter what legal system is used. Provisions are usually made for property division, spousal support, and parental responsibility for access to and support

of children. Property decisions rarely can be changed after the divorce decree is final while child custody and support decisions are more flexible and can be reopened as the '*best interests of the child*' changes. As was mentioned earlier, when the law considered the married couple as 'one body' that controlling body was usually the man. This followed from the laws that initially gave inheritance rights to men. Later, the laws changed so women and children could inherit equally or according to parental wishes.

In the 1970s the laws in the U.S. changed so that women could obtain their fair share of property division in cases of divorce. The United Nations Decades for Women initiatives beginning in the mid 1970s helped change divorce rules around the world so that in many countries, unless forbidden by religion, women and men could both obtain divorces and a share of the marital property and access to children. Until then, divorces were difficult to obtain and usually only granted if one party could prove the other party was committing wrongful acts such as 'adultery' or 'physical or mental cruelty'. Property was usually in the husband's name, so it remained his, while wives, who were unlikely to work outside of the home, were granted 'alimony' which usually lasted for the rest of their lives or until they remarried. Under the new laws, property was divided with a 'presumption' of a fifty-fifty split. However, if one person came to the marriage with more assets than the other, and contributed those assets to the marital property, then he or she could remove them from the total, prior to its equal distribution. This was called 'equitable distribution' of property and the courts could decide who deserved what amounts, based on contribution to work both inside and outside the home in a marriage. The default position or legal presumption, then, is an equal split of marital assets although initial contributions, gifts or inheritances to one party are often removed from the total before the distribution is halved.

Division of the pensions of those who worked outside of the home, increase in property values during the marriage and military service benefits are among other contested areas that have been resolved by statute and case law. For example, Congress, under the leadership of former Congresswoman Patricia Schroeder passed laws in the 1980s that a non-employed spouse is entitled to part of the other person's contributions to social security benefits if married over ten years (cf. Civil Service Retirement Spouses Equity Act in 1984). Military wives are entitled to a portion of their husband's pensions after ten years of marriage also (Uniform Services Former Spouses Protection Act in 1990). This was an attempt to equalize benefits for those partners who choose a traditional marriage arrangement where one partner gives up his or her career in order to assist the other partner's career development. In countries where social benefits are not obtained through employer benefits, these inequities are not necessary to address. In a few states, all marital assets are considered 'community property' and are presumed to be distributed to each party equally no matter who contributed what to obtain the property. However, even in these states, case law has modified the original intent to split the assets equally, so today more of an equitable distribution concept applies there, too.

Spousal support is also determined at the time of the dissolution of a marriage. Remember, in the U.S., marriage and the family is the institution that is expected to support its members-financially, as well as emotionally. However, it is rare for anyone to receive unlimited alimony after the introduction of no-fault divorce laws in the 1970s. This places women who have chosen to follow the traditional marriage role at a major disadvantage. These women are stay-at-home wives and moms who supported their spouse's ability to pursue a career by taking care of all the 'stuff' that goes into maintaining a particular lifestyle. Sometimes, these women work at jobs to earn enough money to support a husband while he gets an education and then, once he starts to earn a good income, and it is her turn to be supported by him, he decides to leave her and the children to start his new life. In these cases, courts may award time-limited maintenance to give the woman a chance to get educated or trained to support herself. Is this fair? Those who support women's rights believe that each person must be responsible for supporting him or herself

unless there is a reason that he or she cannot do so. However, there are those who suggest that the divorce reform act did not benefit all women in the way it was intended.

Most notable are the women who have slipped below the poverty level after divorce. Statistics indicate that the largest number of women and children on the welfare roles are those who are divorced and trying to raise their children. Even if adequate child support and maintenance are awarded after divorce, large numbers of working parents do not pay their share in a timely manner. Prosecutors' offices around the country have been set up with various ways to collect support from them, but one trip to the courthouse on whatever day 'deadbeat dads', as they are often called, come in makes it clear that we have not yet figured out a good way to solve this important societal problem. There are some who suggest that the entire philosophy (that marriage and the family is the best way to support the individuals who live within them), is outdated and needs overhaul. Models of other countries, such as Sweden or the Netherlands, where the state assumes the responsibility of support of those who cannot support themselves, indicate that there are other models to be considered.

Uniform Family Law Models

Although the laws dealing with marriage and the family are different from state to state, there has been an attempt to develop common principles that could be used by state legislatures and higher courts to make and enforce the laws more uniformly. The American Law Institute (ALI), which we discussed earlier in Chap. 4 on criminal responsibility, in connection with the insanity laws, has also attempted to put together a document, called the 'Principles of the Law of Family Dissolution'. This document suggests the principles that lawyers believe are important to pay attention to when developing family laws.

Actual model statutes have been suggested by the Uniform Law commission with the Uniform Interstate Family Support Act, Uniform Child Custody Jurisdiction Act, and Uniform Premarital Agreement Act. These documents are available for state legislators to use when creating their own laws and many simply adopt the entire model statute or take language from it as necessary.

Obviously, given the mobility of the people around the world, it is important to have the laws as uniform as possible from state to state and country to country or people will move simply because of a particular unique provision that fits that person's needs. In some cases, such as those where battered women were afraid for their own and their children's safety, there needed to be protection when a woman fled the state or country with a child for protection. Until Congress passed an exception from the Federal Kidnapping statute, these women were prosecuted under the law. One of the most celebrated cases was that of Elizabeth Morgan, who went to jail for contempt of court because she refused to tell the judge the whereabouts of her daughter, who she believed was being sexually abused by the child's father. A well-educated and quiet spoken doctor, she claimed she would rather sit in jail than place her child back in that dangerous situation. Eventually, she was released by an Act of Congress, but not until she had spent over two years in jail for her defiance of the law. We will discuss protective moms more fully in the next chapter.

Some Federal and International domestic laws that affect marriage and the family are listed in Table 14.2. As is clear, most of these laws attempt to protect family members from lack of support or to protect children from being kidnapped and taken into other countries where one parent might have dual citizenship and out of the legal reach of the United States. The Family and Medical Leave Act passed by Congress in 1993 gives both men and women the right to take time off work to take care of family members who are ill or when a new baby is born without the fear of losing their jobs. Again, remember that since all of American social benefits accrue through employment, if someone is terminated because of the need to take a temporary leave of absence to fulfill family responsibilities, then that person would lose all the employee benefits. This law

Table 14.2 International & U.S. models for dissolution of marriage laws

American Law Institute (ALI) Model Law Project
– Principles of the Law of Family Dissolution
Uniform Law Commission Draft Statutes
• Uniform Interstate Family Support Act
• Uniform Child Custody Jurisdiction Act
• Uniform Premarital Agreement Act
Actual U.S. Laws
• Uniform Marriage & Divorce Act of 1979
• Uniform Child Custody Jurisdiction Act of 1979
• Civil Services Retirement Spouses Equity Act of 1984
• Uniform Services Former Spouses Protection Act of 1990
• Child Support Recovery Act of 1992
• International Parental Kidnapping Crime Act of 1993
• Family and Medical Leave of 1993
Hague Conference on Private International Laws
• Hague International Child Abduction Convention of 1980
– Hague Convention on Protection of Children & Cooperation in Respect of Intercountry Adoption of 1993
– Hague Convention on the Protection of Minors (revision of 1961 laws)

was designed to make it clear that employers, even to their own business' detriment, must adhere to the family values that prevail.

Psychological Evaluation for Duress

As is evident from the discussions in this chapter, one of the major roles of the forensic examiner in family law is to measure the state of mind when an individual enters into the contract of marriage itself or ante- and prenuptial agreements. The standard of proof is usually a *preponderance of the evidence* or more likely than not that this person was coerced or under *duress* when he or she implicitly agreed to or signed or the relevant contract. How can a mental health professional measure duress or coercion, especially some time after the fact, which is when we are usually asked to render our opinion? The answer is found in the language of the laws: first assess if there was physical or mental duress, coercion, undue influence, fraud, misrepresentation, and withholding information. Then, measure how that may have impacted upon the person's state of mind at the point in time in question. We discuss the specifics of how to do this in the book, *Forensic Practice for Mental Health Clinicians* (Shapiro & Walker, 2019).

A good clinical interview with carefully detailed histories concerning the individual's level of fears then and fearfulness now; presence of physical, sexual, or psychological abuse; fraudulent promises; threats to harm the person or loved ones including children; withholding accurate information about assets; promises to have children with no intention to follow through; and harassment or threats to withdraw love, affection, and the marriage itself are all direct evidence of what the courts have declared to be unconscionable behavior. But, is that enough to constitute psychological duress?

In some cases it would be but in other cases it is difficult to measure based only on the client's descriptions and other supportive evidence is required.

Let's look at domestic violence as a claim to duress.

> In a case that one author (LW) was involved, the woman was about to marry her husband when he suddenly demanded that she sign a prenuptial agreement. Not only did he threaten to call off the wedding after all the guests were invited but he insisted she see the attorney he picked rather than one she might choose. When she protested, he punched her in her head and stomach several tines causing bruising. The woman became terrified especially as he had previously told her that he arranged for his last wife to crash her car and die when she didn't obey him. Over the years there were many more incidents of physical abuse, some of which were witnessed by others or the bruises were treated by doctors. Psychological testing demonstrated that this woman's ordinarily good judgment and intelligence was interfered with by strong emotions, especially high arousal and avoidance symptoms that are consistent with Battered Woman Syndrome, a subcategory of Post-Traumatic Stress Disorder. Assessment of the impact front trauma suggests that she is still suffering front the effects of domestic violence. An inference can be made that the psychological data support her claim of duress.

In other cases the presence of domestic violence may be more difficult to prove. For example, if this man did not physically abuse the woman seriously enough to necessitate medical attention, which provided supporting records, it would be more difficult to demonstrate duress. Psychological abuse, particularly unrelenting harassment to do what the man wants, is a typical strategy to force a woman to do something like signing an ante- or prenuptial agreement without benefit of impartial legal counsel. However, it is difficult to demonstrate that the current psychological condition is as a result of the relentless harassment that may have taken place many years earlier. Demonstrating current susceptibility to duress or documenting a pattern of decisions made using bad judgment when under threat or duress in an otherwise competent person sometimes can meet the legal standard of duress. Some psychological threats can also rise to the threshold without demonstrating other domestic violence acts such as threatening to expose pictures to children and friends explicitly demonstrating a woman having sex with a lover during an extramarital affair. Again, like in the use of psychological tests together with a structured clinical interview and any relevant documents like are described in the earlier Chap. 8 on assessment of criminal responsibility, but in this case using documents of any evidence of duress all go to proving the individual's state of mind at an earlier time period that may overturn a contract in family as well as other areas of law.

Summary

In summary, the law can regulate almost every area of family life as the state has a compelling interest in keeping the family together. This is due to the presumption that the family is the best institution to care for its members by providing food, shelter, and financial and emotional support to its members. Obviously, the high numbers of family abuse cases dramatically exposed the fallacy of this legal presumption but nonetheless, the law still prevails when there is no challenge such as filing domestic violence or child abuse charges against an alleged abuser. Still, marriage is a contract and the laws do support the various functions in family life—support, access to property, succession of property and businesses after death, and access to children while alive. Families may keep their business private unless members are unable to solve a problem that triggers the threshold for state interference. Legislated laws and case laws impact on various areas of family law. Legal groups have set forth various models for rules to regulate both the preservation of and dissolution of the marriage and the family. In the next chapters, we will deal

separately with abuse of family members and child custody, visitation, and removal to another jurisdiction.

Questions to Think About

1. Marriage is more about an economic contract between you and the state than about love. Do you agree with this statement? Why or why not?
2. At what age would you advise a person to have a prenuptial agreement with their fiancé? What would you put in the prenuptial agreement? Should it be legal or just informal? If just informal, would you write it down and what categories would you discuss?
3. What changes have occurred to give all people the right to marry including a man and a woman, two men, two women, and gender non-conforming people. What legal rights have people who identify as lesbians, gay men, bisexual, transgender, and questioning obtained due to legal and civil rights in the last twenty years?

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15 Custody and Access to Children

Solomon's Choice

Ever since history has been recorded, the issue of who gets access to the baby has captivated the interest of the courts. In King Solomon's day, as the story goes, the battle was between two women who claimed to be the baby's mother. At first the king offered to split the baby into half, giving each mother one-half of the child. One of the women protested and instructed him to give the child to the other woman. Solomon decided that she must have been the child's real mother as she was willing to give the baby to the other woman rather than letting the king kill the child. Rarely are today's judges as courageous as was King Solomon, preferring instead to split custody of the child into half no matter how inappropriate or dangerous it is for the child. Sometimes the battleground is drawn between the state and the parents when the child is found to have been abused as we discuss in Chap. 16 on maltreatment or even with biological and adoptive parents or other reproductive rights cases as we discuss later in Chap. 17.

In this chapter we will discuss the issues involved in deciding custody when parents divorce and cannot decide what is *in the best interests of their child* by themselves. Although it is suggested that it is only approximately 10% of all divorce cases with children that will require judicial intervention to make this decision, those cases take up an enormous amount of court time. The results often leave one or both parents unhappy and rarely protect the child well enough for many reasons. Psychologists are often sought to help make these difficult decisions or provide psychotherapy when the courts' rulings are difficult to follow. However, providing services to divorcing couples around their child often causes more ethical complaints to licensing boards supporting the notion that family courts are actually broken (Walker, Cummings, & Cummings, 2013). We discuss some of the problems by trying to help these families make difficult decisions, especially when abuse is alleged, in this chapter.

It is important to remember that the family court was created to provide for equity among the members in the family that is dissolving, while at the same time protecting the state from having to care for a family's members. This usually works fairly well when dividing up property during dissolution of the marriage as we discussed in Chap. 14. Once decided, the property distribution cannot be changed. But that is not the same when it comes to deciding who gets responsibility for and access to the children.

The law mandates the decision should be in the *best interests of the child* but defining what that means within the confines of the legal presumptions described below often requires psychologists' and other mental health professionals' interventions. As time passes and circumstances change, what is in the best interests of the child may also change, requiring further court hearings. Most parents can decide together

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whether to share a holiday, change a child's doctor, send them to summer camp, or take a new job requiring moving to a new home. Those who turn to the court to make the decision for them are often angry and unhappy. Many are thinking only about themselves and not about what their child needs. Others are in domestic violence relationships that negatively impact their children. While the court is expected to take all these factors into consideration, rarely do the child's best interests take precedence over the parent's rights or interests. Instead the legislators keep making new laws with untested legal presumptions and create new professionals to try to force people to get along as we discuss in this chapter. As expected, this is frustrating for all involved including the mental health professionals who work in this area and many call for a redesign of this provision of family court (Walker et al., 2013).

History of Custody Laws

Sometimes when we find ourselves in an incomprehensible system quagmire, as in the custody courts today that require mandatory shared physical parenting and forced visitation with an abusive or alienated parent, it is helpful to look back at history and see how we got to this point. Prior to the nineteenth century children were seen as property, as we learned in the previous chapter that meant they belonged to the man as did all the property in a marriage. However, the role of raising the young children was the responsibility of the mother as it was believed men didn't have the ability to parent them. When the child got older and could be of help to the man in earning a living, especially if the child was a boy, fathers were more likely to retain custody. This arrangement was critical for survival in some cultures; if a child was still nursing, then the mother could feed or support them but once the child was seen as a separate person, then it became the father's responsibility. If the mother died or disappeared, or the unlikely possibility of a divorce, then the father kept any child that was not nursing. Often, he brought another woman into the home to assist with raising the children if their mother was not present. Older children usually took care of the younger ones. This was known as the doctrine of *Patria Protestas*.

By 1839, in the *British Balfour Act*, this arrangement was codified and children were kept with their mother until the age of seven (7) and then sent to the custody of the father to be raised. This became known as the *tender years doctrine* and remains as law today in many countries around the world. Unless the mother was found unfit, usually if they committed adultery and suffered from alcoholism or mental illness, it was presumed that she was the best person to raise the young child. Freud's influence on society in the latter half of the nineteenth and early twentieth centuries reinforced this presumption by stressing the emotional nurturance needed by children was better provided by mothers. Actually, as you shall see later, that is probably true, although fathers are capable of learning how to provide the nurturance young children need if they choose to do so.

Not until the middle of the twentieth century, when the new women's liberation movement gained strength was this presumption challenged by both women and men. Women understood that if they were truly to have choices about what they did in their lives, they would have to be free from or at least share the child-raising responsibilities. As men began to take on more responsibility for their own emotional nurturance and became less reliant on women to nurture them, they realized they missed emotional times with their own fathers and wanted to provide that emotional closeness with their own children. Unfortunately, in many cases their wishes far exceeded their skills. The scientific data on parenting show that although men in general are perfectly capable of adequately parenting children, if they do not have formal or informal training in actual parenting skills, sole or even shared custody with a father is not automatically *in the best interests of the child*. Some children cannot thrive exposed to on-the-job training even if the father was willing to learn new skills.

As divorce reform was being legislated, making women legally equal to men in property distribution and inheritance, the custody standard changed from the *tender years doctrine* to *the best interests of the child*. The idea of *joint custody* became popular, and by 1979, without any scientific data to demonstrate the emotional consequences, the Uniform Child Custody models that states adopted supported a move toward the presumption of sharing the child when parents divorce. Interestingly, it was thought that this change would be more likely to encourage fathers to stay in their children's lives, including continuation of their financial support, rather than the dismal picture of abandonment that commonly took place after divorce when mothers were awarded sole custody. Despite the best of intentions this did not happen and the issue of awarding and collecting child support continues to be a problem. In many cases, where the amount of child support is contingent on the amount of time the father is supposed to spend with the child, some ask for more time just to lower their financial burden rather than intending to spend that parenting time with their child. The data show that while some fathers are more likely to remain in their children's lives after divorce since these laws were passed, these were usually not the cases that utilized the courts to make custody decisions for them. Rather the most bitter and seemingly never-ending custody disputes were more likely to occur in what was then called, *high-conflict* families.

Judith Wallerstein, a California psychologist, studied a small sample of parents with high-conflict divorces (Wallerstein & Kelly, 1996). From her initial sample, she indicated that it was emotionally better for the child to be shared in a custodial arrangement than to have one parent abandon the child. However, 20 years later, after much more research, Wallerstein and her colleagues no longer uniformly supported joint custody. Their work indicated that access to the child should depend on the age, developmental and other special needs, and gender of the child, as well as parenting style of each parent, and the ability of the parents to get along with each other to put the child's needs ahead of their own. Further, children who are exposed to abuse have different needs from their parents and from those children who live in homes without such dysfunction. In cases where the child also experiences abuse from a parent, it may be necessary to protect the child with properly supervised or no visitation at all, at least for a period of time. We will discuss these issues later in this chapter.

Wallerstein's research caused legislators to rethink many of the laws that had been in place under the 1979 Uniform *Marriage and Divorce Act*, and many states began to modify their custody laws to include ways to try to keep both parents in their child's lives. In the 1990s there were task forces on gender bias that also provided information about what men saw as bias in the courts against their receiving custody. Changes in names of what was needed occurred hoping to avoid implicit bias with the old terms. For example, custody was changed to *parenting responsibility* and *visitation* was called *parenting time*. Detailed *time-sharing plans* were often required. New professionals were created such as *parenting coordinators* and mandatory *court-ordered therapists* all in the name of trying to force people to take parenting responsibilities seriously. However, none of it seems to have made anything much better and some feel it is much worse as it keeps the court involved in people's lives for long periods of time during and beyond the divorce. Neither the courts nor psychology has found a good way to force people who can't get along or share ideas for the good of their children.

Legal Standards and Presumptions

As in the other areas of the law, there are certain standards that have been legislated that are necessary for mental health professionals to know if they work in family law around custody and access to children. In most states, decisions in family court must be made with a preponderance of the evidence or the more likely than not standard we have seen in other civil matters. In family court there are certain presumptions that have been created by the law making it easier for

judges to weigh the evidence. They are required to follow the presumption unless one party disagrees. Then, that party has the *burden of proof* to provide evidence that can overcome the presumption. Let's take a look at what are the common presumptions in custody determinations.

Best Interests of the Child Standard

First, the standard used to justify decisions about access is a *preponderance* (more than half) of the evidence is in *the best interests of the child*. However, how much evidence or what kind of information is rarely defined in the law. Nor is the fact that it competes with what are considered a mother's or father's constitutional rights to enjoy the companionship of their child. So even if it is in the best interests of the child to have no contact with a parent, the court may find in favor of the parent's rights to have such contact. To justify this finding, custody evaluators who help the courts make these difficult decisions have proposed that it is always in the best interests of the child to have contact with both parents although there is little research that supports such a proposition especially if the parents do not get along. For example, children whose parents are in the military and deployed out of the home for months at a time do not necessarily suffer from their lack of contact. Further, we make the argument that children who live with domestic violence or child abuse in their homes may require no contact with the abusive parent in order to heal from the trauma (Walker, 2017; Wolfe, Crooks, Lee, McIntyre-Smith, & Jaffe, 2003). Being forced into mandatory joint custody competes with the child's constitutional right to be safe in their home. These arguments continue to be played out in custody battles in the courts.

Nonetheless, the laws in most jurisdictions now have several other presumptions that must guide the judge. A legal presumption means that there is a best and preferred way that is in the *best interests of the child*. The *burden of proof* is on the party who wants to overcome the presumption. Sometimes the law tells what is needed to prove what is really in the best interests of the child but not always. Even when the rebuttal is stated, there may be different interpretations. Obviously, it is difficult to prove that something is not the best way rather than to accept the legal presumption. The two other most important legal presumptions are (1) joint custody or shared parental responsibility and (2) friendly parent statutes. There are others such as the presumption that mothers and fathers are equally capable of parenting the child or that it is in the child's best interests to be kept together with siblings. If domestic violence is raised, the judge is usually required to consider its impact on the child. However, as we shall see later, when domestic violence is raised, usually by a battered woman, the man often rebuts the allegations by claiming she caused alienation and judges are less likely to believe the woman.

Joint Custody or Shared Parental Responsibility

As was mentioned, based on little research, most laws favor what used to be called *joint custody* but today go by different names usually signifying continued joint *shared parental responsibility* together with *equal time-sharing or* 50/50 physical custody. This means children usually have to go back and forth to live in each parent's home, often with an equal amount of time spent in each residence, including sleeping time. This may force children to have to change schools, two sets of friends, or disruption in other areas of their lives. In some cases, the parents go back and forth and the children stay in the same home, but this takes an unusual amount of cooperation and is rarely forced by a judicial decision. In families where the parents can agree on what is best for their child, shared custody can work fairly well with different accommodations as children grow up. Younger children often need more stability in one home, while older children need more time with their friends. However, it can cause many problems when parents disagree on child-raising issues. Family court often ignores individualized resolutions based on parents' abilities and children's needs and forces them to share without considering that for some

people that is impossible. Some creative time-sharing plans may be worked out, sometimes even splitting the decision-making responsibilities from the time spent with each parent in physical custody. For example, one parent gets to make the decisions on where the child goes to school and the other decides what sports activities the child engages in.

Time-sharing can get difficult when parents do not live near each other or one parent decides to begin a new relationship with someone who has other children or they have another child together. These types of family relationships can become quite complicated with time spent with different extended families especially around holidays, birthdays, and other important dates. Even who attends a child's sports activities or performances can become a problem. Differences in the financial status of each parent can also cause issues not thought about by the legislature's mandate to share equally. One parent, often the mother, may have fewer resources than the other parent. Teenagers are often negatively impacted by this disparity. If one parent chooses to live a different lifestyle than the other parent, that too can cause problems. For example, a parent who chooses a same sex partner or one who is transitioning to a non-binary sexual orientation may find it difficult for a more traditional cis parent to accept that their child will be influenced by this different lifestyle. However, unless the child has problems with accepting these changes, and the objecting parent can prove another arrangement is better for the child, the court does not have to intervene. When one parent wants to move out of the area, even if it is for a positive change in a job, the other parent has the right to object to the child's *removal* and petition the court for a hearing. In fact, any major life change usually must get permission from the court or the other parent can petition for sole custody. For many people, this feels like a jail sentence, even worse than staying in a loveless marriage, as they are still being controlled by both their ex-partner and the court. Surely, this is not in anyone's best interests including the child.

In some states, the only way to rebut the presumption of shared custody is for the parent who does not agree to prove that it is harmful for the child. Many states, such as Florida, require the proof to be that share parental responsibility will be *detrimental* to the child. In some states, such as New Jersey, the proof required is it will *cause irreparable harm*, which is certainly a very high burden to meet. Mental health experts may be able to testify that it is in the best interests of the child to have an individualized parenting plan with only one parent making decisions or one home where the child lives for various reasons. However, it may be more difficult to state that joint decision-making would more likely than not be detrimental or cause irreparable harm. As we know, most problems that children demonstrate are caused by complex multiple factors. Simplifying them just to meet this type of presumption is not in the best interests of anyone.

To tie the amount of time a parent spends with a child together with how much child support a person must pay to the other parent is also problematic and not necessarily in the best interests of the child. In Pennsylvania, for example there may be significant financial consequences for the parent who has less than 50% residential time with a child. Obviously, if a parent is looking for ways to reduce their financial support responsibilities to the other parent, fighting for more custodial time will make a major difference over time. Although it is difficult to argue that the parent with 51% of the custodial responsibilities is really taking on more of a financial burden personally than the parent with 49% of the shared parenting time, and as such deserves more money than if custody is split exactly 50/50, in fact that is what happens in some courts. It is not unusual for one parent to give into the other parent's request for time division without really understanding the financial consequences. The burden may become even higher if that parent wants to change the agreed-upon arrangement as they will have to go back to court to do so and again the burden of proof is on that parent to document why more or less money is needed. In some states you cannot go back to reopen a custody or access decision for two years after the last review unless you can prove there is an emergency situation that has arisen during that

time period. In situations where the parents cannot agree with each other on what is best for their child, they may end up petitioning the court for any change.

> Take the case of Joann, a 13 year old girl who wants to live with her mother so she can spend time with her other friends. She likes her father but he lives in a one bedroom apartment on the other side of the town in which they live. On weekends when she spends parenting time with her father, he objects to her going out with her friends, and complains that she didn't used to do it. He doesn't understand that it is developmentally appropriate for young teens to want to socialize with peers rather than parents.
> Or, consider the case of Andrea, who was offered a job in another state that paid much more money and would be a good career-builder for her. The extra money would permit her to afford to send her son to a music camp that neither she nor the boy's father could afford otherwise. She had to petition the court to allow her to move even though her child's father said it was okay. The judge, however, wanted details of a new parenting plan and sent the family to professionals to prepare it before the court would grant permission. This cost them money that could have been spent on their child. Both Andrea and her former husband were angry and felt their lives were being managed by the court unnecessarily.

In other states, such as New Jersey, it may be necessary to prove '*irreparable harm*' to the child when overcoming this presumption. Again, proving something is bad and harmful before proving that something else is better is much more difficult. It also causes people to emphasize the negative rather than to focus on the positive parenting skills of each parent. In many courts, even when the parent admits abuse, it may be almost impossible to prove shared parental custody is bad and causes irreparable harm to a child when the judge believes that it is good for a child to be shared by the two people who allegedly love them. In reality, many are discouraged from even trying to prove what seems impossible, especially if serious harm from physical or sexual abuse or emotional maltreatment cannot be clearly proven. Without financial resources to put together a long and sustained legal battle, these cases cannot be won and millions of children from poor or even middle-income homes go unprotected and without their needs being adequately met. We discuss some of these cases later in the chapter.

Friendly Parent Presumption

Another presumption in the law found in a growing number of states is termed the *friendly parent* provision. Here it is assumed that the parent who is more friendly to the other parent will be a better custodial or residential parent for the child. However, when custody or visitation is being determined, one parent may still be angry about the impending divorce and unable to work constructively with the other parent. These normal feelings of anger and betrayal often recede over time and may not get in the way of the relationship between the other parent and the child unless that parent is behaving in ways that interfere with the rebuilding of the relationship with the child himself or herself. In cases where one parent has misused power and control during the marriage, it is rare that this personality style will change after the divorce and cooperation for the sake of the children cannot be assumed.

This presumption works against a protective parent who has reason to believe the child is at risk for harm when in the responsibility and care of the other parent. It is difficult to understand why a battered woman would be expected to be friendly to the man who has abused and hurt her, especially if the law has not been able to protect her. In many of these cases, the mother is protective of her child, understanding that it is the disorder of power and control that causes the man's abusive behavior. So, if the child disobeys the father, the mother believes that the child will more likely be harmed, especially if she is not there to intervene and calm down the father. Whether or not this actually will happen is difficult to predict, but past behavior is the best predictor of future behavior so it seems reasonable for the mother to believe the risks to her and the child are higher than if the father were a non-abusive person. Despite the strongly held belief that love is enough to protect the child, the friendly parent statute applied to most of the cases that end up in litigation can be expected to

actually work against the best interests of the child. Since it is estimated that well over half of the custody disputes that come to the courts for resolution involve allegations of abuse, it seems that the assumptions behind the friendly parent presumption are not appropriate to use in contested disputes.

Joint Custody Is Inappropriate if One Parent Is Abusive

Although not yet a presumption, it is important to understand that the research supports the assumption that joint or shared parental custody is inappropriate if one parent is abusive toward the other parent or the child. It should only be necessary to prove that abuse has occurred to trigger the provisions for the court to consider it as the most important factor in keeping the child safe when making the custody and visitation decisions. This is one reason why it is so important for battered women to obtain domestic violence injunctions where a judge makes *finding of fact* that domestic violence or child abuse has occurred. Once that legal fact is in place, it is no longer the responsibility of the family court judge to challenge the other judge's factual findings, but rather, it does require the family court judge to look at custody from a different lens using a different standard.

In most states a finding of domestic violence has been adopted only as a cautionary rule requiring the judge to consider such violence before rendering a decision. It does not mandatorily exclude joint custody or even award custody to the batterer. Although able to order supervised visitation temporarily, this rarely provides safety to the child if the supervisor is not around and sometimes it occurs even when supervision is allegedly being provided (Parker, Rogers, Collins, & Edleson 2008). Obviously, in parenting evaluations, it is important to consider past or current domestic violence and child abuse in making recommendations about the parent's risk for violence and ability to adequately protect and take care of the child. This is a '*rebuttable presumption*' in that someone who has been judged to be a domestic abuser may have gone for treatment and if he or she can prove that he or she is no longer a risk for committing abuse, then joint or sole custody may be awarded.

The American Bar Association has introduced a suggested amendment to the Uniform Child Custody Guidelines, and similar legislation has been introduced in Congress to make a finding of family or domestic violence an automatic but rebuttable presumption to the various types of joint custody presumptions in the legislature. Several states have already added this language to their access to children laws. The National Council of Juvenile and Family Court Judges passed Model Code #401 on Child Custody, which states:

> In every proceeding where there is a dispute as to the custody of a child, a determination by the court that domestic or family violence has occurred raises a rebuttable presumption that it is detrimental to the child and not in the best interests of the child to be placed in sole custody, joint legal custody, or joint physical custody with the perpetrator of the violence (1994).

Interestingly, with the introduction of the presumption of no-joint custody if there is domestic violence in many states, there has been a rise in the number of cases using unsubstantiated diagnoses such as *parental alienation syndrome* and *psychological Munchausen syndrome by proxy* as a defense. More will be discussed later about how behaviors that alienated children from their allegedly abusive parent can be misinterpreted and misused by mental health clinicians who are not trained in the assessment and treatment of domestic violence disorders. California now requires a minimum of 12 h of continuing education training in domestic violence disorders (including child abuse) for anyone who is court-appointed to perform a custody evaluation. New York State requires two hours of training in child abuse. Florida requires two hours of training in domestic violence every two years, documented when the professional license is renewed. Many other states require at least some continuing education in both spouse abuse and child abuse for all licensed professionals when they renew their professional licenses. However, this is not sufficient to be able to recognize and

assess for the presence of domestic violence and child abuse when performing a custody evaluation.

Rules of Evidence

As we have seen in earlier chapters, courts have many different Rules of Evidence that govern what can and cannot be admitted in a case for a judge's consideration. For example, evidence that is obtained illegally may not be admitted even if it is the best evidence to demonstrate abuse.

> In a case seen by one author (LW), a tape recording was made of a domestic violence incident where the father hurt both the mother and the child, who was trying to protect his mother. The tape recorder that was in the mother's handbag was voice-activated by their screams. The father denied knowing the mother had the tape recorder present during the incident. The judge ruled that the father had the right to privacy in his home and that the tape was made illegally without warning to the father. In effect, the court determined that the rules of evidence took precedence over the rights of the child and mother to protect themselves by documenting the father's abusive behavior. Had the mother notified the police and told them that she would record the father's abusive behavior or had it been permitted on a no-contact or no-violence restraining or protective order, the taped evidence might have been admitted. Other judges might have used their discretion to admit such testimony using the protection of the child as the ruling interest. This requires a 'lesser of two evils' type of decision. Tape recording telephone calls are permitted in many states provided the caller is notified that the call may be recorded. If a caller speaks into a recording machine, such as leaving a voicemail, that is usually considered evidence that he or she was aware of the recording. Those in litigation should' get answering machines or let calls go to voicemail on their cell phones in order to document any verbal abuse or threats. Alternatively, one could rely on communication via text messaging, whether by SMS text built into phones, separate apps which do not delete messages after a specified period of time, or even those designed for use in family court where messages can be monitored by court officials.
>
> Surprisingly, the knowledge of an answering machine or documented text messaging does not seem to stop the abuser from making horrible and embarrassing comments and threats. In another case, two authors (SA and LW) performed an evaluation for symptoms of Battered Woman Syndrome for a woman who had been abused for many years by her husband. After their separation, the husband sent numerous threatening text messages, including direct threats that he would kill his wife if she did not settle their divorce on his proposed financial terms.

Hague Convention Cases

The 1980 treaty on the Civil Aspects of International Child Abduction signed in the Hague Court by many countries including the U.S. governs how custody disputes are settled when parents live in two different countries and one parent takes the child and returns to their home of origin, usually to seek assistance from family. In many of these cases there are serious domestic violence allegations by the mother against the father. Interestingly, Edleson and Lindhorst's study of 22 cases found that the parents were generally in their late 30s with mothers usually white and fathers usually from southern countries. Mothers were usually U. S. citizens, while fathers were not. While living in the fathers' countries of origin, they controlled the mothers' passports, withheld finances, isolated the women, threatened to kill them, and subjected them to physical and sexual assault. In one-third of the families, children were also abused by the fathers and all 45 of the children still were fearful at the time of the study. Frequently the mothers had to flee the fathers' countries as they were being held psychologically if not physically captive by the fathers and their families. Psychologist Chesler (2013) in *An American Bride in Kabul* poignantly writes of her captivity in Afghanistan when she was living there with her then husband even without children.

The goal of the Hague Convention is to return children to their *habitual residence* as quickly as possible so the courts where they have spent the most time can make the custody decisions. The term habitual residence is said to encompass a child's attachment to various institutions such as school, social and religious institutions, friendships as well as family. However, it is also based on the belief that the parents have voluntarily chosen to live in that country and for many battered women that assumption is untrue given the

coercion and duress to which they are subjected. Many believe the man's promises that life will be better in that country without understanding what it will entail. Nor do they stay there voluntarily.

In December 2019, an Ohio case (*AMT*) was argued asking the court to further define what habitual residence means for infants. In this case the mother went to live with the child's father in Italy where AMT was born in 2015. However, she was a victim of domestic violence and when AMT was 8 weeks old she returned to Ohio to be with her family. The father demanded the child's return to Italy, and while the mother was in the U.S. and unable to provide her response, the Italian courts granted him custody with the child's limited contact with the mother. The Ohio court forced the return of the child under the Hague Convention, and the Sixth Circuit U.S. Court of Appeals agreed in 2017. The mother returned to live in Italy to have some limited contact with the child while the case was litigated. She argued that when the child was an infant her habitual residence was wherever the mother was located and that the decision to return the child to Italy did not follow the Hague Convention's intentions. Returning a child to an abusive father is also not in the best interests of the child as we further discuss below. At the time of this publication a decision has not yet been given in this case. Obviously four years have gone by in AMTs life, and today whatever is the decision, those early years with major developmental stages cannot be redone.

Custody and Parental Fitness Evaluations

Access to parental fitness, custody evaluations, parenting plans, and recommendations including permission by one parent to remove a child from the current home and school and move to another locale are initially made or approved by the court once a divorce is filed. These decisions can be changed as the child's needs change or there are other changes in circumstances. However, there is usually a higher standard that must be met to change a custody order once it is issued and, in some jurisdictions, to provide stability for the child the courts will not entertain a change more than one time in two years unless there is an emergency (Table 15.1).

Child custody evaluators (CCEs) may come from any of the mental health professions and

Table 15.1 Summary of custody and parental fitness evaluation steps

Steps
1. Prepare for the evaluation of the case reviewing the issues before the court
2. Disclose to the parties your requirements and obtain informed consent and a clear understanding of how and when your fees will be paid if you are an independent practitioner
3. Review documents obtained from the court or the attorneys involved
4. Collect assessment data from questionnaires sent to parents
5. Interview one or both parents individually to set parameter of evaluation
6. Interview one or more children alone and in sibling combinations
7. Perform a parental interaction examination of each child with each parent or parent-like participant
8. Interview each parent and parent-like participant in depth
9. Interview collaterals for information relevant to parental fitness including school performance, behavioral observations, and character references
10. Administer psychological tests and custody evaluation instruments, if used, to each child and parent individually
11. Review additional materials including abuse reports, medical reports, etc.
12. Prepare data to be communicated to the parents, attorneys, and court
13. Make recommendations based on data
14. Prepare to give sworn testimony in court

work independently or in teams. Some may actually work for the court, while others are independent contractors appointed by the court or who work for the parents' attorneys. Sometimes parents agree to one CCE, while in other jurisdictions, each parent hires their own CCE. In some jurisdictions, when the recommendations are not acceptable to one or both parents, a second CCE may be hired either to do their own independent evaluation or review and give their opinion about the first CCE's methodology or findings. No matter who hires the CCE, the expert's legal obligation is to provide objective advice to the court based on scientific data gathered in an appropriate evaluation. Studies have found that many CCEs do not have the education or training necessary to perform competent child custody evaluations or appropriate parenting plans (e.g., Saunders, 2011). Even though the overwhelming number of contested custody cases has allegations of abuse, most CCEs have minimal or no training in the area. Many only have read one book or taken a continuing education workshop in the area. Therefore, they failed to adequately assess for domestic violence or child abuse.

The selection of competent experts who can provide a written report in a timely manner may actually help prevent long, protracted litigation that often does not permit all parties to heal and move on with their lives. However, the key here is to be sure that the expert has the competencies needed, especially in cases where the child may have special needs. Kleinman and Pollack (2019) have provided information for lawyers, experts, and parents to help select the best strategies to resolve these cases hoping to prevent the never-ending custody battles. Sometimes it is not possible to prevent the battle as it is less about the children and more about keeping the connections between the parties despite their desire to divorce. Time may be the best way for it to end. Other times it is about the abnormal need for power and control by one of the parties. In cases where abuse is alleged, it is often the father who demands continued control although sometimes the mother has become so dependent upon him that she needs time and help in letting go of the relationship without him hurting her. The abuse of power and control in these cases is often an important sign of dangerousness as described by Stark (2007). As we will discuss later, the most dangerous time is leaving a domestic violence relationship.

Alienation

The concept of alienation has become a major factor in the court's decision-making of custody and parenting time when a child refuses to spend parenting time with one parent. Usually the refusal is accompanied by hostility and drama. Some children hide when exchanges are anticipated, others refuse to get into or out of the car, and still others have tantrums accompanied with screaming, cursing, and crying. Some also refuse to speak with the alienated parent on the phone. These are all behaviors of a child who is fearful, angry, and hurt and can be fueled by many different complex reasons, rather than a mental illness. The original concept of an alienated child that was proposed by psychiatrist Gardner (1987) with only anecdotal data claimed that the other parent was promoting the child's alienating behavior toward the hated or targeted parent. Usually these allegations were leveled at mothers who were angry with the father and used the child to get revenge. When the lack of data was demonstrated, Gardner revised his theory to accept that maybe it wasn't just revenge that mothers wanted but somehow they were transferring their anger toward the father onto the child.

Although many of the early cases on which Gardner based his theory were actually domestic violence as well as sexual abuse of children cases, he claimed that didn't really matter since the alienated child was being denied their right to have access toward their father. The cure according to Gardner and his followers was to give the alienated fathers sole custody of the child. Unfortunately, many courts accepted this misogynistic theory without scientific data, without sufficient information and removed mothers from these children's lives and gave

custody to these fathers (Milchman, 2017; Saunders, 2011; Silberg & Dallam, 2019). There continues to be cultlike CCEs, attorneys, and judges who believe in unsupportable alienation theories and have set up profitable reunification camps and so-called reunification treatment that has no evidence-based support (Dallam & Silberg, 2016), and in fact there is evidence demonstrating that it is harmful for children. Psychotherapy theories usually have to meet evidence-based standards before they are considered acceptable; however, the belief in forced reunification therapy has become close to a presumption that it is in the best interests of the child without such evidence.

Claims of alienation of the child by one parent may occur for many different reasons when a child does not want to spend time with one of the parents even though the claim usually is made by the alleged abuser when the mother alleges domestic violence or child abuse (Shapiro & Walker, 2019). The issue of an alienated child has been controversial in that there are mental health professionals who have petitioned the American Psychiatric Association to make alienation a mental disorder while others argue that there are no scientific data to support even the concept of alienation. Throughout history children have not wanted to spend parenting time with one or both parents. Even children from healthy and intact families may have periods of time when they are angry with one parent or simply have an affinity for one parent over the other. Sometimes the parent who is better liked for the moment has personality characteristics that create a closer bond, while other times, a parent may be disliked for either personality characteristics (often not paying as much attention as the child would have liked) or negative behaviors exhibited (being a stricter disciplinarian) toward the child. Mothers are often blamed for everything that goes wrong with the child since they usually spend the most parenting time together.

Feelings about parents may also change over time as the child develops. Sometimes a child feels betrayed by a parent during the divorce. For example, in one case in which LW was involved, the child learned the father had a secret girlfriend that the mother found out about at the same time the parents separated. The child was angry and felt betrayed by the father who had made it an important value in that family not to lie or have secrets. It took time for this child to finally accept her father's flaws and mistakes before she was ready to spend time with him. Had the court forced her to spend time before either of them was ready, the relationship might have been permanently ruptured rather than the temporary separation needed to heal. We discuss some ways children can gain power and control over their lives to heal and thrive in Chap. 20 on providing legal rights for children.

Alienation and Abuse in the Family

Alienation allegations are commonly seen in court cases where there are domestic violence allegations, usually as a way to get the court to ignore the real dangers of continued abuse by contrasting them to the so-called danger from being alienated from that parent. Unfortunately, perhaps in the desire to get fathers to become more involved in their child's life, especially after divorce, or perhaps due to stereotyped bias against women, the courts seem to ignore women's testimony about danger from abuse. Meier (2019) has recently concluded a major study analyzing published opinions of custody outcomes in over 2000 court opinions over 15 years documenting the negative bias judges have toward mothers who claim abuse by the children's fathers. Both female and male judges are skeptical of mothers' claims of abuse, and their opinions are filled with negative stereotypes of women upon which the parental alienation theories are based. When the father filed a cross-claim of parental alienation, the number of rejection of abuse claims virtually doubled with mothers losing custody of children to the fathers accused of abuse. In comparing court responses of fathers to mothers accused of abuse, a significant gender difference is identified. Perhaps the most frightening finding of all is that when guardians ad litem or custody evaluators were appointed, outcomes showed an intensification of

the courts' skepticism toward mothers' but not fathers' abuse claims and removal of custody of the child from the mother but not the father. It is interesting that the opinions analyzed were those that the courts published; imagine what bias might have been in those opinions that were not published.

Contrary to Gardner's theories and the family court's embracing alienation theories, research shows that deliberately falsifying allegations of abuse are rare (U.S. HHS, 2010) and there is minimal or no increase in false reporting during custody litigation (Dallam & Silberg, 2014). Others have found that the majority of false allegations of maltreatment come from misinterpretations of data rather than deliberate false allegations (Bala, Mitnick, Trocme, & Houston, 2007). Sadly, few CCEs, lawyers, or judges are aware of these data according to research (Saunders, 2011).

The negative bias and skepticism that the family court has displayed toward mother's reports of danger to their children go beyond reports of exposure to domestic violence to even include similar skepticism when mothers report the child is being sexually abused by their father. Silberg and Dallam (2019) studied cases where the courts denied protection to children whose mothers' reports of sexual abuse were disbelieved and then, the abuse happened again with more incontrovertible evidence that forced the court to change its opinion. The mothers were often treated poorly, and two-thirds of them were said to have a mental illness by custody evaluators who accused the mothers of making false allegations and alienating the children from their fathers. In almost two-thirds (59%) of these cases, where actual abuse was later proven to occur, the judges awarded changing custody to the father and in the remaining cases the fathers were given joint custody or unsupervised visitation. In 88% of these cases the abuse re-occurred, became increasingly severe, and negatively impacted the children's physical and mental health. The judges turned the case around only when the protective parents were able to present compelling evidence in court, usually supported by mental health professionals who had expertise in assessment of child abuse. The Leadership Council on Child Abuse and Interpersonal Violence in 2008 (www.theleadershipcouncil.org) has documented many cases where mothers have lost custody or were even forbidden to see their child due to judges' rulings, especially if they became annoyed by the mother for her persistent efforts to protect the child. They estimate that abusers are granted custody of at least 58,000 abused children each year.

Child welfare agencies and social services professionals need to be aware of how implicit bias against women who are mothers may interfere with protection of children. Meier (2019) suggests a myriad of legislative changes to exclude or constrain the use of parental alienation theories in court cases where abuse is alleged and to only appoint custody evaluators who are neutral and have expert training on child physical and sexual abuse to perform evaluations. This training needs to include information on how alienation theory is improperly used to deny abuse and fuel misconceptions about how divorcing parents actually behave toward their children. The U.S. House of Representatives has passed H.Con.Res.72 that requires child safety to be the primary concern of family courts in making custody decisions. Further, the resolution urges state courts and policymakers to consider scientific evidence in family courts before considering other best interest presumptions such as friendly parent or alienation allegations by whatever name they go by (new terms such as 'gatekeeping' are another way of blaming mothers) and to stop funding and ordering forced reunification counseling.

Danger to Child from Exposure to Domestic Violence

Children exposed to domestic violence often display a variety of psychological and physiological (health) problems that negatively impact on their current and later development. The major study funded by the U.S. Centers for Disease Control and Prevention (CDC) was conducted by Felitti and his associates in the

early 2000s reviewing the health records of a large Health Maintenance Organization and documenting adverse childhood events that negatively impacted children's development. Exposure to and being a victim of all forms of abuse was high on the list of adverse events occurring in childhood resulting in school learning failures due to cognitive problems, emotional and behavioral disorders, and health problems. Specific findings can be found throughout the psychological literature including studies by the U.S. and other countries' governments. The data are clear. Exposure to abuse is a major risk factor in girls' later relationships and boys' behavior including involvement in the criminal justice system. In one early review of Murray Straus' data by Kalmus (1984) she found that if a 9-year-old boy was exposed to his father abusing his mother he was 700 times more likely to use violence in his own life. If that same boy also experienced abuse himself, it raised the risk of his use of violence to over 1000 times that of the boy who was not so exposed to violence in his family. Other studies show that the risk can be lowered by a number of factors including giving mothers more power and control over what happens with their children (Gewirtz & Edleson, 2007). Yet most family courts do not use these data as a priority in their custody decisions.

In a study by one of the authors (LW) together with psychologist Van Haasselt (2013) we reviewed murder–suicide cases in Florida and found the two most common risks were (1) whether someone was a police officer and (2) whether there was a custody battle going on in family court. In most of the cases examined the father shot and killed the mother and children. In the two cases who were women, they were police officers with access to their guns. In almost all cases where we could get information, there was significant domestic violence prior to the homicide–suicide event and the women had told others including healthcare and legal professionals. Jacqueline Campbell's research confirms that the woman's opinion of danger should be believed as she may be in the best position to evaluate the man's escalation of lethal violence.

Competent Parenting Skills

We have spent a lot of time criticizing the family court's emphasis on negative parenting as a way to make decisions in the best interest of the child in this chapter. Let's take a look at what psychology offers to evaluate positive or competent parenting skills. Child development research has produced research detailing what are competent parenting skills resulting in long-term positive development in children. High on the list are two major areas. First is the ability to listen to the child and support their ability to meet their needs. This includes 'stimulating-responsive' parenting during the first three years which has been shown to be vital for cognitive development throughout childhood and into adolescence (Vandell & Duncan, 2019). Talking to the child, being attuned to the child's interests, and sensitive engagement with the child's play are major skills that are recommended. Boosts in good care delivered by mothers during infancy and toddler years were most apparent when children were 4½ years old, prior to school entrance, but it remained detectable by researchers through age 15 in one study. Even if there were problems with mother's ability to interact with younger children, improvement in the mother's caregiving as children got older also caused improvement in children's cognitive skills especially in vocabulary and math skills. Most important, the research showed teaching these skills to mothers actually had positive results. Fathers were present in about two-thirds of the families assessed, and their contributions were also seen as important in avoiding damage to children's cognitive abilities that neuroscience has shown will be difficult to make up despite much effort in later years. Many of the fathers' interactions were not as competent as mothers', mostly due to less ability to be attuned to and sensitive to what these very young children needed. Other studies

have shown fathers become more involved with their children as they grow older. Deprivation and hitting a child at any age have both been shown to interfere with attainment of Piaget's developmental stages of cognitive development. Obviously, these findings have major implications when conducting custody evaluations during children's years when they are less able to verbally describe how they are being parented. This makes observations of parental interaction with the child an essential part of a custody evaluation.

The National Academies of Sciences, Engineering, and Medicine (NASEM) together with private foundations released a visionary Consensus Study Report, *Fostering Healthy Mental, Emotional, and Behavioral Development in Children and Youth: A National Agenda* that described understanding of influences on mental, emotional, and behavioral development in young people and how healthy development can be fostered. They found rates of depression, suicide, and self-harm have been increasing in families with children and youth despite a decade of efforts to intervene. It is believed that this is due to complex neurobiological processes that interact with the physical and social environment that begin before conception and continue through and beyond adolescence. These factors shape children's brains and consequently also shape their behavior and emotions (NASEM Consensus Study Report, 2019). Effective strategies for lowering risk factors and supporting protective factors listed in the report include supporting the mental health of parents and other caregivers. They urge the nation to make it a priority for children by encouraging new efforts to create a national agenda that can then be disbursed across local communities and state levels.

There is a significant amount of research showing that fathers who perpetrate domestic violence are more often controlling, authoritarian, less consistent, and more likely to manipulate the children and undermine the mothers' parenting than nonviolent fathers. Batterers are often able to perform competent parenting tasks when being observed in custody evaluations or supervised supervision settings, but they typically then change their behavior when outside observers are no longer present. Bancroft and Silverman (2003) suggest that the batterers' history of physical, sexual, or psychological abuse and neglect is important to understand the continued level of danger to the mother or non-abusing parent. Entitlement to be with a child, irrespective of the child's wishes, is a clue to inappropriate parenting as is negativity expressed toward other family members. Refusing to accept any criticism is also typical in domestic violence offenders, many of whom have a history of blaming others for their faults. This makes it difficult, if not impossible, for the batterer to learn better parenting skills, again putting children at risk when no one is present to protect them. Research also demonstrates that mothers are often more likely to try to compensate for violent events by offering increased nurturing and protection to their children. Adult victims may make their decision on whether to remain in the relationship with the perpetrator based on what they believe is in the best interests of the children (Emery, Otto, & Donahue, 2005).

Other Risks to Competent Parenting

There are a number of other factors in addition to risk of abuse that may interfere with competent parenting. One of the most difficult issues to overcome is the impact of living in poverty on children. Public policies that could assist with help to single-parented families, which have increased in the U.S. and around the world, have been found to mitigate some of the difficulties by creating healthy nutrition, safe housing, and competent child care when parents must work outside the home. While there are many cultural variations in competent parenting techniques, most researchers have found the following as essential: protective behaviors, mindful behaviors, and a continuum of nurturance and developmental control. Mental health treatment for depressed parents also helps the developmental trajectory of children who are negatively affected. More education and support for parents as well as policies supporting family leave, and

head start programs especially increase worker satisfaction in low-income workers as well as those in jobs with more responsibility. A meeting in 2014 of the Society for Research in Child Development on “New Conceptualizations in the Study of Parenting at Risk” presented six decades of research on how to foster parenting competence. The report discussed Bronfenbrenner and Morris’s 2006 ecological model of the family where members are nested in a multitude of other systems that directly and indirectly bear on parenting ability, some of which a parent has little control over while others are manageable. Interestingly, they also focused on research that found that in the presence of competent parenting and adequate resources, there is little difference between growing up with a biological mother and father in their first marriage and growing up in alternative family structures.

Procedures for Parental Fitness and Custody Evaluations

There are many different books and articles that help mental health professionals learn how to provide competent parental fitness and custody evaluations. We provide a general summary of what you might consider to help you decide if you wish to work in this area. More details can be found in Shapiro & Walker, 2019 as well as other parenting guides such as Benjamin, Beck, Shaw, and Geffner (2018).

Here is a suggested outline of the procedure that is summarized in Table 12.1:

1. Prepare yourself for the type of cases that you will be evaluating by reviewing the legislative and case laws that govern in your jurisdiction. Decide if you have the education, training, and experience to perform competently. Remember that you will have to evaluate at least one or two parties in a parental fitness examination—mother or father and perhaps together the child, if possible, in order to give your opinion if a person is cognitively, emotionally, or behaviorally fit to parent a child. You will have to evaluate at least three parties (mother, father, and child) in a full custody evaluation in order to give your opinion about custody. Sometimes there are other people that you are asked to evaluate or at least interview including stepparents, grandparents, and other close family or friends who spend considerable time with the child. If there is a nanny or other child care person, then they too may be evaluated or interviewed. If you are not qualified or trained to evaluate one or more parties or elements in a case, it may be necessary to bring in a co-examiner, such as someone who is trained in child development and interviewing techniques with young children, someone from another culture or ethnic group, or those with special needs.
2. Before starting any formal evaluation, it is important to provide the clients with informed consent including the evaluator’s obligation to report suspected child abuse. Issues about the fees involved and who is responsible for them must also be resolved prior to the evaluation. Many evaluators believe that it is best to get the estimated fees paid prior to beginning an evaluation so that neither party can use money as a way to unduly influence the examiner. Usually all fees are collected before a report is issued although sometimes court timelines make this difficult. In some jurisdictions, the attorneys are responsible for collecting the CCEs’ fees. In other places, it is the parents’ responsibility to pay the CCE directly.
3. Review documents and information contained in prior evaluations, if possible, including any abuse reports. Often when abuse is alleged there have been other evaluations that have not properly addressed the abuse issue. While some evaluators do not want to be ‘biased’ by other’s reports, it may be important to know what was and was not done and what issues remain contested so that appropriate assessment methods will be used. In some states, such as California, the law states that

an evaluator must review law enforcement and child protective agency investigations as a required part of a custody evaluation. This is a good idea even if it is not required by law.

4. Send assessment questionnaires to the parents (and teachers if the child is in school), and request that they be mailed back. If there is information about developmental milestones, history, and other pertinent information, obtain and review it.
5. Interview one or both parents, without the child present, to gather relevant information including any particular ways the parent has used to make the child comfortable in accepting the parents' separation. If abuse has been reported or suspected, find out how the parent helped the child feel comfortable in reporting what has allegedly occurred. If the referral comes from one parent's attorney, it is also important to learn what the allegations are from the reporting parent and what evidence has been put forward to substantiate the claims. It is also important to learn if the information-gathering procedure may have introduced bias so that the same procedure can be avoided or other unbiased data can be collected. This interview can be conducted on the telephone but if so, another more formal face-to-face interview will need to be conducted with that parent after the child(ren) have been evaluated to see if and how the parent can best meet child's needs.
6. Interview the child or children first, alone with both a structured and unstructured interview and together if there is more than one child. Try to schedule a time that does not interfere with the child's regularly scheduled activities. Note that it is best for the evaluator to be familiar with the literature on suggestibility in order that the interview is conducted in a matter so as to not ask the child leading questions.

   In a structured interview you will need to obtain information about the child's developmental performance based on age expectations. It is especially important to obtain the child's knowledge of vocabulary and language to assess whether the abuse report is possibly coached or the child's own report. Can the young child count, does he or she understand sexual parts of the body, and does the child know colors, shapes, textures especially if there were allegations of ejaculation? Does the child's report make sense? How does the child view each parent's ability to support him or her? How does the child understand discipline from each parent? There are different opinions about how to determine if a child has a preference for one parent or the other so as not to put the child in a compromising position requiring them to make such a choice. We discuss ways for children to have input and state their wishes in Chap. 20 on legal rights for children. One of the most commonly used structured interviews was developed by the National Institute of Child and Human Development (NICHD) after studying other important research protocols (Lamb, Orbach, Hershkowitz, Esplin, & Horowitz, 2007). They have developed excellent prompts that should be used to make sure the interviewer's questions do not bias the child's responses.

   In an unstructured interview, it is important to watch the child's spontaneous play looking for developmental milestones and personality issues. What kind of toys does the child prefer or what games does the child like to play? Can the child make decisions easily? What kind of drawing does the child make? Only when rapport is established and the child feels safe and comfortable that the interviewer understands what he or she is interested in and saying will disclosure occur. This takes time and patience and cannot be hurried due to time pressures. The American Professional Society on the Abuse of Children (APSAC) has produced various protocols that should be consulted if you are planning to use your own unstructured interview.

It is possible that several visits will be needed including a home visit. If videotaping is done, this might save the child from additional interviews by others especially if disclosure occurs. If not, it may be used as evidence that the abuse didn't occur which would be a mistake and leave the child unprotected. Thus, videotaping is a controversial procedure that should be used carefully. Psychologist and attorney, Andrew Benjamin's clinic at the University of Seattle has developed a protocol that is used to record parental custody evaluations and then used to help them better understand and meet the needs of their children. Tapes are then destroyed which has been criticized by some although Benjamin's data suggest their use in this way contributes to the family members' openness to learn better parenting skills.

7. Perform parental interaction interviews to collect behavioral observation data with the child and both parents individually, each for about 20 min to one hour depending on the child's age. If more than one child is involved, do each separately and then all together to assess if a parent can manage different developmental ages together. If one parent is insisting on joint or shared custody and there are no abuse allegations, it may be appropriate to have both parents together with one or more children, although this can get too chaotic if there are too many people involved to make adequate judgments. However, the chaos might also tell you that joint custody is not a good solution for one or more of the children involved either.

   The parental interaction part may be one of the most important parts of the evaluation as it operationalizes what each parent has said about the child during the interviews. Often parents know the right things to say but really haven't spent enough time with a child to know how to apply the principles. In addition to the formal interaction interview described below, it may be helpful to try to observe the different family structures in a more naturalistic setting such as having lunch together. This gives a good idea of the additional interactions that can occur with cranky or hungry children and parents or simply how mealtimes can be managed.

   For the parental interaction examination, ask each parent to bring toys or games that they can use to interact with the child for approximately 15–30 min. It is often a sign of the parent's expectations of the child just to see what they choose to bring. If it is something that they have not played with before, you can observe how the parent teaches the child to do something new. It is also helpful to ask the parent to bring something that they know the child likes to do together, again to demonstrate the parent's knowledge of the child's interest and skills. Finally, it is helpful to ask the parent to engage the child with something that the evaluator brings. Here it is possible to evaluate for creativity, spontaneity, flexibility, and commonality of interests while observing them interacting together. If you are looking for evidence that a parent is trainable in parenting classes or making a decision about recommending therapeutic, supervised, or monitored visitation, it may also be helpful to join in the interaction and assess the parent's and child's reactions to a third party.

8. Interview each parent next, without the child present, unless sufficient information has been obtained to understand how the parent can meet the child's needs based on the additional information collected from your interviews with the child and parental interaction observations. This is not a difficult part of the evaluation if both parents have the ability to be an adequate or even great parent for this child, despite their different styles. Even if you can't judge who would be the better parent for a particular child, you can assume no harm will be done as both parents will care for and nurture the child. Look for positive parenting behaviors such as empathy and awareness of the child, predictability, non-intrusiveness, emotional

availability, ability to trust and be intimate, and ability to adapt to new situations and multiple demands. Also look for negative parenting behaviors such as self-centeredness and self-focus (other than around protective behaviors), depression, antisocial behavior and attitudes, inconsistency with behavior toward siblings or new stepchildren, domestic violence and child abuse, and other mental illness.

If there are abuse allegations, interview the alleged abuser by beginning with gentle questioning about the allegations after some rapport is established. You must obtain informed consent and be clear in disclosing that you will have to make a formal child abuse report if this hasn't already been done and you have some reason to suspect that the child has been abused. Obviously, this procedure makes it difficult for someone to be honest because of the possible repercussions. However, if you have admissions from the child, you will have to make a child abuse report anyhow, and it is usually appropriate to share the fact that the child is saying that the parent did whatever is alleged. Be careful not to disclose the child's language or facts that would compromise the child's safety. If the interview is videotaped, it may be used as evidence in other legal proceedings.

9. Interview collateral witnesses who have observed each parent's parenting ability. These usually include anyone significant in the child's life such as a new spouse or live-in partner, grandparents, friends with and without same-age children, religious advisors, teachers, doctors, psychotherapists, and babysitters or nannies. The goal is to understand that person's knowledge and interaction with the child, any observations of parenting abilities of each parent, any evidence of abusive behavior, or other concerns. These interviews are frequently done via telephone unless the person will have direct caretaking responsibilities for the child and then an interaction visit might be appropriate.
10. Psychological testing of both parents and the child will often provide additional data to support a custody or visitation recommendation. This area is quite controversial as it is common for psychologists to assess for clinical disorders without relating how they might prevent a parent from acting in the best interests of the child. It is critical to base the findings and recommendations on a variety of data sources, so it is important to assess for mental stability and parenting ability using objective measures as well as interview data, clinical impressions, and observations of others. Most of the newer tests that purport to assess for information specific to custody evaluations do not have carefully standardized procedures that permit basing a custody determination on them. However, they may be useful as a part of a total evaluation provided other data sources are used and comparisons for consistency or inconsistency are made and explained. Some of the psychological tests that can be used are listed in Table 15.2.
11. Review additional documents including court papers to determine if your data can answer the court's questions and make appropriate recommendations based on the data obtained. If abuse allegations are made, then any witness statements, police reports, doctor's or hospital notes, court transcripts such as testimony for an order of protection and the judge's findings, and other evidence of abuse should be reviewed.
12. Communicate your findings to the attorneys, parents, and court in a timely manner in oral and written reports as required. Issues that arise during these evaluations often cause the psychologist to be concerned about the safety and mental health of one or more parties. It is important to know the mandatory abuse reporting law in your state to make sure that you do not violate any legal obligations and you might have to protect children, the elderly, or adults in those states where reporting is required. Even if you believe the allegations do not rise to the level to a mandated report, put

Table 15.2 Typical tests used in custody and parental fitness evaluations

Psychological health of adults
Cognitive assessment
WAIS-III—Wechsler Adult Intelligence Scale-Third Edition
Personality Assessment
MMPI-2—Minnesota Multiphasic Personality Inventory-Second Edition
PAI—Personality Assessment Inventory
Rorschach Ink Blot Test
TAT—Thematic Apperception Test
MCMI-III & MCMI for Custody—Millon Clinical Multiaxial Inventories
House-Tree-Person Figure Drawings
Trauma
TSI—Trauma Symptom Inventory
DAPS—Detailed Assessment of Posttraumatic Stress
MDS—Dissociation
Psychological Health of Children
Cognitive
WISC-III—Wechsler Intelligence Scale for Children—Third Edition
Personality
MMPI-A—Minnesota Multiphasic Personality Inventory for Adolescents
MCMI-A—Millon Clinical Multiaxial Inventory for Adolescents
School-Related Achievement and Learning Disabilities Tests
WRAT—Wide Range Achievement Test
Child Behavior Checklists
Achenbach Child Behavior Check List
Trauma
TSCC—Traumatic Stress Checklist for Children
(two versions—with and without sexual abuse questions)
Violence Risk Assessment
MacArthur Variables
HCR-20—Historical (10) Clinical (5) Risk (5) Factors (total 20 factors)
PCL-R—Psychopathy Check List-Revised
V-RAG—Violence Risk Assessment Guide
SO-RAG—Sex Offender Risk Assessment Guide
CAP—Child Abuse Potential
Custody Assessment Instruments
Achenbach Child Behavior Checklist (CBCL)
Bricklin Scales
ASPECT
CAP-2, PSI

the findings in your report. Remember if you find that more likely than not there has been domestic violence, the judge will have to take it into account when making final decisions. Document all phone conversations with interested parties especially attorneys. Most states have specific requirements for written reports in this area. These requirements may include the time by which the report must be submitted (often a certain amount of time prior to a scheduled court hearing), format of written report, rules to whom to send the report (i.e., in some jurisdictions all attorneys and the court must get the report at the same time).

13. Make recommendations about access to the child that are detailed and give specific changes needed as the child's developmental needs change. For example, while it may be appropriate for each parent to attend sporting and school events on a schedule when a child is ten years old, by the time that child becomes an adolescent, spending time with friends is more important, and there is need for a different kind of parental supervision.
14. Be prepared to give sworn testimony by carefully reviewing your entire file prior to being called as an expert. Review every page in the file and make sure it is reflective of the work you have done on the case. Review the findings and the data on which are based. Go over the raw test data to be familiar with the results. Make sure your documents are separated in files that are easy to find because of labels or other identifying features.

Challenging Parental Fitness and Custody Evaluations

It is not uncommon for one or both parents to challenge the custody report and its recommendations. Sometimes the challenge is to decisions that are based on inaccurate information. Other times the recommendations are not congruent with information on which they are based according to the report. If one of both parents finds that the recommendations of a parental fitness or custody evaluation are inappropriate and unworkable, they can be challenged. While it is always best for one or both parents to try to contact the original evaluator to discuss why the recommendations should be different, sometimes that is simply impossible for a variety of reasons. In those cases, a second evaluation may be requested and the court may order all parties to cooperate. If that does not happen, then an additional parental fitness examination may be obtained by one party to contest the findings of the other evaluation. If the evaluation appears to violate the standards of care that are set down by law or professional guidelines, then hiring a consultant to critique the methodology is an option. If the evaluation appears to be insensitive to or unable to assess the needs of the child, then it may be appropriate to place the child in therapy with someone who is well respected by the court and understands the relevant disputed issues, such as need for protection from an abusive parent. Therapists do not always want to get involved in legal disputes, so it is important to check this out first.

Coaching a frightened parent through the myriad of legal issues that evolve in a custody or access dispute is critical. Many lawsuits are fought over whether or not one parent can remove the child to another state. The parent who must remain in the location for business or personal reasons can learn how to keep contact with a child even if this does occur. Technology such as regular Skype, Zoom, FaceTime or other Internet and video calls makes connection possible even when parents live in different countries, today. Finally, parents who feel that the system is not responding to their needs can take political action. This is occurring within various organizations formed to support fathers' rights or protective moms' rights. Unfortunately, many of these advocacy groups get co-opted by abusive parents who use the group for their own personal vendettas.

There are many ways to protect a child from physically, sexually, and psychologically abusive

behavior by a parent even if it does not rise to the level of a child protective services intervention. First, psychologist Leslie Drozd suggests understanding alienation symptoms that a child might demonstrate on an attachment continuum that begins with equal attachments between both parents on one end of the continuum and alienation and estrangement on the other end (Drozd, Olesen, & Saini, 2013). Drozd defines ‘equal attachments’ as part of normal infant development for infants, children, and teens although there may be times when one parent is more relied upon as a caretaker than the other. ‘Affinity,’ the second point on the continuum, is a normal stage where the attachment to a parent depends on gender, interests, and ability to spend time with the child. ‘Alignment’ is another point on the continuum, where a child is more likely to attach to a particular parent as a normal response to maltreatment or mental illness. Here, the child may like to be with the other parent, provided he or she feels protected but it still aligned with the non-abusive parent. ‘Alienation’ is the fourth point on this scale where children respond to a parent where there is general dysfunction, alcoholism or drug abuse, extreme overprotective behaviors, abuse, and serious mental illness. ‘Estrangement,’ the final anchor on the continuum, is when the child does not want anything to do with a parent who has been abusive, neglectful, or in other ways harmed the child. Sometimes the child goes through a few of the earlier points on the continuum before reaching the alienation or estrangement stage witnessed by the court.

Custody and Access Recommendations

Custody arrangements can be as creative as the evaluator or parents suggest. They can permit access with a range of no visitation for a period of time, therapeutic supervision, supervised visitation, monitored visitation, co-parenting, parallel, or alternate parenting. They can include both parents sharing the child’s home on alternating time periods, each parent providing a primary residential home for a child in the same school district or neighborhood, or parents living in new homes with space for the children when they visit. Some parents divide the number of waking and sleeping hours in a child’s day and insist on sharing them equally while others let the child decide where to go and at what times. Holidays and special days such as birthdays, Mother’s Day, and Father’s Day need to be alternated unless parents learn to get along with each other. If something disrupts the schedule, it needs to be resumed as quickly as possible to give children the predictability they need. Children are remarkably resilient, but they need love, constancy and predictability, empathy, and understanding to overcome many of the natural feelings of anger and betrayal that many family members feel when a marriage dissolves.

Parents can begin new lives and integrate their children into them. This is especially popular if there are children from the new partner’s previous relationship or the new relationship that also get integrated. These new family networks are similar to kinship networks that exist in many non-Western cultures. While it is important to give the children time to adjust to each other, it is also important to treat them all as equally as possible to avoid jealousies that can be worse than normal sibling rivalries. Second marriages often dissolve when there are poor relationships with children from prior marriages. Perhaps the greatest challenge is to learn how to talk and listen to a child without burdening them with parental problems.

Empowering Children

Courts and evaluators need to understand the impact of maltreatment of children as more important than punishing a parent who offends the court by some particular behavior. Children who have lived in homes where they have not had any power to make some decisions for themselves, even if only to pick out what clothes to wear to school or what to drink with dinner, need to begin to feel empowered if they are to grow up mentally healthy and physically strong.

Custody and access recommendations need to take into account children's preferences, if they can express them, or at least attempt to give them power to make some of their own decisions. For example, a child who is required to visit a parent on a weekend when he or she has a special party or other activity to attend should have the right to negotiate with the parent so he or she may be able to attend the party. A child who spends time with a parent who has bipolar disorder and starts to go into a manic state should be able to call the other parent if they feel unsafe and go back to that home. If a parent gets drunk or abusive, the child should have an escape plan to stay out of harm's way. If it is affordable, I suggest teaching children how to use the computer and email to keep in touch with the non-residential parent. A cell phone is a necessity for teens to carry and use freely, so they can maintain contact with their peers. Digital cameras to send pictures back and forth are another way to keep up the attachment when physical presence is not possible. Parents who cannot communicate with each other should send faxes with reasonable instructions, like any medication or special needs for the child, when switching homes. It is most important to remember that children often blame themselves when parents separate so they must be reassured that it is the parents who are getting a divorce, not them.

Summary

In summary, this chapter attempts to take us through the often murky and unpleasant world of a child custody or parental fitness challenge. Some of the most bitter battles are fought by parents over children without realizing the tremendous emotional damage that the battle itself does to the child. While children are resilient in most cases, those who have been exposed to homes where one parent displays an excess of power and control whether or not it leads to actual physical violence, where there is alcohol and drug abuse by one or both parents, and where there is serious mental illness resulting in child maltreatment have special needs. We have tried to discuss the performance of a custody evaluation with the assumption that abuse may be one of the allegations to be assessed.

The legal standards, levels of proof, and rebuttable presumptions that govern the courts when they make the decisions about access to children have been described. Obviously, it is always better if parents can come to joint decisions putting their own needs aside for the good of their children. While joint or shared custody is considered in the best interests of the child, in fact, there are no research data to support that it is really the best arrangement for most children, especially if the parents cannot agree. Self-interest including financial interests and personal preferences may enter into disagreements about custody and access. If a custody evaluation that includes interviewing all parties is impossible due to noncooperation or other factors, then a parental fitness evaluation can still be presented to help the court make these difficult decisions. Sometimes creativity in access arrangement is necessary to foster the attachments between a child and a parent. The bottom line, however, is to always keep the child's safety and needs as the priority in making such decisions.

Questions to Think About

1. Can you think of times when joint or shared parental custody of children would be the best arrangement in a family where separation and divorce are imminent? When might it be the worst?
2. Do you think the judge should listen to a nine-year-old child's wishes about where they want to live? Is there any age where the child's wishes should be followed? What would the range of reasonable arrangements be?

3. Do you think a child should be forced to spend equal parenting time with both of their parents? Why or why not.
4. Can you think of what skills you would want a competent parent to demonstrate in a custody or parental fitness evaluation?

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16 Protection of Abused Children, the Mentally and Physically Challenged, and the Elderly

The Miami Herald headlines screamed that five-year-old Reyla Wilson was missing and no one had seen her for almost two years. Where is she? How can the Florida Department of Children and Families have lost a foster child in its custody? In New Jersey the Newark Star Ledger also had screaming headlines accusing the New Jersey Department of Children Youth and Families of failing to protect two little boys in its care each killed by a caretaker. In city after city the headlines tell the story of children who are killed by family members. Isn't the child protective services system supposed to prevent this from happening?

Introduction

The duty to protect children and other vulnerable populations (those who cannot protect themselves) is delegated to each state's child and family protective services agency. These agencies might be named differently from one state to the next, such as child protective services (CPS), Department of Children and Families (DCF), Department of Child and Family Services (DCFS), Department of Social Services (DSS), or Department of Human Services (DHS), among others. For consistency in this chapter, we will primarily refer to CPS or DCF, or to the more general "protection system." Of course, as we suggest throughout this book, we encourage you to look up your own state's agency terminology and keep in mind how there might be differences as you read through the following sections.

The protective agencies such as DCF operate as a part of each state's division of U.S. Health and Human Services, and they must follow their state's respective laws as well as applicable federal laws. As we noted before, these agencies are tasked with protecting citizens who cannot protect themselves from harm, generally children, the elderly, and those who because of mental incompetence (often defined as intellectually limited, neurologically impaired, or severely mentally ill) as well as other disabilities. In this chapter, we will provide an overview to explain the system, review definitions that vary from state to state and under federal law, and discuss its benefits and drawbacks.

One of the cornerstones of the protection system is the mandated reporting laws that require mental health professionals and others specified in the statutes to report any suspicion that those covered by the laws are being harmed. The precise definitions are discussed below, and, predictably, each state has slightly different requirements for their mandated reporters. For example, in Florida, a report must be made within 24 h of learning reasonable suspicion of abuse that is occurring, while other states may have different timelines. As might be imagined, these reporting statutes also have their benefits and limitations. To make matters even more complicated, the protection system must interact with the criminal justice system and family law systems when there are cases that are filed in

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these divisions, also. In some districts, there has been a movement toward a Unified Family Court where all three divisions can come together and dispose of cases within the same family to streamline the proceedings.

Let's look at a quick overview: the child and family protection system directly investigates reports of child abuse, abuse of the elderly, and harm to others who cannot protect themselves and provides them with appropriate services. It also deals with the prevention of further harm by overseeing a system of foster care and homes for children, adults, and the elderly, which are usually called assisted living facilities (ALFs). The foster care system where children are placed after being removed from their homes is divided into family (or "kinship") care and approved foster homes. Since many of these children's parents or relatives continue to be unable to care for them even after services are provided, this may lead to their adoption, so adoptions are also placed in this division of the legal system. Finally, many of these individuals need treatment to overcome the effects of trauma, so the regulation of residential treatment centers is also assigned to this court.

As might be expected, the numbers of cases of abuse overwhelms the system. In 2001, approximately 4.1 million referrals concerning the welfare of over 7 million children were reported to CPS agencies across the country as suspected of being abused or neglected. In roughly 16% of those reports, the investigation found a child to be at risk, or already abused and maltreated. Although the rates of reporting suspected abuse have been increasing, cases of finding actual maltreatment appear to be on the decline overall. The National Clearinghouse on Child Abuse and Neglect Information serves as a resource for national data on child maltreatment reports and publishes the National Child Abuse and Neglect Data System (NCANDS) and National Incidence Study of Child Abuse and Neglect (NIS) at regular intervals. These are updated regularly and are available at their website, which would be an excellent resource if you're looking for more specific information or detail than is provided here (https://www.childwelfare.gov/topics/systemwide/statistics/nis/).

States also must provide services for children who have special needs. To fulfill this mandate, the social services systems interact with the school systems and medical facilities on behalf of these children. When they are out of school, the state has the responsibility of providing adult vocational training programs, daycare centers, and residential facilities in addition to the ALFs mentioned earlier. In most states, the protection of the elderly comes under the same department's care and protection. Probate court, which determines competency to care for one's basic needs, may also become involved when abuse reports are made. To further complicate the picture, if abuse is determined to have occurred toward anyone in this system's care, the state may also file criminal charges against the abusive parent or caregiver, adding a third legal proceeding with yet a different standard of proof required.

Definitions

Child Maltreatment

As we have seen in other chapters where definitions of an act are based on law, each state and the Federal government have slightly different definitions here as well. In some cases, there will be laws passed by Congress that suggest states follow a particular definition, but these usually are only guidelines to be sure all the elements are covered. "Child maltreatment" is the term used to cover all forms of physical abuse, sexual abuse and exploitation, neglect, abandonment, medical neglect (although usually not if caused by poverty or religious beliefs), psychological and verbal abuse, corporal punishment, and intentionally or unintentionally committing, causing or permitting actual harm or threats of harm to a child. In 2017, almost 675,000 children were found to have been maltreated. Slightly more girls (51%) than boys (48.6%) were reportedly abused. About 44% of the victims were white, with about 22% Hispanic and about 21% African American. Overall the rate of abuse is inversely related to the age of the child with children from ages birth to 3 representing 28% of the victims. In 2017,

1688 children died of child maltreatment, with the youngest children being the most vulnerable. Nearly one-half of the deaths were children under the age of one year and 74% of the children who died were under the age of three (United States Department of Health and Human Services, 2019).

Physical Abuse

Physical abuse of a child is defined as inflicting physical injury on a child by hitting, kicking, punching, beating, throwing, biting, burning, starving, or otherwise physically harming a child. The injury may be a result of one severe incident or cumulative from several injuries. The trauma can be minor, resulting in bruises and abrasions, or major, with injury to internal organs such as the liver or head trauma. Physical abuse of a child also includes bizarre forms of abuse such as locking a child in a room or closet for days/weeks at a time, forcing participation in satanic cult-type rituals, tying a child up to restrict all movement for long periods of time, and forcing the child to drink so much water that his or her electrolytes are disrupted. Physical abuse also includes the use of torture such as electrical stimulation with cattle prods, confinement in a coffin, and forcing the child to walk for long distances in the cold until the child drops from exhaustion. As you can see, child physical abuse encompasses much more than the commonly thought-of hitting or kicking. Almost one-fifth (18.3%) of the child abuse cases reported in 2017 involved physical abuse, with approximately 41% of child abuse-related fatalities coming from the physical abuse category.

Sexual Abuse and Exploitation

Sexual abuse includes a very broad range of behaviors that range from exposure of the genital area, to inappropriate touching or fondling (with or without clothes), and forcing or coercing the child to perform sex acts (whether or not the child stated they "wanted" to participate), including digital, manual, oral, or penis–vagina penetration. Sexual exploitation includes the above, prostitution, electronically recording, and selling pictures of the child commercially, Internet child pornography, or other ways of sexually interacting with a child and others. It is not difficult to imagine the complications that have arisen, from an investigation and prosecutorial standpoint, as a result of Internet advances and social media. Parents and caregivers are the most frequent child sex abusers. Although there are some treatment programs for abusers, rarely are they successful unless they have relapse prevention components that include no contact with children. We discuss this further in other chapters.

While incest between fathers and daughters or sons is the most frequently reported form of child sexual abuse, others in a position of authority have also abused and exploited children. This includes athletic coaches, teachers, and religious leaders. The headlines have become more padded with breaking stories concerning the sexual abuse and exploitation of children. The large numbers of altar boys who were sexually abused by priests in the Catholic Church is an example of how a hierarchical network of priests could and did cover up this abuse, sending priests known to have committed child sexual abuse to another community where they had access to even more children. In recent years, we have seen the names of famous comedians such as Bill Cosby, sports icons like Jerry Sandusky and Joe Paterno, wealthy icons such as Jeffrey Epstein, and physicians such as Larry Nassar of U.S. Gymnastics gracing the news, always with heartbreaking stories of widespread sexual abuse of minors. But we must remember that sports teams or public areas are not the only places children are targeted. Children may be abused in groups or individually, in homes, cars, churches, schools, swimming pools, locker rooms, or anywhere that children are found. They may also be forced into ritual and satanic abuse or other bizarre activities that sound unbelievable but have been known to occur. We shall discuss the damage that occurs when children are sexually abused later. Approximately 9% of children who were reported as abused in 2017 were found to have been sexually abused (United States Department of Health and Human Services, 2019).

Emotional or Psychological Abuse

Emotional abuse, also often called psychological abuse, is defined as acts or omissions that caused, created, or threatened to cause serious emotional, cognitive, behavioral, or mental disorders in a child. These acts or omissions are usually made by parents, relatives, or caregivers, although the definition surely does not limit the actions to only caretaking figures. It includes a number of behaviors on a continuum from belittling a child, cursing and name calling, making damaging derogatory comments, scapegoating, and humiliating, to isolating, screaming, raging, and rejecting the child. Indeed, even the witnessing of these behaviors toward another person in the child's environment, such as in cases of domestic violence where the child is never actually targeted by either physical or verbal behaviors like those described, can have significant psychological impact on a developing child (Walker, 2017). For this reason, several jurisdictions now consider failure to protect a child from witnessing domestic violence as emotional abuse. Emotional abuse cases accounted for nearly 6% of the cases reported (United States Department of Health and Human Services, 2019).

Child Neglect

Child neglect is not providing for the child's basic needs, and it falls into different categories based on what type of needs are not being met: physical (such as food or shelter), educational (such as getting or keeping a child in school, or providing resources such as class materials), emotional (which includes, for examples, withholding of all affection or attention, or not speaking to a child for lengthy periods of time), and medical (such as withholding medical treatment for illnesses or injuries). Usually, not providing something the child needs because of poverty or religious belief is not considered child abuse, although it may harm the child. In cases where poverty is determined to be the reason for neglect, state protective systems will often still step in and provide resources and assistance to help a family, as opposed to removing a child from a parent's care, unless there is imminent risk of harm of death. Take as an example a child born with birth defects who is prescribed specialized medications and medical procedures requiring expensive equipment that must be maintained. While the state may recognize that medical neglect, in this case, might be due to poverty or lack of education, the system will not leave a child in place in a home where they do not receive the necessary care while helping the parents to bolster their financial ability to care for their child. Instead, the child would be placed in a specialty foster home while services are provided for the family. As you can surely imagine, cases involving religious beliefs are quite complicated and create murky legal waters, as the system aims to respect a family's religion while also maintaining their responsibility for child safety. More mothers are found guilty of child neglect than of physical or sexual abuse of the child. Neglect cases accounted for roughly 75% of the child abuse cases reported in the U.S. in 2017 (United States Department of Health and Human Services, 2019).

Abuse of the Elderly

Although there are different statutes that protect the elderly from abuse and neglect, the illegal acts are similar to those listed above for child abuse. In the elderly, the most frequent abusers are caregivers and adults responsible for the care of elderly parents and grandparents. These could be younger family members such as children, grandchildren, or nieces and nephews, or the caregivers could be trained professionals who work in ALFs or as home health aides or medical professionals. Indeed, recent stories about the state of the ALFs mentioned throughout the chapter highlight the concern about abuse in these facilities. In the wake of Hurricane Irma in 2017, several elderly residents of a South Florida nursing home died of complications of heat exhaustion when the residents were not moved from a powerless facility where no generator was running for days (an extreme example of neglect). During the corona virus pandemic in 2020, ALFs and nursing homes accounted for about half the deaths for a variety of reasons. However, if we looked more closely at physical abuse cases, we would also likely find a

high rate of elderly husbands who are still abusing their elderly wives. On the other hand, there may also be high numbers of elderly men who are being abused by wives whom they previously abused when they were stronger and less vulnerable. Given the graying of America and the rise in the numbers of the very old who need adequate care facilities, there is great and growing interest in preventing elder abuse by exploitation, neglect, starvation, medical neglect and malpractice as well as physical maltreatment.

Impact from Abuse

Child maltreatment has known detrimental effects on the physical, psychological, cognitive, and behavioral development of children that lasts long into adulthood. An important study of Adverse Childhood Experiences (ACEs) was conducted by the Centers for Disease Control (CDC) and found significant damage to the participants health and lifestyle (Felitti et al., 1998). These consequences range from minor to severe and include physical injuries, brain damage, low self-esteem, problems with attachment in relationships, developmental delays, learning disorders, mental illness, and aggressive behavior. Some of the mental illnesses associated with child abuse include post-traumatic stress disorder (PTSD), depression, anxiety, borderline personality disorder, conduct disorders, and substance abuse disorders. In more serious cases of child sexual abuse, we have evidence of dissociative disorders and even schizophrenia spectrum disorders that have developed. Many physical illnesses have known association with childhood abuse, including (but surely not limited to) those that involve a breakdown of the immunological system such as Lupus, Fibromyalgia, and cancer. New studies have demonstrated the impact of abuse on the brain development of children, showing evidence that childhood abuse can result in structural changes to the brain and its future development, which can have far-reaching impacts throughout life. These impacts can include the child's educational and career aspirations as well as emotion regulation, interpersonal relationships, and decision-making capacities. Not surprisingly, the percentages of people in prison for all types of crimes who were abused or maltreated as a child number close to 85%. It seems that putting some more money into prevention and early intervention programs might save significant resources—both financial and emotional—on the other side.

Costs of Maltreatment

Direct costs of child maltreatment reflect the dollars spent by the child welfare, judicial, law enforcement, health, and mental health systems as a result of the maltreatment. According to the Centers for Disease Control (CDC), the estimated annual cost of child maltreatment was a staggering $124 billion (2012). This includes the costs of protective services, foster care, legal and law enforcement costs, health costs of low birth weight babies, medical treatment of injuries from abuse and other mental health services (such as evaluations and classes for parents, discussed later), special education costs, early intervention, psychological care for maltreated children, juvenile justice system and correction services, and adult criminality. In addition, indirect costs include lost wages, lost sales tax from children's deaths, teen pregnancies, welfare dependents, domestic violence, and other problems, bringing the totals to unfathomable amounts of money that must be spent on a cycle of abuse that continues to repeat itself. This does not include the money spent on child custody and visitation battles raised by domestic violence perpetrators, who themselves had a high rate of exposure to child abuse. Various groups have tried to place dollar amounts on the total cost of maltreatment as a way of influencing policy-makers to put more money in the front end to prevent or treat early abuse.

Foster Care, Adoption, and Fitness to Parent

One remedy to stop child abuse by a parent is to remove the child from the parent's home and place the child in foster care or kinship care,

which you may recall means the child is living with a non-parent familial relative. The state delegates the authority to CPS to take custody of the child and provide for their needs while "sheltering" the child. Some CPS agencies handle their own foster placement systems or networks, while others contract out to companies or other agencies who license and coordinate foster parents. While the child (ren) is in foster care or kinship care, CPS will provide case plans or treatment plans to the parents, outlining a list of required services (psychological evaluations or parent training classes, for example) and other mandated actions such as securing safe and suitable housing, if this was at issue. During this time, the children and parents will have scheduled visitation opportunities, and these may be unsupervised, supervised by a family member or CPS, or therapeutic supervised, which we elaborate on later.

The court oversees how CPS handles each case by demanding reviews on a regular basis after the initial treatment plan is approved (sometimes monthly, sometimes every two or three months depending on how long a child has been sheltered by the state, how the child is adjusting and handling the circumstances, and how the parents are proceeding through their case plans). One problem that was raised in the earlier chapter on custody and visitation is the mandate for the reunification of the family, in this case between the offending parent and the child. If the parent does not complete the reunification plan, for a variety of reasons, then the children may be placed for adoption. Each state designates a different timeframe for when they expect reunification to occur by, although exceptions can and are frequently made in order for the state to make every possible effort to reunify biological families. As you can imagine, in some rather sad examples, cases can become drawn out based on legal challenges and children can languish in the foster care system for extended periods of time, sometimes even several years in extreme cases.

Fitness for Adoption and Foster Parenting

A special area that differs some from custody determinations where one or both parents are the biological ones occurs when families are trying to raise children who are not related by blood. In many states, relatives who wish to care for a child can apply for "kinship care" and can step into the fostering role while children are sheltered by the state, or they can request to adopt the child if the court refuses to reunify the child and parents. Sometimes the state grants financial assistance to these relatives in order to promote the continuation of family ties. However, careful psychological evaluation of the best interests of the child does not always occur in these particular cases (although they should) and social conditions that breed poverty and abuse may remain untouched. These authors have noted that in recent years, psychological evaluations of pre-adoptive relatives seem to be on the rise, suggesting that judges and caseworkers are recognizing the need to take a holistic look at families and children's needs.

In cases in which a non-biological and non-family person wishes to raise a child, this usually occurs by foster parenting or adopting a child. If the foster parent does not adopt the child, the state will continue to provide financial assistance to the foster parent while the child lives with him or her. If an adoption takes place, the parent is then on his or her own financially and state funding and coordination of beneficial services will cease. This occurs because once a foster parent (or any adoptive parent) adopts a child, then it is assumed the family will now function as any other family unit would, with parents financially and practically supporting children.

Forensic psychologists may be asked to perform evaluations to determine if someone is fit to parent or whether a particular foster or pre-adoptive parent will be likely to be a good match for a child. Sometimes the question for the forensic evaluator is an easy one. This might be

where the child is already flourishing in a foster home, the foster parents want to adopt the child, and the biological parental ties have been broken. Here, the mental health professional must comment on the fitness of the foster family to meet the best interests of the child. These cases may be heard first in juvenile court where the state agency with responsibility for child protection has followed a permanency plan that resulted in the termination of the parental rights to the child. Family caseworkers following standards outlined in Public Law 105–89, the *Adoption and Safe Families Act of 1989* may already be involved and the subsequent long-term foster care or adoption proceedings are simply a pro forma continuation.

In some cases, it gets more complicated, especially when a child has special needs in some way, when there are mixed races between the prospective adoptive parents and the child, or when gay and lesbian couples are the prospective adoptive parents. It is of course possible to challenge outdated state laws on these issues with psychological data indicating that there is no psychological evidence that gay, lesbian, or bisexual birth or adoptive parents intrinsically have a negative impact on the children involved; however, heated emotions, religious concerns, and conservative ideology may make it difficult if not impossible to overcome the myths in some areas. An example is a Florida decision to ban the adoption of one parent's biological child with her Lesbian partner, even though she had been co-parenting the child together with her partner, which demonstrates the difficulty in getting the court to base such a decision on scientific data.

In performing an evaluation for adoption, it is also necessary to include information about the adoptive parents' reasons for wanting to adopt the child, especially if it is not an infant. It may be important to know about their determination of infertility and ability to psychologically accept a non-biological child of a different age, race, religion, or culture, and willingness to provide for a child with special needs, if that is relevant. Information about why a particular child is available for placement may also be relevant, such as kinship issues, financial difficulties of the birth parent, health of the mother, or other reasons for her unavailability, such as incarceration. Now that adoption records are more accessible to both birth parents and adult children, newer forms of adoption are available, such as leaving records open at the child's birth instead of sealing them, arranging for adoptive parents to have structured or flexible contact with the birth parent, or keeping contact with cultural or kinship ties in international or interracial and transracial adoptions.

Most adoptions are handled by private and public agencies. These agencies have the responsibility to perform evaluations of adoptive parents and available children. Usually the court recognizes the work of the agencies and finalizes adoptions faster than if the evaluations are made through private attorneys and mental health professionals. Although the *U.S. Multiethnic Placement Act of 1994* prohibits adoption agencies from receiving federal funds if they use race as a sole criteria for adoption placements, psychological findings indicate that a connection to a child's racial and ethnic heritage is important to healthy development.

The laws covering state and international adoptions are quite complicated and require specialization. In the seven-year period between 1988 and 1995, in the U.S. there were over 10,000 adoptions of poor, lower socioeconomic status toddlers who did not speak English as their first language, many of whom came with health and malnutrition problems. Bureaucratic red tape snafus caused many of delays in bringing these children to their new homes, creating even more psychological and developmental problems. Although some religious groups did help these adoptive parents to anticipate dealing with these children, most were not prepared for the extent of difficulties they would experience. Today, 13 countries have adopted the rules proposed by the 1997 *Hague Private Law Convention on Protection of Children and Cooperation in Respect of International Adoption* and the 1989 *United Nations Convention on the Rights of the Child*. After a peak in 2005, the rates of international adoptions have drastically declined, with only 5370 children from other countries being adopted

by Americans in 2016 (Budiman & Lopez, 2017). The United Nations has supported the development of children's legal rights around the world and serves as an important resource for those who work in this area. We discuss these legal rights for children further in Chap. 20.

Intervention Programs

The most recent reports indicate that parents and other caretakers are the most likely people to abuse a child. As has been the case for years now, the majority of those reported to have maltreated a child are women (54%, although this proportion is evening over the years), with an average age of 31 years old as compared to 34 years old for the men. About 69% of the children who were maltreated were abused by their mother, either acting alone (nearly 41%) or with a father or a nonparent (28%). However, it is important to remember that women spend more time with children than do men. Males are most likely to commit the serious, life-threatening physical and sexual abuse against children.

There are a variety of intervention programs for parents who are accused of abusing their children. The most common are the low-cost educational "parenting classes" that are usually run by local agencies who get referrals from the different branches of the court, in particular, the family and juvenile court systems. In some jurisdictions, and where providers are available, parent education training can be conducted in a one-on-one, more therapeutic format, although these do typically remain primarily psychoeducational and manualized in nature. Treatment programs for parents who abuse children tend to be much more expensive and difficult to find. Gold if the abuse was caused by or related to a substance abuse problem that the parent has, there may be community programs in the substance abuse community. If domestic violence coexists (there is a 60% overlap between child and woman abuse) battered woman shelters and court-ordered offender treatment programs may address the parenting concerns (Walker, 2017). But, if the abuse is because a parent is mentally incompetent to take care of their children, there are few programs available. Along with more discussion of different general intervention options, we will also discuss two model programs: a Florida program called OPTIONS for seriously mentally ill women who are involved with the criminal justice system, and the Southern California PROTOTYPES program for substance abusing and mentally ill women. The reader is encouraged to remember that these are to be considered as models only, although there are more of these programs available across the country than there have been in years and generations past.

PROTOTYPES: A Program for Substance Abusing Women

Many moms are unable to properly care for their children because they have a substance abuse problem that needs treatment. PROTOTYPES provides a residential program where moms and their children can live together while she learns to stay sober, gets help for any mental health problems, learns how to stay out of domestic violence relationships, and how to parent her children. The children are placed in school and mental health programs that include establishing good peer relationships which many of them lack. Both moms and children have difficulty attaching and bonding to relationships, so the program focuses on these areas, too. This is also a step-down series program with moms coming alone first after they detox and begin their substance abuse program. They add a domestic violence prevention component shortly after. If appropriate, they may be offered individual therapy in addition to the groups they attend. Women without vocational skills may also begin training programs once they are stable. A step-down program reintegrating the mom and children together begins with supervised therapeutic visitation when the CPS caseworker brings the children to the PROTOTYPES center, increases to mom and children monitored in different activities, and finally, unsupervised or monitored time together when the children are returned to

live with the mom and the PROTOTYPES residence. Once the women are discharged from the residential facility, they continue to participate with a caseworker and therapist where appropriate. In some other communities, like the program run by the Miami League of Women Voters, there is a stage 2 residential facility that provides even longer support for those who also experienced domestic violence.

OPTIONS for Seriously Mentally Ill Women

The OPTIONS program was begun as a day treatment therapeutic community for seriously mentally ill women who were involved in the criminal justice system. The 69 women who were a part of this intensive program had almost as many children together although some women had none and others had several. Most of their children were in the care of CPS or relatives, as these moms could not adequately care for them. As might be expected, most of these women had been abused as children or in their adult lives. Their diagnoses centered around schizophrenia spectrum disorders and bipolar and affective disorders in addition to PTSD. The women participated in a variety of group programs, including parenting modules, and those who had access to their children were encouraged to bring them in at specific times for hands-on parent training.

Parenting Classes for Abusive Parents

The assumption is made that an abusive parent will commit abuse or fail to prevent it from occurring if that parent does not have knowledge of what to expect from a child developmentally, does not know of discipline alternatives to corporal punishment, or uses the child to make up for deficits in his or her own life history. In fact, a large number of child abusers do need education about children's needs, and, for them, parenting classes may be helpful. However, another group of parents, usually women, fail to protect their children because they cannot even protect themselves from violent and abusive partners. These protective mothers may be forced to co-parent their children by a family court that is insensitive to the danger both the mom and children are in when the dad is willing to abuse power to control them. We have discussed this earlier in Chap. 15.

Parenting classes are not sufficient or helpful here, either for the moms or for the dads who are court-ordered to attend. Especially in the case of fathers who are also abusing their spouses, issues related to power, control, and rigidity can be complicating factors in reducing child abuse rates. The dads need a more hands-on approach so that they can be told immediately when they are inappropriate or miss the signals their child is giving them, or to help them learn to be more flexible or to relinquish some of their control in a healthy manner. Many of them learn to repeat back in a rote manner what they are supposed to do but haven't a clue as to how to apply what they learn in real life. They need a step-down series starting with didactic parenting classes, then supervised therapeutic visitation, then supervised visitation, and finally short periods of unsupervised visitation with monitored pickup and return of children.

Programs for the Elderly

Although physical abuse is a problem with the elderly who are dependent upon caretakers who are untrained, unsupervised, or just worn out, it is neglect that poses the biggest challenge for communities today. The largest number of very elderly—over 80 years old—are women who live alone, are lonely, and do not have enough money to purchase sufficient food, medication, and other necessities of life. They are often unable to drive or to get around on their own as they approach 90 years old but if their minds are still active, they do not want to be sent off to assisted living centers. Few grown children are able to have their parents or grandparents live in their homes, and many live too far away to provide much assistance. There are some community programs that provide meals to seniors,

and other organizations and religious groups provide some small amounts of home care, but basically the elderly in the U.S. tend to get little assistance as they age. In some locations, however, agencies and/or mental health providers have begun to visit ALFs or even elderly individuals who are still living at home in order to provide psychological services to assist with adjustment, depression, anxiety, and the many emotional elements connected to aging. Insurance companies such as Medicare often approve and pay for these services since improvements in psychological health of the elderly tend to lead to reduced costs for medical care. For example, a severely depressed person may not take heart medication regularly and may require frequent hospitalization, whereas a similarly-aged individual who is in therapy and less depressed may be more consistent with medications and suffer fewer medical complications.

Mentally Challenged Adults

Mentally challenged children are provided with special education programs until they turn 18 years old (in some communities the age is 21 years old) and then the state must take over providing them with services if the parents cannot do so. There are sheltered workshops and other vocational where they learn skills that may be helpful in the community, assisted living facilities and group homes, and residential centers for those who are too profoundly developmentally disabled to live by themselves in the community. The state does take responsibility for providing programs and protecting these citizens although most of the responsibility falls on the family.

Individual Psychotherapy and Case Management

Children who have been abused are often placed in individual therapy programs to heal from the abuse they have experienced. In the past twenty years, techniques to deal with specific problems commonly seen in abuse victims have been developed. They are too numerous to address here. However, it is important to note that like others who experience PTSD and associated disorders, these children need therapeutic assistance so that the adaptations and accommodations they made to protect themselves as best they could do not become part of their adult personality patterns (Ashford, 1999; Gold, 2000). Mental health centers, schools, church groups, and trained private practitioners are available to provide such services.

It is more common for adults who were abused as children to wait until they begin to develop chronic or serious mental health symptoms as adults before they seek therapy for their problems. Women and men do not always experience the effects of abuse right away, and in fact they might be okay for many years, sometimes developing specific problems when they become parents themselves. Like the exposed children, adults also have a choice of different treatment modalities although those in rural areas often have more difficulty finding trained clinicians (Courtois, 1999).

We still don't know why some people develop certain symptoms and disorders and others develop different ones when they were all exposed to the same type of abuse. In fact, we do not know why different children in the same family develop differently. For example, five children in a family where the parents were alcoholic and neglected them can turn out differently with some becoming educated professionals and others being unable to hold a job or stop their own substance abuse or domestic violence when adults (Gold, 2000). As we discussed in Chap. 10 on interventions in forensic settings, theorists who work in the field of substance abuse differ in whether the problem is viewed as an addiction, a disease, or a behavior control problem.

Most studies find a definite gender difference in the impact of child abuse with boys more likely to use violence in their own lives and girls more likely to be the abuse victim. In one such study boys who were exposed to violence in their family were 700 times more likely to become

abusers. If those same boys were also abused themselves, the risk of becoming abusive was raised to 1000 times children who were not abused (Kalmus, 1979). New brain imaging studies have found problems with dysregulation of emotions and other PTSD-related problems in children who have been exposed to abuse.

Civil Lawsuits

In addition to treatment, some adults who were abused as children file lawsuits against their abusers. These cases are more successful when the defendant is not related to the plaintiff, such as the clergy, a teacher, or someone else with "deep pockets." If parents or other relatives are sued, it often causes serious splits in a family that make it difficult for the plaintiff to ever have a supportive relationship with some family members. If other children were also involved, it may give the plaintiff a natural support system. As difficult as these cases can be for the plaintiff, it also can be therapeutic to confront the abuser and force and apology. As we have stated in other chapters, a civil lawsuit can only give a plaintiff financial compensation for the damages he or she has experienced. Forensic psychological evaluations to document psychological damages are often required by attorneys who take these cases to trial.

Summary

In this chapter, we reviewed the laws that have been passed to protect children, the elderly, and others in protected classes who have special needs. The child protective services agencies throughout the country have been under scrutiny for their inability to protect children. Reasons for the difficulties include the social mores that protect the family unity and ignore many reports because of poor investigations. The youngest and least experienced workers are assigned to protect children and while many are dedicated to their work, their caseloads are enormous and the resources to back them up are limited or non-existent. Children who are abused often give many clues but do not put it all together for the adults who could protect them. The relationships between them and their parents are complex and include both love and fear of further harm. They learn to accommodate to the situation, keeping the parent as calm as possible. Foster families are not a good solution for most of these children whose needs are great and resources are few.

Adding support to the mother or natural family is another possible way of offering them some protection. Adoptions are often a good way to help children find a good family. International adoptions and those with hard-to-place children challenge the system but when they work out, everyone is happy. Interventions with abusive families involve long hard work and often require protecting the child while the parent gets it together. Residential programs where mothers and children can come together to learn new ways of relating to each other seem to have good success rates. Battered women shelters, substance abuse treatment programs, and residential or day treatment programs for women with serious mental illness all help mothers deal with raising their children. Programs for men, however, tend to be less successful, perhaps because there are so few with hands-on experiences as compared to programs for women. Programs for the protection of the elderly as more difficult to locate and fund but do exist in certain communities. Other programs work with the mentally challenged and disabled populations that also need special protections.

Questions to Think About

1. Would harsher punishments for parents and caregivers help to reduce the maltreatment of children and the elderly? Or would greater access to resources and education be of greater benefit? Why do you think so?
2. Some argue that it is unfair (and even potentially discriminatory) that adoptive parents often have to undergo psychological evaluations to assess their parental fitness. What are your thoughts on this argument?

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17 Reproductive Rights and Assisted Reproductive Technologies

Introduction

When we deal with legal issues around women's reproductive rights, we are into a new area of constitutional law upon which the decisions are made. One of the most fundamental human rights declared by consensus in all the major international organizations is access to good health. For women control over their own sexuality and fertility is seen as basic to their good health and empowerment. It is necessary for women to control when and if they have a child in order to live healthy, productive and fulling lives promised by the U.S. Constitution. Thus, the fewer laws that attempt to restrict women's access to health care, the healthier women will be as most laws interfere with the basic human rights or privacy guaranteed in the constitution. States may pass such laws if there is a compelling reason, but they will be scrutinized at the appellate level to be sure they are not unnecessarily interfering with those basic human rights. There are several standards that are used including terms such as *equal protection* (which means that women are not being unduly discriminated against), *right to privacy* (which means no unnecessary interference with women's right to make her own decisions), and *undue burden* which means that the benefits of the law are not sufficient to cause women major difficulties or burdens in following it. In the case of women's reproductive health, the state has claimed it has *a compelling interest* in making sure conditions are such that women's health is protected. Religious advocates claim the embryo or fetus has its own legal rights, also. Abortion advocates have claimed that women's access to safe and cost-efficient abortion is a necessary part of women's health and legal restrictions that interfere with such access violate women's rights guaranteed under the constitution. The minority of U.S. citizens who oppose abortion do not accept that women's rights are more important. For the past 46 years, after the USSC decision in *Roe v. Wade*, mostly male state legislators have tried to find ways to abolish women's right to abortion by continuously passing laws that interfere with ability to access abortion in various states. The latest case that was decided by the USSC, *Whole Woman's Health v Hellerstedt* in 2016, continued to affirm this constitutional right by a vote of 5 to 3 but with two new justices on the court, there is question about how they will decide any case that comes forward.

In addition to cases around termination of pregnancy, another related area for women is control of whether or not they become pregnant. This means affordable access to good, reliable contraception. We discuss this area and cases where women (and men) were criminalized in some states for seeking birth control methods. Finally, we explore the world of reproductive technologies and how they have changed the ability for women who want to have a child but cannot conceive or carry a fetus to term, usually due to medical limitations. Assisted

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Reproductive Technologies (ART) provide the ability of many of these women to bear a child even after they pass the usual reproductive age by harvesting and storing their *ovum* (eggs). However, it brings with it more legal complications especially if ova are fertilized and then frozen and then the woman or her partner changes their mind or the couple divorces. Also interesting are liability cases against clinics that promise to store the ovum, gametes, or embryos but fail. Two examples will be presented: the University of Cleveland whose clinic malfunctioned and over 4000 frozen embryos were lost and government action in Poland that has barred women from accessing their frozen embryos.

In this chapter we will cover several of the important issues regulated by international, national, and state laws. We discuss the history of the regulation of contraception and abortion since that is the area that gets the most attention in the general public as well as mental health practitioners. Knowing the law is important when counseling patients or consulting with authorities. Some of the cases have been litigated with expert testimony from psychologists, especially when the attempts to regulate include misinformation about potential psychological harm. Research has found that there is no such disorder as a post-abortion syndrome nor does abortion itself cause any harm to women's health if performed under proper conditions. The more accurate information women obtain prior to making the decision whether or not to have an abortion, the better their outcome.

We also discuss access to abortion for girls, especially those who become pregnant through sexual assault or rape. Whether or not teenagers have the ability to make their own choices without interference from their parents or the state has been litigated over the years with a compromise in place in many states where if a girl chooses not to notify or get consent from a parent, then a judicial by-pass can be used with a judge granting the girl's petition to the court. This option is important for girls who come from dysfunctional or abusive homes. Many parents are dealing with their own problems including opioid or other addictions and are not available for their teenage daughter's needs.

The other side of control of fertility is the desire of some families to have a child but who are unable to conceive for a variety of reasons. The use of *Assisted Reproductive Technologies* (ART) has become an important way for them to have a child. There are new laws that have been passed, some in order to protect surrogate carriers from becoming slaves like in Atwood's *Handmaid's Tale*. Other laws have been passed to protect distribution of the fertilized gametes or pre-embryos that are frozen for possible future use especially if the couple is no longer together. And finally, we discuss the ability of women to freeze their ovum postponing their desire to become a mother until well beyond the usual child-bearing age.

History

The history of the control of women and children by their husbands parallels the history of reproductive rights and the law. Many believe that the new women's movement really began when the rights of a woman to choose if and when she would bear a child became legal. There are some who believe that the institution of monogamous marriage itself was created by men who needed to know who are their progeny and only if they found a way to keep women monogamous would that be a certainty. The history of the marriage contract declared that those who entered into marriage became one body, and the governance of that body was by men who retained all the rights. For example, Brownmiller (1975) in her book *Against Our Will: Men, Women and Rape* suggests that in olden days when we were a nomadic people, women married one man to keep from being raped by many men.

History tells us about cultures where one man was permitted to have many wives, certainly an arrangement that would help the man keep control over his own progeny. Jones (1981) wrote in her book *Women Who Kill* that men battered women for the same reasons. Jean Auel's

anthropological novels about her character, Ayla beginning with *The Clan of the Cave Bear* traces some of this history. In any case, the issue of who fathered whose baby has dominated the structure of most societies in the world since historical records including the Bible. As a result, monogamous marriages became institutionalized and the decisions about whether or not to have a child supposedly resided within the marital couple. However, as we shall see, the state claims to have a compelling interest at least in protecting women's health, which has permitted laws to be passed that limit women's reproductive and health rights and access to good health care. Once the state got involved, reproductive health care became politicized, often influenced by religion, and women's healthcare protection rarely resulted as we shall see in some of our discussions in this chapter.

Psychologists have become involved in these legal arguments in a variety of ways. They have offered testimony in class action lawsuits that deal with the constitutional issues around safety to health and especially the mental health of any woman to be forced to carry an unplanned pregnancy to term. Social, developmental, and clinical psychology research that has been provided to courts demonstrates that there are NO adverse psychological effects from an abortion by itself or from providing information about appropriate counseling techniques. Other research has dealt with the impact of consent laws on the psychological health of teens, about the incidence and prevalence of family violence (partner, child abuse, and incest) and its impact on consent laws, with the cognitive capacity of teens to make good healthcare decisions. The American Psychological Association has submitted Amicus Curiae Briefs summarizing this research in various cases (see, e.g., www.apa.org/amicusbriefs). In addition, mental health professionals have offered testimony on individual cases where someone's mental health status is an issue. This can include cases where assessment of high-risk health issues are at stake, where vulnerable psychological states of mind are at issue, or where parental fitness is needed for termination of parental rights, adoption of an infant, or participation in the new reproductive technologies. We will cover some of these issues in this chapter.

Rights to Use Contraception

We must remember that the legal rights that do exist today were won case by case over the past fifty years as not all individual rights were automatically abrogated by the marriage contract. In the mid-1960s in *Griswold v. State of Connecticut (1965)*, the court affirmed the rights of individuals to be free of government interference when choosing to use contraceptives. The court based their decision on the privacy rights given in the 14th Amendment. Some states had adopted laws, supported by those with strong religious views that prohibited the use of contraception including condoms and intrauterine devices (IUD's and diaphragms with spermicidal jelly). In the early 1900s Margaret Sanger and other strong suffragettes founded clinics for poor women to distribute contraceptives so women could safely prevent and control their rate of pregnancies. Doctors, nurses, and other health workers and counselors who worked there were subjected to similar negative feelings and harassment as are workers in 'prochoice' women's health centers today. These early clinics became the infrastructure for Planned Parenthood, the most widely organized centers for gynecological and reproductive health in the U.S. These clinics provide many healthcare services for women besides abortion so threats to defund them threaten access to all forms of health care, not just abortion. Nonetheless, over 95% of abortions in the U.S. are performed in these clinics with only 5% by private physicians. Today there are a number of organizations in addition to Planned Parenthood including the Center for Reproductive Law and Policy and the Guttmacher Institute that are involved in the research, legislative, political, and legal arena to obtain access to good health care. They all have Web sites that are available for information updated on a regular basis.

Regular and Emergency Contraception

Family planning and reproductive health centers around the world are modeled after these early courageous clinics. Most people agree that abortion should not be the first choice for contraception. When the safe oral contraceptive ('the pill') was introduced in the early 1960s, many believed that the women's legal rights around reproductive choice would be won. A mostly safe, reversible, inexpensive, and non-invasive process, the pill was hailed as a substitute for irreversible sterilization, vasectomies, or even abstinence. By 1973, when *Roe v. Wade*—the famous case that a 26-year-old old Texas attorney, Sarah Weddington, argued before the U.S. Supreme Court—decided that women did have the constitutional right to control their own bodies even though the state did have an interest in protecting women's health, women's advocates believed the legal battles were over. As we will demonstrate below, this did not happen. Every year more conservative states pass laws that restrict women's access to abortion. In fact, as we write this book, the USSC is expected to hear one or more cases this term concerning state legislation that limits the access to family planning clinics, who gets to decide what happens to frozen pre-embryos or other interference to a woman's right to terminate a pregnancy.

Advocates had the expectations that medical abortion using *mifepristone or misoprostol*, the so-called morning after pill, RU486, would eliminate the need for abortion clinics and therefore, permit women the right to control their own reproductive productive needs. In fact, in 2017 almost 20% of terminated pregnancies were safely done by women themselves using medical abortion. This is an increase over 12% in 2014 probably due to it being easier to obtain the medication over the Internet. In fact, the American College of Obstetricians and Gynecologists (ACOG) have approved medical abortions using telemedicine in some states like Maine with a large rural population. But, cases like *Planned Parenthood v. Danforth (1976)*, in which the court found that children's rights may supercede parents' rights, have continued to be litigated in the courts despite the fact that surveys find that most people believe that emergency contraception should be available to women without needing to have a doctor prescribe it. As we see in the other chapters on family law, children's rights really are not the issue here. If there really was concern for children, laws mandating the state provide care for them if the parents were unable to do so would accompany this legislation. Rather, the issue is who will have power and control of women's bodies to bear children. It is undeniable that birth control and abortion make it easier for women to venture outside the home, pursue an education, and realize career aspirations without having to be married. Unfortunately, it is poor women who suffer the most under this political fight as they cannot easily obtain the resources to pay for their reproductive health choices independent of government healthcare funding.

Contraceptive Equity

The legal battle for the right to use contraception other than abortion is far from over especially for those who use third-party insurance to pay for their reproductive health. In the U.S., where health insurance is tied to the place of employment, rather than in other countries where the state provides health benefits for all its citizens, there are great disparities between health services for the poor versus those who can pay for their health services without relying on insurance benefits. Unfortunately, many minority women are impacted. Since 1999, there has been a movement within the U.S. for state legislatures to pass what is called 'contraceptive equity bills' to force insurance companies that pay for Viagra (the drug that helps men overcome erectile dysfunction to reach and maintain erections so they can perform sexual intercourse) to also pay for birth control pills, IUD's, and emergency contraception regimes. A bill that would improve private insurance coverage for contraceptives and reproductive health, *Equity in Prescription Insurance and Contraceptive Coverage Act (EPIFCC)*, was introduced in Congress and

signed by 123 co-sponsors, but by 1999 it had stalled in committee. In 2003, the Center for Reproductive Law and Policy found that one-half of the major health insurance companies still did not offer equity in access to contraception and other reproductive health needs.

A class action lawsuit claiming disparate treatment was filed by Planned Parenthood and others on behalf of all women in the state of Florida in the early 2000s. At first it had been shuttled around to different legal forums where it was alleged that there is a disparity of treatment for poor women in the state because Medicaid will pay for men to obtain Viagra but not for women to obtain contraception including abortions. It was hoped that this bill might reach the state or USSC, as a favorable decision could have far reaching implications on providing contraceptive equity for poor women. It failed although it was a creative way of trying to help women get out of poverty. Access to Medicaid to pay for health care for immigrants to the U.S. has also been severely restricted or not available. Obviously, these issues have political, legal, and psychological ramifications for society. As discussed below, the psychological consequences of being forced to bear an unwanted child are far greater than the psychological effects from any of these procedures.

Conscience Clauses

As a countermeasure in which insurance companies and states have granted contraceptive equity, doctors, counselors, nurses, and pharmacists are being permitted to 'opt out' of prescribing or otherwise fulfilling health-related related duties around contraception if they claim that 'moral convictions' prevent them from doing so under 'conscience clauses' that conservative legislators have been introducing into law, sometimes in unrelated legislation, making them difficult to find until implemented. In another example, language in a bill that was introduced in Congress but has not passed, the *Religious Liberty Protection Act*, could also be used to permit religious objections to any law to take precedence over women's reproductive and health rights. Some states use federal funds to set up clinics that lie to women about abortion to coerce them into not terminating a pregnancy. In other cases, unnecessary restrictions on who can work in clinics have forced many to close often causing women to have to travel hundreds of miles to find one. These constant legislative challenges keep the focus on preventing women from controlling their own health. Let's take a closer look at some of them.

Right of a Woman to Choose an Abortion

In 1973, there were several cases that broadened the argument of whose legal rights should govern the procreation of children. Since then, over 20 cases dealing with different aspects of women's right to choose an abortion have reached the USSC. In the now famous Texas case, *Roe v. Wade* (1973, 410 U.S. 113.) the decision of whether or not to abort a fetus was left to the woman and her physician, at least during the first trimester of pregnancy. Since that time, state legislatures under the influence of religious and politically conservative members have attempted to place restrictions on the woman's right to choose when and if to bear a child. Many states passed laws mandating that women be given specific written information prior to the procedure while others keep changing mandated waiting periods that extend from one to 48 h or longer. Some like Texas have passed impossible and unnecessary requirements that clinics could not meet leaving women to have to go such long distances to travel, sometimes requiring overnight stays or two trips, raising their costs. Fortunately, the USSC overturned that legislation ruling it unconstitutional in *Whole Woman's Health v Hellerstedt (2016)* using the substantial burden test and finding it imposed an undue burden without substantial health benefits to create those restrictions.

In the first quarter of 2019 there were 28 states that introduced bans on abortion. Most were in four categories according to the Guttmacher

Institute data: **trigger bans** that automatically make abortion illegal if the USSC overturns any part of *Roe v. Wade*, **gestational age bans** that ban abortion at a particular fetal age, **reason bans** that ban abortion because of specific fetal characteristics such as sex, race, or disability, and **method bans** that ban specific types of abortion or who can perform it.

One of the most recent gestational age laws being passed has been to prohibit second or third trimester abortions when the fetus might be viable. Several states have passed what are called 'fetal heartbeat' laws requiring abortions to be performed only before the heartbeat is detected which could be as early as six weeks after the woman's last menstrual period rather than the current 12 weeks standard. By 2020 seven states have recriminalized performing an abortion with Alabama setting prison terms of up to 99 years. Other states include Arkansas, Georgia, Kentucky, Missouri, Ohio and Utah. Many women do not even know they are pregnant by six weeks. Most of these laws have been stayed by the courts before they could go into effect while the courts are litigating them. It is clear that the legislators who passed them want to get them taken up by the USSC where it is feared the newest conservative justices will overturn the current law. This is despite polls that suggest over 65–85% of the population believe it should be up to the individual woman to make the decision whether or not to terminate the pregnancy (see www.guttmacherinstitute.org for further statistics).

Obviously, these laws place a greater hardship on women who must travel great distances to find a safe clinic to obtain an abortion. Although laws that mandated written permission to be obtained from a married woman's husband have failed to be upheld by the appellate courts (*Casey v Planned Parenthood, 1992*), there are still attempts to require this notification. As we will see later, sometimes it is not in the best interests of the marriage or the woman's safety or health to force such notification, especially if he is not the co-conceiver or he has a history of aggressive and violent behavior toward the woman and other children.

Perhaps as a response to the divisive politics around this issue, 13 states have passed proactive legislation that affirms the right of woman to choose an abortion usually until the fetus is viable or when a patient's life or health is at risk. New York State went further when it passed such legislation on January 22, 2019, commemorating the 46th anniversary of *Roe v. Wade* and dropped the requirement that a physician be required to be present. Ten states now have similar protection. The U.S. Congress has passed legislation guaranteeing a woman the right to control her own health care including abortion but it sits with many other bills in the Senate that the majority leader, Mitch McConnell, refuses to introduce for a vote.

Roe v. Wade

This well-known U.S. Supreme Court case actually was a challenge to Texas' statutes that made either participating in, or performing an abortion, a criminal act. The legal argument that won the case was that criminalizing women's health and reproductive rights was a violation of privacy and due process as given by the 14th Amendment of the U.S. Constitution. It was broadened to a 'class action' lawsuit using the argument that although this plaintiff was the individual currently involved, the laws could impact all women who could become pregnant and should have the choice of whether or not to terminate the pregnancy. Although the Texas criminal statute challenged had been passed in 1854 and like similar statutes in other states had not been widely used, it had never been repealed. The legal argument by Texas was that a state had the legitimate interest to protect the health of its citizens, including women and children and that superceded a woman's right to terminate pregnancy. However, no state has yet to prove that regulating reproduction is not a privacy right per se.

The 7 to 2 decision of the U.S. Supreme Court Justices (Blackmun, Brennan, Burger, Douglas, Marshall, Powell & Stewart in the majority and Rehnquist & White in the minority) gave a woman the right to make her own decisions about abortion together with her 'licensed'

physician through the end of the first trimester of pregnancy. In the second trimester, usually 4–6 months of pregnancy, the decision stated that the government may regulate the procedure, but only for the women's health. Here, psychologists may become involved in rendering opinions on a woman's state of mind if necessary. The third trimester was where the state was granted the right to regulate or proscribe abortion in two conditions: (1) to promote interest in human life but only if does not interfere with and (2) to preserve the health and life of the mother. Again, psychologists may be asked to render an opinion in this circumstance, especially if the pregnancy resulted from rape or incest. As we will see later, this is the area where new laws banning so-called partial birth procedures or 'stem cell' research have occurred. The *Roe v. Wade* justices did not deal with the particularly thorny issue of when life begins, leaving the door open to theologians to continue the argument until today.

The Roe v. Wade decision immediately touched off a firestorm of controversy in the U.S. that still has not quieted down today. It divided people into polarized groups—religious people divided into the religious right versus liberals, politicians divided into conservatives versus liberals, gender groups into males versus females, women's rights advocates versus family rights advocates. Political groups vied for the popular names—prochoice versus anti-choice or prolife versus baby killers. Whether one was for or against women's right to choose to terminate a pregnancy became oversimplified into a political litmus test and was used to win arguments or to keep out those on the wrong side of whatever other issue was being decided. Women's groups became more politically active in electing legislators who passed their litmus test. So did the conservatives or those identifying with the religious right. However, the real money seemed to be provided by those who were much more invested in keeping control of women's bodies and health for political reasons. Obviously, this battle is far from resolved and as such, reproductive rights will continue to be a controversial area. Let's look at some of the legal cases that involve psychology as an example.

In the 1990s, there were a number of cases attempting to define whether married women needed to obtain their husband's permission before choosing to abort a fetus (e.g., *Casey v. Planned Parenthood*), but so far the woman's right to control her own body was held to be a more compelling right.

Undue Burden Test

Casey v. Planned Parenthood (1992)

Casey v. Planned Parenthood challenged the Pennsylvania Abortion Control Act that had been passed in 1982. The act was broad and included requiring: (1) informed consent from the woman seeking to terminate the pregnancy 24 h prior to the abortion; (2) parental consent for a teen from one parent or a judicial by-pass procedure (explained below); (3) spousal notice in which the married woman must sign a statement that she notified her husband of the intended abortion; (4) definition of what was a medical emergency that exempted compliance from this legislation; and (5) mandated reporting procedures for providers.

In this case, the court affirmed *Roe v. Wade*, but modified it somewhat when it applied what is called the undue burden test and stated in its opinion that is the rule to use in determining if a new law conforms to the requirements. The Casey Court found that: (1) before a fetus is viable, a woman can choose an abortion without state interference, but (2) once a fetus is able to survive on its own, the state has the power to restrict abortions unless it endangers a woman's health, and (3) the state has a legitimate interest in the outcome of a pregnancy by protecting both the infant's and mother's health.

Family Violence, Notification, Informed Consent, and Gag Rules

Testimony from one of the authors (LW) in *Casey* gave data about the abuse of power and control by husbands who batter their wives and suggested that the largest number of married

women who do not discuss their decision to get an abortion involved those married to batterers. Batterers as a group will insist on making the decision for the woman, so there can be no discussion and joint decision making in these relationships. The *Casey* Court cited this as one of their reasons for striking down that provision of the Pennsylvania law. Obviously, another reason for holding the law unconstitutional is that it places a different and unequal burden on married women from unmarried women who were not required to obtain permission from the fetus's biological father or as some studies state, the 'co-conceiver'. Since then, no other state has been able to require such permission. However, notification laws have been passed, particularly in regulating adolescent's rights to abortion that will be discussed below.

In *Thornburgh v. the American College of Obstetricians and Gynecologists (1986, PA)* the U.S. Supreme Court began to deal with the issues of informed formed consent and gag rules among other issues. This case struck down a provision of the Pennsylvania law to give a pregnant woman seeking an abortion pictures of fetal development at different stages. However, it still permitted written information describing fetal development as well as information about prenatal care and adoption. Further, it permitted the state to set a waiting period after counseling and before the procedure would be performed. In *Casey*, which came down six years later, the court defined the informed consent piece to include a mandatory waiting period of 24 h for the woman despite testimony that this time period may be unduly burdensome for women who had to travel long distances to obtain the procedure. *Casey* did make it illegal to require notification or consent from the husband or co-conceiver.

Partial Birth Legislation

The vacuum aspiration method of performing an abortion in the first trimester of pregnancy has been found to be even safer than childbirth itself for the woman's health. In the second and third trimester of pregnancy, different methods of terminating the pregnancy are used depending on the stage of fetal development, length of pregnancy, and health of the woman. These are medical decisions and should be made on a case-by-case basis rather than legislated by law. One method, known as partial birth as it requires dilation and extraction of a potentially viable fetus, has been banned in 24 states at this time, although some of these states have injunctions against the implementation of the law until reviewed by the appellate courts. These laws have been challenged as not protecting the health of the woman. In some cases, when the fetus has died or was found to be deformed in utero, it is the only method to protect the woman's health. In other cases, it is a necessary method to use even with pre-viable fetuses so there would be contradiction between two laws governing the same issue. The laws are too vague to be of assistance, and they do not permit a doctor to make the final decision based on the individual woman's health needs.

Stem Cell Research and Abortion

Research into genetic cures for some diseases has been done using stem cells that came from human embryos. This research has already pioneered some genetic alterations that may make spinal cord and other nerve cells regenerate themselves. This could mean new hope for some paraplegics to walk again or even for finding a cure for debilitating diseases such as Parkinson's disease, multiple sclerosis, or muscular dystrophy. Yet, laws forbidding such research using fetal tissue from abortions have slowed down or actually curtailed these important scientific advances. These laws also seem to have created a black market for fetal tissue driving up the price and supporting other unscrupulous practices. Of course, it provides access to stem cell treatments for those who can afford it while poor people are once again unable to obtain them for their health.

Psychological Research on Impact of Abortion

Post-abortion Syndrome Does not Exist

Defining women's health requirements is a complex and difficult task because each woman has individual requirements depending on her physical and mental health status prior to becoming pregnant. One of the arguments against freedom of a woman to choose whether or not to obtain an abortion is that it could cause her psychological harm either immediately or later in life, such as when she goes into menopause. Citing individual cases in which psychological problems did occur after an abortion or at menopause, the existence of a post-abortion syndrome that left women with unanticipated psychological problems was promulgated without any empirical evidence that such a syndrome actually occurred.

Several major research studies gave further information that negated the existence of such a syndrome (Russo & Zierke, 1992). Of course, there are some women who have a negative reaction to an abortion, but these women either had emotional problems before they became pregnant that worsened or they were coerced into an abortion by others and really didn't want to terminate the pregnancy. Many of these individual women can be easily identified with pre-abortion counseling and often clinics will suggest further counseling before performing the procedure as a precaution. However, some states have passed what are known as 'gag rules' forbidding state employees from counseling women about abortion. The federal government has also passed legislation forbidding family planning clinics that receive money from the U.S. and the UN to perform counseling about abortion, negatively impacting the health of women in poor, developing countries who receive our aid. This is further described below. Obviously, these prohibitions on counseling patients and clients negatively impact the healthcare treatment provided by mental health clinicians. None have criminal punishment attached to them as far as we know at this time but if allowed to stand by the courts, could negatively impact professional licenses.

The data that counselors have and could present to women are very clear. The twenty or more decisions by the USSC since *Roe v. Wade* have not removed the right of a woman to proper health services or the requirement that women give 'informed consent' to the procedure. Yet, these so-called gag rules appear to be mandating only a limited amount of information that does not reflect the state of knowledge in the field today. For example, when the data about mental health problems seen after an abortion were compared to the data of mental health problems seen after women give birth, including those who experience postpartum depression after childbirth, it was found that there were significantly fewer emotional problems after an abortion than after childbirth (Needle & Walker, 2008; Russo & Zierke, 1992). The American Psychological Association has published papers that present the available research and has testified and entered Amicus briefs in many of the landmark reproductive health cases during the past 35 years. Yet it has been found that there are clinics in many states that lie to women who seek their advice and present unsubstantiated healthcare information. For example, one legislator testified during hearings that abortions cause breast cancer which is untrue. In other cases, clinics tell women that they are at risk to develop mental illness. Although states should be policing these clinics that encourage women not to choose abortion with false information, they do not do so.

What Do We Know About Women Who Obtain an Abortion

Statistics

The rate of abortions has been going down in the U.S. since the 1980s to its lowest point in 2017 at 13.5 per 1000 women ages 15–44. This is 7% fewer than in 2014 according to the Guttmacher Institute. Although some of this decrease could

be due to difficulties in access to clinics, it is unlikely as the birth rate in general has decreased. Guttmacher suggests it is probably due to access to better long-term and emergency contraceptives. This rate is actually decreasing in the U.S. since 1990. The majority of women seeking abortion were young, with 54% under the age of 25, 22% who were teens, and 24% who were age 30 or older. Sixty-four percent (64%) were not married. Two-thirds of the women stated that they wanted more children in the future. Women who stated they have no affiliation with a religious ideology were four times as likely as religious women to obtain an abortion. Low income and women on Medicaid were twice as likely to abort as non-Medicaid recipients. This statistic may be misleading as women with private doctors may not have their procedures listed as abortions but rather other types of gynecological or obstetric care.

Perhaps most interesting is the increasing numbers of women who are taking control of their bodies using medication abortion either through telemedicine or by obtaining the medication through the Internet. This is important given the difficulties in access to clinics where safe abortions can be performed. In 2017 there were 808 clinics in the U.S. but there were regional disparities with increases in the northeast (16%) and west (4%) parts of the country and decreases in the mid-west (6%), and south (9%). However, it was found that 89% of counties did not have any clinic but did have 38% of the population of reproductive age living there (see Guttmacher Institute for further data).

Who Do Women Talk to Before an Abortion?

The research suggests that over 90% of married women do talk to their husbands before making the decision to obtain an abortion. Those who do not tell their husbands seem to have good reasons. The three most popular reasons in one study were (1) their husband was not the co-conceiver; (2) the couple was experiencing marital problems; and (3) the woman feared the husband's reaction. Interestingly, the research also found that over four-fifths (80%) of non-married women also consulted their co-conceivers. Two-thirds of the women (68%) surveyed said that they consulted their best girlfriends and half (50%) said they consulted their doctors. Only 3% said they consulted their religious clergy.

It is interesting that many mental health counselors have not dealt with their own personal feelings about abortion. Many never knew of a time when it wasn't legal. Now that the U.S. is facing the possibility of it becoming illegal again, it is important to have this conversation with a trusted colleague or supervisor. What would you do if someone you were treating wanted to discuss having an abortion? Would it be the same if it was a colleague? Or a friend? Or a family member? What if it becomes criminalized to talk to a patient about abortion? These are important conversations to have.

Reasons for Abortion

Most women state that they wanted an abortion because having a child at this time would negatively change their lives. Some reasons included inability to afford a baby, problems in their relationship, lack of readiness for the responsibility of raising a child, youth or immaturity, completion of their child-raising years, demands from their current children who need them, or knowledge of an incurable genetic defect in the fetus. It is rare for women to use abortion as their only means of contraception. In some cases, like with abused women who are afraid to demand their partner use contraception, they might not have access to other forms of preventing pregnancy or other sexually transmitted diseases. In fact, as we shall discuss later, older newly single women have been those with the highest rates of sexually transmitted diseases including HIV because their dating partners have not been using condoms.

Psychological Effects of the Experience

Women surveyed stated that the experience of an unwanted or unplanned planned pregnancy and the decision to obtain an abortion is emotionally distressing, but it offers the possibility of being a positive emotional growth experience. Almost all women who have voluntarily had an abortion have stated that they experienced positive emotions after the procedure especially if they had social support (Needle & Walker, 2008). Women who have pre-existing psychopathology are vulnerable to emotional difficulties, but in some cases these difficulties would have been worsened by a pregnancy (Russo & Zierke, 1992). For example, women taking medication for depression are often told to stop the medication in case of teratogenic impact on the fetus. In those cases their depressions can worsen causing serious health issues.

Parental Notification and Permission for Teens

Another series of cases have been litigated to determine whether a teenage girl's rights superceded the legal rights of her parents if she chooses to abort a fetus without their knowledge or permission. Currently, most states require a parent's consent or notification for a minor to obtain an abortion. In these cases, a judicial bypass procedure was put in place by the appellate courts for when an adolescent was unable or unwilling to go to one or both parents for permission. Testimony from psychologists about the cognitive and intellectual ability of adolescents to make similar competent decisions on their own and the impact of exposure to family violence on girls' ability and willingness to confide in parents was designed to help the courts make these decisions. In some cases, such as *Hodgson v. Minnesota (1990, 497 U.S. 417.)*, the American Psychological Association entered an Amicus Curiae brief to explain the state of psychological knowledge about such issues, as well as the data about the lack of psychological damage from abortion in most cases.

Again, these has been a lot of legislation attempting to interfere with girls right to control their own bodies and health care. The *Federal Child Custody Protection Act* (2006) was an attempt to require that a teen may only obtain an out-of-state abortion if she is accompanied by a parent by imposing stiff penalties on any person, other than a parent, who 'knowingly transports' a woman under the age of 18 across a state line to obtain an abortion if she has not met the requirements for parental notification or consent in her state of residence. Parents whose daughters have abortions under such circumstances would have the right to initiate a civil action against such a person. This federal legislation was amended in 2017 by Senate Bill 1173 raising the penalties to criminal charges, and in 2019 another amendment is pending making those criminal penalties even stiffer. This legislation will only harm teenagers who can make their own decisions or need the protection of others when parents are unable or unavailable to protect them.

Why Teens Do not Tell Parents

A remarkably small percentage of teenage girls who become pregnant refuse to tell at least one parent, usually because they fear the reaction of the parent. Many fear being forced into the parent's decision, and thus, they would not have a choice of what to do. Of those who do not tell a parent, one-quarter (25%) disclosed they have histories of physical or sexual abuse. That percentage would be higher if exposure to parent's domestic violence was recorded. Many are financially independent and may live outside of the parents' home. Some stated that their families

are unable to talk about any sexual information. Those who do not tell their parents often tell other adult family members, including aunts or grandmothers.

Who Do Teens Talk to?

Interestingly, teens find different people supportive at different stages of decision making. Over half first talked to their co-conceiver when they first suspected they were pregnant, and almost half talked to their friends. But, if a pregnancy was confirmed, then over half talked to their parents. Approximately one-third of those who made the decision to obtain an abortion found their parents and their co-conceivers helpful in making the decision, while only one-fifth found their friends helpful and less than 10% found a counselor helpful.

Reasons for Wanting an Abortion

Most teens have valid reasons for choosing not to have a child despite spite their sexual activity and resulting pregnancy. Reports from judges who hear judicial by-pass procedures indicate that they found most of the women who came before them to be thoughtful and mature in their reasoning skills. Psychologists who have testified in the class action lawsuits resulting in the judicial by-pass have presented arguments to indicate that sexually active teenage women usually have the cognitive ability to make good judgments about whether or not telling a parent will be helpful and supportive to their health needs.

Over three-quarters of girls who have been surveyed said they wanted an abortion because they were too young and not mature enough to raise a child. Over one-third said they wanted to finish their education first, and over one-quarter said they couldn't afford to raise a child. Approximately one-half cited social disapproval or problems with their co-conceiver partners as a reason for terminating the pregnancy. A small number felt coerced by their parent to have an abortion. Approximately 10% learned the fetus had an irreversible genetic defect.

Surveys of teenage mothers who decide to keep their babies and raise them do not always indicate good judgment and emotional health and well-being. Many are survivors of child abuse and incest, while others grew up in homes where they felt unloved and unwanted themselves. Often they state that they want to have a baby in order to have someone love them. This attitude poses a high risk to abuse or neglect their child. Funding for programs for teenage moms in the public schools is not easily available which forces most of these young women to drop out of school and not complete their education. This lack of social support only brings about a repeat of the vicious cycle of poverty, abuse, lack of education, mental and physical disability, and incomplete participation in society.

Actions Against Abortion Providers and Clinics

Family planning and women's health clinics have provided simple and inexpensive abortions as it became clear that the access to good reproductive health care was going to remain difficult regardless of the law. These clinics have been picketed by protesters making it difficult for women to enter them safely, doctors have been personally harassed and abused, a few clinics and doctor's homes have been bombed, and public funding has been withdrawn or was never accessible.

Hyde Amendment and Global Gag Rules

Unfortunately, people's personal views have been codified into legislation such as the so-called Hyde Amendment that was attached to the Health and Human Services funding bill in 1977 and continues each year making it difficult for any organization accepting government funds to provide or receive adequate reproductive health

services. Planned Parenthood now no longer receives government funding to support any of its services limiting the numbers of poor women it can serve. Under the Bush government, legislation supported what is called a 'global gag rule' where international family planning and reproductive health clinics are unable to utilize UN funding if they provide abortions or other services on the prohibited list. Since the major funding support of these clinics in developing nations provide many other services in addition to abortions (which are now legal in over 75% of the countries of the world), this rule has virtually shut down women's education programs funded by our government. These programs also provide education about democratic ways of life that are vital to our national interest in promoting democracy around the world.

TRAP Laws

Today, the local reproductive health clinics are also undergoing challenges posed by new laws, often called TRAP laws that stands for Targeted Regulation of Abortion Providers. These laws, now passed by 25 states, often single out health centers that provide abortions and require that they meet regulations that are different and more stringent than other comparable medical centers. In some states, such as South Carolina, even the privacy of women who seek services in these clinics is violated by permitting state inspectors to copy their medical records without the woman's permission or even stating a reason why medical confidentiality can be violated. In its 2003 term, the USSC permitted an appellate court decision to stand without reviewing the constitutionality of this law despite the fact that it appears to violate the *Roe v. Wade* decision that during the first trimester a decision to terminate the pregnancy should be made by the individual woman and her licensed physician. In other states, such as Arizona, similar regulations have been overturned by the courts.

Access to Good Reproductive Health Care

The politicalization of women's reproductive health care has made it difficult for all women to get adequate medical care because of limited access to well-trained caregivers. Poor women who must rely on government services under Medicaid have restrictions on what providers they can see and what services are allowed. Although these restrictions have been challenged on a number of grounds including *disparate treatment* under the law, many have remained stalled in various legal forums. Whether or not it is illegal has yet to be clearly ruled on by the courts as each term Congress passes new legislation (sometimes adding it on to completely unrelated bills so it does not draw attention). One area to watch in the future is the criminalization of Female Genital Mutilation (FGM) in various countries of the world where it was practiced. A large number of African countries that had tolerated if not actually approved of the practice, which essentially excises a woman's clitoris and renders her unable to experience physiological sexual pleasure, have now declared the practice illegal. However, not being 'circumcised' as the practice is sometimes benignly called, may make a woman unmarriageable, which can doom her to a life of prostitution or servitude.

Migration to the U.S. has brought many immigrants who still believe in the practice and have attempted to genitally mutilate young girls so they can be promised in marriage. As might be expected, they are subjected to criminal penalties for engaging in a practice that might be culturally relevant but against the law. Human rights

groups have attempted to help change the actual practice to a symbolic ceremony avoiding actual physical harm.

Right to Have a Child

The government is not only interested in a woman not having a child, such as regulation of abortion clinics and contraceptives, but also in the ability of pregnant women to seek proper medical treatment during the pregnancy. At a 1998 conference on reproductive health held in Moscow, Russia, sponsored by the World Health Organization, researchers from around the world presented data that suggested deteriorating conditions for women's health since the UN International Conference on Population and Family Planning held in Cairo in 1994, just four years earlier. Among the data presented were statistics indicating an increase in the number of miscarriages, infertility, death from infectious diseases, pregnancy anemia, and other complications that threatened the health of women who worked outside of the home. Although some of these conditions were seen as due to the HIV/AIDS pandemic around the world and some were concerned with toxic substances in the workplace, others were believed to be caused by the lack of priority given to women's reproductive health needs.

Punishing Substance Abusing Women

Women who do not practice proper health care of themselves and their fetuses during pregnancy, such as those who continue to use sufficient quantities of alcohol and other drugs that are toxic to the fetus (called a 'teratogenic effect') can be punished by the U.S. criminal and civil law. Here psychologists may be called upon to evaluate the woman's potential to change her problematic behavior or the woman may be incarcerated until delivery and/or the infant may be removed by social services with the court's permission from the mother immediately upon birth.

While this may sound like a reasonable public policy plan to protect the infant, in fact, it is usually against the infant's best interests in the long term. First, the legal and human rights of the woman are violated and can cause or exacerbate psychological trauma. This is of particular concern since many of these cases involve sexually and physically battered women who are in danger of being further abused or developing even more serious post-traumatic stress disorder symptomology. It is common for victims of sexual assault and domestic violence to use alcohol and other drugs as a form of self-medication to keep the psychological symptomology under manageable control. Second, few jails or prisons have the resources to provide good prenatal care for a pregnant woman that would include proper nutrition, adequate rest, appropriate exercise and good medical care. Third, and perhaps most important, is that the infant is not really protected by what appears to be punishment to the mother. One of the major areas of damage that can occur with fetal alcohol syndrome and drug-exposed fetuses is the subsequent inability of these infants and children to emotionally connect and attach to others. By placing these sometimes fragile infants into foster care programs that may not have stability, it almost guarantees later psychological problems in interpersonal relationships. Many of these infants have great difficulty in being soothed so they constantly cry and are fretful even when being held, something research suggests they need. To avoid developmental problems, the best solution is to add one or more additional helpers to the home who can assist the mother in providing for the infant's and the mother's needs. Thus, adding support services to the mother, rather than isolating and punishing her, appears to be the most helpful long-term solution to a difficult problem.

Assisted Reproductive Technologies

Reproductive rights cases involving technology continue to fascinate the general public and the judiciary, especially those that deal with helping

infertile couples to become parents. Recently there have been a number of cases that dealt with the impact of the *Assisted Reproductive Technologies (ART)* on family law. For example, if a couple who wants a child cannot conceive or carry a fetus to term, there are a number of technologies including removal of sperm and eggs for in vitro fertilization (IVF) and replanting the resulting pre-embryo or gamete[1] in that woman or another gestation carrier or surrogate's uterus. These pre-embryos or gametes can also be frozen and implanted at another time. More than a million frozen gametes or pre-embryos are stored in fertility clinic freezers across the U.S. These clinics usually require contracts forcing couples to decide what should happen to these embryos in the case of a divorce or other reason that they change their mind about implantation. Psychologists are often called upon to evaluate the parties to see if they can handle the stress of the invasive medical procedures and the subsequent child-raising or termination issues. Let's look at the following fictional case:

> Jana, a 36-year-old woman, with a great position in one of the major stock brokerage houses on Wall Street in NYC woke up one morning realizing that she was getting older and that meant she'd better decide whether or not she should have babies. Bill, her equally ambitions husband, had brought up the topic several times during the ten years they had been married, but Jana was too busy building her career to think about building her home and family also. Besides, women of her generation were told that they could have babies whenever they wanted to - after all, there were all kinds of new technologies that extended the possibility of motherhood well into a woman's forties.
>
> That night she and Bill had a long talk about whether or not they really wanted a baby now and both decided this was as good a time as any to begin. However, six months later, when Jana still hadn't gotten pregnant, they had to review their decision to have a family and make a different kind of commitment to the long and sometimes embarrassing process that has developed with using the new reproductive technologies. Did they really want a baby so much that they would be willing to enter The IVF program, as the in vitro fertilization program is often called?
>
> After being screened by a psychologist to see if this couple could withstand the difficult and invasive medical procedures, Jana and Bill were accepted into the program. It involved Jana taking hormones to stimulate the production of more ova, surgically removing several ova from Jana's ovaries, fertilizing them with Bill's sperm in a petri dish in the laboratory, and then implanting the embryos in Jana's body. Several ova are taken at a time in the hopes that at least one 1VF procedure will be successful. Since the procedure is so invasive, it is also common for several groups of ova to be removed, fertilized with the partner's sperm, frozen, and then stored for later use either because the first try didn't succeed or in the hopes of having a second child in this way in the future. Jana and Bill opted for the procedure and decided to freeze several sets of fertilized ovum in the hopes of having another child to complete their family.
>
> Two years after their daughter was born, Jana and Bill's marriage fell apart and they decided to get a divorce. Now, forty years old, Jana wanted custody of the fertilized ova they had frozen with the intention of using for such a purpose. But Bill, perhaps understanding he would have financial and other parental responsibilities of raising another child, wanted the pre-embryos destroyed. Unable to resolve this issue on their own, Jana and Bill went to the courts to settle the question for them. Recognizing the precedent it was setting, the court decided that in this case, it would be unlikely for Jana to obtain new 'good' eggs because of her age and history, so the judge gave her custody to either use them to become pregnant or destroy them, as she decided.
>
> What do you think is the right decision? What if Bill insisted that Jana become impregnated with the pre-embryos and she refused? What if the man had testicular cancer and he no longer had his own sperm to fertilize other ovum?

Who Owns the Fertilized Ovum?

There have been several cases in different states that have helped make the decisions when couples fail to have a prearranged directive or divorce and can't agree on the pre-embryos' dispositions. In the most often cited Tennessee decision (*Davis v. Davis, 842 S.W.2d 588, Tenn. 1992*) that first brought national attention to this problem, the court set the rules for other cases to

[1]The fertilized sperm and ovum outside the human body is called a 'gamete' for up to 2 weeks and a 'pre-embryo' afterward. This is usually the stage when the gamete or pre-embryo is frozen. Once the pre-embryo is thawed and inserted into the uterus, it is called an embryo and becomes a fetus usually 8 weeks later.

follow. Declaring that the pre-embryos were human lives, the court awarded the wife the right to implant them should she so wish.

Although Ms. Davis originally wanted to use the frozen pre-embryos to have a child, by the time the divorce was final, she wanted to donate them to another woman who had infertility problems to save her the medical ordeal she experienced. Here the court said that the father's right not to use his genetic material to procreate was stronger than her right to donate the pre-embryos to a third party although had she wanted them for herself, that right would probably have been greater than Mr. Davis' rights not to be a father because of her infertility problems. Thus, she could have implanted the pre-embryos or 'gametic material' had she not changed her mind about their disposition.

A second important case that occurred in New York, *Kass v Kass* (1997), rather looked at the pre-embryos as property and held that neither person could implant the embryos without the consent of both parties. In the *Kass* case, the couple had previously tried unsuccessfully to implant other pre-embryos that had been removed at the same time as the disputed ones. After several unsuccessful tries, the Kass's signed an uncontested divorce agreement and stated neither would lay claim to the fertilized eggs. However, one month later, Ms. Kass changed her mind and asked for custody of the pre-embryos so she could undergo another implantation procedure. Mr. Kass objected and asked to use the pre-embryos for research as their prior agreement had specified if they no longer wished to use themselves. The trial court agreed with Ms. Kass, but the appellate court reversed that decision. Much of that decision dealt with analysis of the Kass's agreement that agreed to resolve disposition as a property distribution requiring both parties to agree.

This approach seemed a bit too severe for other courts who turned to the Tennessee court that eventually suggested a third approach, which was to consider the pre-embryos as a special case. This *special respect* approach tried to balance the two competing views, the right to procreate and the right to avoid procreation, with a compromise whereby the right to not procreate prevails unless one party has no other means to procreate than the use of those embryos. In what was considered a three-part decision, the Tennessee Court eventually stated a divorce court should first look to the parties wishes about ownership of the cryo-preserved pre-embryos. If they can't resolve the dispute themselves, then the court would go to the second step, which is to look to prior agreements between the parties. Third, absent some current or prior agreement, the party choosing to avoid procreation should prevail unless the other party does not have a reasonable possibility of achieving parenthood by some other means (Table 17.1).

Over the years, most states followed the so-called *special respect* viewpoint, avoiding deciding if the four to eight cells (gamete or pre-embryo) that fail more than succeed in implantation, really represents human life and at the same time, encouraging prior agreements about disposition created at a time when both parties are in agreement with each other. This resolution is consistent with *Roe v. Wade* and *Casey* decisions that prevent states from interfering with a woman's reproductive decisions prior to the viability of the fetus. In most cases, though, it is usually the woman who wants control of the pre-embryos while the man wants them destroyed. Not so in the ongoing fight by actress Sofia Vergara's well publicized attempt to prevent her former fiancé Nick Loeb from gaining control of their frozen pre-embryos. He claims that he paid for them and wants to implant them in a surrogate, as they both considered doing when they were frozen. Vergara cites a New Jersey case, in 1998, where the husband wanted the pre-embryos to be preserved to be implanted in another woman of his choosing or donated to an infertile couple while the wife wanted them destroyed. The N.J. judge ordered the embryos destroyed siding with her.

Notwithstanding those few cases, medical and legal groups generally followed the courts' rulings to avoid forcing procreation unless it is the person's only option to become a parent. In 1998, however, the American Bar Association tried to adopt a proposition that eventually was

Table 17.1 Cases impacting right to procreate or not procreate

Skinner v. Oklahoma	*316 U.S. 535, 548 (1942)*
Case recognized procreation is one of the basic civil rights and marriage, and procreation is fundamental to human existence and survival.	
Griswold v. CT.	*381 U.S. 479, 485 (1965)*
Right to contraception and privacy rights	
Eisenstadt v. Baird	*405 U.S. 438, 453 (1972)*
Reaffirmed	
Roe v. Wade	*410 U.S. 113, 152-53 (1973)*
Woman's privacy right to terminate pregnancy first trimester	
Planned Parenthood Central	*428 U.S. 521 70 (1976)*
MO. v Danforth	
State lacks right to permit husband to force stop termination	
Belloti v Baird	*443 U.S. 622, 639-43 (1979)*
Reaffirm state can't authorize absolute parental veto over minor abortion	
Planned Parenthood of	*505 U.S. 833, 877 (1992)*
S PA v Casey	
Whole Woman's Health v	*136 S. CT. 2292, 2309 (2016)*
Hellerstedt	
State can't place a substantial obstacle in path of woman's choice quoting *Casey*	
Matter of Romero	*990 P 2d 819, 822 (CO 1992)*
Individual's right to procreate so state can't force sterilization even if. Incapacitated	
Matter of A.W.	*637 P2d 366 369 (CO 1981)*
Individual has right not to bear a child, and state can authorize non-compulsory sterilization	

never followed, specifying that the party that intended to procreate after a divorce should have control of the frozen pre-embryos. A Tacoma Washington case in 2000 added an interesting twist to these cases when a couple had a donor's eggs fertilized by the father and implanted in a surrogate or gestational carrier. Some pre-embryos were left over and frozen until they could be implanted at another time. Before they could be used the couple divorced. The egg donor, the wife and the husband all claimed interest in obtaining custody of the pre-embryos with the wife saying she wanted to implant them in another gestational carrier's uterus. The husband wanted to place any children born from the embryos for adoption in a two-parent family outside the state of Washington if the wife was granted custody. The court awarded the embryos to the husband who had them destroyed. Some courts have had to order the pre-embryos remain frozen until it made its decision such as when a Cook County woman tried to get them implanted during the divorce period.

However, by 2015, cases began to favor the party who wanted to procreate with the pre-embryos. A California case, *Findley v Lee*, that began in 2010 and finally resolved five years later in 2015, ruled that Ms. Lee could not utilize her frozen pre-embryos despite them being her only means of possibly having a child. Lee and her former husband, Findley, had signed an agreement directing the destruction of the pre-

embryos if they divorced. The court decided that the valid contract signed at the time they entered into IVF procedures was determinative even though Lee developed cancer that could preclude her being able to procreate.

An Arizona law (Senate Bill #1393) passed in 2019 also changed the decision-making rules from the direction earlier cases were going. By absolving the partner who is not awarded custody of the pre-embryos of any "parental responsibility" and giving that partner "no right, obligation, or interest" with respect to the child, nor any obligation to child support, the law awards custody of frozen pre-embryos to whichever spouse plans to have a child with them after the divorce. This new law is considered the first of its kind is siding with conservative groups who argue that life begins at conception and therefore, the pre-embryos are human beings with rights of their own. Those who believe in the primacy of the rights of women to choose argue that no one should be forced to become a parent against his or her will. Under previous decisions, Ruby Torres, the woman whose case spurred the Arizona legislation, could have been granted control of the pre-embryos because of her diagnosis of cancer and chemotherapy prior to her divorce from her then husband, John Joseph Terrell. He claimed he had no interest in having a child with his former wife while she claimed these pre-embryos were her only way to have a child. Other courts have granted the partner whose only chance to have children control of the pre-embryos but most have not gone so far as to take away the co-conceiver's responsibility of child support and other parenting demands.

Another case *In re Marriage of Rooks* decided by the Colorado Supreme Court in March 2018 has been submitted by petition of Ms. Rooks to the USSC after the Colorado court agreed with the husband to have the pre-embryos destroyed rather than permit Ms. Rook to have them implanted for more children. Despite the fact that Colorado courts would have absolved Mr. Rook from any rights or responsibilities toward the child Ms. Rooks wanted, the Colorado Supreme Court in a detailed and thoughtful opinion acknowledged that he might still have psychological bonds to a child conceived with his own genetic material. The couple had three other children conceived through IVF methods prior to their divorce. It appears that the USSC has agreed to hear this case in the 2019–2020 term. According to the legal briefs submitted, the arguments are narrow and deal only with the conflicting rights of a parent to procreate or not to procreate. It makes the assumption, however, that the fertilized embryos have already started life which was not supported by the Colorado Supreme Court in its siding with the father's right not to procreate. Rather *Rooks* petition claims that he is now withholding consent for implantation previously given by participating in the original IVF procedure.

Although most of the control of frozen pre-embryos cases using IVF are with divorcing couples, there are some that deal with implantation after death and inheritance rights. Interestingly, in a California case (*Hecht v. Superior Court*) a California man made several deposits of sperm that were frozen in a sperm bank prior to committing suicide. He signed an agreement that if anything should happen to him, he wanted the sperm to go to his girlfriend. His grown children filed a lawsuit to stop the transfer of their father's sperm as they had an interest in protecting their inheritance rights by no further progeny from their now deceased father. The court ruled that his testamentary gift to his girlfriend was valid and gave the ownership of the sperm to her. Other cases have been resolved, usually in favor of the party who does not want parenthood. Some suggest that this decision prevents women from having their full reproductive rights to their fertilized embryos as they would if the conception took place naturally in their bodies. The

argument suggests that it is a violation of *Roe v. Wade* and *Casey* not to give the woman full rights over the gamete pre-embryo as the sperm donor has already made a commitment to procreate by becoming a co-conceiver. However, as you can see, this issue is far from settled.

Liability of Storage Companies

What if a storage company makes a mistake and gives or sells your pre-embryos to another couple who implant your genetic material in a surrogate? Is that theft, negligence, or some other tort action? What if you decide to genetically clone yourself using new DNA techniques that are available in the laboratory? These are fascinating questions that have yet to be answered in the law. The first one, however, is due to be litigated after temperatures rose in the area where over 900 patient's 4000 frozen eggs and embryos were stored and damaged or destroyed them in the summer of 2018 at the University Hospital's Fertility Clinic in Cleveland Ohio. Wendy and Rick Penniman brought a civil lawsuit that was at first dismissed but then appealed it on behalf of themselves and the 900 others using the *Davis* decision that life begins at conception and embryos have standing as people. Civil liability may be determined given that the storage freezer's external alarms that would have alerted staff to a change in temperature were turned off. Apparently, no one was present during the night when the incident occurred, so no one heard the internal alarm at the hospital until the following morning. There are various possible damages that could be claimed besides claiming damages for a 'live' embryo. In many of these cases, the frozen eggs or pre-embryos were irreplaceable due to medical conditions or age of the donors. Even in those cases where they could be replaced, it is an invasive retrieval procedure especially for a woman. Further, the older the woman's eggs, the lower the probability a viable pregnancy will result.

In the summer of 2015 the laws in Poland about fertility treatment changed and IVF that was previously permissible became limited to heterosexual couples who were married or living together. The law required clinics to get signatures from prospective parents agreeing to be take legal and financial responsibility for any children they had before IVF could take place. Single women who previously could have their eggs or embryos frozen were unable to retrieve them from the clinics unless they could get a male partner to sign with them making him legally and financially responsible for any child. The new law also mandated that any unused pre-embryos be donated to infertile couples. Despite challenges to the law and attempts at ways around it, such as having the pre-embryos shipped to another country, most single and lesbian women have been forced to leave Poland and attempt to have a child in another country (Sussman, 2019).

Surrogacy and Gestational Carriers

Legal issues around the validity of surrogate contracts especially when disputes arise have made headlines such as in the *Baby M* case in New Jersey when a surrogate mother decided to keep the child and not turn her over to the biological father and his wife [*In re Baby M, 525, A.2d 1129 (NJ Super. Ct. Ch. Div. 1987; In re Baby M, 537 A.2d. 1227 (NJ 1998)*]. Using similar technologies as in the ART programs, a surrogate (usually a woman) agrees to carry the fetus to term and delivery and then relinquish the child to the biological father and his partner. Usually, the surrogate uses her own eggs to be fertilized by the father and the intended mother then adopts the father's biological child. In cases where the mother's eggs are retrievable and can be fertilized in vitro but she is unable to have them implanted in her own uterus (usually due to medical reasons such as cancer), a gestational carrier may be chosen who has no biological claim to the embryo that is implanted in her uterus. Media report cases where mothers or other family help a daughter or sister to have a child by being a surrogate for their fertilized embryos. Drugs now permit once incompatible parents and blood types to successful bear babies in this way. Although some states have created

special contracts in the law to protect surrogates and biological and adoptive parents, other states have declared such contracts are illegal and cannot be enforced. Laws have been promulgated to prevent babies from being sold or women from being exploited and used as 'incubators' or 'baby-hatchers'. Science fiction stories are based on these possible scenarios such as *The Handmaid's Tale* by Margaret Atwood.

Finally, what about men who want to become surrogates? Some scientists suggest that it is possible to fertilize an embryo outside of the uterus, build a synthetic uterus, implant it in the abdominal cavity of a man, implant the embryo in the synthetic uterus using drugs to enhance both the implantation process and nutrient delivery system to the growing fetus, and then deliver a healthy baby by Cesarean surgery. One question might be whether the man would be the child's legal father or mother?

MOVING TO THE HEAD OF THE RIVER

We're swimming in a river of change…

We've spent the last decade standing on the river bank,

Rescuing women who are drowning.

In the next decade,

Some of us have to go to the head of the river

To keep women from falling in.

GLORIA STEINEM

Questions to Think About

1. Should a woman have the right to control whether or not she has a baby? What about people's religious rights? How these concerns be balanced to be fair to everyone or can they? If not, who prevails and why?
2. Have you thought about what you would do if you or your partner became pregnant, accidentally? How would you go about making the decisions about who to tell and what to do?
3. Stem cell research has been curtailed if it utilizes stem cells from aborted fetuses whether spontaneous or planned abortions. What do you think about these laws?
4. How do you think reproductive technologies can be abused? Should they be controlled? How?

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Part V

Juvenile Justice

18 Juvenile Justice

Alisha was just hanging out with her other 15-year-old friends in the parking lot of the local fast food hamburger place. It was a little before her 11 pm curfew. She knew she could get up to go to school the next morning so she was pretty unconcerned about the hour. All of a sudden, it seemed without any warning, Alisha and her friends were surrounded by the local police. She watched them hassle a few of the guys for a few minutes and then, she and some of the others started yelling at the police to stop mishandling their friends.

"We ain't done nothin' wrong. We still got time before curfew. Why 're you hurtin' them? Leave us alone."

These were some of the comments Alisha can remember making. Before she knew it, the police were all over her too.

"Don't touch me. Don't touch me!"

She remembers screaming at them while grabbing for her backpack to hold up as a shield. One officer grabbed her backpack away and began rifling through Alisha's stuff letting her brand new $15.00 lipstick fall to the ground and crack open. The $20 bill she had persuaded her mother to give her before she left home that evening lay next to the lipstick, ready to be blown away by the wind. Alisha said she was 'freakin' out' as the police officer started to pat her down. Without thinking, she started fighting back, hitting and kicking, all the while screaming, 'don't touch me!' Satisfied Alisha did not have any weapons on her, she was handcuffed and placed in the back of the police car. Finally, she was taken to the police station along with several other teens.

Alisha was luckier than some of the others. Her mother was at home and came down to the station to bring her home that night. Several of the other teens spent the night at the detention center and some never got to go home when the next day the juvenile court sentenced them to a youth facility after being charged with unlawful loitering and battery on a law enforcement officer.

Was Alisha a delinquent minor? Should she have been arrested? Could this whole incident have been prevented? Of course, she was not behaving in the true spirit of delinquency as it was conceived. The facts were pretty clear. The officers did not have any reason to hassle the teens. The owners of the hamburger joint had never told the teens to move on. This was a pretty popular hangout and everyone knew it. The teens were angered by the mishandling of several of their friends who turned out to have been previously known to the police who were just stopping in for a snack anyhow. Unknown to the police, Alisha had been sexually assaulted less than one year earlier. Touching her brought back all those memories of her abuse in a flashback and in her mind she was fighting back against her rapist and no longer even realized the police were present. Had the police used a more sensitive approach with all of the youth there, this entire incident probably could have been prevented.

History of Juvenile Justice System

The history of the juvenile justice system began in 1899 with the first court that was especially designed for juveniles established in Cook County (Chicago) Illinois. Within 30 years, all states had followed Chicago's lead and enacted laws and special rehabilitation services for responding to the needs in youth. It must be recognized that it wasn't until the late nineteenth century that we began to see youth as different from miniature adults. Until then, minors who

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got in trouble with the law were treated as adults with the same penalties. Children under the age of seven were considered to be in their infancy and that was an absolute defense. From ages 7 to 14, there was a presumption that a youth had the mental capacity to form intent to commit a crime which could be rebutted by a showing of immaturity, similar to the competency standards in use today. Otherwise, a child was treated as an adult.

As we began to develop a comprehensive mandatory public education system, instituted child labor laws, and began a child welfare system, we accepted the state's responsibility for protecting youth. Children, especially adolescents, began to be seen as still in their formative years where personality could be more easily changed and shaped than when they became adults. Thus, their misconduct did not have to demonstrate that they would become hardened or career criminals as adults to be eligible for delinquency court. In fact, today we have data that suggest that less than 20%, of those arrested as youth will go on to become 'career criminals'. This is amazing given the poor track record that we have in adequately providing for the needs of these youth. Unfortunately, Alisha's story is not unusual, even 100 years after we openly recognized the need to treat adolescents differently from adults.

Balancing Rehabilitation with Public Safety

Rise of the Rehabilitation Model

In the beginning of the twentieth century, juvenile courts were by definition set up to be rehabilitative, not punitive, or retributive. They were supposed to operate under the doctrine of *Parens Patriae* which, as we discussed in an earlier chapter, is Latin for a wise and merciful 'substitute parent'. The guiding rule was that adolescence was the transition period between childhood and adulthood. Some children needed more guidance and help in making this transition. Juvenile court was designed to help 'delinquent or wayward' children become responsible adults. Rehabilitation in the juvenile court meant procedures were supposed to be informal, closed to the public, and dispositions were individualized to the child's needs. To do this, it became important to use mental health workers to gain an understanding of the child and what we today call his or her biopsychosocial needs. Then, mental health workers, usually social workers, were supposed to educate the court.

Rehabilitative decisions were to be made on the basis of what the child needed, not based on what acts the child had done to get arrested. Thus, the 'sentencing decisions' for a runaway girl (technically a status crime) might be the same as for a girl who was shoplifting or stealing a car (delinquent crime) if their needs were the same. A *status crime* involves an act or acts that would not be considered criminal except for the status or age of the child. Examples of status offenses include truancy from school, running away from home, and incorrigibility or inability of a parent to properly supervise the child. A separate juvenile court category for children in need of supervision developed to deal with some of these cases now mostly being handled in the dependency and neglect courts as described earlier in Chap. 16.

By the middle of the twentieth century, it became clear that the rehabilitation model was not working well in juvenile courts. First of all, the court system has always had difficulty in moving away from a punishment model as we saw earlier in Chap. 10 when we discussed psychological interventions in forensic settings. The law has a way of defining someone by the act they have committed, rather than dealing with who they really are. Second, the juvenile courts became overcrowded and resources to understand and treat youth became scarce. Rarely were these adolescents placed in good treatment programs even though reports of some outstanding programs made it seem like they were the norm. Reports of abuse in some of the programs that did exist became widely known and much like in the criminal system, the public lost confidence in the possibility of rehabilitation. Besides, the laws were all stacked against children's rights and in

the favor of parent's ability to best care for their children despite the evidence that was emerging about the impact of abuse in these families. This is further discussed during the issue of granting children legal rights in Chap. 20.

Thirdly, the violent crimes committed by some youth began to take center stage and the type of crime rather than the needs of the child became more of the court's focus. Although violent crimes committed by juveniles actually have been decreasing over the second half of the twentieth century, the general public believes that adolescents are very violent and are afraid of them. Short-term public safety needs began to outweigh the long term need to rehabilitate youth. The recent publicity given to school violence shootings has reinforced the message that violent teenagers are not easy to differentiate from normal teenagers prior to their committing violent behavior as we describe in Chap. 19.

Movement Away from the Rehabilitation Model

By the middle of the 1960s there were two USSC cases that are credited with recognizing the juvenile courts had de facto changed from rehabilitation and moved back to a quasi-punishment model. By this time there was ample evidence for the USSC to believe that many juvenile courts around the nation were really punitive despite the law, and so they decided that juveniles needed the due process protections as well as other legal rights.

In the first case, *Kent v United States, 383 U. S. 541 (1966)*, the court found that juveniles were entitled to procedural due process because children in juvenile court received "the worst of both worlds". By this statement, the court meant that neither the procedural protections of adult court nor the proper care or treatment of children were actually being practiced in juvenile courts despite their mission. One year later, in the second case, *In re Gault, 387*, U.S 1 (1967), the court went further and actually described juvenile courts as "kangaroo court[s]" and reiterated its belief that children deserved the protection of due process and procedural rights by stating, "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone." Thus, the USSC essentially ruled that the juvenile courts had failed to live up to their rehabilitation promise. Had they done so it would not have required so many legal protections as the USSC was now granting to juveniles. Interestingly, neither of these cases would have better protected Alisha or her friends, in the story recited above, from the attitudes of the police although we cannot be sure she would have been able to tell her story without the court being required to listen to her defense had she not had been granted those legal rights under *Kent* and *in re Galt*.

The rights that those USSC cases mandated for juveniles included the same *due process* rights of others who are arrested and brought into adult criminal court on the same charges. This includes the right to have an attorney represent them, the right to know what the charges against them are, the right not to incriminate themselves, the right not to be charged more than once for the same act (double-jeopardy), and other similar adult rights except for the right to a jury trial in front of the public. Their age was considered a sufficient reason to protect them against loss of confidentiality in a public trial or in open records. In addition, the state was required to meet a burden of proof in juvenile court cases which had not been required previously as cases were disposed of, rather than adjudicated. But, dispositional evaluations, as the forensic psychosocial histories and reports had begun to be called, were still admitted in the post *Kent* and *in re Gault* cases as judges retained great discretion and latitude in final dispositions of cases.

Further drawing the juvenile court away from the rehabilitation model was the American Bar Association's Juvenile Justice Standards Project rejection of treatment in favor of what are sometimes called the five D's:

1. Due process;
2. Desserts (punishment based on blameworthiness);
3. Diversion (when punishment and juvenile court jurisdiction isn't necessary);
4. Deinstitutionalization (preference for community placement); and

5. Decriminalization (of minor crimes, status crimes, and incorrigibility).

In the past twenty years, there has been a further movement away from a rehabilitation model by states making the juvenile codes more stringent and emphasizing the role of the courts to protect public safety rather than guiding youth into adulthood. In many jurisdictions the age for judicial waiver or transfer into adult court has been lowered. In most courts it is now permissible at 16 rather than 18 years old, although in some courts it has been lowered down to 12 and 13 years old, with an even wider variety of charges such as possession of a handgun and sexual assault on a minor, despite the knowledge of brain immaturity in such young teens. In 2005, in the *Roper v Simmons* case, the USSC ruled that a youth under the age of 18 can no longer be subject to the death penalty. This case acknowledged the immaturity, vulnerability, and changeability of youth, and it was followed by several other cases described below prohibiting sentencing juveniles to life without parole and even resentencing those already serving such sentences. So, on one hand the USSC seemed to be more inclined to believe in rehabilitation of juveniles while on the other hand, it made waiver into adult court even easier for more youth. At the same time, in some states it is even mandatory to transfer to adult court without a hearing to determine the mental state of the juvenile, when a serious violent offense is charged no matter what the child's age. The issue of brain maturity, responsibility, and waiver will be further discussed below. However, despite the inconsistencies, the juvenile court still remains a separate part of the judicial system in most jurisdictions and an attempt to follow the rehabilitation model or at least give it lip service remains.

What Do We Know About Juvenile Crime?

According to the Office on Juvenile Justice and Delinquency Prevention (OJJDP) Juvenile Crime Statistics (JCS) [www.OJJDP.gov (2019)] the crimes committed by juveniles continue to decrease since the high level in the 1990s despite the public perception that they are responsible for most of the criminal activity in their neighborhood. Comparing rates of various crimes over this period is difficult since definitions of how they are defined and what data are collected have changed. For example, violent crimes in some places are now defined as including murder, robbery, and aggravated assault rather than measuring each type of crime separately. Rape and sexual assault statistics no longer require it to be 'forcible' and include penetration, no matter how slight, of the vagina or anus with a body part or object as well as oral penetration by a sex organ of another person without consent would be classified as rape. In addition, data of some types of crimes such as dating violence are now being collected separately showing that 18% of teens report being physically abused, 18% report being sexually abused, and 60% report being psychologically abused by their dates. The number of youth who were victims of homicide has continued to decrease (30% since 1993) but the proportion of those killed by firearms remains high with African American youth at the highest risk. In 2015 most youth who were homicide victims were either very young (ages 0–5) or older teens (15–17). Since the 1999 school shooting at Colorado's Columbine H.S. through the 2018 Valentine's Day Massacre at Florida's Stoneman Douglas H.S., there has been an increase in media attention to youth.

So, although the overall crime rate is down, the violence used in crimes appears to be increasing. Even so, the number of teens murdered by adults is much higher than teens doing the killing. For example, six times as many teens are murdered by their parents than are parents murdered by teens. Over 70% of all teens who are killed are murdered by adults, not other youth. Obviously, the numbers of adults and teens killed during the rise in school violence in middle-class areas are also of concern although school violence has been noted in inner city schools for decades now. We shall discuss school violence further in the next chapter.

National Juvenile Crime Statistics

The U.S Office of Juvenile Justice and Delinquency Prevention (OJJDP) under the Department of Justice collects crime statistics of juveniles as one of their functions and publishes them in the National Criminal Justice Reference Services *Statistics Briefing Book*. Studies of patterns of criminal behaviors use these and other statistics gathered by various agency reports. Unfortunately, despite the plethora of data, it is often difficult to get a complete picture of what is happening across cities and states in the U.S over long periods of time due to a variety of factors including incomplete reports and different definitions of what the various laws describe as status or delinquent behaviors of youth. This is true for adults also as we reported in earlier chapters. For example, in 2013, the FBI changed some of its definitions on rape and violent crimes making comparisons before and afterward difficult. They broadened the definition of what would be categorized as rape by removing the need for it to be 'forcible' (that means the victims were unwilling but didn't need to show forcible resistance nor did the perpetrator need to use physical force to get the unwilling victim to submit). They also were specific in that they included any penetration, no matter how slight, of the vagina or anus, with any body part or object, oral penetration by a sex organ of another person, without consent. The burden of proof was on the perpetrator to demonstrate consent was obtained, not the victim to prove no consent.

While rape prevention advocates were supportive of these changes, the research demonstrated that most youth, particularly boys in the early teenage years, still believed that it was the girls' responsibility to say 'no' if they tried to have sex. This is troubling as the data show that in 2015 18% of juvenile arrests were for sexual violence while dating. Interestingly, 18% were arrested for physical violence while dating and 60% for psychological abuse and controlling behavior.

Definitions of what were included in statistics of violent crimes by juveniles include murder, robbery, and aggravated assault, usually with a weapon. Although the crimes reported in that category have been decreasing by 30% since the high in the mid-1990s, in 2015 the proportion killed by firearms remains high. The data suggest that Black or Brown youth are more likely to be killed than White youth and the outbreaks of police brutality continue to be reported in the media especially in racially divided communities. Most youth victims of homicide are either very young (0–5 years old) or older teens (15–18 years old). Prior to the 1999 school shooting incident at Columbine H.S. in Colorado, most teen violence was gang-related. However, mass shootings have created a new culture where teens have major safety concerns when going to school.

In 2010, the OJJDP began a federal initiative to prevent youth violence by attempting to identify and prevent the root causes. They found that there were complex interactions of both risk and protective factors together with individual personality issues that needed to be addressed in order to encourage the positive development of youth. Using a public health approach they identified 39 sites where the OJJDP and communities entered into a partnership to reduce high crime rates by changing neighborhood environments, raising level of school success, improving housing, bringing access to healthy food and nutrition, and reducing gang influence. Interestingly, there is little discussion about reducing the child abuse in many of these youth's homes although the model programs do describe what they called trauma-based approaches.

Gender and Violence by Juveniles

Offenses against other persons by teens occur as much in a gendered role as they do in adults. Four out of every five violent offenses against other persons reported were committed by males. Newer data from the OJJDP suggest that there is an increase in use of violence by girls at an even younger age. However, girls are more likely to engage in relational violence, while boys are more likely to engage in gang violence, school shootings, other homicides, and sexual offenses.

Girls are more likely to be arrested for status crimes, which are defined by the age at which they occur, such as running away from home, truancy, and inability to be supervised by a parent. They are less likely to have arrests for antisocial behavior and crimes of violence than are boys. Sexual abuse and domestic violence are frequently seen in the homes of youth who are arrested. They are at risk for being seduced into sex trafficking as many are looking for love while others have learned to use their sexuality as survival. While more girls than boys are known to have been trafficked, the boys who have been in treatment suggest that there are many more who are not known. Girls are more likely to be arrested by police for prostitution although today with the new laws designed to provide safe homes for teens who have been arrested, prostitution is rarely charged any longer. One of the authors has co-authored an edited book on sex trafficking (Walker, Gaviria, & Gopal, 2019).

Although antisocial and aggressive behavior can be noted at any age developmentally, the earlier it develops, the more likely it will have persistence across the life span. Thus, in one study 75% of those with a first arrest from 7 to 11 years old were found to be more likely to continue 'life persistent' use of violence and antisocial behavior. In fact, most of those children retrospectively were found to have conduct disorders as young as three years of age. In comparison, only 25% of those youth who were arrested from ages 11 to 15 were found to continue their antisocial behavior through their life cycle. As most of these studies dealt with boys, it is difficult to understand the specific issues that are raised with girls who do use violence. Interestingly, 80% of all youth in the juvenile justice system have no further arrests after age 21 and therefore are assumed to have stopped their antisocial and aggressive behavior. However, many undoubtedly continue to physically or sexually abuse women and children in their families without being arrested.

Florida Study

A recent study reviewing cases of youth who were arrested under a new "*red flag law*" passed by the legislators in 2018 in response to the Marjory Stoneman Douglas school shooting that killed 17 students and teachers earlier that year concluded that there were many youth who were 'time bombs' ready to explode with violence. The new law empowers judges to disarm people who appear on the verge of suicide or murder. Judges already had the power to involuntarily hospitalize people who are considered a danger to themselves or others but the shortage of treatment facilities usually results in a quick stabilization, often on medication that they do not continue to take when they are released back into the community with little or no follow-up and support. Although the majority of people for whom these laws are applied are adults, there has been some research on over 100 cases of children over the past year with histories and behaviors similar to Nikolas Cruz, the Stoneman Douglas school shooter (O'Matz & Wallman, 2019). In nearly one-half of the cases the children had diagnoses of serious mental illnesses and many had already been hospitalized but treatment was unsuccessful. Other children were often the ones who reported hearing their threats of violence. Interesting, O'Matz and Wallman reported that Cruz, who had a long history of mental illness and conduct disorders along with an unstable home life, had made a Google search five days prior to his shooting rampage looking for a therapist who could quiet his obsession with murder.

Florida is known for its inadequate mental health facilities, especially treatment for children. The Florida Department of Law Enforcement (FDLE) data show that in the 15 years prior to 2017 the number of arrests of children who threatened to kill was fairly stable, around 50 each year. In 2017 it doubled to a little under 100 while in 2018 it jumped to 300. O'Matz and Wallman (2019) also reported data from the University of South Florida showing the 2½ times increase in the Baker Act used to involuntarily hospitalize children from 2002 when it was approximately 550 per 100,000 children to 1200 per 100,000 children. Of the youth hospitalized in 2018 most were suicidal but one in four also reported wanting to kill someone else, also.

Interviews with parents of the children in the O'Matz and Wallman study showed a variety of responses with some claiming they were unsuccessful in their numerous attempts to get help for the behavior problems or mental illness of their children while others either denied any problems refusing help or totally abandoning their children who ended up homeless.

The easy access to guns was also observed in the 10 major counties where the study took place. Although the new law raised the age to 21 that youth could lawfully purchase a gun, they are still permitted to use guns with those under 16 needing adult supervision. Nonetheless, more than half of those arrested had found ways to access weapons owned by family members, even when the owners denied making them available. Although it is common for teens to embellish stories when they are angry or seeking revenge, the violence the youth in this study described that they wanted to engage in, was quite alarming in its intensity. The authors called them 'ticking time bombs', and it is unknown how it will impact their behavior as they grow older.

Behaviors of Adjudicated Delinquents

Psychopathic Traits

Youth who end up demonstrating predatory violence (searching for victims outside of their homes) have certain characteristics consistent with later development of psychopathic behavior as adults. This includes poor peer attachments and lack of empathy for the pain or other feelings of others. They are prone to mood disorders, attention deficit and attention deficit hyperactivity disorders (ADD and ADHD), post-traumatic stress disorders (PTSD), oppositional and conduct disorders as children and neurological problems. Some symptoms of early onset schizophrenia may occur as early as 15–16 years old, and these youth are prone to using drugs to self-medicate against the symptomatology they cannot control in any other way. Often, these youth are rejected by peers as young as the age of 6. They have numerous school problems and their ability to learn particularly in an educational setting suffers. Again boys are more likely to fall in this category than are girls.

If these youth experience child abuse in their home, at least one study found that they are at a 40% higher risk to use violence. In another study, boys who are exposed to violence in their homes are 700 times more likely to commit violence themselves and if they are also abused, that raises their risk to 1000 times those who have not been so exposed. Girls who are found to use violence are even more likely to have been exposed to violence in their homes, especially early sexual victimization. In a recent study of girls arrested and brought to the detention center, it was found that over 85% of them had experienced abuse at some time prior to the arrest. Yet, nowhere in the supposedly rehabilitative programs' curricula are these issues addressing the impact of physical and sexual abuse and psychological maltreatment at home or in other parts of their lives found.

Interpersonal Relationship Difficulties

Interestingly, youth who are more likely to become career criminals are more likely to misperceive intentions of other youth toward them, and in particular, they believe that people are being negative toward them more often than is factually accurate. In addition to misperceiving aggressive intent, they are more likely to have problems in solving interpersonal conflict situations than others their age. This may be because of or a result of the social rejection they experience as they are growing up. It is of critical important to provide more corrective socialization experiences for at risk youth in order to prevent some of these lasting conditions. In fact, the studies that look at abused youth who overcome the obstacles and are successful find that the single more important factor is the ability to affiliate and get along with peers (Loeber & Farrington, 2012).

Suicide and Substance Abuse Issues

Increases in alcohol, drugs, and suicide continue to be a significant problem for teens, especially those in the older teenage group according to the *Issue Brief of the Pain in the Nation Report* (2019). The opioid epidemic among young adults has been featured in the media with discussions about how many youth have been unable to 'launch' or move on to the next developmental stage of getting a job, leaving home, and beginning to live independently. Based on data, the death rate of young adults has increased by 400% over the last two decades, mostly attributed to the opioid crisis. In the ten year period from 2007 to 2017, death rate from alcohol abuse increased almost by 70% and suicide deaths for young adults increased by 35%. The report goes on to call for attention to building resiliency in youth so they can cross into the young adult years without the current difficulties, many of which are due to negative underlying social conditions such as economic instability, un- or underemployment, poor housing, education, discrimination, poor nutrition and lack of community supports. These are the same factors noted by OJJDP reports as contributing to criminal justice involvement. In Broward County, Florida, Ginger Lerner Wren, the judge in charge of the young adult specialty drug court, has formally changed its name to the Broward County Substance Use and Prevention Court to signify its realignment of goals and mission so as to emphasize the sense of urgency to create new pathways to purpose, well-being, and public safety for those who come before her court.

Role of Cognitive, Emotional, and Neuropsychological Deficits

Those who are mentally retarded also make up a large proportion of the adult criminal population even though they are not as large a group arrested as youth. In some rare cases, mentally disabled youth are manipulated and used by other delinquent youth in the community to commit crimes for the benefit of those delinquents, not the retarded youth who was trying to please and make friends. There are a number who are just in the wrong place at the wrong time and then are coerced into confessing to crimes that they did not commit, although they may have seen what happened. Let's look at the case of Tim.

> Tim was a large, African American 15-year-old when he was passing by an all night convenience store on his bicycle one night. Although tests indicated his cognitive abilities were around an IQ of 54, he had never been placed in special education program by the schools he attended. No one seemed to care whether he attended school or not, so obviously he rarely showed up as he got older and was less able to follow the lessons being taught. He was held over twice and then continued to be promoted for social reasons. He grew up in a family where his father abused his mother, Tim and the other children who lived there. The abuse was quite severe especially when his father was high on crack cocaine, and included the use of weapons.
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> When Tim was 12, his mother was arrested for shooting at his father but charges were dropped when she proved that her actions were in self-defense and in defense of Tim. His parents then divorced. Two years later, his father was shot and killed by his then current partner who interestingly enough was never prosecuted for the shooting. By then, Tim had been arrested several times for loitering, shoplifting, and car theft. Each time he was held in the detention center or sent to a juvenile correction facility, and each time he came out without receiving any psychological treatment.
>
> On the night in question, twelve years ago, when Tim was only 15, he witnessed the shooting of a police officer sitting in his car in front of the convenience store, working on writing up his reports for the night. Tim was so high on drugs when he was questioned, that he was released and back on the streets soon afterwards. But, seven months later, the murder was still unsolved and police picked him up. This time without giving him access to his mother or an attorney, denying him due process, he was questioned throughout the night. He says he was beaten up by police. Of course, they deny it. But, by the end of the questioning period, Tim had confessed to the murder of the police officer. He had denied having anything to do with the murder before and after that fateful night of questioning. He was automatically waived into adult court without a hearing, tried and convicted by a jury, and by the time he was 16 years old, he was incarcerated for the rest of his life in adult prison and labeled a murderer.
>
> Tim's mother never believed that he had killed that police officer. She knew it was his right as a juvenile to have her present and to have an attorney present during the questioning and that denial

of his rights resulted in a false confession. She knew her son was mentally retarded, although those words were never directly spoken. She didn't believe he could read or understood Miranda rights. For 12 long years, she faithfully visited Tim and promised to find a way to get him out of prison. Finally, the opportunity she had prayed for happened. Another police officer confessed to killing his colleague. But, he both confessed and then recanted his confessions confusing the police department that did not want to believe the scandal that was buried with the death of the first officer. The governor appointed a special investigation team to try to learn the true details, but they too were unable to come to any conclusions about who really murdered the officer.

Whose confession was more reliable and valid? A 15-year-old, mentally retarded youth or a former police officer? Despite local and state investigations, no one except Tim's mother, his lawyers, and his psychologists believed in his innocence. After all, he already had a juvenile record. But Saul Kassin and his colleagues have demonstrated how this method of police interrogation, sometimes called the 'Reid' method often leads to false confessions in both juveniles and adults (Kassin et al., 2010).

None of the state appellate courts wanted to hear the case, so it was taken to Federal court on a Writ of Habeas. The Federal court judge who heard Tim's appeal, listened to the testimony of psychologists who explained in detail what mental retardation meant in terms of what Tim probably could and could not understand during the police questioning. For example, the Miranda statement asked Tim to remember about seven different things in sequence, something impossible for someone with an IQ of 54 to do. Finally, in a 90-page opinion, the judge ruled that the confession was not properly obtained and returned the case to the state prosecutors with instructions to decide whether to retry him without the statement within 90 days. Tim was released on bond from prison fully expecting the state not to retry the case without any evidence of Tim's involvement in this homicide without the improperly obtained confession.

As we will see later, the procedural unfolding of Tim's case is similar to what he has occurred in death penalty cases in which new technology such as genetic DNA testing has freed so many who have been charged and convicted of murders they did not commit.

Neuropsychological Deficits

In one case in which two of the authors (DS & LW) were involved, a 17-year-old youth killed two older neighbors. Despite the fact that records documented his brain damage at birth, placement in classes for the educable and emotionally disturbed, and prior hospitalizations for psychotic and violent behavior, the state waived this young man into adult court where he was charged with a capital crime. Much to our surprise, after a hearing an adult court judge declared him competent to proceed trial with the state asking for the death penalty. Eventually, they dropped the death penalty and the now 20-year-old man pled guilty to first-degree murder and was sentenced to spend the rest of his life in prison. Would placing him in a mental hospital for the rest of his life been a better outcome? This was the only other option if he were found not guilty by reason of insanity.

It is important to remember that a significant number of youth in the juvenile justice system have mental retardation and neuropsychological problems. Recently, attention has been focused on the role of sports participation on the development of neurological disorders due to untreated concussions. The National Football League (NFL) has formed a committee on mild traumatic brain injury to study what they called an alarming trend of increase in symptoms such as persistent headaches, vertigo, cognitive impairment, personality changes, fatigue, and difficulty performing ordinary daily activities. In 2005, Bennet Omalu, then a pathologist at the University of Pittsburgh, reportedly diagnosed the first known retired NFL player with chronic traumatic encephalopathy (CTE), a neurodegenerative disease associated with the same symptoms the head-injured NFL players reported. Around the same time, psychologist Eva Valera conducted a study of battered women living in a shelter and found three-quarters of them reported at least one incident of trauma to their head with similar symptoms. At least half of her sample had sustained multiple mild traumatic brain injuries, most of which went undiagnosed. It is unknown how many battered children have also suffered traumatic brain injuries from the abuse they experienced and what impact it has had on their behavior. Nor are we aware of the further damage participation in contact sports might have on abused boys or girls. Much of the impact from

repeated mild traumatic brain injury may not be seen during childhood but rather foster the development of degenerative brain diseases like CTE seen as they get older. Nonetheless, these youth may be exhibiting some behavioral symptoms from the developing disorders that are not well understand when they come before the court. Hopefully, the research will continue and emphasis on paying attention to mild concussions and closed head injuries will help prevent further injuries.

Many of the youth who end up in juvenile court appear cognitively and emotionally much younger than their chronological age even though they may be committing actions similar to other adults. In fact, they may even look like adults because of their size and appearance but interviewing techniques need to be tailored to their level of understanding. This is also true for those who because of severe emotional problems are not competent to understand what has happened or what will happen to them after an arrest. The number of youth who are arrested today who are not competent seems to be growing. Considering the number of television programs that deal with crime these days we would expect them to understand they do not have to give up their rights not to talk to detectives without a lawyer present. Like their adult counterparts who are arrested, one only has to go into the juvenile detention center on any day to find more mentally disabled youth than in a mental hospital. It is not unusual for psychologists who evaluate detained juveniles who were showing off and acting tough during the arrest process to find them highly anxious, fearful, and crying during the next stages in the proceedings against them. Often the first question even those who have committed violent crimes ask about is when they can go home. It is important to remember that even those whose brains are developing normally are not expected to be fully cognitively functional until somewhere in their mid-20s. Below we discuss several important USSC cases that have provided some relief for teenagers who have committed serious crimes.

Recent USSC Cases

As the research on children's brain development became more available in the 2000s, it shined light on the issue of a youth's culpability for committing a serious crime. The USSC was asked to decide if age alone would be a sufficient mitigator to differentiate a youth's sentence for committing the same crime as an adult. In 2005, 17-year-old Christopher Simmons who had been sentenced to death for both planning and committing capital murder petitioned the USSC for relief (*Roper v. Simmons, 2005*). The justices concluded that sentencing a person to death for a crime committed before the age of 18 was unconstitutional as a violation of the 8th Amendment due to the individual's immaturity, vulnerability, and changeability. In other words, they could possibly be rehabilitated and so the death sentence would be considered cruel and unusual punishment. However, that still left them being able to be sentenced to '*life without parole*' which some asserted might even be worse.

A few years later, Terrance Jamar Graham, previously convicted of a violent crime, was again convicted of armed home invasion robbery and sentenced to life without parole. The case went up to the USSC and again the justices ruled that the constitution also prohibited a life sentence without the possibility of parole for a youth who committed a non-homicide crime (*Graham v. Florida, 2010*) even though he was a repeat violent felony offender. Two years later, in two other cases (*Miller v. Alabama, 2012 and Jackson v Hobbs, 2012*), the USSC extended the prohibition of life without parole to youth who committed homicide. In *Miller*, 14-year-old Evan Miller high on drugs and alcohol, along with a friend, severely beat a neighbor with a baseball bat and set fire to his trailer ultimately killing the man, clearly a heinous crime.

In these cases, psychological research played an important part in the justices' decisions having cited the information submitted to them in *Amicus Briefs*. A neuropsychological explanation was offered citing the fact that juveniles,

including older teenagers, are less able to restrain their impulses and exercise self-control than adults. The frontal lobes of the brain, especially the areas in the prefrontal cortex that control planning, decision-making, weighing risk versus reward, evaluating future consequences, and controlling emotions and impulses, are the last areas of the brain to develop, often not until the mid-20s according to brain studies. Synaptic pruning leads to more efficient neural connections and improves executive functioning as it matures. There is more myelination that speeds some neural connections and transmission. Increased connections between cortical and subcortical connections regulating emotions created more cognitive control over emotional regulation.

Thus, juveniles lack the same level of higher-order executive functioning as do adults. In addition, juveniles also are less capable of withstanding the negative influence of peer pressure and are more susceptible to altering their behavior at the demand of peers. Puberty is known to change the incentive processing system involving neurotransmitters such as dopamine which impacts the risk and reward behaviors and spikes in peer influence behaviors. Vulnerability to peer pressures peak around age 14 and slowly declines till 18 or even older. Youth are more likely to make decisions based on immediate rewards as compared to adults who are more likely to make decisions based on longer-term consequences. The court was also influenced by the research that shows that psychopathic traits that may be observed in adolescents frequently drop out at adulthood. The bad behavior of these youth may indeed be transient and not an indication of the person they will become as adults. False positive rates of prediction may be as high as 87%.

In the latest case in this area, *Montgomery v. Louisiana* (2016) the USSC made retroactive the prior decisions to abolish life without parole as well as the death sentence for juveniles. They permitted new hearings to assist the court in making decisions in individual cases of the 1200–1500 juveniles already serving sentences of life without parole, mostly in Pennsylvania, Mississippi, and Louisiana. (See the Amicus Briefs submitted by the APA (www.apa.org) for further discussion of the specific areas of immaturity, vulnerability, and changeability used by the USSC to justify their decisions while reviewing the decisions themselves.)

Forensic Evaluations of Juveniles

Until the recent reforms making juvenile courts more of a part of the criminal system than following the earlier rehabilitation model, clinical evaluations of the youth usually by psychologists, psychiatrists, and social workers were sufficient for the court. The court was interested in making proper placement of the youth to dispose of the cases, and forensic issues were not as relevant. That has not changed given the court's changing role and today, a more forensic-oriented evaluation needs to be done by those clinicians who practice in juvenile court. This includes the assessment of the youth's competence to waive Miranda rights at the time of arrest, ability, and competency to proceed to trial, violence risk assessment to determine public safety issues, necessity for detainment of the juvenile and waiver to adult court for trial, amenability to treatment—rather than incarceration—as punishment, and what if any role the juvenile's family should play in the rehabilitation process. We describe how to perform these forensic evaluations in our book, *Forensic Practice for the Mental Health Clinician* (Shapiro & Walker, 2019). Let's take a look at each of these questions here.

Competency to Waive Miranda

As we have seen before, 'Miranda rights' is the term given for mandating law enforcement to recite a suspect's legal rights, especially the right to remain silent and not be interrogated until a lawyer is present. The USSC granted these rights under the constitution to anyone who was suspected of committing a crime in a case called *Miranda vs. Arizona (1966).* In addition to

having the right to have an attorney present while being questioned, juveniles also have the right to have a parent present. Let's take a look at Tim whose experience with the legal system is summarized above. He had been questioned and arrested several times prior to being questioned about the murder of the police officer. At each arrest, his mother was present during the questioning by the police. He never went to trial, as the court disposed of his cases usually by sending him to juvenile facilities for rehabilitation. However, he never received therapy or other psychological intervention.

Tim spent a few months at each facility every time and was returned home to the same situation he has been in before his arrest. At the time of this last arrest for murder, he was at home awaiting placement in a higher level locked facility. Being out on the streets while awaiting incarceration in a locked facility doesn't make sense for public safety or rehabilitation, does it? But, the juvenile facilities were too crowed to accept him right away. His reading scores from school records and achievement tests indicate that he couldn't read above a second grade level. His comprehension was even lower. Yet, on each of the Miranda warning statements that obviously were above 5th or 6th grade reading level, he initialed and signed that he read and understood each of those rights. Twelve years later, he learned in prison to read and understand what the rights were that he didn't know he had but 'voluntarily' gave up then. Tim claimed the detectives beat him up and forced him to sign the Miranda waiver. His mother testified that she saw the bruises several days later when they finally let her see her son.

Grisso (2013) has developed a standard protocol to test to see if someone can understand their legal procedural rights. He suggests that it is critical for law enforcement to develop and carry cards with the legal rights written in simple language. For those who appear to be cognitively impaired, it is important to explain the Miranda rights in a simple enough way to match their developmental level of understanding. Is it possible for law enforcement to be trained to know what appropriate levels of understanding at different ages are? It seems that at a minimum, juvenile detectives must have this information if the minor's Miranda rights are to be respected. Many jurisdictions have now required that a parent or guardian must be present or at least notified to be sure to protect a minor's rights.

Competency to Stand Trial

Legal Competency Versus Competency to Consent to Treatment

Psychologist Thomas Grisso (2013) has developed a psychological assessment instrument to measure legal competency in youth that is consistent with most of the statutes on competency in effect today. Grisso's research parallels the research funded by the MacArthur Foundation that assesses for competency in adults and youth. This covers the following areas.

Understanding of Charges and Potential Consequences

1. Ability to understand and appreciate the charges and their seriousness;
2. Ability to understand possible dispositional consequences of guilty, not guilty, and not guilty by reason of insanity;
3. Ability to realistically appraise the likely outcomes.

Understanding of the Trial Process

4. Ability to understand, without significant distortion, the roles of participants in the trial process (i.e., judge, defense attorney witness, jury);
5. Ability to understand the process and potential consequences of pleading and plea bargaining;
6. Ability to grasp the general sequence of pretrial and trial events.

Capacity to Participate with Attorney in a Defense

7. Ability to adequately trust or work collaboratively with attorney;

8. Ability to disclose to attorney reasonably coherent description of facts pertaining to chares, as perceived by the defendant;
9. Ability to reason about available options by weighing their consequences, without significant distortion.

Potential for Courtroom Participation

10. Ability to testify coherently, if testimony is needed;
11. Ability to control own behavior during trial proceedings;
12. Ability to manage the stress of trial.

Competency to consent to treatment is measured differently. Here we are interested in the youth's cognitive, affective, and emotional functioning. Any mental disorders are assessed, and the youth's capacity to weigh the risks and benefits from treatment is estimated. These results are used to create treatment plans and find appropriate placement for the child should home not be an appropriate setting (Grisso & Schwartz, 2000).

Violence Risk Assessment

Assessing the risk of further violence of a juvenile present even more difficulties than assessing an adults' risk of further violence. As we stated earlier, only 20% of those youth who commit a crime and are arrested for delinquency go on to become career criminals as adults. Figuring out which youth are in that 20% is complicated. Researchers have tried to adapt some of the actuarial tests used on adult violent offenders and sexual offenders to juveniles without much success. The MacArthur variables used to measure the risk of further adult violence are also not easily adapted for juveniles. One reason is the incomplete brain development of a youth especially in the frontal areas of the brain that control impulsivity. At the same time, studies of those adults who have committed violent crimes indicated that the highest risk is for those who have been abused themselves or exposed to abuse as a child and those who have had serious school problems throughout most of their childhood. Interestingly, in Europe the European Union (EU) mandates healthcare provider report those youth suspected of joining a terrorist cell in order to prevent terrorism by attempting to rehabilitate them. Ethical issues as well as difficulty in the identification of those who will be at risk to commit a terrorist act are difficult to predict given the limited tools we have at this time (i.e., see Montanari et al., 2019). Nonetheless, the combination of child abuse and negative ideology against Western values make some youth more vulnerable to joining a terrorist group that plots use of violence.

Assessment of Mental Health Issues

Those with active psychotic symptoms of a paranoid nature are the most likely to be violent especially if they are experiencing delusions or hallucinations. It is important for law enforcement to understand that if they are approaching a teen who may be in a psychotic or drug-induced psychotic-like state, they must use non-aggressive and carefully chosen means of making contact with the youth so as to avoid setting off a violent incident. If these youths are more likely to misperceive aggressive intent on the part of a law enforcement officer, it may also be a good idea to approach in an overly friendly manner so that their intentions are made very clear from the outset. This is often counterintuitive as many believe that it is important to establish who is 'boss' right from the start. However, there are many techniques that can be used to remain firm but friendly and non-aggressive to avoid any misperceptions and unnecessary force when dealing with these youth. This is important as studies have shown more youth, like Tim described above, will falsely confess out of fear and desire to 'get the interrogation over with' (Kassin et al., 2010).

Substance Abuse Issues

Substance abuse in teens represents both normal experimentation and a desperate attempt to

moderate emotions otherwise difficult to do or even block out symptoms of mental illness, especially depression and thought disorders. Only a small percentage of those teens who experiment with alcohol and other drugs go on to a life history of substance abuse. However, it is difficult to pick out those who will do so except for the complex histories with other forms of dysfunction. It is also important to note that the most serious violent crimes are committed by youth under the influence of alcohol or other drugs. So, this is a serious problem in the juvenile community. Addiction to opioids has become an epidemic in our society, as discussed above, and many youth are involved in both petty crimes and more serious ones to support their habits. Although substance abuse treatment centers are always crowded with youth, their long-term success rate is not good, similar to adults, especially if there is not adequate follow-up support.

Intervention Strategies

Pretrial Detention Centers

It is common for youth who are arrested to be taken to the police station, booked, and sent over to the main detention center for youth in that community. Once in the detention center, a hearing must be held to determine if there is probable cause to hold the juvenile on particular charges. In some communities children have a lawyer assigned to represent them, but it is not a uniform practice, especially if they cannot afford to pay for an attorney themselves, which covers most juveniles unless the parents can afford to hire an attorney to represent the child and choose to do so. About half of the children who are charged are sent home to await further court proceedings while the other half remain in the juvenile detention center for a specified length of time, usually up to 30 days. The juvenile justice case manager must find a residential placement for the child that is appropriate to his or her needs. Rarely do youth who are held in the detention center receive psychological services although it would be a good time to provide crisis counseling, intervention for abuse and trauma including reduction of PTSD symptoms, and psychotherapy for depression or other diagnosed mental disorders.

Juvenile Facilities and Boot Camps

Adjudicated youth can be sentenced to juvenile facilities that function more like prisons than detention centers or other holding areas depending on the level of seriousness of their crime or how many prior arrests had occurred. The facilities are rated by levels of security needed, and each level has more restrictions with a locked facility similar to a prison at the highest level. A newer concept that has been introduced in juvenile justice has been the '*boot camp*' modeled after the strict adherence to following rules that occurs in the military induction camps. Instructors are very strict, sometimes even punitive, especially when the rules are broken. No excuses are accepted. The goal is to intentionally break the youth's spirit so that it can be rebuilt in a more prosocial way. Obviously, the definition of what is prosocial is up to the individual program. While this type of program has gained popularity with the general public and legislatures, the research studies indicate very mixed results.

Let's look at two major psychological issues that may make rehabilitation difficult if not impossible under these conditions: (1) moral development in juveniles and (2) social modeling in adolescents.

Moral Development

Psychologists who have looked at the moral development in children believe that the highest level of moral judgment is reached by early or mild adolescent even though there is some controversy about what constitutes this highest moral level. One school of psychology represented by Kohlberg found that the highest level or moral judgment is to understand the rules and apply them appropriately. Another school of psychology, represented by Gilligan found that for girls, the highest level of morality is to know

the rules and apply them with compassion. Psychologists studying gender issues with males and females tend to find that compassion in following the rules and applying them to justice is more likely to be found in a gender-sensitive person. Police and other law enforcement officers, particularly those who are comfortable in using a military style training program, are rarely gender-sensitive people. Gender sensitivity tends to be more likely associated with non-violence while military programs are used to train people to use violence in the military setting. Boot camp programs probably do not pay attention to these subtle but important difference.

Social Modeling in Adolescents

Child development specialists like James Garbarino (1999) who believe that adolescents are still developing in cognitive, emotional, and behavioral ways suggest that the strongest influence on the youth's behavior is identification and modeling with other peers. If adolescents who get in trouble with the law are placed in facilities with other youth who commit offenses, they will not have social models appropriate for prosocial development. The psychological data suggest that they will learn how to behave from their peers. If all their peers are acting-out and committing antisocial acts, will they learn how to behave as better criminals? Psychological theory would suggest that they need to be in a mixed school environment where both prosocial and acting-out youth are present, not in locked facilities with other delinquents.

Summary

In summary, youth who are arrested and adjudicated as delinquent are sent into a special juvenile justice system to be rehabilitated unless their crime is adjudged to be so dangerous as to warrant being 'waived' into adult court. The history of how the juvenile justice system moved from being punitive to being rehabilitative and back now to a quasi-punitive and quasi-rehabilitation model is discussed in this chapter. Teenagers who commit violent crimes are often waived into adult court and tried as adults despite the research that shows how their brains have not yet achieved maturity. They have less control over their impulsive behavior, cannot easily evaluate consequences of their actions, and are more likely than adults to be persuaded by their peers to engage in risky behavior. They are also more likely to respond to rehabilitation and so the USSC has ruled to spare their lives in capital cases and cannot lock them up for the rest of their lives if their crimes were committed prior to age 18.

Although the general public believes that adolescent crime is rampant, the statistics from OJJDP make it clear that only a small percentage of crimes are committed by juveniles. It is also important to recognize that less than 20% of adolescents adjudicated as delinquent will go on to criminal behavior as adults. Girls tend to be arrested more for status crimes, which are those that an adult would not be arrested for, such as being truant or run away from home. The high number of teens adjudicated as delinquent who have been abused is alarmingly high and intervention programs must take into account PTSD symptoms, as well as other cause of crime.

Questions to Think About

1. Do you think youth should be punished in a boot camp model or be in a rehabilitation model for their criminal behavior? Why?
2. How would you assess for and treat mental illness and trauma in teenagers? Is it the same way for children or adults?
3. Why is it more likely for girls to commit crimes involving people with whom they are in a relationship and not boys?
4. What, if anything, can we do to help the juvenile justice system be less racially biased?

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19 School Violence

Introduction

Although the actual rate of serious youth violence appears to be decreasing, there are two types of violent behavior by teens that appear to be on the increase. First is the violence committed by girls, which was discussed in an earlier chapter. Second are the mass killings that occur in or out of school by boys, sometimes acting alone and sometimes acting together with others. These chaotic, deadly, and terrifying attacks serve as examples of how youths are able to escape detection and intervention by parents, school authorities, law enforcement, peers, and the community. It is difficult to understand how the massive amounts of ammunition, bombs, video plans, and documented manifestos could not trigger concern on the part of adults who had to have known that this behavior is not normal for most teens, especially in the era of social media where our children learn so much from and share so much to their various social profiles and accounts.

However, despite the anger and despair many of us and our readers feel when we hear of these horrors on the news, the attacks must be studied. While you have surely noted that with each attack, we see louder reminders and urgings to focus on the innocent victims in an effort to avoid giving the attackers any more infamy or 'voice for their hatred.' However, especially in professional areas like that of forensic psychology, the attacks must not be ignored. Any policy-related discussions of gun control aside, we must focus on continued research and greater understanding of how to both recognize the clues our children give us and believe the explicit warnings they actually tell us, so as to work to prevent these kinds of incidents from happening in the future. In this chapter we will examine the typical clues that we must look for and discuss some possible interventions to avoid further escalation of violent incidents.

Let us review just a small selection of the examples of mass school violence that have occurred over the years:

Columbine High School

> On April 20, 1999, at exactly 11:19 a.m., two Columbine High School students, Eric Harris and Dylan Klebold began a 16-minute shooting rampage that left 15 people (including themselves) dead and 21 wounded. Two 20-pound propane bombs that Harris and Klebold are believed to have put in the cafeteria that morning could have killed all 488 students and teachers who were there, had they detonated as they were supposed to. At that time, the Littleton, Colorado shooting was the deadliest incident of school violence in the history of the United States; far worse than Kip Kinkel's killing his parents and two students and wounding 25 others at Thurston High School in Springfield, Oregon one year earlier in May 1998. It was also worse than the shooting and killing of four students and one teacher and injuring 10 others by 13-year old Andrew Golden and 15-year old Mitchell Johnson at West Side Middle School in Jonesboro, Arkansas in March 1998. West Padukah, Kentucky, Santee, California-these were

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other cities or towns where nice, middle-class people lived. People wondered if urban shootings finally come to suburbia, and all asked, “what has gone wrong with our youth?” Standard answers that included poor parenting, school difficulties, poverty, divorce, violence on television, mental illness, too much sex, too much spoiling…and yet, the golden question went unanswered, even though these two young men put out many messages that they were about to explode for at least one year prior to the 1999 killings.
In fact, they had made a video for a class the previous semester, detailing the Columbine shootings as well as more violent plans afterwards. Their teachers corrected the video’s technology but did nothing about the disturbing violent images they viewed in the content of the messages. Harris and Klebold’s parents have had to live through the tragedy of that day’s violence and lawsuits filed against them for failure to properly supervise their children (there was enough ammunition and explosives found in one boy’s garage to blow up the entire school). The Columbine investigation took several years to complete, with 4400 leads followed up by 80 investigators. The original response to the tragedy involved over 1000 first responders such as law enforcement, fire rescue, medical and psychological service providers, and clergy from nearby Denver and surrounding suburbs. Filmmaker Michael Moore made a movie, Bowling for Columbine, asking the same question: what could have led these two young men into committing such mayhem?

Virginia Tech University

On April 16, 2007, Seung-Hui Cho, an undergraduate student at the Virginia Polytechnic Institute and State University (typically called Virginia Tech), opened fire on campus with two semi-automatic pistols. Cho’s attack was two-pronged, beginning in the West Ambler Johnson Hall where two students were killed, and ending in the Norris Hall, where 30 innocent students were killed. Cho then killed himself with a self-inflicted gunshot wound, bringing the total death toll that day to 33 people. The Virginia Tech shooting was, at the time, the deadliest attack by a lone gunman in U.S history (it was since surpassed by the Pulse nightclub shooting in Orlando, Florida, in 2016). Notably, Cho had been diagnosed with severe depression and selective mutism earlier in life and received therapy throughout much of middle and high school. However, it was said that he ‘fell through the cracks’ on Virginia Tech’s expansive campus, since federal privacy laws protected many of his records and the university therefore did not have a full picture of his mental health background. Despite that, efforts were made to require him to attend treatment, but without formal institutionalization, there was little that could be done, and he was still permitted by law at that time to purchase weapons.

Sandy Hook Elementary School

On December 14, 2012, 20-year-old Adam Lanza murdered his mother at their Newton, Connecticut home. He then drove to Sandy Hook Elementary School, also in Newton, where he shot and killed 20 children (between the ages of six and seven years old) and six adult staff members. He turned his weapon on himself as first responders arrived on the scene and committed suicide. Investigations later uncovered that Lanza had been diagnosed with depression, anxiety, obsessive-compulsive disorder, and Asperger’s Syndrome as a teenager, but the report by the Connecticut State Attorney’s Office stated that these conditions had not contributed to his violent attack. How could they be so sure that his untreated mental health conditions did not matter to his behavior?

Marjory Stoneman Douglas High School

On the afternoon of February 14, 2018, a gunman opened fire at Marjory Stoneman Douglas High School (MSD) in Parkland, Florida. Alleged gunman Nikolas Cruz, a former student of MSD, was identified by witnesses as the shooter. Importantly, he is identified here as “alleged” despite these identifications and his later confessions, because as of the writing of this text his charges are still pending and trial has not yet commenced. On that deadly day, reports are that Cruz arrived at the school property by Uber carrying a rifle case and a backpack and walked into one of the buildings on the high school campus. He entered Building 12 with an AR-15 style semi-automatic rifle and additional ammunition, and he opened fire. In six minutes, the gunfire killed 17 students and staff and wounded 17 others, before Cruz escaped on foot by blending in with the crowds of innocent students escaping the building. Cruz was later identified as the shooter on surveillance videos, and he was located several miles from the school and arrested.

The vast majority of the recent school shootings have been carried out by boys, most of whom have given signs that they were in deep emotional trouble. However, these signs were

either missed by the adults who could have gotten them help, ignored and treated as if they were not serious, or recognized as desperate attempts to get help that was not available. The facts are clear—there are fewer and fewer mental health services for our youth, especially those that they can get to on their own or at a cost they can afford. The stories of all these boys suggest we might have prevented this needless violence with more attention to the psychological health of all students, but especially boys.

In this chapter we discuss ways for schools to recognize those students who are at highest risk to explode into violence and intervene to prevent it. The murders in Columbine High School were not the first school shooting events to come to our attention, and as we all now know, they were also not the last. However, the majority of attacks prior to Columbine were in schools located in poor neighborhoods filled with minority youth who were expected to use violence in communities that are known for the inability to protect residents. Columbine hit middle-class America, as have so many attacks since. Between this sad reality that society started paying attention when the violence crossed a socioeconomic class threshold, and the rapid rise of Internet news outlets and social media, the world is now paying attention. Now let's turn to what we have learned from the examination of these incidents.

Statistics

The FBI defines an *active shooter* incident as "one or more individuals actively engaged in killing or attempting to kill people in a populated area" (U.S Department of Justice, 2019). This definition encapsulates what we think of when we think of 'school shootings,' although we should be cautious in reviewing articles and documents of statistics on the subject since many sources include any gun violence on school grounds or during school events (like one victim being shot at a homecoming dance over a relationship feud, for example). In gathering data on the subject of active shootings, the FBI has tallied 277 such incidents in the United States between 2000 and 2018, with 884 total deaths and 1546 wounded across all incidents. The frequency of these incidents has generally risen over the years, although some dips and plateaus may appear to shift those patterns. Not all of these incidents and deaths occurred in schools (in 2018, there were five active shooter incidents in schools, according to the FBI's report; U.S Department of Justice, 2019).

Of note, less than 1% of children die from murder, so these shooting attacks are actually quite limited despite the high levels of publicity they receive and fear they instill in people. Nonfatal violence with bullying behavior and fights among peers are the most frequently reported incidents in school, although teacher victimization is also frequently reported. Teachers report both threats and actual physical attacks toward themselves. The prototypical violent youth is a male who attends public, not private, schools. Interestingly, 75% of the attackers who do commit murder also threaten suicide which is an important clue to rate the seriousness of all the violence threats. The line between suicide and homicide is a very thin one, and as those who study police psychology, the skills needed in successful hostage negotiations are also important when working with someone who is determined to cause his own destruction and/or violence toward others. Bullying behavior tends to be most commonly experienced at the elementary school level, with physical fighting increasing as the youth gets older. The recent shooters appear to have been both the victims and aggressors of bullying behavior at different times of their lives. Researchers suggest that the probability of a child becoming a victim of a threat of or injury from violence depends on whether or not weapons are available to the aggressor. This is an important fact when

thinking about the debate on how to regulate gun violence in general.

Classification of School Violence

What Do We Know About the Dynamics of Violence?

We know from our studies of different types of violent acts that there are multiple pathways to the use of violence. Violence is generally organized, fixated, and focused behavior on a specific target. Violent actions almost always seem to legitimize violent problem solving. So, if someone thinks about violence and comes up with a plan, it is more likely than not that they will carry it out. There is usually a sense of urgency or at least a specific time frame for violent actions. Sometimes this timetable makes no sense while other times it is critical to the success of the operation. In their studies of school violence in the U.S, Kris Mohandie and the late Chris Hatcher, psychologists at the National Threat Assessment Center in California, have divided the events into three classifications:

Type I Events include violence by a perpetrator who has no relationship in the school. A Type I event would be the shooter at a Jewish Community Center preschool in the Los Angeles area.

Type II Events include violence by a perpetrator who is a service recipient or customer of the school. This can include parents or guardians, students, or someone who is related to either group. Columbine students and other youth who killed teachers and/or students in the school would be an example of this group.

Type III Events include violence by a perpetrator who has or had an employment relationship with the school. An example might be a school janitor who held a child hostage.

Threat Assessment

According to Mohandie, there are warning signs that include verbal statements and threats, bizarre thoughts, physical and behavioral signs, and obsessions that those who committed school violence demonstrated before the shooting events (2001). The FBI, National Threat Assessment Center, and others suggest paying serious attention to the following warning signs:

Warning Signs: Verbal

- Direct and indirect threats.
- Verbalizing a violent plan.
- Recurrent suicide threats and statements.
- Child expresses a wish to kill, a wish to be killed, or a wish to die.
- Threatens or brags about bringing a weapon to school.
- Threatening or harassing phone calls or emails.
- Hopeless statements.
- Bragging about violent behavior or fantasies.
- Excessive profanity in an inappropriate context.
- Challenging or intimidating statements.
- Name calling or abusive language.

Warning Signs: Bizarre Thoughts

- Persecutory ideas with self as victim.
- Paranoid ideation.
- Delusions in general or specific delusional ideas.
- Command hallucinations.
- Grandiose delusions involving power, control, and destruction.
- Significantly deteriorating thought processes.

Warning Signs: Physical and Behavioral

- Physical altercations with another person.
- Frequent fights.
- Inappropriate weapon use or possession.
- Drawings or other creative outlets with persistent violent themes.
- Attire associated with violence (camouflage fatigues and violent messages on T-shirts).
- Physically intimidates peers or young children.
- Following or surveillance of target individuals.
- Short fused, loss of emotional control.
- Destruction of property.

- Bullying or victim of bullying.
- Deteriorating physical appearance.
- Violent literature and hate group materials.
- Inappropriate displays of emotion such as anger, hate, rage, and depression.
- Isolating and withdrawn behavior.
- Signs or history of substance use, abuse, or dependency.
- Rebellion against school authority.
- Identifiable violent tattoos.

Warning Signs: Obsessions

- Self as a victim of a particular person.
- Grudges and deep resentments.
- Particular object of desire (unrequited love turned to hate, shame, rage, etc.).
- Perceived injustices, humiliation, and disrespect.
- Thoughts of death and violence.
- Narrow focus–belief that there is no way out type or tunnel vision.
- Immersion in aggression (themes are consistent).
- Sequence-specific stimulation of repeated aggression ideology.
- Publicized acts of violence.
- Interest in historically violent figures (Hitler and Nazi literature).
- Violent music and other media.
- Weapons of destruction.
- Stalking (simple obsessional, love obsessional, and erotomania).

Experts agree that it should take more than just a few of these warning signs to trigger a further inquiry. Consider that one of the warning signs in the verbal category is recurrent thoughts of suicide—a youth expressing suicidal ideation to friends and peers may not be planning a school shooting, but needs help nonetheless. Thus, it is important to recognize these signs when they appear in children or are reported by others. In the Columbine tragedy and in so many of the attacks since, it appears that parents, teachers, police, and/or other students had observed some of these warning signs before the massacre. Although the initial shock leads people to make statements like “we never saw this coming” or “there was just no warning,” when we dig deeper we find that a combination and escalation of these warning signs are always somewhere to be found. One does not wake up on a Tuesday morning and decide to go on a shooting rampage at the local school.

Stabilization and Prevention

If we identify some of the above warning signs in time, is it possible to prevent violence from erupting in youth who have a vested interest in disguising their anguish and thoughts of violence as well as in those who display at least some of the warning signs? Mohandie and other experts such as Scott Poland and Douglas Fleming suggest that every school should put a school safety plan into effect, much like the protective plans that employers put into effect to try to prevent workplace violence or sexual harassment, and according to Erbacher and Poland (2019) school psychologists should be involved in developing the plans and active shooter drills. Florida schools have instituted safety plans after the MSD shooting. Children are learning how to lock classroom doors and hide under desks. Debates about arming teachers have been proposed. A typical school safety plan is discussed below. In addition, it is important to assess school violence and other criminal acts in the school carefully and accurately. Many school administrators tried in the past to bury violent incidents either by minimizing their significance or by failing to report their occurrence to the district. Today there seems to be a report of an incident somewhere on the nightly news.

In more recent years, with greater awareness and training, teachers and administrators seem to be making great strides on the whole in acting on warning signs and tips and involving police and mental health professionals in time to ward off more attacks. On any given day in a large metropolitan area, one might find one or more headlines about students who were caught with

weapons at school or making threats by social media. There is a drive to spread awareness of the 'See Something, Say Something' campaign to move beyond past terrorist activity and apply it to school violence as well. Many school systems now even have their own tip lines or online portals established so that students, parents, and teachers can anonymously report suspicious behaviors or concerning warning signs, so that school officials and law enforcement can follow up to assess.

Law and Policy in Addressing School Violence

In 1994 Congress passed the Gun Free Schools Act that mandated a minimum of a one-year expulsion from school for any youth bringing a gun to school. Federal funding such as money received under the Elementary and Secondary Education Act (ESEA), where Title IX and other funding originate from, can be withdrawn if the school does not follow this policy. Some states have made it even more stringent, mandating immediate expulsion (not suspension) for anyone with a gun in the school. The only exception to this strict policy on a federal level is if the youth has a disability that is related to his or her bringing the gun to school. If the youth meets the definition under the Individuals with Disabilities Education Act of 1999 (IDEA), then an alternative program can be implemented. Obviously, students who are found to be intellectually impaired or seriously emotionally disturbed would fit into the exception category. Shortly after the MDS shooting, Congress passed the STOP School Violence Act of 2018, which focused on funding for prevention and safety training for schools, the reporting systems mentioned earlier, and threat assessment and intervention teams. Even more recently, the proposed School Shooting Safety and Preparedness Act provides a federal definition of the terms '*school shooting*' and '*mass shooting*,' and establishes a system for annual reporting of information and statistics on the matter. On the state level, states across the country have been enacting or pushing for legislation to strengthen the federal ban on bump stocks (additions which make it easier to rapidly fire semiautomatic weapons), institute, or strengthen the system of background checks for purchasing weapons, and other preventative measures thought to help improve the safety of our children in schools.

However, the waters remain murky in some areas. How would someone know that a student has a gun or other weapon if they don't show it? The Fourth Amendment to the U.S Constitution, dealing with search and seizure limitations, makes it clear that a student's locker and school bag, or person cannot be searched without *probable cause* and proper *search warrants* being issued. Schools often bypass these legal necessities thinking they are simply not important and then they cannot make the legal case against a dangerous student, resulting in everyone being in jeopardy. The Fifth Amendment to the U.S Constitution guarantees a student the right to remain silent and not incriminate himself. This is where the critical issue arises of whether a juvenile understands the *Miranda rights* that should be read to him and the inability of authorities to question a student without a parent or attorney present. While the student may waive the right to request the presence of a lawyer or a parent, it is important to demonstrate the *youth's competence to waive these rights.* Psychological methods for assessing Miranda and competency issues were discussed in a previous chapter on juvenile delinquency.

To complicate matters even further, the Family Education Rights and Privacy Act (FERPA) makes it clear that records of any discipline of a student issued by the school must be kept confidential. Each state has laws regulating the disclosure of information related to juveniles. Federal and state Occupational Safety and Health Act (OSHA) requirements mandate safe work environments with stiff fines issued for any violations. So, ignoring a threat of violence by a student could trigger an investigation of the possible lack of compliance with OSHA standards. At the same time, the school has a duty to a mentally ill or cognitively impaired youth under the Individuals with Disabilities Education

Act (IDEA) or even the Americans with Disabilities Act. If the youth threatens or disrupts the safety of another student, it may trigger the threshold for a child abuse report to the local child protection agency or police.

Individual school districts must put campus safety regulations in place whether or not there is legislation mandating it, and in a great many cases they have done this. Safety regulations and trainings should be done in conjunction with guidance from local law enforcement and the FBI, reviewing other local and educational codes for a safe entrance and departure from the school, and other efforts. School rules about discipline, dress codes, access to and from campuses and classrooms within buildings, and other safety matters must be explicit and known to all the students. If there are known problems with gang membership in the community, it will also impact on the school culture. Only when all of these areas are understood, can new strategies and programs be put in place to carry out the school policies.

Review School Warning Signs

Review of all hiring, supervision, personnel retention, wrongful termination, and violations of student rights accusations should be a regular occurrence, and school boards and individual schools should be sure to take cautionary steps if problems are identified. Parents are becoming increasingly aware that they may face civil liability for foreseeable youth violence ('*know or should have known*' is the usual standard) that they could have prevented. Areas of liability here might be awareness of the youth's access to guns or other weapons and failure to report it, negligent supervision of a child (in some jurisdictions, it is against the law to leave a child under twelve unsupervised), failure to get therapy or take some other action when aware of a youth's mental health struggles, and failure to notify others of the danger posed by a youth who is demonstrating a sufficient number of warning signs to be of concern. Schools may also have liability if they report danger inappropriately. If students or employees fail to re-adjust after a school violence incident has occurred and the school did not provide any services to help the re-adjustment, there may also be some civil liability. Administrators must walk a very fine line between preventing a violent incident and avoiding liability.

When to Use Civil Commitment Laws

If it is decided that the risk of violence is too high for everyone's comfort, there are a number of things that a school psychologist or other mental health professional can begin to do. First, civil commitment laws can be used by the school in order to meet its duty to prevent harm to those in the school. Youth can be involuntarily hospitalized by the school or parents who go to the court to get the youth declared mentally ill and dangerous to himself and others. Secondly, school and family stabilizers can be recommended, and helping those around the child to implement these stabilizers will lessen liability issues should they arise later (if efforts are unsuccessful).

Stabilizers

The school is an organization that has its own culture that can be utilized as a stable influence on minimizing the risk of violence on its campus. It is important to provide assurances of safety to students so that they know that everything is being done to protect them and prevent violence from occurring. This may include the presence of campus safety officers, who used to be primarily unarmed, although now more of these safety officers are either 'school police' or are civil security personnel. Safety officers now tend to be armed in some manner to protect as many students and adults as possible if violence erupts. These security personnel should be visible to students, although there are some who believe that the physical presence of such officers is viewed as a challenge to some violent youth. Many school districts now use trained off-duty police officers or former military members as safety guards, although others prefer to have officers with less of a law enforcement profile. Many schools have set clear rules and boundaries

including 'no weapons' rules. As was mentioned previously, it is important to follow up and hold students responsible for obeying the rules or they will not have the meaning that is intended. For example, most (if not all) rules related to the banning of weapons in schools include a ban on toy weapons (like water guns or fake swords). If a child arrives at school in a ninja costume for the Halloween parade with a large toy sword as part of the costume, he or she must still be disciplined. This could include taking away the toy, calling parents, or further reprimand, depending on the age of the child (we would hope a kindergartener would be addressed differently than a seventh grader in this type of situation). Even minor infractions of these rules must be followed because, as we know from research on child development and behavior, consistency of rules, discipline, and boundaries is crucial for behavior change and social development.

Resources need to be available for all to access in the school. For example, if lighting in the building is dimmed because of financial reasons, all students, staff, and faculty may not feel safe. Since schools now tend to have lockdown procedures and run active shooter safety drills to prepare students and staff for how to respond in the event that violence breaks out, these trainings and resources to support further knowledge about the procedures must be made accessible to all students, staff, and parents. Consider that one of the most widely recommended actions in the event of hearing gunshots in a hallway is to quickly hide under desks or in a closet, if available. What about students with physical disabilities, either permanent (such as being wheelchair-bound) or temporary (using crutches for a broken leg)? Many astute readers may now be thinking, "But the teachers would be trained in how to protect these students and carry them to where they need to go." While we hope this is true, should we not consider the fears and concerns of disabled students, who may not be made aware of this plan? Focusing on all perspectives can not only encourage swift and safe action in the event of crisis but help to address anticipatory anxiety and improve overall mental health of our students.

Most importantly, there needs to be a cultural attitude that makes it easy for students, staff, and faculty to talk to each other about disturbing signs that something is potentially frightening or dangerous. Fear of consequences of bringing up the topic must be alleviated, and students must be genuinely encouraged to talk about the classmates whose behavior or conversation frightens them. School guidance counselors and school psychologists often can keep such information confidential unless they gain knowledge of specific threats against specific people. At that point, the community police must be brought in even if this has been done earlier. Concern about the reluctance to 'snitch' is one of the key contributors to the funding and establishment of the anonymous reporting systems we have discussed. But past that 'Band-Aid' of offering an anonymous system, as noted above the school's culture must promote openness and transparency and a clear way to help the troubled youth, both initially and with follow-up to be sure any plan is working. In one instance, author SA recalls a story shared by a high school student in 2018: A sophomore in a public high school had been increasingly depressed and withdrawn, and several students were present when the depressed teen fashioned a noose and attempted to hang himself in a school stairwell. Of the bystanders, several tried to convince the boy not to carry out the act while one ran through the halls shouting for teachers' help. Our 'runner' in this story found the principal, who made it to the stairwell just in time to rescue the boy. Thankfully this story has a happy ending as the student who attempted suicide was treated in a hospital and then outpatient therapy, and months later was reported to again be thriving in academics and sports, likely because the 'runner' thought and acted quickly in his decision 'to tell.' Our children are capable of much more than we often give them credit for, and given the knowledge and safety to make the right decisions, they often will.

In addition to school stabilizers, there are also steps that families can take to reduce the likelihood that a member would become involved in violent crime, although it is clear that most of the

teenage shooters did not label their behavior as criminal. Rather, they saw it as justified, a way to teach or punish people or systems that had hurt them. Family stabilizers include trying to help the family behave in more responsible and less dysfunctional modes of behavior. This may be less obvious in intact families than in those where parents do not live together. The presence of stepparents in the home can be destabilizing, although in some homes, the presence of a strong parental figure that is loving or not punitive may be helpful in setting boundaries and following rules. It is important to get family caregivers involved, noticing problems, and demonstrating positive rather than punitive interest in the youth. Often violent youth come from homes where harsh punishment was the discipline utilized and there were no other effective coping strategies to be modeled. We have discussed some of the problems noted with parents of delinquent children not being willing to take mental health treatment or other options offered seriously in Chap. 18 on delinquency. Corrective methods for youth with problems in controlling their violent behavior often are multifaceted, and a variety of resources are necessary for its success. Families need support while trying to assist the identified youth in controlling his hostile feelings and aggressive impulses. Community agencies and mental health professionals can provide services and resources, often funded by the state if finances are a barrier for a family. School personnel who take the extra step to assist families in following through with referrals often find that they are more likely to utilize and benefit from other services.

Hatcher/Mohandie Risk Investigation Model, Threat Assessment Teams

Threat Assessment Teams

One of the models for prevention of school violence is for a school to create its own Threat Assessment Team (TAT) and give support, including investigatory powers, to its members. Members on the TAT are usually multidisciplinary and include the principal and other administrators, teachers, mental health consultants, and security and legal representatives, together with student representatives. The size of the TAT varies according to the size of the school. In large school districts, there may be a school-wide team that meets on a regular basis with the in-school team members. In smaller schools, the individual teams may be small but meet with a larger system-wide group regularly. The TAT members become first responders in the school, convening as soon as safety concerns arise. The TAT is responsible for disseminating accurate information to administrators, staff, faculty, and students when safety concerns arise, attempting to keep everyone calm and well informed. TATs also develop a school-wide anti-violence campaign that advertises the school's policies including 'zero tolerance for violence' while still encouraging students and teachers to make reports (i.e., to follow the 'See Something, Say Something' guidance) when there is suspicion that a student is having some difficulties with some of the earlier mentioned warning signs. These teams must have the support of the school administration so that there is a clear policy about who makes decisions and what the policy is regarding the making and documentation of reports. For further reading on this topic, see Mohandie's chapter on threat assessment in schools in the *International Handbook of Threat Assessment* (2014).

Risk Investigation Model

Hatcher and Mohandie suggest that when a report is made and investigated there are five different categories in which it can be placed.

1. High violence potential. This qualifies for immediate hospitalization or arrest of the student. There is an imminent risk of harm to someone in a category 1 incident.
2. High violence potential but it does not qualify for immediate hospitalization or arrest of the student. However, some immediate action must be taken. There is a high risk for harm in

a category 2 incident and there are enough warning signs to require other services.

3. Insufficient evidence of violence potential but with evidence of repetitive and intentional emotional distress. There is a moderate risk for harm in a category 3 incident, and some stabilizing factors need to be instituted immediately.
4. Insufficient evidence of violence potential but there is evidence of unintentional emotional distress. There is a minor risk for harm with a category 4 classified incident, but there are some warning signs so stabilizing efforts should be started.
5. Insufficient evidence of violence potential and insufficient evidence of emotional distress. There is low or no risk of harm in a category 5 incident that appears to be misunderstandings, peer trouble and poor judgment.

Possible False Reports

Although relatively small in number, there may be false reports of incidents that do not have any further violence risk or connect to any potential concerns. These reports often can be identified. Some of the reasons for them include: bragging or talking about false claims to make themselves look 'tough,' wanting attention, revenge, reconciliation, or even an alibi for an otherwise embarrassing event. These reports may be identified by inconclusive or inconsistent forensic evidence, stories with conflicting statements, or even preposterous or outrageous stories. Sometimes the victim doesn't behave as expected, and often there is a big drama in the retelling. There may also be a history of misperception of events or even outright lying that requires careful scrutiny. In many of these cases there is an intuitive or 'gut' feeling that something is not true or at least being grossly exaggerated. On the other hand, it is important not to dismiss a suspicious claim too quickly, as many youth scenarios for violence appear to be improbable to adults who are not familiar with the fantasies of those who have been abused or exposed to abuse and violence.

When School Violence Occurs

Sadly, it appears as if we have passed a point in time when we can use phrases like "*if* school violence occurs," and rather we rely on words like 'when.' Arguably, school violence has occurred frequently in the past, even prior to the Columbine massacre, but differences in the use and prevalence of media, the nonexistence of social media outlets prior to the early 2000s, and the fact that most violence used to occur in 'predictable' high-risk lower-socioeconomic-class urban neighborhoods meant that not as many people were paying as much attention then as now. But the fact remains that the pattern we are witnessing in rates of school violence (especially mass shootings like Columbine, Sandy Hook, and Marjory Stoneman Douglas) is distressingly rapid and frightening given the random numbers of people who lose their lives in minutes.

To help allay the fears of children, teachers, parents, and community members, the FBI and various other groups have developed training models to instruct students and school staff on how to react and respond when an active shooter or assailant enters a school. Numerous companies have formed offering response training, and a word of caution is important that schools and school boards should consult with TATs to carefully weigh the source of these trainings. However, the concept of trainings and response drills is sound. Some do argue that by running 'active shooter drills' we are creating a culture of fear in our children and potentially traumatizing them, in a sense, even before violence occurs in their close proximity. But the research has shown that by teaching people (even children) what to do in the event of an emergency and practicing it repeatedly, we encourage the development of 'muscle memory' and improve response times

and accuracy of safe behaviors. This is why schools across the country hold regular fire drills and schools in the tornado belt hold tornado drills: 'practice makes perfect.' As noted in a piece by Erbacher and Poland (2019), the head of the crisis response team for the National Association of School Psychologists (NASP) has even called active shooter drills "essential." Experts in the area of school violence suggest that school psychologists should be involved in both planning and conducting active shooter drills to not only help them be most effective, but also to help address student and staff fears and struggles (Erbacher & Poland 2019). For a reliable outline of generally recommended steps to take in an active emergency, review the website Ready.gov (https://www.ready.gov/active-shooter), a resource published by the Department of Homeland Security.

After a violent incident has occurred in a school, the crisis intervention plans as described in an earlier chapter are often the most useful intervention. Many different professionals are trained in using crisis intervention, including those in the community called 'first responders' who are often police, fire workers, social workers, counselors, and other volunteers. The Red Cross, Sheriff's Departments, and other community groups often advertise for volunteers when they conduct training programs. However, in addition to the outside assistance that may be available, it is important for the school officials and TAT members to debrief the staff and students.

Debriefing

Psychologists are often involved in providing mental health counseling to victims and first responders when a school shooting incident does happen. The initial response is usually to give aid, comfort, and information to survivors. First responders and survivors then need to debrief after an incident, usually by having someone in authority control the information flow immediately to avoid rumors, inaccurate information being disseminated, or speculation that raises anxiety in those inside and outside of the school. Media usually are at the site of a violent incident immediately, sometimes even before the first responders get there! It is important to have a policy in place about who will speak to the media and what information can be released. This often must be coordinated with law enforcement so their investigation is not compromised. Obviously, the most important information formation is about the safety of the children and staff in the building. If there are injuries, information about where they are and their condition would also be important to release with warnings for non-relatives not to try to go to hospitals or wherever they are taken. Depending on the numbers of people impacted, it may be appropriate to set up a debriefing station in a place away from the school building. A designated spokesperson needs to provide updated and accurate information as it is available as well as responding to questions that arise. Obviously, that spokesperson should know what can and cannot be released to those inside the building and those outsiders who want and need information.

Police officers are often trained in debriefing methods, especially those who have been trained in special CIT programs. Psychologist and police officer, Vincent Van Hasselt has studied different programs to train police officers and psychologists together that assist when disasters occur. Those trained can also assist if hostages are taken or if a known mentally ill person needs to be restrained without inciting more violence. In the Nova Southeastern University's Clinical Psychology Program, doctoral students are trained to role-play with police officers who volunteer for this training.

Return to 'Normal' Quickly

Although it can be reasonably argued that no school can ever reach a state of true 'normalcy' again after an incident of violence, returning to a 'new normal' is essential. It is important for all to return to the business of school as soon as possible after an incident. Work is therapeutic, and so is going about one's daily business. Quick and thoughtful interventions can mitigate the

traumatic stress reactions. Debriefings, informal discussions, individual support, and follow-up services all may need to continue for awhile after school is resumed. It may also be important to give extra support for those who were caregivers, as well as those who were victims to prevent secondary victimization that can occur when there is a major traumatic event. This may involve special groups to talk about the experience or individual counseling. The aftermath of a school violence incident may be long lasting, especially if there were significant injuries and deaths. Lawsuits that often are filed by different parties will keep the traumatic memories alive, and re-experiencing the trauma will occur if there is participation in depositions and trials. With good preparation and significant support services, the psychological impact from disaster incidents such as school violence can be minimized even when they can't be prevented.

As we write this it is coming on two years since the MSD shooting that devastated our neighborhood. The aftermath of this disaster included empowerment of many of the students, their families, and teachers who were exposed to the incident that day by trying to participate in finding an answer to stopping this kind of violence. This included the seventh graders who hid in their classrooms in a different building as well as those who hid in closets and under desks while a classmate was shot or a teacher who locked the door and saved the rest was killed. It also included those who knew the shooter and wished they could have done something to prevent the incident and others who were indirectly affected by the loss of a relative or friend or patient. First responders and caregivers have joined various action groups including trying to stop gun violence. It has energized the community to let their lawmakers know their wishes. Perhaps the brave students there that day will show their elders the way.

Workplace Violence

In recent years, we have seen what appears to be a rise in workplace violence as well as school violence. Although different in many ways, there are numerous similarities between school and workplace violence incidents, and many of the effects are the same. Thus, a brief discussion of workplace violence is warranted here before we close this chapter.

Types of Workplace Violence

Workplace violence may take different forms including threats, vandalism, equipment sabotage, and personal conflict with other employees. Threats often include angry letters (either signed or anonymous), telephone calls, and verbal arguments. Vandalism may occur in the school or business offices, in the building, in bathrooms, or in parking lots. The most common equipment to be sabotaged is computers, although this may also occur in places that have expensive equipment for the vocational training, telecom functions, or research and other technology. Fights with co-workers can escalate out of control, especially if there are grudges held, romantic liaisons that are broken, or even unrequited love by those with erotomanic obsessions and/or delusions. Employees who have been fired have had their jobs re-classified, have lost benefits, or were given negative performance evaluations may become so enraged that they commit serious violence toward the person(s) responsible or take out their anger on others. In some cases, they have taken an office filled with workers hostage in order to retaliate for what they believe is unfair treatment. One of the most common types of workplace violence involves a perpetrator of domestic violence who stalks and comes looking for his partner, and then shoots and kills her when he finds her at work. Homicides and suicides are not uncommon in these situations.

Workplace and Other Violence in Schools

We must always remember that a school is a workplace for many people, from administration to teachers, counselors, assistants, janitorial staff, and other employees. The same principles of

workplace violence discussed above can occur in the school setting, putting the safety and lives of innocent children at risk along with innocent adult victims. Violence can also be threatened and can be carried out by strangers who have no relationship with those in the school (random drive-by shootings, a police chase that ends up in the school parking lot, or a sex offender who impulsively wanders into the bathroom when he sees children on the playground). These events are random and cannot be predicted although precautions can be taken. Still they may cause emotional distress and psychological harm to those who work in the school as well as the children. Often, when we think about school violence, we do not think of the impact on school staff as we pay so much attention to the children. Violence can also be threatened or committed by those who have had an employment relationship with the school and are disgruntled—similar to what has received high publicity in post offices by dissatisfied employees.

Workplace Preparation

Although it is not possible to predict every potential incident of violence in a workplace or school, it is possible to prepare a policy in the likelihood that it should occur, just as is done in schools for response to school shootings. All employees should be trained to cope with threats. The suggested routine to cope with threats is to stay calm, maintain eye contact with the attacker, be courteous, get someone else to go for help using a pre-arranged signal, be patient while stalling for time, keep talking but do not risk harm to self or others—especially children, if they are present. If it is possible, get a witness on the extension when talking to someone who is making threats on the telephone (although this is now increasingly difficult because of the heavy use of mobile devices for communication). Keep the person talking by asking him to repeat the message and write it down. Try to listen for background noises or clues while getting more information such as where the person is calling from and how to return the call.

It is also suggested that special plans be developed and implemented for high-risk situations such as domestic violence. Many workers do not reveal that they are in a domestic violence relationship to co-workers, but there may be suspicions of some sort of trouble. Workplace policies that treat domestic violence as confidential as other medical or substance abuse problems often have advance warning that a batterer may be escalating violent behavior. As was described in the earlier chapter on syndromes, the most dangerous time for a batterer to stalk and kill a battered woman is when they separate. If there is a specific crisis plan and a high alert occurs, all employees should have instructions not to disclose the woman's whereabouts or put telephone calls through to her. The TAT or a designated employee safety leader should be notified immediately. Perhaps the woman's work schedule can be modified to avoid detection. Any crisis plan should be rehearsed and updated as needed.

Summary

In summary, the shocking reports of teens who bring guns and other weapons to school and go on a shooting spree have prompted research into the psychological signs and predispositions that these youth may have demonstrated before they explode with violent behavior. The vast majority of the recent spate of school violence incidents were committed by boys, not girls. All displayed some of the symptoms that have been categorized as verbal, physical and behavioral, bizarre thoughts, and obsessions. Most had paranoid disorders with delusions and PTSD, and some also used alcohol and other drugs, perhaps as a way to treat their mental disorder symptoms. There are a number of new laws passed or proposed, at the federal and state levels, that guide schools as they restructure the safety within their buildings. No-weapon policies are mandated now. Threat Assessment Teams and crisis intervention policies must be put into effect prior to experiencing an incident. Employees can also trigger a workplace violence problem at schools, which are also workplaces for

them. It is important that other employees have had training to deal with any crisis or hostage situations that arise.

Questions to Think About

1. State legislators are talking about passing laws to allow teachers and safety personnel to arm themselves with a gun? Some people think this is a good idea as they can shoot and kill a school shooter more quickly than waiting for police to arrive. Others think it will cause more violence, especially if a minority person is suspected of being armed. What do you think?
2. Suppose you are friends with someone who has a bad temper and becomes angry with a teacher who gave them a lower grade than they think they deserved. The person threatened to hurt the teacher if their grade was not changed. What signs should you look for to determine if this is a credible threat and what should you do?
3. Why do you think almost all of the school shooters were boys, not girls?

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20 Legal Rights of Children

What Legal Rights to Children Have?

Historically, children, like women, were considered the property of their fathers and had no legal rights themselves. All decisions that affected their lives were made by their fathers. All earnings they might have belonged to their fathers. If they needed discipline, then it was the fathers' responsibility and corporal punishment was allowed. These rights were accorded to the father, under the law, using the same philosophical belief that we discussed in the earlier chapters on marriage and families: Parents are thought to act in the best interests of their child. However, as we saw in the chapter on protecting abused family members, this does not always happen. Despite the Ninth Amendment to the U.S Constitution that recognizes certain basic personal rights for everyone, the law has always tolerated a certain amount of physical discipline and psychological abuse from parent to child. It was not until the early 1970s that corporal punishment of a child was outlawed in the U.S except what is regulated in schools and at home, and criminal statutes against family violence were not enforced until the mid 1980s. In many countries around the world, children still do not have the right not to be abused by a parent.

Today, the social milieu is more permissive toward children's rights to express feelings, thoughts, needs, and their opinions in families than it was before World War II. This milieu has resulted in a modification of laws toward giving children more legal rights. Despite the state's reluctance to make decisions against what parents want for their children, there has been a steady increase in the support for legal rights being accorded to children around the world, even if what they want is different from their parent's wishes. The feminist movement brought about its criticism of the patriarchy including father's rights over women and children. Then, in 1989, the UN *Convention on the Rights of the Child (CRC)* changed the understanding of a child to an independent human being with different needs, wishes, and feelings from the parent. Although the CRC does support the need for a cohesive family, it also emphasized the need to facilitate the growing independence and autonomy of the child. Further, it enumerated a number of fundamental social, protective, and legal rights of the child including the right to participate in the decisions made about their life. Every country in the world has since adopted the CRC except for two: Somalia and the U.S

In this chapter we will discuss the arguments for and against the child's right to participate along with the challenges that have occurred as countries have tried to legislate and then enact some of these children's rights. Arguments focus around a child's *capability* by raising the issue of how to identify at what age a child is capable of making rational decisions and how much weight to give their views. Some of these arguments have merit in that children develop capabilities for different types of decision-making as they

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grow. Others, as you shall see, bear similarity to the arguments that were put forward about women and minorities as each group fought for their independent decision-making rights. Another popular argument is the need to consider the child's *best interests* which is often contrary to what the child may want or wish. Professionals often fear the child will be harmed by such participation although those who have been implementing new laws of child participation report difficulties in some cases but not harm. A third argument is the concern that children should be protected from the *confrontational nature of participation* including their ability to be manipulated by parents or other authority figures. While this is possible, there is usually confrontation in the family or other areas already once legal remedies are sought to assist in difficult decisions (Kleinman & Pollack, 2017). Experiments such as children's participation in the divorce courts in Israel, described later in this chapter, have found that in most cases children's participation led to greater rather than less communication within the family. Even when the decisions did not go in the child's favor, they felt like having their feelings and opinions respected was empowering. This is quite different from the typical way family court decisions are made in the U.S where many of the participants come away angry, disillusioned, and upset with the process as well as the outcome. Walker, Cummings, and Cummings (2013) presented speakers at a two-day conference in Phoeniz, AZ where the presentations lived up to the conference title, *Our Broken Family Court.* Others have been highly critical of mental health and legal professionals calling for so-called psychotherapy to 'coerce' divorcing parents into compliance with court orders even if they believed they were detrimental to the safety of themselves and their children (Kleinman & Walker, 2014).

Those who seek legal rights and participation of children claim there are clear benefits to granting children legal rights including the power of participation itself (Parkinson & Cashmore, 2008). First, psychologists describe the need for control that permits children to get to the next stage in their development. Learning to think about and participate in making decisions about what happens to them is a coping mechanism that can always be used in other stressful times, too. Second, participating in decision-making about their own future life can foster the development of trust in other people, feelings of self-esteem and being respected. Having a voice in both normal as well as stressful situations gives people power. Third, participation in one area of life may extend to other areas fostering a belief in democracy and toleration of different viewpoints. Fourth, involving children may actually improve the adults' decision-making process and the final outcome. Everyone can come away from the process feeling that whatever the outcome, it was made in a fair way (Taylor et al., 2013).

History

Let's take a look at a 1904 case called *Rule v. Geddes*. Here, a daughter requested a hearing before the court because her father demanded that she be sent to reform school. In this case the court opined that she had no right to control her own actions or select her own course in life and refused to acknowledge her request for a formal hearing. Courts continued to permit parents to make decisions impacting their minor children's rights until quite recently. For example, in another case, *Katz v. U.S (1967)*, the court reaffirmed the personal privacy of a parent except in what they called 'dire' circumstances. But, by 1971, in *Gibson v. Gibson*, a California Court struck down the doctrine of 'parental immunity' and substituted the 'reasonable prudent parent' standard to be used to decide if a parent's decision about a child was appropriate. As cases appeared that challenged the age and standards by which a child could be considered competent to testify, the presumption that no child was competent was changed to all children are competent unless they don't know what is happening in the courtroom, cannot recite the facts of what happened to them, or do not know the consequences of taking an oath (or can't tell the difference between truth and fantasy). In most

jurisdictions, the child may be protected from testifying if a mental health expert testifies that he or she would be harmed by the experience or 'medically unavailable' in some laws.

In the 1960s in the U.S feminists who fought and won their legal rights were not always supported by children's advocates who believed that they needed their mothers' protection. Changes in family law that gave women the right to divorce, obtain credit in their own name, and be awarded custody of their children did not extend children's ability to give voice to what would happen to them. Instead their lives changed under whatever both fathers and mothers decided, even adding more stress when parents couldn't agree what was in their best interests. This area continues to be one of the most highly litigated with more and more professionals being created to make decisions about children without giving them any say in the matter. Guardians ad litem, children's lawyers, parenting coordinators, child custody evaluators, time-sharing coordinators, social history recorders and whatever the *nom de jour* all are tasked with figuring out the child's *best interests* often without ever asking the child about their wishes.

Fortunately, children's views are sought as they gained legal rights in other areas. As we saw in the USSC decision *In re Gault, 387 U.S 1 (1967)* that extended many adult-like procedural rights to children in juvenile cases discussed in Chap. 17, it provided the opportunity for children's activists to argue for more legal rights for children. For example, the USSC granted children's rights to speech in public schools in *Tinker v. Des Moines Independent Community School District, 393, U.S 503 (1969)*. It also granted due process protections to school children who were about to be expelled in *Goss v. Lopez, 419, U.S 565 (1975)*. The following year, the USSC Justices went further in granting children access to contraception in *Carey v. Population Services, 431, U.S 678, (1976)* and later to abortion through judicial by-pass if the child did not wish to tell her parents in *Belotti v. Baird, 443 U.S 643 (1979)*. As mentioned earlier, the 1989 *UN Convention on the Rights of the Child* granted other affirmative rights to a decent standard of living including education, health care, and the right to express their views about decisions being made in their lives according to age and maturity.

The rights granted to children may be a function of age and maturity but sometimes the law itself imposes an assumption of dependency that is not necessarily true. If a child is not permitted to enter into contracts, consent to medical care, or negotiate wages, they have to rely on adults to perform those functions for them, creating a dependency just because of their legal status. It is important to recognize that even adults are not always independent as they may rely on others to help make decisions for them. For example, there are different ages for when children are considered legal adults capable of entering into marriage, sexual activity, employment, driving, drinking alcohol, voting, and criminal prosecution. Many of the changes in legal age were due to politics or necessity. Lowering the voting age to when the person can serve in the military during wartime was political. Assumptions made about a child's maturity may be influenced by biases around race, class, or gender. Some states lower the age of a juvenile's criminal prosecution as an adult if a serious or violent crime was committed as we discussed in Chap. 18 on juveniles.

As discussed above, granting children legal rights remains a controversial area today with some psychologists and jurists believing that doing so will destroy the family, especially if they are permitted in the courtroom to testify against a parent. Others believe that it is necessary to give children the legal right to contest decisions that will harm them as protection against child abuse. Still others believe that criminalizing child abuse laws that permit children to testify against a parent is particularly destructive to both the child and the family unity. Others say an abusive family is already broken. Obviously, there is not an easy answer to this issue.

The rights of the family as an institution are granted by law and parents can stand between the child and the state. Without being a signatory to the CRC, the U.S is not obligated to follow all its

dictates, but it already does follow some. For example, the state already prevails over family rights with certain laws such as compulsory education or the age when a child can be left alone at home. Parental rights and responsibilities sometimes clash, and these types of laws are needed to protect children, again demonstrating that total autonomy is not possible for adults or children. Currently there are tensions between parents who do not wish to vaccinate their children against measles, for example, and the state laws requiring such immunizations before a child can enter school. Given that certain diseases are easily communicable causing epidemics, one family's right not to vaccinate may violate another family's right not to be exposed to disease. So far, refusal to permit the non-vaccinated child to enter school has been the remedy, but then the child is denied their right to an education and freedom from a nasty disease!

Children's Presence in the Courts

Family Courts

In the 1990s, a movement toward greater empowerment of children and a change in focus to children's rights and needs also extended to their presence in the courtroom. However, the acceptance of what types of rights and when they can be granted is still not settled. Legal case decisions such as *in re Gault (1967)* gave juveniles more rights to be present in delinquency courtrooms, *Craig v. MD (1990)* permitted special arrangements in the courtroom to enhance reliability of children's testimony in sex abuse cases, and guardians ad litem (GAL) and children's attorneys were given standing in cases involving minors. However, other cases such as *Belloti v. Baird (1979)* and *Parham v. J.R. (1979)* suggested that adolescents had fewer legal rights than did adults primarily because they were less competent to make informed judgments about many decisions especially those involving medical treatment. We saw in Chap. 16 on Reproductive Rights how many states were willing to exercise their special powers over adolescent girls by refusing to permit them to decide whether or not to obtain an abortion without a parent's or judge's consent despite the research that showed most adolescents were indeed competent to make their own decision. If they couldn't make a competent decision whether or not to elect to terminate a pregnancy, how could they be considered competent enough to raise a child, especially in families where incest or other abuse exists?

Civil Courts

Lawsuits that involved children became popular in a number of different areas including disputes over property, family business controversies, disagreements over inheritances, disputes over child support, assault and battery cases involving damages from incest and abuse, kidnapping and deprogramming from cults, children suing to divorce their parents or terminate parental rights, and cases involving injuries sustained where parents may be covered by insurance (such as car accidents). Let's look at a few of these areas.

Cases involving parents *who take children's property* and refuse to return it received some publicity on the so-called 'reality television shows' recently. Can a child sue a parent for refusing to return property such as gifts given to the child or even property purchased by the child and left in the home when the child goes off to school? In some courts, when the child is emancipated (usually at age 18 but sometimes earlier depending on circumstances), they can file such a lawsuit. Rarely can it be filed when the child is still a minor unless it is a *dispute over child support* that is sent by one parent for the child but spent by the other parent. Those who favor a more therapeutic and healing role for the courts believe that this type of a lawsuit should be settled in mediation. However, the belief that the parents always make the right decisions for their children is simply a myth as we have shown in families where mental illness, other incapacity or abuse is prevalent (Kaslow, 2000).

Family business controversies carry this illusion even further. Historically, the oldest male inherited the father's property including the businesses. Today most families share their wealth equally. But, what if one child is better at

running the business than the others? What if the father and the other children do not get along? Or, the father doesn't like the child who could keep the family business profitable? Generally fought out in family court, unless a parent dies and children take the battle to probate court, arguments about who inherits the family business may cause even further dissension among family members. *Challenges to inheritances* by one child against one or other children or a subsequent wife may end up being resolved in court rather than within the family.

Criminal Courts

Cases in criminal court often involve a parent who is accused of abusing a child, usually sexual abuse. Several of the cases cited in the previous chapters on child protection are in relation to the issues raised by child abuse cases. Usually the child is represented by their own attorney who has responsibility only to the child or by the court's appointment of a GAL who has more responsibility to look out for the best interests of the child and report to the court. One issue raised by those opposed to minor children testifying against a parent is whether the child's testimony will render his or her role in the family as irreparable. This is especially difficult when the child's other parent is supporting the accused parent and not the child. Obviously, the normal family relationships are already broken when abuse takes place no matter what the legal outcome.

Research on abused children generally finds that different types of relationships between the alleged abuser and the child may be established after the legal proceedings are over. Some studies have found that some sexually abused children are able to forgive their abusive fathers for their abusive acts before they can forgive their mothers for 'failing to protect' them, even when they never told their mother what occurred (Walker, 2017). There has been little research to understand whether the parental bond is irretrievably broken when the child provides testimony in open court or what relationship a child and parent can have after that parent is sent to prison on the basis of the child's testimony. These are interesting areas that need to be further studied.

Israel Model Project

Morag and Sorek (2015) discuss a project in Israel where children's participation in family court occurred. Prior to this project, all the Israeli laws were changed to conform to giving children their legal rights according to the CRC recommendations (personal communication with Judge Saviona Rotlevy, Chair of the Task Force appointed by the Israel Supreme Court). Child participation in decisions around access and parental responsibilities has been extremely controversial when parents divorce, especially since there are often differences of opinions between parents angry with each other at that time. Although other countries have now attempted to include children's wishes in helping to decide what is really in their best interests in both family and dependency courts, there are still arguments against doing so [see Gal and Duramy (2015) for more information]. Perhaps the most often cited argument against participation is the fear that children will be manipulated by one or both angry parents who are unable to come to their own joint decision-making at that time and turn to the courts. Other arguments include the possibility that children are not capable of making such an important decision or perhaps should not be asked about what they want as it is invading parental rights and destruction of the family. Also problematic is whether family court judges have the expertise to have such a discussion with children of various ages given their own backgrounds and training. Many have little patience, understanding, or tolerance for children and some are known to say things that can be disturbing to them or violate their confidentiality. The latter issue of keeping the child's confidentiality is an interesting issue since without their own legal rights, their parents hold their privilege.

Given all these factors, the Israeli CRC Legislative Subcommittee recommended different

models be implemented to study child participation (2003 *Report of the Committee for Examination of Basic Principles in the Area of the Child and the Law*, "General Part" p. 32. http://www.justice.gov.il/MOJHeb/HavaadLeZhuyotDochKluali/). Results recommended a model establishing a "child participation department" be attached to the family courts staffed by mental health professionals who have expertise in working with children and youth. That staff would be responsible for educating children and parents about child participation, explain that the judge retains the final decision-making authority, and invite them to participate in talking about their wishes to the mental health professional and/or the judge. The child could also waive their right to participate. Their age and maturity would be assessed by the mental health professionals and an agreement be reached with the parents for the judge and staff to keep confidential what the child specifically discloses. The decision of the judge is explained afterward by the court or the mental health professional. Implementation of the model was done in two stages. Although the model called for all children to participate, judges only referred about 40% of their cases to the team initially. In the first stage, only 35% of the children and parents agreed to participate, mostly because parents didn't agree. However, in the second stage participation rose to 60%. The team stated that as they themselves became more comfortable with the process, they were better able to explain it to the parents encouraging more cooperation.

Most interesting, the children asked afterward if they thought it was a good idea to give children the chance to express themselves about their parents' conflict, 93% agreed and said they would recommend it to their friends. When asked why, most said they felt their feelings and opinions were respected, that talking helped them clarify what they really wanted, and that their relationship with at least one of their parents had improved. Even if what they wanted didn't happen, they still felt better that they were listened to and heard. In cases of children who appeared to be alienated from one parent, at first their participation did not seem to have an impact one way or the other, although most wanted to be heard by the judge. However, in the follow-up study, it became clear that these children were helped by being able to talk about their own issues to both the mental health professional and the judge who appeared to better understand the reasons for the child's own wishes that were different from the parent who was accused of being an alienator. Even if the child was parroting the parent's issues, their own wishes usually began to surface (Morag & Sorek, 2015).

In the initial evaluation, almost half the judges felt that hearing the child's opinions helped them "to a large degree" better understand the case but probably did not change their decision. However, later on, after the pilot study was concluded, most of the judges and team members cited many cases where the child's participation led to much better decisions and even changes in judicial rulings. One of the most significant findings was that the participating children talked about not having anyone to talk to about the intensity of the pain caused by their feelings or opinions on the things that disturbed them the most. When the mental health professionals, after obtaining permission from the child, discussed this with their parents, many were surprised and said afterward, it opened up better communication.

In courts where the model continued after the experiment, although fewer cases continued to be referred, many of the initial fears actually did not become a problem. Nonetheless, some judges continued to be uncomfortable with the model, especially with the issues around confidentiality of disclosed information. Some feared an increased workload and others complained that they did not have sufficient power or training to make a difference in the most disturbed family's behavior toward their children. All of this is true in family court which although it is supposed to be a court of equity and fairness, children rarely get fair treatment if what they want or need conflicts with their parents' ability to provide it.

Civil Court and Personal Injury Cases

Civil court personal injury cases may be filed by an emancipated child or adult against a parent for damages from child abuse. There is usually a statute of limitations about how long after the child becomes an adult that the lawsuit can be filed but this statute can be 'tolled'—the term for beginning to count the time period from the time that the person 'knows' that he or she was hurt and harmed by the parent's actions. It is not uncommon for adult children in their 30s to go into therapy, discover they have been harmed by the parent's abuse (in some rare cases, even gain total recall that the abuse occurred while in therapy), and file a lawsuit against the parent many years after the statute expired. However, proof that he or she didn't know that he or she was harmed, even if some aspects of the abuse were never repressed, may permit the lawsuit to go forward by what is called *tolling the statute*. Interestingly, New York State just passed a new law removing the statute of limitations for people who were sexually abused and wish to sue their abusers. In most cases these are lawsuits against third parties in positions of authority, such as religious people, athletic coaches, and therapists in response to what has been called the "me too" movement. If other states do the same, more cases of abuse will be uncovered, and abusive parents may also be included as defendants.

One response from defendants have been lawsuits against therapists for 'implanting false memories' of abuse; these have been instituted with accused parents using information obtained from a group called the False Memory Syndrome Foundation in initiating these lawsuits. Interestingly, this organization was founded by two psychologists whose own daughter, also a noted psychologist, accused them of abusing her. Although the parents' denied the abuse, in fact, their daughter has publicly stated that she always remembered the abuse, and thus, whatever arguments about memory that were raised by this group should not be applied to her.

Jennifer Freyd has written extensively on the betrayal that is experienced by an abused child that disrupts the parental relationship and also extends to other relationships. The issue of recovered memories has been a controversial one in psychology and will not be discussed in depth here. However, it is important to understand that human memories can be stored in the cortex or cognitive area of the brain or in the midbrain structures such as the hippocampus where nonverbal trauma memories are also stored. As these memories are easier to retrieve when processed and stored in the cortex, we know more about them but newer research on emotional memories and emotional intelligence has helped understand the clinician's argument about trauma and abuse memories.

The case of *Ramona*, a California case that was heard in the 1990s put therapists on notice that improper assessment or treatment methods could cause a client to develop a memory of abuse that had not occurred. In this case, the client, *Ramona*, had been given sodium pentothal and supposedly remembered an incident where her father sexually abused her. The father did have a known history of inappropriate sexual behavior that came out during the trials. She confronted her father who filed a lawsuit against the therapist and psychiatrist who gave her the sodium pentothal for implanting false memories. Ms. Ramona denied that the memories were false and did not join in the lawsuit. There were several novel legal issues that this lawsuit raised. The more important one was whether the father had standing in the court to file a lawsuit against his daughter's therapists. The court ruled that he was an interested party since the therapist had a joint session with the father and his daughter and permitted the lawsuit to go forward. Eventually, the father prevailed which frightened therapists who worked in this area.

Another area that further clarified the legal rights of children occurred when *children who joined a cult* tried to sue parents for hiring detectives to find, kidnap, and deprogram their children who were living in a cult or cult-like

group. These cults and pseudoreligious groups were popular from the 1960s to the 1980s. They used brainwashing techniques to get youth to join and stay with them. These brainwashing techniques included repeated lectures, immersion in a new culture, isolation in retreats, and concepts such as 'heavenly deception' and 'love bombing' to persuade members to engage in risk-taking activities. When several of these charismatic cult leaders led their followers to commit suicide, many parents got worried and hired these deprogrammers who reverse-brainwashed them into their families of origin. Interestingly, some adult children went right back to the cult and sued their parents for breaching their privacy rights and freedom of religion. The lawsuits had mixed results. Kaslow (2000), who has been studying the impact of cults on families, found three common areas of vulnerability for a child to join a cult: (1) There was an external locus of control and a ready submission to authority figures; (2) there was a prior weakness in their relationship with their own father; and (3) something emotional or spiritual was missing from the family of origin.

Children suing a parent for divorce or termination of parental rights. It was unheard of for a child to obtain legal standing in the court to sue a parent for divorce or termination until the Florida case of *Gregory K* that occurred in 1992. Gregory K was an 11-year-old foster child who was under the care of the state having been placed there voluntarily by his mother who could not care for him. He hired his own attorney and sued his birth parents for divorce demanding his constitutional and other legal rights in order to be adopted by his foster parents. Evidence suggested that the child had never formed an attachment to his birth parents. His mother had substance abuse problems and originally placed Gregory and his siblings in the custody of the state child protection agency (CPS) foster care voluntarily. She rarely visited him and one time she took him home to live with her for several months but again placed him back with the CPS who returned him to his foster family.

In 1991, the court-ordered termination of his mother's and father's parental rights and his foster family made plans to adopt him. Six weeks later, the court reversed itself and CPS began reunification plans with his mother. Although the court had appointed a GAL to represent Gregory, this person never met with him during the two years in which the case was pending. Gregory hired his own lawyer and fought for standing in the court to present his case. The court entered an order that affirmed Gregory's legal rights, stating that minors have the same rights as adults to due process; equal protection; privacy; access to the courts; and the right to defend life, liberty, and pursue happiness.

Although the appellate courts later reversed the trial court's decision, recent cases suggest that the law may well be moving in the direction of giving children greater legal rights even to choose new parents when the old ones are inadequate. *Gregory K* set an important precedent that raises some important questions. Do children have the same legal rights as do adults? Will the granting of legal rights to children destroy the family as we know it or will it strengthen it? Obviously, families that do not fulfill their responsibilities to their children and meet whatever threshold the state sets for its interference already can lose their rights to privacy under the child abuse laws as we saw in Chap. 14. But, what about non-abusive parents like Gregory K's mother who placed him in the state's care because she knew she could not care for him properly? Do Gregory K's rights to have parents who can help him reach his full potential take precedence over his mother's rights to reunification with her son. Should reunification be the goal in these cases? Does reunification meet the legal standard of 'the best interests of the child'? Finally, can psychologists determine that a non-genetic parent will be better than the biological parent in promoting the best interests of the child?

Empowerment of Children

Psychological studies of youth who have been arrested for delinquency indicate that they have many needs that are not being met by either

parents or the child protection system. Areas that have been found to be predictors of youth crime include teen pregnancy, family abuse, school problems, poor peer relationships, and violent community lifestyles. Once a youth is arrested and held in a juvenile detention facility, it is important to assess for these factors and begin interventions that will give the juvenile more power over his or her own life. How can a juvenile who does not have full civil rights be empowered legally? This was an interesting question for an experimental program that was funded by the Legal Aid Foundation and being implemented in Broward County, Florida, as well as several other communities.

Teamchild

Broward County Legal Aid, Nova Southeastern University Center for Psychological Studies and the Broward County Public Defenders' Juvenile Division were involved in a project called TeamChild to identify and offer legal assistance to girls who have been arrested for delinquency or status crimes. A similar program is also in Washington State. Girls were selected because there were reports that their arrests were increasing in numbers and in the seriousness of their charges. The goal of the program was for each girl who participated to be assigned an attorney who could assess for and educate the girl about her legal and civil rights and represent her in court to obtain them. The legal aid attorney did not take the place of her criminal defense attorney and the two attorneys often worked cooperatively along with the case manager from the Office of Juvenile Justice. In the two years of the project, over 150 girls were represented by an attorney who helped stop the school neglect they faced, helped them get appropriate school placements, advocated for their medical and psychological needs, helped them get away from abusive parents even petitioning the court for emancipation in some cases, and taught them to use the courts to fight for their rights rather than batter it out on the streets. In fact, in Florida, the law permitted youth to hire their own attorney to represent their rights in two specific areas; (1) if their parent's rights were about to be terminated and (2) if they were about to be sent to a residential facility. However, in TeamChild, the attorneys were advocating for further legal rights for children.

> Janie was referred to TeamChild after her fourth arrest for running away and fighting with her teacher. Janie had a long history of school failures and although she was 13 years old and in 7th grade, she still couldn't read very well. The psychological screening found that she has been physically abused by her mother and sexually abused by several of her mother's boyfriends during her young life. Her family did not have many resources and when her eye-glasses were broken in a fight, no one thought to get them replaced. The school failed to even notice that one reason for her poor performance in reading and other classwork was that she couldn't see without glasses! The juvenile courts failed to note the importance of protecting her from further abuse during her previous appearances. TeamChild got her accepted into a good residential school, got her health services through Medicaid, and managed to get her new glasses; Janie is on her way to a non-criminal lifestyle.

Not all cases are as relatively easy as Janie's. Nor do they all have such successful outcomes. But, teaching juveniles how to use the system to help themselves can prevent turning toward alcohol and other drugs for comfort. Calling a lawyer at night is better than getting into an argument that results in a violent encounter. Schools are more interested in juveniles who have someone advocating for them. It is better to have someone who will listen to a complaint about the unfair practices of a teacher and teach the child how to formalize the complaint if it is legitimate than to go home, become so emotionally distraught that he comes back to school with a gun and shoots the teacher as 14-year-old Nathaniel Brazil did. The girls that are part of the TeamChild program have become empowered. Their numbers of rearrests have dropped significantly. Their success stories have multiplied. A new program for boys who have been arrested based on the same empowerment model also has now been implemented. Again, the goal is to prevent these youth from turning to a life of crime by providing them with models about how

to obtain their legal rights in a socially approved manner. We discuss the cases of participation by teenagers further in the chapter on juveniles including assessment of their competency.

What Is Needed to Give Children Full Legal Rights

In reviewing studies of places where children's legal rights have been instituted, usually under the attempt to conform to the CRC, there are usually several steps that need to be taken to be successful. First, the legislative history and new legislation as well as judicial practices must be reviewed and made compatible with the provisions of the CRC. Children's rights may also need to be incorporated into the country's Constitution along with both implementation laws and remedial provisions if breached. In 2009, the UN Committee passed Article 12 that specifies what needs to be done to implement children's rights including adopting mechanisms for implementation. It includes judging the age and maturity of the child and giving weight to these factors in interpreting their views and providing the opportunity for these views to be expressed independently in a judicial hearing either directly or through a representative. In countries such as the U.S where child custody evaluators are appointed, some argue this meets the provision independently even though as a non-signer of the CDC, the U.S is not under any international law obligation to follow its recommendations. However, there may be questions about child participation in Hague Child Abduction Convention cases. The *AMRI v KER* (2011) case from Canada illustrates how a 13-year-old child had the right to notice and participate in the hearings where her liberty was threatened. In other cases, hearsay evidence presented by a parent or other witness like a therapist, a video recording or written statements of the child, testimony by mental health professionals or lawyers, a child's own attorney, a *guardian ad litem* have all substituted for a direct meeting with the judge in chambers or open court (Table 20.1).

Despite the international mandates and studies in various countries, little has been done to change implementing regulations, policies, budget allocations, or other reforms needed in most countries (Gal & Duramy, 2015). Professional journal articles are filled with skepticism about how or whether it will work to include children's participation, especially in courts. Giving children legal rights is often viewed as taking away someone else's rights rather than seen as a potential for negotiation and

Table 20.1 Children's legal rights cases

Rule v. Geddes (1904) Court refused daughter's request for hearing and reaffirmed father's right to make decisions about her course in life
Katz v. U.S (1967) Reaffirmed parents right to privacy and doctrine of 'parental immunity' except in 'dire' circumstances
Gibson v. Gibson (1971) Reasonable prudent parent' standard to judge parental decisions
In re Gault (1967) Gave juveniles due process and other legal rights
Craig v. MD (1990) Permitted special arrangements in courtrooms to create reliable testimonyTestimony from a child
Bellotti v. Baird (1979) Adolescents were less competent than adults
Parham v. J.R. (1979) Adolescents were less competent than adults
In re Ramona Case that lasted several years alleging therapists implanted memories in client's minds
Gregory K Child divorced his parents so he could be adopted by his foster parents
Thompson v. OK (1989) Cannot execute someone under 16 years old when crime was committed
Perry v. Lynaugh (1989) Mental retardation must be considered as a mitigation factor in death penalty cases
McCarver v. N.C. State of N.C. banned executing people with mental retardation

compromise. But then again, that is probably why those cases end up needing a judge to make the decisions for them. Judges need to be clear and inform all parties that by listening to what everyone, including children, want will help them be better informed and be more likely to make a fair decision. However, in itself it will not solely determinative of their ultimate decision. Such a position will require changes in how judges are trained, since many take on the authoritative role and by nature or training are not particularly comfortable being collaborative. Demonstration projects including the success of teenage drug courts or other juvenile programs are already visible. Making custody decisions using child participation may help avoid the continued revolving door where difficult cases are never ending despite the continuous formation of new professionals to try to keep litigants out of court as discussed in the chapter child custody. Like any major social change, it will take continued experimenting, further exposure to models where the participants' fears are allayed, and education of the general public to give children their full legal rights (Shapiro & Walker, 2019).

Assessing Children's Competency

The issue of children's competency to testify in court has changed from the presumption that no minor is competent to the presumption that all children are competent. This means that a child can be compelled to testify whether voluntarily or not. The burden of proof is on the child (or their representatives) to provide that he or she is not mentally competent by (1) establishing that the minor does not have the requisite cognitive abilities to understand the case and all of its consequences; (2) cannot behave appropriately in the courtroom; and (3) cannot tell the difference between fact and fantasy. These requirements are similar to those that the courts require in criminal cases as we discussed in Chap. 5 on adult competency. Psychologists trained in child development are often asked to provide such assessments in legal cases.

Cognitive development of children has been studied by various psychologists over time with new theories expanding and replacing older ones, just as we would expect in science. One of the major theories about how children develop their abilities to think and solve problems was found in the ideas put forward by a Swiss psychologist, Jean Piaget and his followers. Piaget conceptualized children's mental development as occurring in stages with the final stage of formal operations beginning at around 11 or 12 years old. Children in that formal operations stage were thought to be able to generate many solutions to a problem, think about each one, anticipate their consequences, and weigh each factor in coming to their conclusion. Surely a child who could reliably think in this way would meet even the most stringent legal test for competency. However, most researchers found that there was a significant difference between the cognitive abilities of younger adolescents and those who were 16 or older with the older cohort being more likely to think in a manner more similar to adults than the younger ones. The issue is whether the younger adolescents are legally competent also.

Newer child development researchers suggest that adolescents are more variable in their capability to make cognitive judgments similar to adults, as skill development occurs continuously, rather than in stages, such as suggested by Piaget. Nonetheless, the research seems quite clear that in most areas of decision-making, adolescents are capable of using salient knowledge and applying good reasoning skills to reach a judgment. Obviously, when under stress, it is probable that adolescents may be subject to influences from their own emotions and pressures from others including parents. But, isn't this true for adults also? We all make better, more thoughtful decisions when we are not under extreme emotional stress.

The courts are still inconsistent about what level of cognitive ability is needed to make what kinds of decisions. For example, in child abuse cases, children as young as 3–5 years old are presumed competent to testify about some issues but not competent to testify about where they

want to live if the abusive parents divorce. Adolescents are presumed competent to be granted medical authority over their health issues including the right to choose their own psychotherapist but cannot make the decision of whether to have an abortion. A pregnant adolescent has the right to marry without parental permission in some states. We grant adolescents the right to drive a car at the age of 16 in many places even though a car can be used as a deadly weapon. Recently, the trend in criminal courts has been to waive minors who commit serious crimes into adult court rather than remaining in juvenile court, based on the premise that if they commit an adult crime, they should be judged and punished as an adult.

Cognitive Competency and Execution

The issue of whether or not to execute a juvenile who is convicted of a capital crime in adult court has been of interest to the U.S Supreme Court in several important cases. The leading case, *Thompson v. OK (1989)*, resulted in an opinion that the state could not execute an individual who was younger than 16 years old at the time of the crime. This was based on the USSC's reasoning that a juvenile had limited intellectual and moral development. Thus, the juvenile should not be regarded as blameworthy as an adult. Interestingly, at the same time that *Thompson* was heard, another case was before the USSC dealing with the same issue but in a mentally retarded defendant rather than a juvenile. In this Texas case, *Penry v. Lynaugh (1989)*, the defendant was found to be mentally retarded at the time of the crime which of course implies that he did not have the same intellectual and moral development of an adult. In *Penry*, the court did not ban execution of mentally retarded defendants per se but did indicate that a state must consider mental retardation as a mitigating factor. However, Texas did not have any such mitigators specified in the instructions to the jury although it did list three aggravators that it considered to be special issues: (1) Whether the criminal act was deliberate; (2) whether the defendant would be violent in the future; and (3) whether the defendant's criminal behavior was unreasonable in response to the provocation.

The USSC sent *Penry* back to Texas with the instruction to consider mental retardation as a mitigating factor. As we discussed in Chap. 7 on death penalty cases, juries must consider both mitigators and aggravators before sentencing a defendant to death. In the retrial of *Penry*, the jury instructions remained the same, but the judge did admonish the jury to "give effect to the mitigating evidence." Penry was convicted a second time and again the case went back to the USSC in 2002. By this time, 13 years later, 18 other states had banned the execution of people with mental retardation and the USSC decided to reconsider the issue with two other cases, *McCarver v. North Carolina* and *Atkins v. Virginia*. While the McCarver case was pending the state of North Carolina passed a law banning such executions. Using the *Atkins* case the USSC considered whether there was an emerging national consensus against the execution of a mentally retarded defendant and in 2002 found such a consensus existed and ruled that it was unconstitutional to execute the mentally retarded.

Waiver into Adult Court

The headlines screamed from the newsstands as I (LW) walked into the courthouse that morning, "nine-year old girl shoots brother while fighting over a Nintendo game." I was asked to go to the juvenile detention center to see Tiesha as soon as I arrived. When I got there I found a tiny scared nine-year-old with neat pigtails who was wearing a sweat suit that as at least three times as big as she was, but it was all that they had to give her. On it was the written words, "I cannot speak to you without my lawyer." I explained that I was a psychologist who was sent by her lawyer and showed her my ID without much hope that she really believed me or even understood what a psychologist did. Together we called her parents (who expected the call) and they told her it was all right if she talked with me since they couldn't be with her. They were at her 2 ½ year-old-brother's bedside in the nearby hospital where he was recovering from the gunshot wound that luckily just grazed his head and left a surface wound.

> Tiesha told me that she and her brother were not fighting over the Nintendo game, but rather they were playing cooperatively until he noticed the box where the gun was kept sticking out from under the dresser. Curious as one might expect a two-year-old to be, her brother took the box out and they both saw the gun when it was opened. Tiesha, who had seen her Dad teaching her older brothers how to shoot, wanted a closer look, and picked it up. She didn't know what happened to make the gun go off but it did and her brother lay on the floor crying and bleeding. Tiesha called for help immediately. It was clear from my interview with this child that she was not a tough street kid, but rather a curious young girl who should not have been left alone with a two-year-old, nor should a loaded gun have been left in the house.
> I then went to the hospital to interview the brother and parents as requested by Tiesha's attorney. Her brother was doing well and was able to support what Tiesha had told me. Tiesha and he didn't fight. They both were looking at the gun together. Lesson #1—Do not believe sensational media headlines too quickly! The parents told of having recently moved from their old neighborhood where crime was rampant. They were both working in order to support their family. The mother had left for her night job and the father left the children alone for a short time to help a neighbor fix the car. He thought older children were also at home and could watch Tiesha and her brother. He insisted that he didn't know that the gun had been removed from the closet where he kept it hidden. Lesson #2—good intentions can be damaged by a lapse in judgement. In other words, in trying to improve their economic and social situation and bring safety to their family, the parents neglected to protect the children adequately for that split second when a tragedy could have occurred.

Was this a criminal case that deserved prosecution? In Florida, the prosecutor has the legal right to waive a case where one youth shoots someone with a gun into adult court without a transfer hearing. Fortunately, the prosecutor used his judgment and did not do so. This was a case that appeared to be able to benefit from rehabilitation, not punishment. Based on the psychological evaluation, done immediately after the incident with a child-centered interview technique that avoided getting stuck with an inaccurate version of the incident, the child's lawyer was able to successfully argue dismissal of the criminal case. Arrested for a crime, this nine year old had the same legal procedure rights as did an adult as the USSC determined in 1967 in *re Gault*. The two-year-old victim had the same rights as would be accorded an adult victim of a similar crime. Even so, when the criminal case was dismissed, the state referred the family to the state agency responsible for protecting children and they put the family under their supervision for several months to make sure all the children were properly protected.

Cases where the crime committed by a juvenile resulted in someone's death usually get handled differently by prosecutors. As we described above, since the decision in Roper the law now forbids the execution of juveniles under the age of 18. But there is a growing trend for these juveniles to be tried as adults and sentenced to life in prison with other adult offenders rather than seeking a plan for possible rehabilitation. We described the case of Tim in Chap. 15 who was both under the age of 16 and mentally retarded, yet he was tried and convicted a first degree murder and sentenced to adult prison for the rest of his life for a crime he steadfastly denies ever committing. We know that this has happened with other individuals that attorney Barry Scheck and his Innocence Project have freed from prison with newly analyzed DNA evidence proving their innocence. It is difficult to believe that anyone would falsely confess to committing a crime but vulnerable people under the pressure of a police interrogation do. Some do so out of confusion, some out of fear, and some believe lies that interrogators may tell them (Walker, 2017).

Waiver of Juveniles into Adult Courts

There are three major ways that youth may be diverted from the juvenile system: dismissal of the charges if already charged, civil commitment to psychiatric care, and automatic waiver to adult criminal court. In most states, a hearing to waive a juvenile into criminal court may be requested for certain serious crimes usually if that youth is over 14 years old. In some states, such as Oregon, the law permits youth under the age of 14 to also be transferred to adult court if certain criteria specified in the law are met. Florida,

interestingly, has no requirement for a hearing. Rather, any youth can be charged with a serious crime by the prosecutor. Neither the judge nor defense attorney can present evidence to persuade otherwise. Judges in adult court are permitted to take the youth's age into account, but they are not required to do so.

Two recent cases have attracted national attention to Florida in this area: Broward County's Lionel Tate who admitted killing the six-year-old girl whom his mother was babysitting by wrestling with her when he was 12 years old and Nathaniel Brazil, the 14-year-old West Palm Beach youth who returned and shot and killed his middle school teacher after being sent home from school. Both were featured in the media and both prosecutors immediately waived them into adult court for adjudication. Tate's mother turned down a three-year sentence offered in a plea agreement before the trial and he was convicted and sentenced to spend the rest of his life in prison. The legal arguments have dealt with the contradiction here: How can he be considered cognitively capable of using adult-like reasoning to commit a crime, but not cognitively capable of making a decision to accept a plea different from his mother's decision? Brazil was found guilty of manslaughter and received a much lighter sentence than would an adult. Why the differences? One reason might have been the discrepant opinions offered by psychologists on the witness stand about the mental competency at different developmental ages. Another possible reason might have been Tate's behavior—he had a long history of aggressive behavior and was noted to be a violent and disturbed child at an early age. We may never know for sure but these two cases point up both the difficulties in assessing and evaluating juvenile's intellectual and cognitive abilities and moral development and the utilization of these evaluations in the search for justice.

Summary

In summary, the trend is toward giving children the same legal rights as are given to adults in criminal, juvenile, family, and other courts. There is still much controversy about the competency for children in different settings with their being waived up to adult court if they commit a crime while being forced to remain in family court to get permission to have an abortion. Children's moral development is explored with the conclusion that unless there is a serious mental illness or mental retardation, most children are competent to make thoughtful and intelligent decisions.

Questions to Think About

1. If you were an advisor to the president would you recommend the U.S sign the 1989 UN *Convention on the Rights of the Child (CRC)* treaty. Why or why not?
2. As a parent, would you want your child to have legal rights? Why or why not?
3. Why do you think the studies show that children feel more empowered when they can tell the judge what they want to happen, even if they don't get their wishes granted?
4. How old do you have to be to refuse to spend time with a parent who abused you? Explain your response.
5. If a teenager kills someone, should they be prosecuted as an adult since they committed a violent crime?
6. Do you think a parent has the right not to have their child vaccinated? Describe the benefits and detriments of taking such a stand.

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Part VI

Legal Consultation Based on Social Psychology

21 Discrimination and Sexual Harassment

How Do We Know if Discrimination Still Exists in the U.S?

In 1991, an African-American man named Rodney King was stopped by four Los Angeles police officers and beaten mercilessly. Luckily for him, the beating was captured on a home video camera and subsequently played for the entire world to see his non-violent response to these police officers. Would he have been so seriously beaten if he had been White? Was he discriminated against by the Los Angeles police department and if so, was it a systematic policy or simply widespread discrimination of Blacks by police officers there?

In February 1999, an immigrant to New York City from the African country of Guinea, Amadou Diallo, was shot and killed by four white police officers as he left his building in the Bronx to get something to eat. These plainclothes officers, searching for a serial rapist they believed to be in the neighborhood shot Diallo over 40 times. One year later, after the trial was moved to upstate Albany, NY where few immigrants live, the four officers were found not guilty as were the officers who beat up Rodney King on the other side of the country. At the same time, several New York City police officers were found guilty of brutalizing a Haitian immigrant, Abner Louima in the New York City courts with a jury composed of the racial mix found in NYC.

In 2012, 17-year-old Trayvon Martin, an African American boy, was visiting his father in Sanford, Florida, after being suspended from high school. George Zimmerman, a neighborhood watch captain, called 911 to report a suspicious-looking individual in the neighborhood, and he was instructed by the 911 dispatcher to not leave his car or approach the individual. Neighbors and members of the community reported then hearing gunfire, and when questioned, Zimmerman admitted to fatally shooting Martin, but claimed this action was taken in self-defense. It was later determined, however, that neither deadly force nor a deadly weapon were employed by the teenager Martin.

The question for psychology to answer is "Were these acts evidence of racial discrimination and if so, can it be proven using psychological research?"

Social Psychologists Weigh in About Discrimination

Social psychology is the branch of psychology that studies the attitudes and thoughts that are motivation for the behavior of people in groups (Gilbert, Fiske, & Lindsey, 1998). Clearly, then, the study of discrimination is an area in which social psychologists may delve. It should be noted that it is a natural human behavior to group other people and things into categories so that we can better understand our world. Indeed, we do it all the time. If we say we do not like vegetables and someone suggests a new fad diet (think about all the kale we are now told to eat), we are unlikely to want to try this new food because we already believe we do not like vegetables. '*Prejudice*' is a preconceived opinion that is generally based on insufficient reason or information. People who are said to be prejudiced often use a bias that comes from using a few characteristics or membership in a particular group, to view everyone as the same if they belong to that group.

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Stereotypes and Discrimination

Stereotypes are the overgeneralized attitudes that categorize a particular group. *Prejudice*, which is often said to influence the development of a *stereotype* that can create *discrimination*, is the internal attitude while 'discrimination' is the behavior that results. Prejudice can be a negative or positive bias, although we usually focus on the negative ones. Once a person is identified as part of a group, it is more difficult for that person to be classified on the person's own unique characteristics. In general, people expect members of a group to be more alike than different.

Overt and Covert Discrimination

When studying discrimination, we look for both overt and covert negative behavior. Overt discrimination can include violence, aggression, and outward hostility, while covert discrimination can be patterns of withdrawal, isolation, and avoidance of a particular class of people. '*Racism*' is a form of discrimination where a person's behavior (either overt or covert) expresses hatred toward all members of a racial group out of the belief that one's own race is superior. In the King and Diallo cases, it was said that the police used more force than necessary because of their internalized hatred of African Americans. Certain groups are more likely to experience discrimination than others because of the historically marginalized position in a particular society. In the U.S, the groups that are most likely to experience discrimination are by race, ethnicity, color, religion, national origin, gender, age, sexual orientation, and those with physical and mental disability. Sometimes these groups change with events of a major social magnitude. Arab Americans, for example, have claimed to feel prejudicial attitudes against them in the U.S, perhaps because their different customs and dress cause them to stand out. However, it was not until the terrorist attacks of 9/11 that non-Arabs recognized the legitimacy of the fear of prejudiced thinking and racist behavior directed toward Americans who looked and sounded similar to the attackers. As we all know, the 9/11 attacks were carried out by members of the Al Quaeda, a terrorist organization with training camps all over the world preaching hatred of Americans, using the religion of Islam as an excuse.

Reports that pilots and passengers refused to fly on airplanes together with Arab-looking passengers, or that travelers with Arab-sounding names were subjected to extra layers of screening in airports, serve as examples of how stereotyped attitudes can affect daily life. Detention of Arab American citizens under the newly expanded war powers given by Congress (in what is often referred to as the Patriot Act of 2001) is another example. The impact of a clash of different stereotyped attitudes was observed on television with Iraqi citizens demonstrating against American soldiers, calling them invaders, during the 2003 war in Iraq despite the American attitudes that they would be well received as they were rescuing the Iraqi people from a cruel dictator.

Sexism and Sex Stereotyping

'Sexism' is the application of prejudicial attitudes toward women because of their gender, and it is considered to be a similar process that includes behavior common to racism. Psychological research on sex stereotyping indicates that they are not any more inaccurate than are other kinds of generalizations, but nonetheless, they do lead to either intended or unintended discrimination against women. As in other forms of discrimination, this then leads to feelings of inferiority, low self-esteem, and difficulty in trying to function up to one's full potential in many areas such as education, social relationships, and business. As with racial prejudice, overgeneralizations about gender are often either inaccurate or do not apply to an individual within a group. So, women are less likely to be seen for their own individual characteristics and are rather perceived as only part of the group.

The expectations that are created when people are overgeneralized into a group can lead to distorted judgments about that person and about

the group as a whole. This faulty reasoning then leads to more biased feelings about individuals and then is applied to the entire group which further disadvantages them, not because of who they are or what they do but because of the group they belong to. People in the 'in-group' get preferential treatment while those not in that group, do not. In work and in some fields in higher education, men are the 'in-group' and women are not. Therefore, men are more likely than women to get the benefits including promotions, raises, and premium appointments. One area where this is particularly salient is in what is called the 'gender pay gap.' You may recall that this issue was brought to international attention through the lawsuit filed by the United States Women's National Team (USWNT) in soccer, when they filed a class action lawsuit in March 2019. The USWNT alleged in their lawsuit that they were consistently paid less than the United States Men's National Team, despite a strong performance record. The disparity was highlighted when the USWNT won the Women's World Cup in 2019, and reports were made known that the women's championship team was awarded 10.5% less in prize money than the men's team would have been awarded for an equivalent victory. The U.S Soccer Federation argued that this difference was due to different contracting agreements governing *how* the players were paid (for men, payment is based on play performance, whereas women receive salaries plus benefits). Feminists the world over can recognize that the disparity may arise from different contract structures, but the question remains: Why is this difference in contracting even in existence or still in effect, and isn't its basis in gender unfair?

Studies have been conducted on the attitudes and biases that men and women have about women in general and in the workplace particularly. These attributes are often based on typical behavior thought to be stereotypes of women. These sex role stereotypes have been found to cause discrimination against women. In particular, they are based on faulty descriptive beliefs about women and how closely women behave or 'ought to' behave. For example, when women speak up for themselves or for each other (particularly using strong language), they are called 'aggressive' or 'nasty,' while men engaging in the same behaviors are called 'assertive' or identified as 'strong leaders.' Other instances could include women being labeled as 'sensitive' when they raise concerns about offensive language used in the workplace. We discuss this further following a briefcase example.

The case of *Hopkins v. Price Waterhouse* is a good example of this process in operation. Ann Hopkins had worked in a large accounting firm as described below. She was denied partner status after doing all the same things her male counterparts had accomplished. In her file were the remarks made by one partner who criticized her for her loud and aggressive verbal behavior. He suggested that she attend a 'charm school' before she applied for partner status and wrote down this recommendation and placed it in her file. The American Psychological Association (APA) submitted an amicus brief in this case that apparently influenced the justices in their decision as it was cited in their final opinion that found in the favor of Ms. Hopkins. Psychologist Susan Fiske's research on sex role stereotypical processes was an important part of that brief.

Case of Hopkins V. Price Waterhouse

Ann Hopkins was an account executive with Price Waterhouse, a large accounting firm with offices all over the United States. She worked in the Washington, D.C. office. She brought in over $4,000,000 worth of business to the firm, well over the expectations set for most of the male partners in the firm. To be eligible for senior status and a share in the company earnings, associates strive to become partners by doing the things required of them including working many long hours, servicing clients of the partners they are assigned to work for, and bringing in sufficient revenues and cases to build one's own group of clients. Law firms function in this manner as do most large national and international accounting firms. Ann Hopkins brought a federal sexual discrimination lawsuit against Price Waterhouse when they passed over her and did not offer her partner status despite the fact that other men who completed exactly the same steps as she did but brought in even less business revenues were made partner.

Luckily for her, at the partner meeting where her status as partner was discussed, one senior level partner's comments that she was too loud, pushy, and aggressive to become a partner and recommendations that she attend a 'charm school' for her 'finishing' were recorded. She was denied her partnership. The American Psychological Association submitted an Amicus Brief in this case citing the work of social psychologists, particularly Susan Fiske, showing that sex role stereotyping behavior results in the discrimination that Ann Hopkins experienced. As a woman, she was expected to be demure, charming and passive while men who exhibited aggressive behavior were rewarded for it. The U.S Supreme Court ruled in her favor and cited the influence of the social science data in their brief.

Are Women Discriminated Against for Behavior Praised in Men?

In a 1972 study of attitudes toward the behaviors that lead to good mental health of men, women, and people in general, Psychologist Inge Braverman and her colleagues found that gender bias existed here too. They gave a list of adjectives that described women's and men's behavior and asked people to check off what behaviors were important to each group's mental health. Mentally healthy men were seen as having the same attributes as mentally health 'people,' but mentally healthy women were not. Like the senior partner in Price Waterhouse, this study demonstrated that mentally healthy women were expected to be passive rather than active, non-assertive, non-aggressive, more introspective, and less physically strong than men or people in general. Obviously, this study underscored the bind for women—if they were seen as mentally healthy for a woman, they were not seen as a mentally healthy person. Lest we think that these attitudes have sufficiently changed to claim that gender discrimination is no longer operative or powerful, in 1985 Braverman reported at an APA meeting on a replication of her earlier study, and the results were not very different. In fact, in a recent class project in 2003 in one author's (LW) Nova Southeastern University's graduate class in feminist therapy, the Braverman study was replicated with results that showed some liberalization of attitudes, but not as much as might be expected after 30 years of fighting for equal rights. Sadly, we still see examples of this type of thinking in the workplace, academia, and in society at large even today, despite continued efforts to raise awareness and fight for equality.

However, the '#metoo' cases have recently brought attention to sexual harassment and sexual exploitation by prominent media figures shining attention on the continued problem women have in getting ahead in their chosen careers. The trial of movie mogul, Harvey Weinstein, is taking place in NYC as we write this book. We discuss this case more fully later in this chapter. Accused by dozens of women prepared to testify against him in civil as well as this criminal case and another filed in Los Angeles, Weinstein faces years of accusations in the courtroom. Interestingly, a noted psychologist who studies eyewitness identification, Elizabeth Loftus, has been announced as one of the potential expert witnesses for his side. As a result of this and other high publicity harassment and sexual assault cases, different states such as NY have changed their rape and sexual harassment laws dropping the *statute of limitations* so that many of these older cases will be filed in the future. If you are a man who engaged in this behavior at a different time period, how might you feel now?

Research continues to confirm that non-feminine women are less popular and more poorly adjusted than are those who conform to the stereotype. Just like the data that show that people in the in-group get preferential treatment, women who behave according to expectations are preferred over women who do not. This may be a contributory reason to why women are less likely to do well in upper-level managerial jobs than are men. Research published in the Harvard Law Review demonstrates that women who are part of the corporate culture can get ahead until they reach what is called the '*glass ceiling*' where it appears that they should be promoted to the next level, but like Ann Hopkins, are passed over in favor of the man who may have the same characteristics needed for the job. However, in

the woman, these characteristics are not viewed as gender appropriate even if she would get the job done. In the wake of the decades-long fight for equality and rising awareness of this glass ceiling, reasons for passing over women for promotions are now more varied, but many come down to gender nonetheless. Consider the idea that a woman is passed over for a CEO position because it is believed that she does not devote as much of her time outside of work to the company, but rather to her family. Don't gender role stereotypes of women being the primary caregivers for children and elderly family members likely influence the assumption that a woman would not have enough time outside of the office to devote to her company? And, following this logic, if a woman is not married or has no children, does this fact (which should make her an 'equal candidate' for a promotion) not then land her in the 'out-group' among women? By the logic identified in the research we have discussed, this out-group woman is now viewed as more poorly adjusted and less likely to succeed. The trap thickens.

Women and Management Style

Other research shows a different type of discrimination in effect in some cases where women have a distinctly different managerial style that may be incompatible with the male-dominated corporate culture. Often described as horizontal or vertical management, women are less comfortable with the vertical, hierarchical, or authoritarian style and do better with a more egalitarian, inclusive, and high contact with people style of management. So, in a military or paramilitary (e.g., law enforcement) command, women in general might be less comfortable, especially in management positions since a vertical hierarchy dominates the culture. But, what about the individual woman who likes the hierarchical work environment and is as effective as a man in an upper management position there? Or, what about environments where this organizational and leadership style may not actually be the most beneficial to a business? A woman with a different style might actually have much to add to an organization and its function.

Common Worksites Where Discrimination Exists

There is research that has found that certain types of work environments do promote discrimination against women because of sex role stereotyping. The most important contributory condition here is where the group from which the individual comes is rarely found in the work setting. If less than 15% of the workforce is female, the woman is considered to have 'solo status,' and if there are fewer than 25% females in the pool from which they are to be selected, the less likely a woman will be preferentially selected. In most discrimination cases, the so-called *tipping balance* is around one-third of the group. This percentage was actually set forth in cases that dealt with racial discrimination and the quality of education in the schools but has been found to apply in sex discrimination cases also. Anti-Sex Harassment Policies and Interventions in work environments can put forth certain policies to try to minimize the impact from any kind of discrimination. Not only would such actions place the company in a favorable position should an employee file a lawsuit for discrimination, but also makes good business sense. A list of these policies can be found in Table 21.1.

Companies can recognize the natural tendency for people to categorize and the subsequent links that occur between such categorization and bias. Of course, it is important to openly discourage any kind of bias in the workplace. People often can resist that link between categorization, prejudice and stereotypy by being made aware of the possibility of it and by gaining more information about people who are different from them. They are then more likely to correct their errors. Motivational incentives that support increased attention to the problem and consensual disapproval of stereotyping and discriminatory behavior can also be instituted. An example of this occurred when President Bush used the media to urge Americans not to give into the

Table 21.1 Policies against discrimination

Psychologists can consult with organizations to develop policies and procedures that l discourage discrimination of marginalized groups such as
1. Create heightened awareness about possibilities of overgeneralization
2. Provide accurate information about groups likely to be discriminated
3. Encourage self-examination and correction of biased attitudes
4. Make it clear there is consensus for disapproval of prejudicial attitudes, statements, and discriminatory behavior
5. Give motivational incentives for collaboration including team projects that include members from groups where there is a high risk for discrimination
6. Create a culture where each person's talents are displayed and necessary for successful completion of team programs
7. Encourage specific performance criteria for evaluating job competency
8. Use company newsletters and other media to educate all employees about the negative impact from discrimination of any kind
9. Encourage anti-racism and anti-sexism company training programs
10. Prepare company procedure manuals that stress avoidance of discrimination

temptation to stereotype all Muslim Arabs in the United States after the attacks on the World Trade Center and Pentagon on 9/11. Encouraging teamwork to solve problems with people from different groups maybe important over the independent work atmosphere. Creating a culture of 'interdependence' in which people have different competencies to create the whole project is another way to encourage getting to know the individual talents of people. The more objective and well defined the criteria for judging the efficacy of a person's efforts, the less likely performance will be misjudged because of distorted attributions. More information rather than limited, ambiguous, and performance criteria is important here.

Men and Women's Attitudes Toward Harassment

Sexual harassment is considered a form of sexual or gender discrimination. Sexual harassment is similar to other forms of violence against women in that it is usually committed by men who abuse the power they have over women in order to control the women. The general public gained a greater awareness of sexual harassment in 1991 during the Senate confirmation hearings for U.S Supreme Court Justice Clarence Thomas, whose former staff member, Anita Hill, testified about unwanted sexual advances that her then supervisor Thomas made toward her. She did not report his behavior nor did it stop her from following him to the EEOC when he was offered that position. In fact, she did not come forward to offer the testimony herself; it was discovered while Thomas was being investigated for the position on the Supreme Court. Interestingly, women were far more likely than men to believe that Hill's testimony was credible and had a ring of truth to it despite Thomas's denials. Opinion polls taken by several reputable social science research organizations found that close to 90% of women surveyed at that time had observed or experienced unwanted sexually harassing attention in school or at their workplace, while less than 1% of men surveyed either had the same experiences as women described or defined similar behaviors as either unwanted or harassing. Although Justice Thomas was eventually confirmed, Hill's testimony may well be considered a watershed for recognition of sexual harassment. Indeed, the following year, Congress passed legislation strengthening the issue of sexual harassment being a violation of women's civil rights and added more penalties to the sexual harassment actions under the Civil Rights

Title VII Act making it easier for women to bring lawsuits into Federal court to seek remedies.

But did those changes work? Fast-forward to 2017 in Hollywood, Los Angeles, California: An article is published by the New York Times detailing that Hollywood Mogul Harvey Weinstein has spent years sexually harassing and sexually assaulting women in the entertainment industry. Reports included that Weinstein had forced women to give him massages or watch him naked, had made sexually degrading comments, touched women inappropriately and without their consent, promised quid pro quo arrangements where he would advance women's careers (which promise big bucks in Hollywood!) if they would perform sexual favors for him, and paid 'hush money' to keep his victims quiet. The allegations began to roll in faster from dozens of women in the industry, including 'A-list' celebrities who we now know and love but who shared that the beginning of their careers was marred by Weinstein's assaults. At the time of the writing of this chapter, Weinstein is in the middle of his NY criminal trial and no outcome is available.

Psychological Impact from Sexual Harassment

The impact of the experience of sexual harassment on the victim, unlike like that of most other forms of abuse, seems to have wide variation, with the most overt and egregious misconduct having, predictably, the most negative effects. Often the victim never tells anyone; sometimes she is able to talk about what happened many years later, especially if others have also accused the man. We see this play out in cases like Harvey Weinstein's, described above, or even the allegations of sexual assault made against now—Supreme Court Justice Brett Kavanaugh—reports are not made until years later, and there appears to be a 'safety in numbers,' effect wherein victims are empowered to speak up if others are doing so.

It is not clear why some women appear to have less psychological distress on exposure to behavior that seriously traumatizes other women. Some women and most men still do not take most forms of sexual harassment seriously. Often the victim is blamed for seductive behavior or the past problems when she reacts with major psychological stress, although there is more understanding when the most egregious forms of sexual touching occur. In fact, difficulties in defining what behaviors constitute sexual harassment have been a problem in recognizing its negative effects in those who present for clinical treatment, as well as in conducting empirically based research.

Sexual Harassment Lawsuits

Under Title VII of the Federal Civil Rights Act of 1964 (42 USSC 2000 3), it is possible to file a sexual harassment lawsuit if first the harassment is reported to the company's Equal Employment Opportunity officer so that the company has an opportunity to investigate and make substantial changes to remedy the situation. If that is insufficient, then the employee has the opportunity to file a complaint with the U.S Equal Employment Opportunity Commission (EEOC) requesting that they investigate and obtain remedies. If that fails, then the EEOC issues what is called a 'right-to-sue' letter which gives the employee the opportunity to file a Title VII Civil Rights complaint in Federal court. The employee then becomes the plaintiff, and the company is the defendant who must defend against the employee's claims. The plaintiff has the burden of proof which is at the clear and convincing evidence level. To prove the claim it is often necessary not just to demonstrate that the offensive behavior occurred, but also to prove that the alleged behavior actually constituted sexual harassment; although it is noteworthy that unlike personal injury tort actions, in these cases the plaintiff does not have to prove injury or proximate cause. Psychologists are often called upon to provide this expert testimony. We describe how to evaluate and testify in a sexual harassment lawsuit whether it is filed in state or federal court in our book *Forensic Practice for the Mental Health Clinician* (Shapiro & Walker, 2019).

Definitions of Sexual Harassment

The most commonly accepted definition of sexual harassment is cited in the U.S Equal Employment Opportunity Commission (EEOC) (CFR Ch. XIV, 7-1-90 edition, p. 1604.11), which states: "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment."

Furthermore, such actions must be considered in the context of the entire working conditions as stated: "In determining whether alleged conduct constitutes sexual harassment, the Commission will look at the record as a whole and at the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred. The determination of the legality of a particular action will be made from the facts, on a case by case basis." And to make sure that other civil rights violations that might simultaneously occur are not overlooked, the rules further state that: "Harassment on the basis of sex is a violation of SEC 703 of Title VII (The Principles involved here continue to apply to race, color, religion or national origin)." The connection between other forms of discrimination in the workplace place and sexual harassment is clear. Often it is the woman of color, the woman who has a physical disability, or the lesbian woman who is more likely to be picked on or sexually harassed, especially if she also appears to be vulnerable for some other reason. As might be expected, the workplace atmosphere has much to do with individual workers' behaviors. Those sites where diversity is accepted are less likely to have reported sexual harassment complaints.

ADA and VAW Civil Rights Laws

The 1990 Americans With Disabilities Act (ADA), with most provisions having gone into effect by 1992, is now being used in conjunction with other civil rights protection, including the Civil Rights Act provisions enacted by Congress in 1991 and signed by President Bush to enforce equitable treatment of women at worksites. The ADA is discussed further later in this chapter. As women's civil rights are being violated not only by sex discrimination and harassment, but also by use of violence against them, in 1992 the U.S Congress passed the Violence Against Women Act (VAWA) which declares use of gender-based violence against a woman can be remedied by civil rights law. This law provides for recovery of compensatory and punitive damages as well as an injunction against the offending party to prevent future damage and retaliation. Perhaps the most interesting part of the VAWA is the denial of a gun permit to anyone who has been convicted of domestic violence. This provision was bitterly contested during the renewal of the VAWA legislation because it had a major impact on police and law enforcement officers who could no longer serve in that occupation, having been found guilty of domestic violence at home and now forbidden by the law to carry a gun, which was required on the job. As the provisions are still quite controversial, it has been difficult for anyone to successfully recover under this law. Importantly, the VAWA was reauthorized in 2000, 2005, and 2013. In fact, in the 2013 reauthorization, President Barack Obama extended protections to Native Americans and members of the LGBTQ community. Psychologists and other mental health professionals are being called on by the courts to help determine the extent of damage that comes from oppression because of gender, racial or ethnic group, sexual orientation, and disability. Presentation of social psychology research on the negative

Table 21.2 Important sexual harassment cases

• Rogers v. EEOC, 454 F2d,234, 238 (5th Cir. 1971)
• Bundy v. Jackson, 641, F.2d,934, 944, (DC cir. 1981)
• Rabidue zy. Osceola Refining Co, 805 F.2d 611, 619-20, (6th Cir 1986)
• Mentor Savings Bank, FSB v. Vinson, 477 U.S 57, 65-67, (1986)
• Scott v. Sears Roebuck, 798 F2d 210, 213 (7th Cir 1986)
• Price Waterhouse v. Hopkins, 490 U.S 228 (1989)
• Harris v. Forklift Systems, 510 U.S 17.114 S.CT. 367,63 FEP (1993)
• Clark County School v. Breeden (1994)
• Ellison v. Brady, 924, F2d 872, 880 it 15 (9th Cir, 1991)
• Oncule v. Sundozoner Offshore Oil, 83F. 3d 118, 70 FEP (1998)
• Faragher v. Boca Raton, 110 s.ct. 2275, (1998)
• Davis for Lashonda v. Monroe County B of Ed (1999)
• Pollard v. du Pont (2001)
• Neal v. Ferguson Constr, 237 F.3d 1248, 1253 (CA 10 2001)

psychological effects of discrimination in general (cf. Price Waterhouse and Harris v. Forklift cases, in which the American Psychological Association submitted amicus briefs), as well as the clinician's assessment of specific damages to a particular individual (another area where the assessment of post-traumatic stress and the impacts of battered woman syndrome are critically important for the forensic psychologist) has been important in federal lawsuits. See Table 18.3 for a list of the important cases.

Subtle Harassment

Obviously, there is a line between behavior that is clearly considered sexual harassment and that which is considered normal bantering between males and females in the work setting. Women often define the line at the point at which they are uncomfortable enough about the behavior for it to continue to bother them, even if they cover up their feelings of discomfort by pretending to ignore it or even talking back to the males. Sometimes the same behaviors are classified differently depending on the status of the initiator in relation to the victim and the explicitness of the behavior. Gutek et al. (1983) found that some behaviors might be tolerated from a peer while viewed as harassing from a supervisor. Sexual harassment differs from "flirting" by the uninvited, invasive, and often embarrassing behaviors that persist despite the woman's obvious displeasure or lack of interest. Other terms used to describe this behavior include "seductive behavior," "sexual bribery," "sexual coercion," and "sexual assault." Sometimes sexual harassment is contained under the legal term of "sexual discrimination." Table 21.2 lists the important sexual harassment lawsuits that helped create the laws under which cases may be filed.

When we are designing intervention or treatment plans for women in recovery after sexual harassment, or when we are assisting organizations or schools in designing prevention programs, it is important to keep in mind the differences in male and female views of sexual harassment (Walker, 1994). Most victim advocates would put theoretical understanding of sexual harassment at a place similar to that of rape in our culture twenty years ago. Some attitudes toward rape find their counterparts in sexual harassment. Psychologist Ken Pope has found that sexual harassment and exploitation produce similar negative psychological impact to rape. Psychiatrist Judith Herman found in 1992 that men's definition of what constitutes rape does not appear to be based on women's experience of violation, but rather just slightly above the higher level of coercion that is acceptable to men.

MacKinnon in 1983 claimed that rape, from women's point of view, is regulated and gives many examples of how this occurs. Since most women who have experienced sexual harassment are aware that their experience of what happened to them is different from the experience of the men who committed the acts, and that other people are more likely to view the behavior from the male cultural standard than from the victim's own personal experience despite the law, women are less likely to report such harassment or even pay much attention to it until it becomes emotionally impossible not to deal with its effects. There have been attempts to debunk the myth that women cannot effectively persuade some men to stop rape or sexual harassment, by describing many different types of attempts made by women, some of which may be successful in limiting the harm they experience. These data also support the validity of the individual woman's perceptions of danger while in the middle of the attack.

Types of Sexual Harassment Behaviors

The most commonly reported modes of harassment are verbal comments about a woman's body, jokes about sex, sexual innuendos, and invitations, which persist for a long period of time, regardless of the woman's response. In some studies, more than one-half of the women report also being subjected to repeated physical advances which include touching and kissing. Sexual parts of the woman's body are fondled or grabbed without her consent (usually breasts, buttocks, and crotch areas), and it is not uncommon for the offender/harasser to restrain the woman with some kind of physical force such as putting his arms around her or backing her up against a wall or furniture. The American Psychological Association brochure on sexual harassment suggests that although there are many different types of behavior that constitute sexual harassment, the defining characteristic is that it is "unwanted." The brochure lists the following broad categories, the first two being considered the most common:

(1) Generalized sexist statements and behavior that convey insulting or degrading attitudes about women. Examples include insulting remarks, offensive graffiti, obscene jokes or humor about sex or women in general, and the display of graphic materials of a sexual nature.
(2) Unwanted, inappropriate, or offensive social invitations, sexual overtures, or advances. Examples here include unwanted letters or phone calls of a personal nature, insistent requests for social contacts (drinks, dinners, dates), and repeated unwanted requests for sexual contact.
(3) The subtle or overt solicitation of a personal relationship or sexual activity by promising benefits—for example, a promotion or a pay raise.
(4) Coercion of social contact or sexual activity by threat of negative consequences. For example, a negative performance evaluation, withholding of promotion, or threat of termination.
(5) Unwanted physical contact, including touching, feeling, pinching, grabbing, or kissing.
(6) Threats of physical or coerced sexual activity.
(7) Sexual assault (APA, 1993, pp. 1–2).

Clarifying Definitions of Sexually Harassing Behavior

Definitions of sexual harassment have also been used in training companies to prevent such behavior and thereby used to limit their liability in potentially expensive litigation. One such program suggests to employers that there are three parts to a commonsense definition of sexual harassment: First, that the behavior doesn't necessarily mean that the perpetrator's intent is to have sex. Rather, the entire continuum of sexual behavior is included "ranging from the least severe end-sexual jokes, innuendos, flirting, asking someone for a date to the most serious end-forced fondling, attempted or actual rape, sexual assault." Sex-based behavior is defined as

"negative behavior that is directed at, or has an impact on, only one gender. Negative gender-related behavior can include men putting down women or women making negative remarks about men in other words, a serious battle of the sexes at the job." It is suggested that where this sex-based behavior occurs, the more serious forms of sexual harassment are not too far behind.

The second part of this definition of sexual harassment is that "the behavior has to be deliberate or repeated." This stresses that some forms of the behavior are so offensive that the first time they occur they are considered deliberate, hurtful, wrong, and maybe even illegal. For example, forcing a woman to have oral sex, pushing one's clothed genital area against the woman while making writhing movements and suggestive sounds, forced intercourse, or grabbing a woman's breasts and fondling them, all would he considered deliberate behavior by most people. Definitions become less clear where the behavior is more common, such as patting the woman's behind, running one's hand seductively up and down the woman's back under her sweater while she is pinned against the wall, breathing heavily at her desk or whispering in her ear about how sexually aroused she makes him feel. While some jokes may be sexually offensive to some women immediately, other women may find them funny at first. Sometimes it is the repeated nature of the joking that wears the woman down until it ceases to be funny anymore. Even if the individual behavior is not considered illegal, exposure to it day after day can wear women down, sometimes coming up to the standard of a '*hostile work environment*'.

Those companies with a history of discrimination against women in their employment practices, which often includes jobs that are traditionally male, often have such negative attitudes toward the first women hired that the behavior needs less repetition to cause the same effects as the more serious harassment and abuse. It is suggested that "the more severe the behavior is, the fewer times it needs to be repeated before reasonable people define it as harassment; the less severe it is, the more times it needs to be repeated." We would also add that the more negative the attitudes toward women in general in the workplace, place, the less repetition is needed to produce severe psychological effects.

The third part of this definition of sexual harassment is that "*sexual harassment is not welcome, not asked for, and not returned.*" This does not mean women should be considered as accepting the behavior directed toward them when they do not take strong action to try to stop it because of fear of reprisals. Some women may try to make a joke of it while giving the message that such attention is unwanted. Remember that there are gender-based differences in social expectations, and so women who have been raised in male-dominated societies recognize that speaking up for themselves may lead to further attacks or even subtle but damaging claims that they are 'too sensitive' or 'can't take a joke.' Behavior that might not be defined as harassment when it is mutually acceptable outside of the work environment is often unwanted within it. Even mutually desired behavior by two people may be considered unacceptable if it promotes a "hostile work environment" that appears to facilitate or even just tolerate other men's sexual behavior toward other women in the same environment. On the university campus or in small offices with civil service career workers, this is a particularly difficult problem. Obviously, if one woman is perceived as gaining advancement through sexual behavior, this creates an environment that is perceived as having barriers to equality for women who refuse to sexually submit.

Perhaps the most critical factor in defining sexual harassment is that the issue of mutuality or consent cannot exist when there is an *unequal power distribution* between the man and the woman involved. Thus, although the woman may believe that she willingly engaged in a sexually intimate relationship with a male in a supervisory or power role, in fact, the power differential makes equality, and therefore mutual consent, impossible, and the exchange include more than sexual affection. Legal scholars often call this *quid pro quo*, or an exchange of 'this for that' (i.e., an exchange of sexual favors for better

work conditions or job advancement). In typical quid pro quo cases the woman is approached by a more senior level male with direct or indirect ability to affect her career and is asked to provide sexual favors (sometimes presented in more affectionate terms) in return for job benefits (sometimes using a less direct promise). Have you seen the film *Legally Blonde*, where a law professor tries to seduce a first-year law student into sexual relations with reminders of the benefits she will see in her legal career? Or even think back to the discussion of Harvey Weinstein, who leveraged his ability to both directly or indirectly 'make or break' the careers of aspiring young actresses based on their willingness to engage with him in sexual behaviors.

Perception of particular sexual incidents as harassment has been found to be influenced by several factors—including gender, severity or explicitness of the incident, and behavior of the woman, according to psychologist Louise Fitzgerald, whose trail-blazing studies have resulted in most college and university campuses adopting anti-sexual harassment policies (Fitzgerald, 1992). Although universities tried to use 'consent' between adults as defense against allegations of sexual discrimination and harassment lawsuits, the issue of how the unequal power difference created a hostile work environment for everyone in that workplace overcame the attempt to prove consent was willful and totally voluntary. Further, it gave an unfair disadvantage to those women who were submitting to sexual demands and unfairly punished those women who did not by preventing advancement in their careers. MacKinnon (1979) makes a distinction now commonly in use between two main forms of behavior constituting sexual harassment, which has been used in the courts. She calls this *quid pro quo*, in which sexual compliance is exchanged (or proposed to be exchanged) for an employment opportunity, and sexual harassment as a 'persistent condition of work'. "In the quid pro quo, the coercion behind the advances is clarified by the reprisals that follow a refusal to comply. Less clear, and undoubtedly more pervasive, is the situation in which sexual harassment simply makes the work environment unbearable. Unwanted sexual advances… can be a daily part of a woman's life even though she is never promised or denied anything explicitly connected with her job" (MacKinnon, 1979).

Racial, Ethnic, and Cultural Issues

As we have seen, women from racial, ethnic, and cultural minorities (and those with other kinds of minority status as well) are even more likely to experience sexual harassment, especially if they also appear vulnerable for some other reason. At the same time, they are less likely to report such behavior, fearful that it will only add to society's negative attitudes toward their minority group.

Can a Man Be Sexually Discriminated Against?

Interestingly, the issue of sexual harassment of a man by another man was raised in a lawsuit, *Oncale v. Sundowner Offshore Services* (1998). In this case, one male employee physically assaulted a male co-worker in what was claimed to be a sexual manner. The man who performed the alleged assault claimed it could not be litigated under the sex discrimination civil rights laws because his behavior was not sexually motivated. The USSC found that Title VII applied to the same kinds of sexual harassment in both men and women. Further, the justices found that sexual harassment does not have to be motivated by sexual desire but has to constitute discrimination or creation of a hostile work environment because of sex and not just some simple sexual teasing and roughhousing.

Employment Discrimination Lawsuits

Most employment discrimination lawsuits are based upon the civil rights law. As we discussed earlier, Title VII of the Federal Civil Rights Act of 1964 prohibits discrimination by private and public employers, and by labor organizations and

employment agencies, with respect to hiring, classifying, promoting, demoting, firing, pay, or other employment conditions. Title VI of the Federal Civil Rights Act of 1964 provides that no individual on the basis of race, be excluded from participation in, denied the benefits of, or subjected to, any discrimination under any program or activity receiving federal financial assistance. Title VI does not apply to religious discrimination although it does apply to race, color, and national origin. The Civil Rights Act of 1991 expanded the 1964 Act in a number of different ways. Most importantly, it granted certain relief such as back pay, rescission of discipline in retaliation cases, injunctions, reinstatement of a job, seniority, benefits, and the like. The 1991 Act also provided for *compensatory damages* in cases where '*intentional discrimination*' occurred or the employer's conduct caused '*pecuniary*' and '*non-pecuniary*' losses but not to '*disparate impact,*' '*disability,*' *or* '*age-based*' claims. Pecuniary losses are out of pocket expenses to be incurred in the future such as medical or psychotherapy costs, while non-pecuniary expenses are those losses associated with emotional harm and intangible injuries. All of this relief is subject to reasonable caps on the amount to be recovered depending upon the number of employees in a firm, with $300,000 set as the maximum compensatory damages to be covered. In some cases, where '*malice or reckless indifference to civil rights*' can be proven, punitive damages may be ordered. However, federal employees are not eligible for punitive damages in these cases.

There are other federal and state laws that also apply to fair employment practices, including the education and civil rights laws. The first amendment to the Constitution sometimes is applied to discrimination cases by arguing for freedom of religion as well as freedom of speech. Workers' Compensation Cases that deal with specific injuries to employees while on the job are separate cases and usually are not part of a civil rights complaint. This system was designed to efficiently deal with workplace injuries by having a hearing officer determine equitable solutions after hearing the facts presented by employers and employees. Many workplaces have contracts that govern the relationship between the worker and the employer. Sometimes the contract rules are written, and other times they are implied in employee manuals and handbooks. Many employers have instituted an informal and formal employment equity office to handle complaints before they are submitted to the nearest federal Equal Employment Opportunity Commission (EEOC) office. After the EEOC reviews the case (which can take a long time), they may issue findings that support the claim to discrimination. In these cases, the employer usually negotiates a settlement that is favorable to the plaintiff. If the EEOC does not make such a finding, they may issue what is called a '*right to sue*' *letter* which then must be filed together with the lawsuit in Federal court.

Racial Discrimination Lawsuits

As described above, The Civil Rights Act of 1964 that was amended by Congress in 1991, as well as both federal and state case law, has provisions for compensation if it can be proven by clear and convincing evidence that racial discrimination took place in a private or public workplace. Under the law, it is not necessary to prove that the company intended to discriminate. Rather, like in sex discrimination cases, a pattern of discrimination is sufficient proof in most cases. As in sexual harassment discussed above, it is possible to file a civil rights complaint in state court, as well as in Federal court. However, in state court, it is usually necessary to prove both that the discrimination occurred and caused specific damages. In Federal court, it is only necessary to prove that discrimination occurred as the question of damage when someone's civil rights are violated is already accepted. One reason for this difference is that the Federal statutes are designed to discourage further discrimination rather than simply compensate an individual for what happened to him or her. However it is important to note that once the issue of emotional damages is raised separately in a federal lawsuit, it is possible to put the individual's entire mental

health history at issue, rather than limit it to the discrimination complaint. To avoid opening this issue, psychologists will often review records and give an opinion on whether or not the behaviors specified are consistent with harassment and discrimination, but do not examine the plaintiff for mental health damages.

Americans with Disabilities Act (ADA) Lawsuits

The ADA (1990, 42 U.S C. $12101) goes further than the civil rights legislation and not only prohibits employment discrimination or harassment, but also requires the employer to make 'reasonable accommodation' for the employee's disabilities. Employers with more than 15 persons in their company are prohibited from discriminating against a qualified person with a disability in regards to hiring, advancement, discharge, compensation, training, and benefits. The definition of a qualified person with a disability is that with or without reasonable accommodation, the person can perform the essential functions of a particular job. A two-step process is required to determine if the employee meets these qualifications: (1) Does the person meet the requisite skill level, experience, education, or other job-related requirements? and (2) Can the person perform the job whether or not it is with some difficulty but without major health risks?

For example, in one case, the employer was ordered to make *reasonable accommodation* for a woman who developed cancer and needed time off for treatments two days per month. In another case, the ADA was found not to apply when an employee with diabetes developed diabetic retinopathy and could no longer work at the computer, an essential requirement of the job. Defining what constitutes a disability under the ADA has been a subject of concern since its inception. At this time there is a three-pronged definition including: (1) physical or mental impairment that substantially limits one or more life activities; (2) records that such an impairment actually exists; and (3) the person is known to have the impairment. Impairments can affect the neurological, muscular-skeletal, sensory, respiratory, cardiovascular, vascular, reproductive, digestive, genital, urinary, endocrine, and blood and lymphatic systems, as well as the skin and any mental or psychological disorder such as mental retardation, organic brain injury, emotional or mental illness, and specific learning disabilities. Obesity, advanced age, pregnancy, and personality traits that are not part of a mental disorder are not covered under the ADA definitions of disability. Although most mental diagnoses that appear in the DSM-V are covered, there appears to be some conflicting case law about conduct and disruptive behavioral disorders.

Many of the other specific requirements for invoking the ADA legislation are clearly defined in the act which is different from other civil rights legislation that relies on case-by-case arguments. This is because the legislation was intended to prevent stereotyping of individuals due to misperceptions of what limitations are caused by a disability. However, definitions of what is a 'reasonable accommodation' by an employer are decided on a case-by-case basis. Unfortunately, unlike the civil rights laws, the ADA does not specify the relief to be granted should an employer be found to have discriminated against a person because cause of disability. Some employment discrimination scholars suggest that it is impossible to make a disabled person 'whole' which is the concept of relief under the Civil Rights Act. Others suggest that the law was too new to really grasp what kinds of relief would be appropriate in these cases.

Summary

One of the important areas where forensic psychologists use social psychology research and principles is to explain these principles for judges and juries to understand in cases of discrimination. The anti-discrimination laws that have been adopted by Congress arise from the civil rights that are given to every citizen by the U.S Constitution. Evidence of the psychological harm from stereotyping, harassment, and discrimination was part of the evidence that persuaded

Congress and the Courts that laws were necessary to prevent further damage. Although the civil rights laws have been amended from time to time and the court's interpretations vary depending upon the political climate in the nation, it is still clear that employers cannot discriminate based on race, nationality, gender, or other key distinguishing factors among people.

Questions to Think About

1. What do you think about the possibility of filing lawsuits against someone for sexual harassment or assault that occurred ten or more years ago? Do you think there should be a statute of limitations?
2. Some say that gender-based discrimination is pervasive in American culture. Why do you think this is?

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22 Eyewitness Identification

Introduction

> Picture this: a defendant charged with a crime has pled not guilty and taken his case to trial. He and his attorney have reviewed and prepared evidence, considered and chosen witnesses, and his attorney has prepared opening and closing arguments. Then, the prosecutor produces a witness who says that he can identify the defendant as the perpetrator of the crime.

In the minds of most laypersons, the testimony of this eyewitness is likely the most devastating thing that could occur to our hypothetical defendant. Laypeople think of eyewitness identification as highly accurate and reliable. Indeed, studies of juries have shown that it is the single most important factor responsible for convicting a defendant. However, as you shall see in this chapter, eyewitness errors are often the cause of wrongful convictions. In many recent cases, in which convicted defendants were later exonerated on the basis of DNA evidence, it was found that one or more eyewitnesses falsely identified the innocent person. Experimental psychology has demonstrated for many years that eyewitness identification is not as accurate as laypeople would believe because of the witnesses' problems in retrieving accurate memory of events.

In eyewitness memory cases, the psychologist plays a very different role than has been discussed in many of the preceding chapters. In earlier chapters, a psychologist with clinical training examines an individual (most often the defendant in criminal trials or the plaintiff in civil trials) and attempts to answer certain legal questions about the person's state of mind, such as whether or not she or he has the mental capability of assisting an attorney in preparing a defense or whether the psychological condition from which the person suffers could be attributed to a certain trauma, accident, or injury. In eyewitness identification cases, however, the psychologist is usually an experimental researcher who does not examine the person involved in the court proceedings. Instead, the psychologist serves as an expert witness and presents information to a judge or jury regarding experimental studies that demonstrate the unreliability of eyewitness identification (Goldstein, 2003). On occasion, these experimental presentations may be coupled with clinical testimony (usually of another psychologist), when there are questions regarding the ability of a specific witness to recall matters (e.g., if that witness may be neurologically impaired).

There are a number of factors that a psychologist testifying about the reliability of eyewitness testimony will assess. These include the nature of memory as we know it today, the factors that influence a person's suggestibility, and the techniques that a detective can use to enhance memory or, conversely, contaminate the memory of a witness. Discussion of the nature of memories of personal trauma is included here because they involve differences of opinion between some experimental psychologists who specialize in understanding the impact of emotion on memory.

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Cognitive and Emotional Memories

One of the basic concepts that is central to the studies of the reliability of eyewitness testimony and has been documented for over 75 years is that cognitive memory is reconstructed. Cognitive memory is not like a photograph or video recording, and when you recall what you remember, it may not accurately describe what actually happened. This is because we do not remember everything we experience but rather, we only remember details that are meaningful to us. Cognitive memory is stored in special sections of our brain in the cortex and is retrieved from there using appropriate cues. We must reconstruct events using the limited details that we do remember. People may forget details that seemed unimportant to them at the time or add in details that really didn't occur for various reasons. This is what is called reconstructive memory. Thus, human memory becomes a mixture of what really happened, with what a person has heard about the event, feels must have happened, or whatever other information the person uses to "fill in the gaps."

This reconstructive view of human memory has gained general acceptance in the scientific community. However, the clinical psychology community has challenged some of the cognitive psychology research especially when trauma memory is involved, and our knowledge of the issues continues to develop. Cognitive psychologists suggest that all memory gets processed in the same way and stored in the memory areas of the cortex. Clinicians have found that clients who are in psychotherapy have other ways of dealing with memories that are loaded with emotional content. Newer research in what is called "psychoneuroimmunology" (or PNI) now demonstrates that these emotional memories are stored in the midbrain area—probably in the hippocampus with some in the hypothalamus, amygdala, adrenalin, and pituitary axis—regulated by hormones and neurotransmitters, and they are not easily accessed because they have not been verbally processed. The midbrain area is different from the cortex which is where cognitive memories that have been verbally processed are thought to be stored. Emotional memories (especially when they are of very strong feelings) that get stored in the midbrain area actually influence our emotional and physical states of being because they regulate the autonomic nervous system. This is one of the ways stress has been found to impact our physiological and mental well-being.

Many clinicians believe that psychotherapy is successful in helping people deal with strong emotional experiences in part because it helps retrieve these emotional memories out of the midbrain centers, processes them in therapy sessions, and then the person is able to store them in the memory centers of the cortex rather than the midbrain. The person is then able to retrieve the memories without being flooded by overwhelming emotions. Cognitive psychologists question the accuracy of these memories given what they know about the reconstructive process. They suggest that there are many places along the way that memory can be altered, sometimes purposefully and sometimes unknowingly because of the process itself. Clinical researchers do not disagree that the memories can be altered intentionally by unscrupulous people or even unintentionally, but believe this is only temporary. For example, prospective studies of women who were sexually abused as children found that there were periods of time in which the women remembered certain details and forgot others, but despite this variability of memory, what was remembered was usually accurate.

Reconstructive Cognitive Memory

The reconstructive memory approach divides memory into three stages: acquisition, retention, and retrieval. The first stage, acquisition, has to do with the encoding of stimuli (events, information, encounters, conversations, situations) into memory. Retention refers to how this information is stored over time. Finally, retrieval

refers to the ability to find what has been stored. Different factors impact on each of these stages and therefore can have an effect on the accuracy of recall. Complete and accurate memories of complex events are highly unlikely, simply because people cannot pay attention to absolutely everything going on at the same time. During acquisition they tend to form general impressions and focus on what seems most important at that time. Expectations of what *should be* in a given circumstance or beliefs about how things *must* be based on past experiences may well distort what is actually there. During retention, details may be distorted, changed, or forgotten. If outside sources talk to the person about the event, the memory of it may change and incorporate these outside sources. This is one reason why clinicians examining witnesses are cautioned not to use leading questions. One frequent technique in a criminal trial is to cast doubt on the accuracy of a defendant's statement by implying that the police "planted seeds" which distorted the witness's actual memory. A particularly controversial area which led to many debates over the years was whether therapists could "implant" false recollections of abuse into people's memories while helping the client to process emotional memories and store them in the cognitive areas of the brain. In the final stage, retrieval, the conditions under which the recollection is retrieved (sometimes called cues) may influence what is remembered.

Acquisition Phase

There are numerous factors that can influence the first stage, acquisition. In the acquisition phase, time can influence the accuracy of a witness's ability to encode the event. The longer a witness views an event, the more accurate the encoding usually is. How frequently the event occurs is another important factor, which makes sense if we consider that watching the same comedy film makes us quicker to quote that classic punchline accurately. While most crimes that people witness are one-time events, in non-criminal legal cases, a witness may observe an event more than once. It is possible that memory can be impacted by witnessing scenes repeatedly, such as friends who witness behavior between a husband and wife who are claiming duress in a marital case or co-workers in an office where there are allegations of sexual harassment. However, since eyewitness testimony has been studied mostly in the context of criminal investigations, we will use primarily those examples here.

Encoding Core and Peripheral Events

People tend to be more accurate when they encode what is called *core* as opposed to *peripheral* events. Peripheral events are just what they sound like: factors or parts of the event that are not central or integral to the actual event. They figuratively "occur on the periphery," in a sense, in that they are secondary to what appear to be the most crucial aspects of the memory to be encoded. An example could be the color of a burglar's shirt or the model year of the car idling in front of a bank. This can be problematic in eyewitness testimony, because a peripheral event might be the major identifier in a case—the model year of the car may help identify the burglar from the bystander, but the memory of this peripheral event (seeing a 2010 Toyota Corolla along with a 2019 Honda Civic) is less reliable than core factors such as watching a masked burglar walk out of a bank with a duffel bag.

The complexity of the scene being observed can detract from accurate identification as well. If some item draws the observer's attention away from the core event, it can result in less accurate identification. Expectations of what a situation *may* have been like can distort the accurate encoding of what it actually was. In other words, if a witness is accustomed to see certain things regularly in a scene, the witness may state that he or she recalls those things being present, even if they were not at the time of a particular incident. Think about a shooting that occurs in the driveway of the house across the street from you. You see the person's car parked in the driveway every day. The day of the shooting, the car was not there, but four different cars were present, thus

complicating the scene. Later, however, you may describe the scene with the car where it is always parked because your memory encoded both the shooting event and your memory of the car's usual place together. Merging these details may or may not make your memory of who did the shooting less reliable but on the witness stand, the jury will have more trouble believing your eyewitness identification than if your memory of the event matched the memories of others, who spotted the car across town (to match, your memory would have to exclude the victim's car from the driveway!).

Inaccuracies can also occur if the event is viewed under unclear or rapidly moving circumstances. When a witness says to a police officer, "It all happened so fast, I really can't remember," she or he is giving an example of this finding. Lawyers often will try to demonstrate that the witness is not credible because he or she cannot remember certain peripheral details about a crime that were proven by pictures of the crime scene. If the witness says, "I can't remember" or gives an inaccurate fact, then it can be assumed that whatever the person can remember is not reliable either. Not recalling the color of an accomplice's shirt may not *actually* make the identification of a gunman inaccurate, but we must recall that a criminal defense attorney's primary goal is to cast doubt about the "who done it," and attacking the memory of an eyewitness can be a way to get that job done.

Stressful Incidents

The relationship between stress and the accuracy of memory is complex, with some studies suggesting that stress enhances accurate memory and others suggesting that it detracts. Many researchers view the level or intensity of the stress to be the important factor: moderate levels of stress increase accuracy of memory, while high levels decrease it. For example, if an individual was a witness to a stabbing that took place in the apartment building across the street (consider viewing through a window), this could be considered moderate stress. On the other hand, if that stabbing took place inside the witness's own apartment and the perpetrator was within arm's reach of the witness, this would be considered high stress. Therefore, it would be expected, if all other factors were equal, the witness' memory would be more accurate for the incident that took place further away. This then begs the question of whether other factors could influence the accuracy of memory (including, e.g., the witness usually wearing glasses but not having them on that day, as was comedically exemplified in the 1992 film *My Cousin Vinny*), but remember we did say "all other factors being equal."

Interestingly, brain researchers are finding that memories of events that are perceived as traumatic do not get processed right away. First, they are encoded directly into the areas of the brain that regulate emotions. The research suggests that these memories are recorded as they actually occurred, which may be partially responsible for the re-experiencing of all or parts of the memories of the traumatic events *along with* the distressing emotions experienced at the time which we see as a symptom of post-traumatic stress disorder (PTSD). If the process of retrieving these emotional memories is protected from outside contamination, the reconstructive memories that finally get stored in the cognitive memory area might even be more accurate than those that are processed immediately, since as they are re-experienced they are repeated!

Retention or Storage

The second stage of cognitive memory is retention or storage. A number of factors that occur in this stage may also influence the reconstructive memory. For example, the longer the time between the observation of an event and when it is reported, the greater the likelihood of its being forgotten or reported inaccurately. If a witness observed a car in front of a home being robbed, but the robbery is not reported for several weeks and therefore police do not come to question the neighbors immediately, his or her memory of the car on the curb may be less accurate than on the morning after the event. Sometimes, additional

information obtained during retention can detract from the accuracy of reporting. For example, a 5-year-old child who witnesses the shooting death of his mother may be interviewed by several different people about the event. During these interviews, the child may learn new information from the questions being asked and encode and store that new information along with the original memories. The next time that the memory is reconstructed, it may contain the new information mixed together with the original scene, confusing everyone. Interviewers asking witnesses to retrieve stored memories must be careful not to taint them while reconstruction is taking place. Even subtle cues such as smiling or frowning when the child is saying certain things and repeating certain questions when the child says other things may influence what the child reports.

Forgetting Information

Generally, the tendency to forget information increases with time, but this varies with a number of factors. One factor is how familiar the information may be to the witness. If the witness is unfamiliar with a particular person or place, she or he may forget more about the details over time than if the witness was more familiar with it. As an example, a witness who is traveling and unfamiliar with a city may forget more details (especially peripheral ones) than a witness who works in the building where a crime took place. Another factor is the length of time between the observation and its report. Research shows that the longer the time interval, the greater the likelihood that the individual's recognition of an event will be incorrect. However, a word of caution regarding traumatic events: clinical conditions can alter this finding. For example, an individual who already has PTSD and is under stress during an event may unintentionally fill in gaps of memory with similarly perceived trauma events that are recalled mentally at the time the actual incident is occurring. So, police officers must be very careful when interviewing witnesses right after an event to clarify what was actually occurring and what was being re-experienced mentally.

Source of Information

The source of the information can have a major effect on the accuracy of the memory retention. Two factors seem to be operative here: the status of the individual providing the information and whether or not the person is perceived as unbiased or without self-interest in the issue. If the source is perceived as high status and unbiased, then that person may have a profound impact on altering memories. Since police are often perceived as having high status and are thought to be unbiased by jurors, attorneys may cross-examine them vigorously to try to uncover any bias that might have influenced their witness interviews or when they obtain confessions from defendants during the interrogation. This is what happened in the O. J. Simpson trial. Although the defense attorneys were accused of playing the "race card," in fact, uncovering the racial bias of detective Mark Fuhrman demonstrated the unreliability of his testimony at the trial. For the same reason, therapists and parents who uncover child sexual abuse are held to a different standard in order to demonstrate that any bias they might have toward the protection of the child, did not unduly influence their interviews to persuade the child to say what they knew the therapist or parent wanted them to say, if it was not the truth.

Many such different mechanisms seem to be involved in the distortion of memory and, most often, inaccuracies are due to the joint effect of several of these mechanisms interacting together. Thus, both forgetting and contamination by material presented after the actual event can result in inaccuracies in memory during the retention phase.

Retrieval

Rugg & Wilding (2000) provide a thorough discussion of retrieval of memories. Retrieval is the final stage in reconstructive memory and during this stage, information that was encoded and retained is brought back to consciousness. Witnesses may make a police report, be asked to identify suspects from a police lineup, and

ultimately testify in court as to what they saw or heard. Interviews with eyewitnesses may be conducted under poor conditions; witnesses may be injured, psychologically upset, distracted, or confused. Police may form premature conclusions about what happened and intentionally or unintentionally bias the witness. Sometimes these premature conclusions can lead the detective to ask leading questions and construct biased lineups or photograph arrays that aid in identifying the individual whom they already suspect. Given the previously noted status of police officers (including both respect and fear that some minority groups have), these interview techniques can profoundly influence the accuracy of eyewitness identification.

Sometimes cues presented to witnesses may assist with accurate retrieval and reconstruction of memory. Other times, if subtle pieces of incorrect information are embedded in the cues, it can result in even more memory distortions. The more often the person repeats an incorrect recognition, the more likely each time the memory is reconstructed, it will not be accurate. Thus, repeated questioning can result in even poorer reconstructive memory.

A variety of techniques have been found to increase these inaccuracies. If, for instance, the interrogator used complex rather than simple questions, the potential for inaccurate identification increases. If an interrogator were to use strong, as opposed to weak, verbs in describing behavior (such as he attacked the man rather than he hit the man) inaccuracies of reconstructive memory are also more likely to occur. However, if the interviewer uses cues such as props to aid in recall, it may enhance a person's memory, especially with young children and adults with intellectual deficiencies (Salmon & Pipe, 2000).

Oftentimes, police will employ artists who draw (or now construct on computers or tablets using specialized software) a composite sketch from the verbal or visual memories of witnesses. These sketches are then used as props both to choose photographs to go into a photograph lineup and to enhance the witness's memory prior to showing him or her the photograph lineup. The closer the photograph is to the composite sketch that has been seen by the witness, the more likely he or she will compare the photographs to the sketch rather than his or her memory of the actual scene. For example, if a composite photograph looks most like suspect #2 out of four options, and the witness has seen the composite photograph minutes before viewing the lineup, she or he is more likely to choose suspect #2, even if it was actually suspect #1 who committed the crime. This can result in choosing an inaccurate person from the photograph lineup. However, it will be difficult to change the person's opinion as he or she will feel quite certain, having seen the sketch a few minutes before the lineup (remember what we discussed previously about the length of retention time!). It has been found that putting several pictures of people who resemble the suspect together will result in more confusion than just one mixed in with several dissimilar pictures. This is also true for a live lineup used for identification purposes.

In general, when testimony is given in court, it will be more accurate if fewer details are required to be remembered. For example, if the witness needs only to recall a particularly identifying characteristic of a defendant (the perpetrator had a tattoo of a clown on her face and the defendant has a tattoo of a clown on her face), the retrieval should be more accurate than if numerous (and less unique) details are needed. Moreover, attorney's questions can have a substantial impact on what is remembered. A witness' testimony is usually most accurate if first, the person's free recall is obtained. Afterward, it is okay to use open-ended questions and eventually it is okay to ask more specific questions. However, it is best for attorneys (and interrogators, for that matter) to avoid misleading questions and multiple-choice options as they can confuse the person and memory retrieval will be less accurate. The most accurate eyewitness reports have been found to be obtained by first asking the witness to give a narrative of what was observed at the scene. Then, the questioner should ask simple, brief, and direct questions that are designed to elicit direct responses. Finally, they should make a broad request for any additional information.

As might be expected, police and attorneys have been made aware of the extensive literature regarding these effects, and efforts to help them formulate better questions are an important trial consultation strategy. Even so, the legal and psychological literature are replete with stories about the poorly constructed questions asked of eyewitnesses right after a crime scene, in follow up interviews, and in depositions. Sometimes police are unable to prevent one witnesses (witness) from hearing the information provided by another witness, further contaminating the individual's memory. Police may take poor notes, forget to turn on the tape recorder, or even destroy recordings so that neither the complete questions nor answers are available for analysis. When unedited reports are available, analysis sometimes reveals frequent interruptions by police during the witness's narrative, preventing a full and complete response. Research has also found police often ask too many questions requiring just a yes or no answer without letting the witness put the events in his or her own words. These questions give away the answer that the police want and so, really do not measure the witness's own observations. Asking too many compound questions results in a lack of clarity as to which part of the question the response addresses, as does asking too many questions with inappropriate sequences that witnesses do not get a chance to correct. When training police in interview techniques, they are encouraged to slow down their pace of questions and formulate each question taking into account the particular person being interviewed and the specifics of the previous answers, rather than using generic questions from a list that have not be rephrased or put into their own language.

Trauma Memory Retrieval

A controversial question regards the timing of an interview of a witness to a traumatic event. Some studies suggest that deferring interviewing until the stress subsides yields more accurate results, while other studies suggest more accuracy in reporting before some of the factors enumerated above have had a chance to intervene. As was discussed earlier, trauma memories are not always processed in the cognitive areas of the brain; rather, they remain in the midbrain area where emotional memories are stored, and they may be stored separately and in fragments, which may influence the ways that survivors re-experience traumatic events in PTSD. Lanius and colleagues (2004) also suggested that neural connectivity may account for primarily nonverbal recall of traumatic memories in those with PTSD as opposed to more verbal recall among those without this condition.

People experience their emotions differently, so retrieval of emotional memories would be expected to differ depending on how much control a person has been able to exercise over his or her emotions. For example, someone whose emotions are still on a roller coaster might be less accurate depending on where they were in their emotional cycle when an event occurred, while someone who keeps their emotions under very rigid control might be more accurate (recall that moderate levels of stress enhance memory while high levels of stress decrease it). On the other hand, so much of the processing of emotional experiences occurs automatically and involves the secretion of hormones and neurotransmitters that are difficult to consciously control or measure, it may be difficult to know the impact on someone's cognitive recall and retrieval. Psychologist Daniel Goleman has written about this area of study in his popular book, *Emotional Intelligence*.

Enhancing Retrieval of Memory

Other issues that come into the retrieval stage deal with various techniques used to enhance the retrieval of memory. Some of these are hypnosis, guided memory, and what has been called the cognitive interview. While these techniques may, on the one hand, enhance the retrieval, some critics suggest that they may influence and distort the accuracy of the memory. Hypnosis that is recorded by audio or video means may be permitted as reliable evidence in some courts but if the suggestions are likely to alter the memory,

then the witness may not be permitted to testify. Guided memory or imagery is a technique often used by interviewers to relax the person so they can more easily access memories. The cognitive interview is a technique that police may use to instruct the witness to mentally reinstate the crime scene in his or her mind before the police begin asking questions. Witnesses are instructed to focus on sensory recollections, such as how things appeared or what smells and sounds were noticed. The police may also ask questions to stimulate recall of what he or she was doing, feeling, or focusing attention on earlier in the day, shortly before the event, at the time of the event, etc. Witnesses are also asked to report on the event from multiple perspectives and also in several different orders and throughout the whole process witnesses are encouraged to be thorough and report every single detail they recall, no matter how trivial or silly it may seem (Perfect et al., 2007). A method which has been found to improve recall in individuals is eye-closure, because closing one's eyes reduces a person's cognitive load and eliminates interference from visual distractions during the interview process (Vredeveldt, Hitch, & Baddeley, 2011).

Reliability of Eyewitnesses

Identification

A number of intriguing issues have emerged from the basic premise regarding the unreliability of eyewitness identification. One of these is cross-racial identification. Generally, as we now know from a large body of social psychology research, people are more accurate in identifying people of the same race than those of different races. It also appears that the difficulty in cross-racial identification increases as the potential witness grows older. In addition, some researchers have found that witnesses tend to be more accurate in their recall of peripheral events and details when observing an event involving a same race perpetrator (Wrightsman, 2001). One hypothesis to consider is whether those who live in areas where there are many different cultures can more reliably identify differences within groups than those who live in more homogenous areas. It was once thought that humans' tendency to better identify and distinguish members of their own race was fueled by racism; however, in light of recent years' worth of memory research, it appears this may be due more to our memory and cognitive abilities than our social prejudices or biases.

Another area of study by experimental researchers dealt with whether intelligence positively correlates with greater accuracy in eyewitness testimony. Like most laypersons, you probably intuitively feel that the two *should* be related; however, there does not, in fact, appear to be any consistent evidence that intelligence and accuracy of eyewitness testimony *are*, in fact, related. Similarly, there have been suggestions that lower intelligence would correlate positively with greater suggestibility. Again, no consistent relationship has been demonstrated, with the exception of individuals who are performing significantly below-average intelligence (e.g., in the borderline or mentally retarded range). Courts have accepted research on the limited resources that individuals with low intelligence have when responding to police questioning. For example, a person with an IQ of 55 would not be expected to be able to remember a question with 4 or 5 parts in it. This is also true when questioning those who are mentally challenged or even those with attention deficit disorders (e.g., ADHD) who cannot be expected to remember more than one or two things in a sequence. Reliability of responses from mentally challenged adults may be enhanced by using appropriate language, unbiased cues, and props similar to what is recommended with children.

In a similar manner, personality characteristics and cognitive styles that one would intuitively believe to be correlated with higher accuracy of eyewitness identification in fact have not demonstrated any consistent relationship. Thus, the belief that someone who was an independent thinker and less dependent on cues from the environment to make decisions would be a more accurate witness has not been verified consistently in the laboratory. In a similar manner,

attempts to predict eyewitness accuracy based on such measures as introversion–extroversion or reflection–impulsivity have been equally unsuccessful. In general, there are no consistent data regarding gender differences in eyewitness accuracy but this has not been well-enough studied by those psychologists who have expertise in gender issues.

Estimator and System Variables Impact Accuracy

Estimator Variables

Many experiments regarding eyewitness accuracy are carried out in laboratory settings. The two major types of variables are called estimator and system variables. "Estimator variables" refer to those that influence reconstructive memory because of the individual's tendency to estimate the scene from memory. They include various environmental and personality factors that influence accuracy of acquisition, retention, and retrieval of memories. For the most part, these variables are not under the control of the criminal justice system, although interviewers must pay attention to them so as not to manipulate the witness.

According to Wells and Olson (2003), some of the estimator variables impacting accuracy are:

1. Age of the witness (less accuracy in children and in the elderly);
2. Unusual aspects of the person being observed (greater accuracy if one or more unusual characteristics is present);
3. Seeing the face at a different angle than originally viewed (which would decrease accuracy);
4. Change of the context (less accuracy if seen in a different setting);
5. Intoxication of the witness; and
6. The degree of violence (more accurate memory is event is nonviolent).

In addition to these variables, perceptual salience, or something the defendant did that involved drawing attention to him or herself or somehow cause him or her to stand out, may increase accuracy. Global impressions are generally more accurately recalled than specific features. However, despite the success in the laboratory in finding factors that increase reliability, concerns have been raised regarding the applicability of these variables in the real world due largely to complex interactions of variables that have not (or cannot) be tested in the laboratory. In other words, the findings that emerge from research are based on holding certain factors constant in the laboratory, factors which, in the real world, occur in a context that might further influence the witnesses' memory. This makes testing outside the laboratory highly difficult, as one could well imagine.

System Variables

System variables refer to the type of police procedures used that can negatively impact on the reliability of a witness' memory. Police can be trained to use appropriate interview techniques to avoid many of these pitfalls. The degree of accuracy of eyewitness identification, in other words, can be influenced by the procedures used (Loftus, 2003). These procedures have all been touched on throughout this chapter, but in review they include the type of questioning done by the police, the nature of the lineup or photographs shown to potential witness, the use of props during questioning, the amount of time allowed to lapse, whether or not the procedures have been videotaped, and others. Further, there is a subtle interaction between the personality of the potential eyewitness and the police. Such dimensions as the witness's reasoning processes, suggestibility, self-confidence, authoritarian submission, and conformity can all influence what is presented as eyewitness testimony (Wells & Olson, 2003).

The dynamics of the interview situation itself can reflect on the accuracy of the recall of memories. The witness often looks for verification or confirmation of what he or she remembers and can interpret a nod of the head or some other unintentional movement as a signal. Witnesses may feel pressured to give the right answer or at least not to appear ignorant when being questioned by authority figures. These are called the

"demand characteristics" of the situation and are cues as to how the witness is expected to respond. If a witness did not notice the color of someone's shirt and yet is asked about that during questioning, he or she may make up an answer rather than appear stupid. Or, the witness may feel desperate to try to help locate or apprehend a criminal, and therefore may add or make up details that are not actually accurate. What's more, leading questions by the police can impact the witness's memory. If a witness is shown a picture of a suspect more than once, such as in two different interviews separated by a period of time, this can increase the likelihood that the wrong picture will be identified. If the same question is asked repeatedly during an interview, it may influence the witness's response, perhaps causing him or her to change the answer believing the first one given was not acceptable to the interviewer. For more on the topic of eyewitness testimony in general and many of the elements touched on here, Elizabeth Loftus provides a thorough overview of what she calls the "contentious issues" that have arisen surrounding eyewitness testimony over time (Loftus, 2019).

Frye and Daubert Standards and Federal Rules on Admissibility of Evidence

Remember that earlier in the chapter, we discussed the typical role of a psychologist regarding eyewitness testimony is to serve as an expert witness to provide education on these topics. Given all of the above cited research, does the scientific knowledge about reliability and validity of eyewitness testimony meet the legal standards for admissibility of this testimony in court today? Remember, earlier discussions that the Frye standard called for a "general acceptance within the relevant scientific community" while Daubert and the Federal Rules also require a judge's determination about the reliability and validity of the scientific basis upon which the testimony will rest. Let's take a look at what this research says:

1. Testimony of an eyewitness can be significantly impacted by the way the questions are worded.
2. The instructions that police give to a witness viewing a lineup can affect both the witness's willingness to identify someone and the probability of identifying a particular person.
3. Testimony of eyewitnesses can be impacted by information obtained after the actual event.
4. The degree of confidence an eyewitness has in her or his own accuracy does not correlate well with actual accuracy.
5. Attitudes and expectations of an eyewitness may have an impact on his or her perception or memory of an event.
6. The less time that a witness observes an event, the less accurate the memory.
7. Witnesses may "transfer" identification; in other words, they identify someone as a perpetrator whom they have seen before in a different context.
8. Misidentification is more likely if a witness is shown one individual rather than a full lineup.
9. Most forgetting occurs immediately after the events and levels off subsequently unless trauma memories are involved.
10. Caucasians tend to identify other Caucasians more accurately than they can identify other racial groups such as African-Americans. The likelihood of accurate identification in lineup increases the more the members of the lineup resemble the subject.
11. The likelihood of accurate identification in a lineup increases the more the members of the line up resemble the subject.
12. Eyewitnesses tend to overestimate the length of time an event takes to occur.
13. High levels of stress negatively impact on accurate identification while moderate levels enhance it.

Finally, the important question to be raised is the relevancy of this information to judges and jurors (the triers of fact) who must make decisions about guilt or innocence of defendants of crimes. The Rules of Evidence that govern testimony suggest that there should be different standards for what is admissible and how its credibility is weighted by the finders of fact. Some suggest that the laboratory research on factors that influence acquisition, retention, and retrieval of memory in general are well-enough known by the average person so that it is no longer necessary to have expert witness testimony to explain the possible contamination to memory. Those who take this position believe that jurors can sort it out themselves. Others believe that the weight given to the credibility of a witness may be so skewed by the status or confidence with which a witness testifies, that expert testimony is necessary to avoid mistakes being made. What do you think?

Summary

This chapter discusses the issue of how people remember what they see and retrieve those memories under stressful conditions such as witnessing a crime. Testifying as an eyewitness in cases depends on accurately encoding what you see and retrieving it. We discussed how reconstructed cognitive memories are stored in the cortex of the brain using verbal cues while emotional memories, particularly those that are traumatic are stored in the hippocampus in the midbrain. Those emotional memories are stored as they occurred with all senses intact so that when recalled the experience occurs as if it were happening again. The cognitive memories have been processed verbally, and many variables could impact the accuracy of how they are perceived or recalled. Eyewitnesses may not be the most reliable reporters given the variations in people's memories.

Questions to Think About

1. Given what we have learned about memory and retrieval of memories, especially under stressful circumstances, do you believe that eyewitness testimony should be permitted in courts?
2. Do you have an emotional memory that stands out to you? Bring it to mind, if it's not too difficult, and consider some of the characteristics of memory we have covered in this chapter.

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23 Jury Selection and Psychology of the Trial

Introduction

The area of trial consultation, including selecting juries, is one that has developed over the past 30 years into an important area of forensic psychology. This has occurred despite the skepticism that arose from concern that unscrupulous attorneys or psychologists would overstep the boundaries of ethical and moral behavior (as was portrayed in the *Runaway Jury* by John Grisham). Everyone likes to think that psychologists can see into people's minds and use what they learn to be manipulative. While that occasionally can and does happen, the fact is that most trial consultants use perfectly acceptable research methods to obtain important information that lawyers can then choose to use or discard. There is even now mainstream media focusing on the topic. You may have heard of a new CBS primetime show called *Bull*, which is entirely centered on the trial consultation services of a psychologist and his team of experts offering trial consultation services for high-impact cases in New York City. Like most modern media, the show tends to exaggerate the true scope and abilities of trial consultants, but if we suspend our disbelief (and ignore the price tags and actual time-tables of these story lines) we find that kernels of reality and research infuse most of the episodes' plots.

Now let's snap back to reality: One of the most celebrated cases in which one side took advantage of the knowledge of trial consultants while the other side ignored it was the O. J. Simpson criminal trial. Joy Stapp, PhD, wrote that it was the O.J. Simpson trial which brought trial consultation to the public eye (1996). Whether you remember the murders of Nicole Brown and Ron Goldman and watched the trial as it aired on television, or you are familiar with it only compliments of HBO's recent miniseries, most of us know of the O. J. Simpson trial. In her book, *Without a Doubt*, prosecutor Marcia Clark (1997) said she was offered the services of a trial consultant, Donald Vinson, 'pro bono' or at no cost, but rejected the advice he gave her because she was personally offended by his attitude. The defense team hired Jo Ellen Dimetri, a well-known and respected trial consultant who worked with them as part of the so-called dream team throughout the trial. Through the use of scientific methods (rooted primarily in social psychology research in tandem with pre-trial research), both consultants concluded that African-American women were more likely to be sympathetic towards O. J. Simpson than towards Nicole Brown. However, Clark believed that she could persuade these women to sympathize with the victim, using her theory that unchecked domestic violence led to Nicole Brown's death, ignoring the racial issues raised in this case. Author LW, who was a consultant to the defense, remembers Johnnie Cochran's excited telephone call to her when they had selected the final 12-person jury that had eight African-American women and one African-American man. Based

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on the research he had obtained, he was sure that the prosecution had made a terrible mistake that would favor his client. Social psychology data clearly suggested that the identification with racial discrimination was stronger for African-American women than their identification with gender.

Interestingly, there are those who suggest that the prosecution lost that trial when they filed the case in the downtown Los Angeles courthouse, rather than at the suburban Santa Monica site. Since the deaths of Nicole Brown and Ron Goldman occurred in the wealthy suburb of Brentwood, the usual filing would have been in Santa Monica where the juror pool would better represent those who live in the more affluent neighborhoods than downtown Los Angeles. However, Gil Garcetti, the L.A. District Attorney at that time, believed that managing the media would be a major issue for the city and preferred to hold the trial in the larger and more accessible courthouse. What might a good trial consultant have advised about this issue? Would the research have suggested that geographical location (and the in-group affiliation of socioeconomic status) outweighed identification with race and racial discrimination? Sometimes hard decisions must be made when two conflicting issues are raised, such as in this case.

What Research Methods Can Be Used?

Social science provides us with many different ways to collect information about jurors that will allow attorneys to learn about their general attitudes and biases for and against specific clients. For example, conducting a *public opinion poll* using a sample of people who live in the area from which jurors will be selected can help attorneys learn what potential jurors know about the case, whether pre-trial publicity has caused them to favor one side or the other, if there are certain specific facts that might be more troublesome than others, and if it is impossible for the client to obtain a fair trial in that jurisdiction. While it used to be said that "sometimes the media publicize a case without all the facts," this is now no longer a "sometimes" issue. The rise of the Internet and the overwhelming impact of social media nearly guarantee that any case which might generate clicks or views will go viral. Because digital media can be updated so rapidly and repeatedly, media consumers may see early posts with next to no details, every post (all of them containing conflicting details), or only view headlines or video captions and draw incorrect conclusions. This can cause bias that negatively influences that person's ability to listen to the facts presented at trial, should they eventually be selected for a jury. Systematically collecting this information using scientific methods can produce the evidence to persuade a judge to move the trial to another community where jurors have not been exposed to the detrimental information. Although this is difficult now since digital media has effectively shrunken the globe of reference for media consumers, a story may be shared more often in one geographical location than in the area where a crime took place. Or, other considerations—such as specific jury instructions—may need to be made for cases which have taken on national interest. Think of the Florida trial of Casey Anthony who was accused of killing her four-year-old daughter. Viewers all over the world weighed in on social media as to their opinions on her guilt versus innocence. Many had quite a shock when the jurors, who heard and saw all the information, found her not guilty! Remember the standard to have found her guilty was *beyond a reasonable doubt* and obviously the evidence presented did not come up to that level for the jurors.

Sometimes the community as a whole has certain attitudes and beliefs that would make it difficult for members to serve fairly as a juror on a particular case. This is particularly true for attitudes about racial and gender bias. A U.S Supreme Court case, *Batson v. Kentucky, 106 S. Ct. 1712* (1989), found that jury selection could not be based on racial prejudices. In other words, a defendant is entitled to have members of his or her own racial group on the jury and they cannot be excluded on the basis of race. In *J.E.B. v.*

Alabama,114 S. Ct. 1419, 62 U.S.L. W. 4219 (1994) the Court decided that one gender cannot be systematically removed from the jury. One of the tenets of the jury system is that a person can be judged by other people who are similar to them 'a jury of their peers'. If you are a dark-skinned woman who grew up in San Juan, Puerto Rico, you speak Spanish as your first language and you are on trial in a small farming town in Iowa, the chances of finding a jury of your peers are quite remote. However, if you were to be on trial in the Bronx, New York, you may well be judged by others who understand how your culture impacts on your behavior.

Some attitudes and prejudices are more subtle to discover so trial consultants may conduct 'community surveys' to try to find out what people think about these issues prior to trial. Using a random system of selection, a trial consultant may distribute a survey designed to collect information about certain attitudes in the community. The results of both the *Public Opinion Poll* and the *Community Survey* may be attached to a *Motion for Change of Venue* and used to try to persuade the judge to move the trial somewhere else. Sometimes the trial consultant is called to testify at such a hearing while other times the court makes the decision based on written documents. The downside in filing for a change in venue is that the new community selected by the court might hold even more unsympathetic attitudes towards the client than the original one, and despite the ability of trial consultants to conduct research in remote areas (since so much of this work is possible to conduct online) these motions and venue changes cannot be made repeatedly. Does this suggest that the venue for a trial becomes a question of choosing "the devil you know?"

Jury Selection or Deselection

Many people believe that selecting jurors is not fair. They believe that psychologists are hand-picking the right people to unfairly decide a case. Although they fear that psychology can really help select the best juror to determine the outcome of the trial in favor of their client, in fact, what psychological research is *best* at doing is predicting who would *not* be good on a particular jury. Thus, we really should call it juror "deselection" rather than jury selection, since we are trying to learn who should be sent home because they will not be able to be fair and impartial on a particular case. Lieberman and Sales (2007) provide thorough coverage of the research and methods critical to the process, but we will review a brief summary of important methods here.

Focus Groups

Once the decision is made about where a trial will be held, the jury pool can be studied even further using social science methods to determine what information a typical juror would need to come to a decision favorable to one side or the other. This can be determined by creating small groups (usually eight to ten members) called a *focus group* and presenting the facts of the case to these people. After the case is presented, they are encouraged to discuss the case amongst themselves, determine their opinion based on the information presented so far, and share what additional information might persuade them otherwise. These groups are particularly helpful in focusing on one or two aspects of the case rather than on all the facts at the same time. Using a scientific method rather than relying only on an attorney's intuition helps remove some of the guesswork from the trial outcome. However, these focus groups can also result in identifying new (i.e., not previously considered by the trial consultants) points of interest where attorneys may need to focus more. The results can give attorneys a better understanding of who might be sympathetic to their client and who might not be.

So, for example, in the O. J. Simpson trial, if the attorney wanted to know the sympathies of African-American women, a focus group of a variety of different African-American women would be selected and the facts to be studied would be placed before them in a systematic manner. Different issues could be varied so as to

test Marcia Clark's belief that identification with the feminist issue of domestic violence would be more persuasive than identification with being an African-American in a racist culture. Different focus groups could study different sides of this issue including identification with being a wealthy African-American man who made it in the 'white man's world', sympathy for a white woman in an interracial marriage, disgust for a racist police officer who may have manipulated evidence, lack of credibility for the proper preservation of scientific evidence and other facts upon which a case is decided. Jo Ellen Dimetri chose various focus groups to study the answers to these questions. This guided the attorneys in their selection of jurors chosen. While the evidence was being presented, a *shadow jury* composed of people demographically similar to the real jury was also getting the evidence to help the attorneys decide the best way to present the facts so they could be understood. In the end, the O. J. Simpson jurors were able to identify with the belief that some police officers could lie and manipulate especially in a case against an African-American man, even one who was more identified with rich white men, and that the medical examiner's office could destroy evidence either by sloppy procedures or by deliberately following the detective's orders to ignore chain-of-command in collecting such evidence.

Mock Trial

Another technique that is popular with trial consultants is to hold a *mock trial* before the actual trial occurs. In this procedure, the consultant actually present the elements of the trial to a focus group who have been selected as comparable to the population from which the actual jury will be selected (much like the shadow jury mentioned above). Here the attorneys put together an opening statement representing the best version of their case, the facts in a particularly chosen order, and a closing statement. Presenting the best version of the opposing side's facts for the client or the worst version, depending on what information is desired by the attorney, can vary the presentation. Using this method, attorneys can learn which jurors would be most sympathetic to which facts. Mock trials are also used as a way to gather information about trial strategies such as which order would be best for a particular set of facts or pieces of evidence such as testing the impacts of psychological principles like the primacy effect or recency effect. In general, these say that either earlier or later presentations of evidence, respectively, are most salient in a person's mind. Other topics that can be examined are which facts should be emphasized, which should be minimized, and how much information about a particular issue a jury can remember. If only parts of the trial strategy need to be tested, a focus group can be used instead of the entire case being presented at a mock trial.

Analogue Jury Studies

Mock trials are often used as research methodology for professors to study problems that seem important to social science and psychology, in general as well as in a particular litigated case. One of the most important studies of how different jurors might be impacted by new information was done by psychologist, Regina Schueller, in Ontario, Canada. Schueller took groups of college students and presented different case studies of battered women who killed their partners to them, changing the facts slightly and varying the composition of the group so she could study general attitudes to specific fact patterns in what is called an *analogue* study. The outcome or criterion measure was whether the mock juror would vote for first-degree murder, manslaughter, or not guilty by reason of self-defense.

Schueller looked at variables such as whether being a man or a woman would impact the mock juror's verdict, the age of the mock juror, factors from the mock juror's background that might influence the vote, and the amount of information about the abuse that was necessary to change from murder to self-defense. Then, she put the mock jurors together in a room to deliberate with

each other. This is a time when each juror's individual opinion can be impacted by another juror's point-of-view. Obviously, if you think jurors are leaning in your favor, you want some jurors on that panel who will be persuaded by the strong majority. But, if you have bad facts or think that the jury is leaning against your client, you want a few individualists on the jury to try to persuade the others or at the worst, hold out for a mistrial because they couldn't come to agreement.

In Schueller's experiments she found that women were the most sympathetic to battered women who claimed to have killed their abusive partner in self-defense. Although this seems like it would be consistent with public opinion, in fact, earlier jury studies about the credibility of rape victims showed that women were often less likely to believe the victim was raped. Psychologists interpreted this finding as evidence that women who identified with the woman as a victim first had to accept that they were vulnerable to attack, too. If they blamed the victim for going out late at night, going into a "bad" neighborhood, wearing a seductive outfit or whatever, then they were more likely to falsely believe they had control over their own vulnerability—if they didn't do those things, then they wouldn't be raped. It may sound counterintuitive, especially in today's different landscape of believing victims and raising awareness that rape (and even domestic violence) is never a victim's fault. However, we must consider that generations of women were raised on misinformation and toxic advice from parents and other influencers. Only in more recent years, as widespread campaigns have spread education and awareness, are we beginning to empower women as a whole to see themselves as intrinsically worthy of safety and dignity, no matter where they choose to party or in what attire.

Another interesting fact that Schueller found in her experiments was that jurors are more likely to acquit a battered woman on the basis of self-defense if there is direct evidence about the psychological state of mind of that particular woman introduced at trial. We have discussed the role of a forensic psychologist in serving as an expert witness to testify about the state of mind of a defendant whom he or she has examined, and in cases of battered woman syndrome this is just as relevant as in other types of cases. However, an argument in psychology in these cases suggests that a social scientist could also testify effectively about the dynamics of domestic violence in general, and expect the jurors to generalize from the expert witness testimony about *all* battered women to fit the facts of the particular victim who was on trial. Schueller presented the same set of facts to her mock jury using three conditions: (1) information given through general fact witnesses; (2) information given through a social psychologist who had not examined the woman on trial; and (3) information given through an expert witness who had examined the woman and testified as to her specific state of mind. As we saw in Chap. 6 on syndrome testimony, the standard for a not guilty by reason of self-defense verdict is that the person had a reasonable belief of imminent danger, usually proved by her terror that she would be seriously hurt or killed at or around that time. Schueller's research found: providing no expert witness testimony resulted in the highest number of convictions of first-degree murder; testimony by a general expert witness resulted in a higher number of manslaughter convictions; and testimony by an expert witness specific to the defendant on trial resulted in the highest number of acquittals. This research can be introduced in admissibility arguments or for post-conviction relief to demonstrate that a woman didn't get a fair trial if she didn't have the opportunity to introduce specific expert witness testimony on her behalf. In fact, that is exactly what happened in California and the legislature passed a law that permitted women who were convicted at trial where the judge denied full expert witness testimony to petition for a rehearing to lower their jail sentence. An advocacy group is still fighting to change the law and allow an expert witness to offer full testimony in cases where battered women kill their abusers in what they claim was self-defense in Michigan, one of the few U.S

states where such testimony is limited and women are serving life sentences, similar to what Schueller found in her research.

Non-Sexist and Domestic Violence-Sensitive Language

Research has also demonstrated that to be fair, jurors need to have their jury instructions given in the same gender as the person on trial, not using only male pronouns to imply both male and female or even the newer generic language emphasizing plurals. This means that all pronouns need to be female for a female litigant or defendant. Thus the statement written above about the elements of self-defense should be stated, "If you believe that this woman had a reasonable belief that she was about to be killed or seriously injured by the batterer, then she had the legal right (in some places, legal duty) to defend herself using deadly force, and you should find her not guilty." Moreover, some argue that the use of domestic violence-sensitive language is crucial in the family court setting (Kleinman, 2004), and this logic can be extended to align with the non-sexist language recommended in trials. The trial consultant can advise attorneys on the nuances of language and how to use these as a trial strategy, much the same as presenting evidence in a particular order.

What is the Process of Voir Dire for a Jury?

Armed with all this research, the next step for attorneys (sometimes with the trial consultant present) to enter the courtroom. In some places, prospective jurors are given written questionnaires to fill out when they enter the jury room. This usually includes general questions such as name, age, county of residence, driver's license number, citizenship, magazines and newspapers read, favorite television programs, education, occupation, marital status, number and age of children, partner's occupation, last vacation taken, and the like. Responses to these questions will give the consultant information to make some inferences about the likes and dislikes of jurors and some potential biases. For example, if a potential juror is a retired janitor and the defendant is an elite Wall Street executive, might there be bias in the juror's mind based on socioeconomic class?

In some cases, attorneys want more specific information about prospective jurors, especially since this is probably the last time they can legally ask their questions directly. Specific questions that are often developed by the litigation/trial consultant especially for each case include those about possible bias because of exposure to media reports (although as mentioned before, now exposure to media is nearly guaranteed), opinions about some of the facts in the case, and sometimes personal facts that might influence the ability to be objective and fair. For example, in one case where a man shot and killed his former wife in the cemetery while visiting the grave of their daughter, the television reporter who had told the man about where his ex-wife was filmed the entire incident and parts of it were frequently broadcast on television. Specific questions about what the prospective juror remembers from when it was viewed can help determine the degree of potential bias for that particular person. Or, consider the quite recent case of Inyoung You, a 21-year-old woman charged with involuntary manslaughter after her boyfriend committed suicide following allegations of extensive abuse (including reports that You instructed her boyfriend to kill himself) by You (Taylor, 2019a). The story was shared extensively across social media platforms, but so too are various stories and posts about bullying, cyber-bullying, and psychological abuse. While it is possible that a potential juror has never heard of this particular case, they may have seen media coverage of a similar case (of defendant Michelle Carter, whose boyfriend died by suicide in 2015; Taylor, 2019b). In that case Michelle Carter was charged with manslaughter for telling her friend in the telephone call he made to her to go ahead and get back into the truck filled with carbon monoxide. Her defense was that she wasn't there so he didn't have to listen to her and he had told

her numerous time that he wanted to die. How many of us might have gotten tired of hearing someone say they want to do something and just say something like ‘so go ahead and do it already’ not really wanting someone to die? Should she be punished for just telling him what to do? Some potential jurors may have been recently exposed to awareness campaigns about psychological abuse, suicide, or bullying. As we can see, the ways that potential jurors can be influenced or possibly biased are numerous and complex, so it is easy to understand how trial consultants can serve great benefit to attorneys who may not know what to make of all of these factors.

Peremptory Challenges and Challenges for Cause

After any questionnaires are reviewed, jurors are selected in a particular way right before the trial begins in a process known as *voir dire* (Latin for “tell the truth”). This is the process of a judge or counsel preliminarily examining potential jurors. Each side in a case can request a certain number of jurors to be dismissed for no particular reason. This is called a *peremptory challenge* and is one way that consultants are able to deselect jurors who may be likely to be biased in specific ways. Other jurors can be *dismissed for cause* if the judge can be persuaded that they cannot listen to all the evidence and make a fair and impartial decision. It is important to save as many peremptory challenges as possible so they are not all used up in the beginning, leaving the attorney with no recourse to someone who has a known bias but is able to persuade the judge that they can listen to all the evidence and make a fair and impartial decision afterwards. Those potential jurors who have special needs or cannot serve in a particular type of case may be excused before they even get into a jury pool for a specific trial. This may include people who cannot sit through a long trial because of physical health problems, cannot understand the English language, or have special duties like health or child care. Others may not be able to sit on a jury because of religious reasons or moral opposition to the death sentence. However, there are still other reasons that may make it important for the judge to excuse someone for good cause (such as knowing the defendant from business dealings, or being neighbors with the victim), rather than expect the attorney to utilize a peremptory challenge, although that is always an option if the judge denies the *cause* until there are no more left.

Methods of Conducting Voire Dire

Usually the attorney walks into the courtroom to conduct voir dire with several sheets of paper that list the potential jurors who will be in the first jury pool. If a 12-person jury is to be selected, usually 30–50 prospective jurors will be sent to the courtroom for questioning. Individual judges usually determine how much verbal questioning the attorney can do with each juror. In cases in Federal court, it is common for the judge and not the attorney to conduct the voir dire. Judges will sometimes ask attorneys to submit written questions for them to consider or sometimes just ask attorneys to submit areas in which they wish to gather information. If potential bias is an issue, it is possible to scan the written responses to earlier questionnaires so these can be reviewed. Once the responses are reviewed, it is common for trial consultants to confer with the litigant and the attorneys, perhaps even sitting at the same table in the courtroom. If there is time, information collected earlier on each of the prospective jurors is in front of the selectors. Rounds of questions begin, not only to learn new information about each potential juror, but also to impart information to everyone sitting in the room.

Good attorneys use this period of voir dire to educate the potential jury members by the questions they ask others as well as that particular person. For example, if the case is about a juvenile, it may be helpful to ask a mother about the different abilities of children who are the same age as the juvenile in question. Further questions can be asked if it appears that woman

can do a good job of educating the jury pool members to better help those who might eventually be selected. If the case is about a big business company, it may be helpful to ask about attitudes towards business and find someone who is a stockholder or CEO, depending on what information would be helpful for jurors to have.

In some cases, such as those involving such personal issues like abuse, mental illness or other potentially embarrassing facts, voir dire questions may be asked of individual prospective jurors in the judge's chambers. While this does save the potential juror from embarrassment, it may cause the attorney to lose a potentially important period of education of the jury panel itself. Another danger to asking about specific instances of abuse, for example, in a battered woman or rape case, is that the other side can use its peremptory challenges to get rid of the juror if the court won't do so for cause.

It is important for attorneys to remember that jurors make decisions using a number of variables that include general group variables such as gender, race, culture, community norms, educational level, and personal experiences from their past. Individual personality characteristics and attitudes are also important. For example, it is thought that the more authoritarian someone may be, the more likely that person will be conviction-prone in a criminal case. The opposite is also thought to be true, the more egalitarian attitudes a person might hold, the more likely that person might favor the defense. However, in a justification defense case, sometimes a person with more authoritarian attitudes better understands the need to carry a gun and use it to protect oneself than someone with more liberal views who does not believe in guns for personal use. Another example would be a compulsive personality tendencies—not in the sense we think of when we think 'OCD-type' Jack Nicholson in *As Good As It Gets*, but rather a highly organized and structured person who believes in following fairly rigid rules. This type of juror may be more inclined to side with the state in the case of a battered woman who killed her spouse, because the logic is "even if you were defending yourself, you 'still broke the rules'. All kinds of other factors will also influence jurors in addition to the variables they bring to the jury room. The strength of the evidence, who gets chosen as foreperson, how well the jurors get along with each other and unpredictable things that happened during the trial may also influence how their final decisions get made.

Psychological Tests

Social psychological tests may also be helpful to gather information about attitudes and decision-making in prospective jurors. Basic social psychology research indicates that people with different attitudes may look at the same data and make different inferences. These different attitudes can be measured by psychological tests given to prospective jurors. The *Juror Bias Scale* (Kasin & Wrightsman, 1988) and the *Revised Legal Attitudes Questionnaire* (Kravitz, Cutler, & Brock, 1993) are two popular measures that have good predictive validity of who would be more likely to vote with the prosecution and defense in criminal trials. However, these tests have been validated using college students and videos of simulated trials and have not been validated using real-life jurors. There are also current questions about the factor structure of the *Legal Attitudes Questionnaire*, so more research is needed in this area (Ross & Morera, 2015). However, the point remains that tests like these, which measure general attitudes, are probably better than guessing or using intuition alone, but their predictive accuracy is low when it comes to verdicts by actual jurors.

Biases that occur in civil trials have not been as easily identified as attitudes that impact on verdicts in criminal cases. For example, how people feel about the amount of risk someone takes when using a product later found to cause injury (think cigarette smoking leading to cancer, automobile defects causing accidents, and the famous lawsuit against McDonald's restaurant for serving hot coffee) can all impact on a civil product liability verdict. Aside from carefully constructed interview or voir dire questions, some assessment tools are available to review

people's attitudes about cases against third parties who fail to properly protect consumers, doctors who harm patients, people who file too many lawsuits, and corporations who ignore warnings and pollute the environment or fail to provide worker safety. To date, there are still no assessment tools to measure potential jurors' attitudes towards cases that involve civil rights, discrimination, harassment, or violence against women, although many jury consultants utilize the general stereotypes and social psychological research to assist in choosing sympathetic pro-plaintiff or unsympathetic prodefense jurors.

Research to Assist the Attorney in Trial Preparation

Trial consultants may also be asked to conduct research for the attorney as a trial progresses. Sometimes this occurs when an unexpected witness or previously undiscovered evidence becomes available and the attorney wants to have an idea how it might affect the sitting jurors. In these cases, other methods will have to be used rather than directly questioning jurors themselves, since it is not possible to question jurors once they have been selected. This is called *jury tampering*, which was outlawed by the courts in several important cases. In *Kelly v. U.S* (1918), as reported in Wrightsman (2001), the court found that a person can be held in contempt of court for trying to communicate with jurors even if it is not clear that the person was trying to influence the jurors. In *Sinclair v. U.S*, (1929), a defendant was held in contempt of court for hiring a detective agency to follow jurors during a trial, similar to the description in *The Runaway Juror* (Grisham, 1996), even though no jurors became aware of their surveillance. Even in today's more liberal acceptance of psychology in the courtroom, surveillance of jurors or sneaking a question in the bathroom like portrayed in the movies would still be held as overstepping the boundaries and limits. Analogue studies such as the ones conducted by Schueller on battered women syndrome defenses or focus groups that are selected to match current juror characteristics are about the best that might be utilized to experiment with different outcomes.

Psychological Consultation of Trial Strategies

Another popular area for behavioral trial consultation today is assisting the attorney in planning trial strategies, which we touched on earlier in this chapter. This includes deciding on the theme of the case, what facts to emphasize, which ones to downplay, how to get the jurors' attention, and how to persuade jurors to see things from the client's perspective. Lawyers who may be good at collecting relevant data for a case may not have any idea how to best organize it. This is like planning for any other type of activity that needs organization. For example, you might be wonderful at picking out just the right shoes to go with a particular outfit, but if your closet is a disorganized mess, you may never be able to match those shoes with the intended outfit. The same is true for a trial. Not all facts have the same amount of importance in a case, nor should they. Rather, some are more important to emphasize while others have little or no real meaning. Just as you might hire someone to clean out and organize your closet, so might an attorney hire a behavioral trial consultant to help organize the case so that the jurors remember what the litigant or defense attorney wants them to know in order to make a decision in his or her favor.

Litigation or trial consultants can use psychology to assist in figuring out how to emphasize the best features of a case. Often visual aids are used in the courtroom such as charts and graphs that help explain complicated figures or theories. Graphics presented in an interesting and attractive way can enhance the credibility of the material as well as assure that the jurors understand what the facts actually mean. Although chalkboards and poster boards are less often used today than in the past, in favor of digital presentations, this may be the better approach for a specific subject matter or specific demographic variables of key jurors.

Preparing Witnesses

Trial consultants may use the knowledge gained in social psychology to help prepare witnesses to testify at trial. Social psychology experiments that deal with the influence of attractiveness and appearance of confidence on perceptions of credibility have helped consultants prepare witnesses so that what they have to say will really be heard by jurors. Pleasant facial expressions, color and style of clothing, upbeat attitudes when discussing important information but more serene attitudes when discussing problems are all part of the consultants' package. When witnesses look too slick, sound too rehearsed, sound unprepared, demonstrate mental instability, talk too much, giggle, get angry or display a whole host of other behaviors, these can detract from the credibility of their testimony. Cases have been lost when witnesses laugh too much in the public bathroom even though they might demonstrate a serious demeanor in the courtroom. Sitting on the witness stand is a daunting task for many people, even professionals who must testify. If a witness's words are mumbled or garbled or if the witness doesn't look the jurors in the eye, for example, the chances are that witness's information may not be remembered, although the person's demeanor might be. Thus, trial consultants are often hired to work with witnesses to help improve the delivery of their testimony. In some cases, attorneys hire actors to assist witnesses in speaking, as if they have a particular role in the theater to prepare for. After all, many have said that the courtroom is theater, where both sides have the opportunity to play act what they believe is their truth.

Tensions Raised by Relationships Between Psychologists and Attorneys

As might be expected, many attorneys believe that they are best at jury selection, figuring out the best trial strategy for a particular case, and presenting their case to a jury. That is often true for experienced trial attorneys who have learned to sharpen their intuitive skills. However, adding the rigor that science provides can strengthen a case and/or prevent disasters that can occur when an attorney gets overly confident of their ability to persuade a group of people about their client's version of truth. It is not unusual for trial attorneys to complain that consultants take too much control over the decision-making role in their trials, while consultants complain that attorneys do not follow their advice, even when they pay for it. It is most helpful when all professionals who work on a case are thought of as a team, with the attorney and sometimes the client in-charge of making the final decisions. Smart attorneys and clients permit the professionals they hire to make the decisions appropriate to their expertise. But, it is the attorney and client who must adopt a master plan to strategize a case and all the other professionals must fit into their goals. That is truly the role of a consultant who gets paid to give away knowledge and advice. In the end, it is the client and sometimes the attorney who must live with the consequences while the trial consultant goes on to the next case. The area of trial consultation is an excellent example of the importance of 'knowing your expertise', in that attorneys need to know where their strongest abilities are and when they need help, but also 'knowing your role', in the case of consultants who must recognize they have been hired to provide consultation, not take over. If this balance can be struck, the services of trial consultations can go a long way in and outside of the courtroom.

Summary

In this chapter, we reviewed the common psychological methods used by trial consultants to gather scientifically systematic information about prospective jurors before they are selected to participate in the voir dire and after they are empanelled. Community surveys, public opinion polls, and demographic data collected from a representative community sample can yield information about the types of people who may be found in the large jury pool. If pre-trial and

social media publicity or special characteristics of the community appear to make it difficult to find jurors who can give a litigant a fair trial, then these research data can be used to accompany a Motion for a Change of Venue which, if successful, would move the trial to a new location. Once a pool of prospective jurors is sent to a courtroom, written or verbal questions can be used to gather information about the individual's habits, lifestyle, personality style, or other factors that might help predict how a person might decide facts of a particular case. Mock trials and focus groups may also be used to gather information about how someone with similar characteristics and attitudes might listen to and decide a case. Psychological assessment inventories may provide information about general attitudes held by prospective jurors that help predict where their sympathies lie. A jury deselection process where prospective jurors are questioned and dismissed on the basis of cause, or by an attorney using a preemptory challenge, then occurs.

Trial consultation also includes gathering information about how to organize the data for the trial. Opening and closing arguments, selection, timing, and sequencing of witnesses may be tested and the best way to present the evidence decided by scientific data gathering rather than intuition or the attorney's beliefs. How to present facts and preparation of visual aids might also be an area for psychological consultation. Preparing witnesses to testify, especially if their testimony is critical to the theory of the case, may also be part of the trial consultant's work. Although many people have questions about the ethics of trial consultation and jury selection, in fact research suggests that this may be the fairest way to obtain a jury that can carefully listen to all the testimony, ascertain the facts, and make a decision based on the facts of the case and not be influenced by other known and unknown factors. It is important for both consultant and attorney not to overstep their roles and carefully collect only those data that are needed to come to appropriate decisions.

Questions to Think About

1. How much of an impact do you think the 'venue,' or geographical location, of the O. J. Simpson murder trial had on the outcome of this case?
2. How important is it for psychologists and attorneys to 'speak the same language' when preparing for a trial? What are some of the ways that psychologists can use what they know about people in general to aid in the communication process among legal professionals and mental health professionals?

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Part VII

Practical Tips for Forensic Psychology Experts

24 Forensic Experts and Attorneys: Communication Process

As we have seen in this book, mental health professionals often speak different languages and approach situations differently from attorneys and judges. As a result we need to spend some time learning how to communicate effectively with each other. In this chapter, we begin by suggesting a communications strategy that begins at the time the contract to perform services starts and goes all the way through the time that the expert submits a report and may testify in a legal proceeding. We summarized the steps in Table 24.1 and provide some description in the text that follows. In the second section of the chapter, we present discussions of practical solutions to difficulties when an expert and an attorney work together during the actual testimony itself (Table 24.2).

Step 1. Clarify the Referral Question:

It is important for both the forensic expert and the retaining attorney or court to be clear on what is/are the referral question(s). If each party understands the role they must play together, it will make the final product more useful than if the expert does not understand the law or the lawyers do not understand the limits of the examination. Check out admissibility issues to determine what may need to be done. Jurisdictions vary in terms of their admissibility standards. If you are in a state in which the *Frye* test governs admissibility, make sure you have some resources to document that your methodology is generally accepted by other mental health professionals. In a similar manner, if you are presenting scientific data that would come under the *Daubert* standard, be able to cite the literature regarding the hypotheses to be tested and the known error rate. If your state, on the other hand, is guided by the Federal Rules of Evidence, be able to describe how your conclusions and methodologies may be beyond the knowledge base of the judge or jury. Make sure important court dates are clearly understood so that deadlines are not missed. Sometimes putting the referral question(s) in a written contract letter can focus everyone on the same issues.

Step 2. Obtain Appropriate Collateral Materials:

It is important for the attorney to forward any materials that the expert will need for corroboration of the forensic issues in a timely manner to the expert. Often the attorney will ask the expert to specify what is needed. It is suggested that all pleadings filed, hospital records, employment records, as well as school and police records, and legal discovery, including witness statements, be obtained. Sometimes the expert will ask the attorney for additional information based on the first reading of the documents provided or during the evaluation period. It can be quite damaging to a case if an expert has not been provided with materials on which they will be cross-examined at deposition or trial. Beware of attorneys who withhold certain materials, based on their belief that it will hurt their case for the expert to see those materials. Such attorneys are seeing you as an advocate for their side, not as an objective

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Table 24.1 Steps in the communication process between attorney and expert

Steps	Case procedure
1	Clarify referral question
2	Obtain and review appropriate collateral materials
3	Perform an initial assessment
4	Expert and attorney consult about initial findings
5	Complete the forensic evaluation
6	Integrate findings
7	Expert and attorney discuss findings orally
8	Additional agreement for further consultation on case
9	Prepare written report if requested
10	Prepare for trial or deposition
11	Consult immediately before testimony
12	Confer after trial testimony is completed

Table 24.2 Guidelines for expert testimony

1. Preparation
2. Anticipate attack
3. Present cross during direct
4. Is it possible that…?—Don't answer it
5. Be aware of double binds, learn to unravel them
6. Three levels of cross-examination. Listen carefully, and relax
7. Psychological testing within hypotheses generating model
8. Consider and deal with malingering
9. Beware of the learned treatise attack
10. Prepare with relevant case law
11. Hypothetical questions—listen carefully, respond only with conclusions from available data
12. Do not overgeneralize from data

evaluator. If you become aware that an attorney is doing this, you should insist that you receive all of the discovery material, explaining that it is important to maintain your objectivity and to protect yourself against cross-examination, because issues regarding material that you have not reviewed will almost certainly be brought up.

> Example: *LW was testifying as an expert in a case of a battered woman who killed her abusive boyfriend. One of the pieces of evidence that was noted in the police report was a diary she had kept; the defense attorney had the diary but refused to turn it over to LW, stating that there might be material in it which could diminish the impact of her testimony. The diary was, in fact, brought up on cross-examination, and while LW handled it well, indicating that one piece of evidence would not have changed her opinion that the woman was a survivor of domestic violence and felt that she was acting in self-defense, nevertheless, the jurors wondered why that material had not been shared with LW.*

Indicate to the attorney who is withholding information that you are doing an objective evaluation and that if there were things in those materials that might require further explanations, it would be best to review them prior to testimony.

Step 3. Perform an Initial Assessment:

For those who are clinical psychologists, this will include a standard clinical or structured interview, psychological testing, and review of documents provided by the attorney, as well as any supplemental materials such as employment and school records, relevant medical records, and copies of the pleadings and/or motions available. With the exception of the psychological testing, the same materials should be requested by the non-psychologist. Non-clinicians asked to give an opinion on research will need to gather the literature at this point and document its relevance to the referral questions.

Step 4. Expert and Attorney Consult About Initial Findings:

Attorney and expert discuss the initial findings, and the psychologist puts together the plan for further evaluation. Records that were not provided initially should be requested at this time. For example, if there is a question about an earlier head trauma, it is important to try to find any records that would clarify if there were any injuries at that time. If there are other people who could give information about the person's history, decide who will interview them and when. If there is a need for referral to another specialist, such as a neurologist or neuropsychologist, discuss who might be a referral source.

Step 5. Complete the Forensic Evaluation:

This will consist of collecting further detailed clinical interviewing and important histories, such as childhood, school, relationships, and work history from the client. Also, obtain information relevant to the client's state of mind at the time in question from people who may have been present at the time (e.g., witnesses). Administer, score, and interpret any psychological tests or review other experts' test results so they may be integrated into the findings. Conduct collateral interviews or review depositions or investigator interviews.

Step 6. Integrate Findings:

Integrate findings. The expert needs to integrate all the information gathered during the examination, collateral sources, and records review and provide a summary of the key findings. Consult with peers or other professionals involved in the case at this time. It is important to organize and catalog the file so that all materials are carefully labeled and easily found should a particular point or issue need to be verified.

Step 7. Expert and Attorney Discuss Findings Orally:

The expert and the retaining attorney discuss the findings from the evaluation. At this point, the initial contract is complete if the referral question(s) is/are answered. It is important to record the date and substance of the conversation in the expert's file so that it is clear that the findings were, indeed, reported. If the findings are not helpful to the attorney or client's case strategy, then this will terminate the expert's work on the case. Although it may be required to put findings in written format in some limited areas, unless agreed upon by the retaining attorney, it is usually best not to do so or the collaborative process will be disrupted. On the other hand, it is also important to retain the integrity of each professional and not compromise an objective examination in any way.

The expert also needs to keep in mind that, while this model of the findings not going beyond the defense attorney in criminal cases is prevalent in most states, there are some exceptions. In the states where the material is protected by attorney–client privilege (sometimes called work product), there is no revealing to opposing counsel (a prosecutor, for instance), the findings of the expert if they do not support the defense position. In other words, if you as a defense-retained expert were to find that the defendant was malingering, you would talk with the defense attorney and certainly the defense attorney would not want that as part of the findings and would generally ask you to terminate your contract at that point and then may attempt to find another expert. In essence, the state would have no way of knowing your opinion in this case. Of course, a diligent prosecutor could subpoena sign in sheets from the jail, determine whether or not you had examined the defendant on a particular day and call you as a "fact" (not an expert witness), to establish the fact that you had examined the individual; you would not be allowed to render any professional opinion, but

the jury or judge would be made aware that you have not been called as an expert, suggesting that you had reached an opinion unfavorable to the defense.

As noted above, however, there are a limited number of states in which there is an opposite approach. If you, as a defense-retained witness, reach an opinion that is not of assistance to the defense and the defense does obtain another expert willing to testify, at that point, the state may be entitled to your non-supportive written report. In short, while you were initially retained by the defense, you may subsequently be called to testify at trial by the prosecution in those few states. In both of these instances, the nature of this disclosure needs to be made in a statement to the defendant as part of the informed consent.

Step 8. Additional Agreement for Further Consultation on Case:

At this point, if the attorney, expert and client decide that the expert's testimony will be helpful to the case, a second retention occurs for this part of the consultation. Here, the attorney and expert work closely on fashioning what the expert testimony will cover. Findings are usually put in written format, though in some cases attorneys prefer not to have written reports until close to trial especially if they are still gathering material relevant to their theory of the case. In cases where sworn depositions are taken, preparation for the expert's testimony in the deposition will begin once notice is served. Arrangements are usually left to the attorney who hired you and the opposing attorney after consultation about your availability.

Step 9. Prepare Report:

The written report needs to be short and to the point, while still disclosing the data on which the expert's opinion is based. Sometimes, a draft of the report is reviewed collaboratively and changes may be made for factual accuracy and to clarify the communication of findings relevant to the legal questions. The expert's opinions may not be changed unless new data are obtained. The outline of a report should include the following sections:

1. Reason(s) for referral.
2. Procedure (i.e., time, date, and procedure used, at what location, documents reviewed, collateral materials, and interviews used).
3. History (integrate materials obtained from various histories, reports, and collaterals).
4. Findings (these are the expert's findings and the foundations upon which they are based). Test and clinical findings may be compared to the known literature in a discussion subsection.
5. Conclusions (repeat the legal conclusion using "In my professional psychological/medical, etc., opinion" to introduce each of the findings that answer the legal question(s). In cases where it may be relevant a diagnosis using an accepted nosology such as the DSM-V or ICD-11 should be stated here.
6. Recommendations, usually in a list that makes it easy to read.

Step 10. Prepare for Trial or Deposition:

The expert and the attorney, together with the client wherever possible, need to carefully analyze the strong and weak points of the findings, begin to strategize questions for the direct examination and how to handle the areas that may pose some difficulties. The attorney may request your assistance in preparing questions for other experts' or witnesses' depositions, especially if your findings will be strengthened by what they can confirm. If, during deposition, it is discovered that further information is needed, make arrangements to obtain the information before the next time that testimony is given. Be sure to review the file prior to deposition testimony and bring the entire file, including materials requested in the subpoena, unless otherwise directed. Make sure not to waive reading of the deposition and submit errata sheets after reading it, if necessary.

Step 11. Consult Immediately Before Testimony:

Shortly before trial testimony, schedule sufficient time to review the entire file so that all the information is covered the file is in order with

no extraneous papers in any folder and the contents catalogued so that they can be found easily if necessary during testimony. Bring the entire file to the courtroom and be prepared to look up information that may not be easily remembered in order to avoid giving erroneous testimony. Try to know the information in the report and deposition so well that it is not necessary to refer to notes, unless a question requires a precise and detailed answer. Remember that the role of the expert is to educate the triers of fact, so the presentation has to convey the expert's findings in a way that both the jury and judge can understand.

Schedule sufficient time for rest so that the expert and attorney are alert and ready for the trial. Dress professionally in the proper courtroom attire for the community and observe courtroom protocol. There should be no talking about the case until outside the building. Be especially careful about having lunch with the attorney, for you may be subject to cross-examination, such as "What did you discuss about your testimony with the attorney at lunch?" Be respectful to any jurors who happen to be in the same place and leave as quickly as possible. If the expert had to fly in to testify, make arrangements to review testimony with the attorney prior to taking the witness stand. Make sure all the rules of the particular court have been explained to you to avoid unnecessarily upsetting the judge. For example, in some jurisdictions it is not permissible for the attorney and expert to confer once testimony has begun. In others, the attorney and expert may confer but no other witnesses may be present. Sometimes a *motion-in-limine* may have been resolved prior to your testimony striking your mention of something in your findings. Even if that is difficult for you to do and doesn't make sense given your findings, you must follow that rule. You may be asked on direct testimony and usually you may say that you have been ordered not to disclose whatever it is. However, if asked on cross-examination, you may be able to disclose the information as usually the request for the motion was by the cross-examiner.

In a case in which LW was not permitted to testify to all criteria in the DSM-V diagnosis of PTSD. She was allowed to state that there were other criteria. The attorneys won the client a new trial on appeal as the judge had restricted her testimony.

Step 12. Confer After Trial Testimony Is Completed:

In addition to sharing the outcome of the trial, it is also important for the expert and the attorney to get together afterward to review their work together. This permits each party to learn from the experience, both the positive and negative issues that arose during the entire process. Sometimes, experts and attorneys cannot work together because they approach the trial with different styles, while at other times each can respect the other's perspective and actually learn how to complement the other. Of course, if the outcome of the trial is success for the client, at a minimum, everyone deserves to be pleased. Sometimes even the opposing attorney is impressed by your testimony and will hire you on another case where your expertise is relevant.

Nuts and Bolts of Expert Testimony

When mental health professionals, academic professors, or experimental psychologists leave the security of their offices and laboratories to enter the courtroom, they encounter an atmosphere which can be both challenging and intimidating. A first-time forensic expert will find that the preparation of a forensic report and testimony regarding a case involve new ways of gathering the data, interpreting it, and distinctly different ways of presenting one's conclusions than assessment evaluations for clinical purposes. Most importantly, the forensic expert cannot merely say, in a declaratory way, whatever he or she thinks is relevant about a particular topic to educate the judge or jury, but must figure out (hopefully with the attorney) how to present the opinions in response to questions posed by an attorney.

Qualifications of the Expert

The process of rendering expert testimony proceeds in phases. In the first phase, the attorney who has retained the expert will attempt to qualify him or her in front of the judge, which is called "*voir dire*". It is the judge who determines whether a particular individual will be allowed to testify as an expert and give opinion testimony. Recall our discussion in Chap. 3 on Admissibility of expert testimony where the Federal Rules of Evidence define an expert as someone who has the knowledge, skill, education, experience, and training to render an opinion. Questions will, therefore, be asked of the proposed expert regarding his or her educational background and the experience they have had in dealing with a particular kind of issue being adjudicated in this case (e.g., competency, custody). This may be relatively brief or very extended, given the strategy that the attorney chooses to use. Usually, the attorney wants to impress the jury with an expert's credentials to enhance credibility about the opinions to be offered. Opposing counsel will then have the opportunity to also *voir dire* the expert, to challenge the expert on his or her degree of experience, expertise, or training. Challenges to the expert opinions will come during cross-examination, after the direct examination, rather than during the *voir dire*. At times, the opposing attorney will defer the examination of the proposed expert's credentials to later in the proceeding during cross-examination. This happens when the opposing attorney understands that the judge will admit the testimony, so any challenges to credibility of the expert will occur during the cross-examination phase. The retaining attorney will then *proffer* the individual as an expert in a particular area.

Direct Testimony

Once the judge accepts the individual as an expert, the direct testimony is then presented. Direct testimony will cover the methodology used by the expert, the conclusions reached, and opinions regarding the legal issues at hand. Depending on the criteria for admissibility in a particular jurisdiction (e.g., *Frye* or *Daubert*), the expert may also be asked how widely accepted the methodology is or the degree of scientific research behind the theories utilized. (In some cases, there may, in fact, be a separate admissibility hearing to determine these issues, even prior to the qualifications of the expert.) The questions asked during direct examination usually have to follow the format that the rules of the court require. In some jurisdictions, this means a question and short answer colloquy is acceptable, while in other jurisdictions the expert's answers may be much longer. It is important to organize the testimony so it has some rhythm to it in order to hold the interest of the jury. If demonstrative evidence, such as charts and drawings, can illustrate the points to be made, it is advisable to use them, especially if the testimony is expected to be longer than one hour and may reflect complex information for the layperson. For example, when giving the results of the MMPI-2, it is helpful to have a chart of the graph to explain the scores to the jury or, if a diagnosis is made using DSM-5 criteria, a chart that already had the criteria listed can help the jury to follow along and make the diagnosis with the expert. These decisions should be made well in advance of the testimony so materials can be prepared and ready to be used. It can be a nightmare if there is no easel or place to hang a chart or the marker runs out of ink in the middle of the testimony. In traveling to unfamiliar areas, it is often helpful for the expert to carry his or her own marker pens.

Cross-Examination

The direct testimony is followed by the cross-examination in which opposing counsel may try to undermine the witness' credibility or the bases for their opinions. We discuss ways to handle typical cross-examination questions below. However, the best cross-examination is one where the expert listens carefully to the question and provides as short an answer as possible. Less

is better here. Smart attorneys do not keep an expert on the witness stand any longer than is necessary to make a few points, usually raising questions about what the expert did not do, whether or not that was necessary to arrive at the opinion. It is rare that an attorney knows as much psychology as does the expert, so it is not usually a good idea for an attorney to keep asking questions. Attorneys who do that often permit the jury to hear the expert's testimony several times. As we shall discuss later, it is best not to fight with the attorney while on the witness stand, nor is it appropriate to give an inaccurate response to a question.

Redirect Examination (Rebuttal)

Retaining counsel may then utilize redirect examination to clear up any inconsistencies that were raised during the cross-examination or provide additional information that the opposing attorney would not allow the witness to testify about directly. For example, the opposing attorney may have asked the expert to read a sentence from a paragraph is a book which, when taken out of context, had a different meaning than when put in its proper context. If it is important, the retaining attorney may then ask the expert to read the whole paragraph at this time. In some cases, there is time between cross-examination and redirect for the expert and retaining attorney to prepare some questions. However, most of the time the attorney needs to rely on the earlier preparation to decide what is and is not important to go back over. New areas cannot be raised during redirect, so it is usually fairly short.

Necessity for Careful Preparation

Careful preparation is the keyword in any forensic evaluation. This involves preparing not only one's opinion but preparing an attorney with the proper questions in order to best elicit the opinion. This requires a somewhat more proactive stance than traditionally trained clinicians generally take. It involves not only analyzing and interpreting one's own data but also anticipating the challenges to one's opinion that may come from rigorous cross-examination. It is suggested, therefore, that the expert not wait until cross-examination to deal with these challenges; rather one should try to present and defuse the attack in advance during the direct examination. If this strategy is followed, the retaining attorney should ask as many questions as possible during direct testimony that may come up as subsequent challenges during the recross. On occasion, especially when working with an attorney who is not familiar with a particular area of testimony, the expert may actually have to prepare written questions for the attorney to ask.

Example: *A defendant had been charged with a violent offense during which he had apparently suffered a brief psychotic episode. By the time the defendant was being evaluated at the hospital's forensic unit, he had gone into remission and did not appear to be overtly psychotic in his behavior on the ward. Since the daily nursing notes are always important to review as a source of data, the clinician could anticipate that this relatively normal behavior would be brought up as a challenge to the opinion about the defendant having had a psychotic episode. Therefore, the clinician prepared the attorney to ask what a brief psychotic episode was, how long the symptoms might be expected to last, whether they might not be obvious in subsequent behavior and where the clinician would have to look for more subtle signs, such as responses on projective testing (where, in fact) the psychotic thinking did emerge,) during the direct examination. In this way, the drama was taken out of the cross-examination when the challenge to the psychotic symptoms occurred. As a strategic manner, it also demonstrates to the trier of fact the degree of careful preparation by the expert. The expert would be well advised, before consulting with retaining counsel, and certainly before coming to court, to cross-examine himself or herself, frankly examining both the weak and strong points of the proposed testimony.*

The most common methodology in cross-examination is to highlight the areas which the expert overlooked or did not consider sufficiently. The above strategy may help to defuse this line of cross-examination.

Is It Possible That…?

It is, of course, impossible to anticipate all possible grounds of cross-examination. The challenge to the clinician's opinion will frequently come in the form of "Doctor, would it change your opinion if I told you…?" This question is really a legal trap. One should not answer the question either "Yes" or "No". If one answers the question "Yes", then the entire opinion immediately becomes suspect because the judge or jury may believe the witness' is willing to change an opinion based on very little evidence, that is, one question. If the expert were to answer the question "No", cross-examining counsel would keep asking questions to which the expert would still answer "No". The expert would then be perceived as a rigid dogmatic fool, unwilling to change an opinion under any circumstances. In fact, the most appropriate response would be, "I don't know whether it would change my opinion or not. I would be glad to re-examine the client in light of the information you are presenting." The attorney may well respond that since trial proceedings are ongoing, they cannot be interrupted in order for the defendant to be re-examined and might the expert speculate on whether or not his or her opinion might change. This becomes an excellent opportunity for a response indicating that one cannot speculate because ethically one can only base an opinion on the data available, not on speculation.

Responding to Other Attacks

While considering this line of cross-examination, we should also consider what is sometimes referred to as the double bind or "damned if you do and damned if you don't". Any answer the expert gives will be attacked. An example would be, "Have you reviewed records prior to examining the defendant (or plaintiff)?" If the expert answers, "Yes", then an attack follows about being biased by the records and not reaching a truly independent opinion. If the expert answers "No", then an attack follows about not being thorough or not doing a complete job. A suggested response utilizes what is sometimes called the "precedent dependent clause". When asked one of these double-bind questions, the expert responds, "If what you are asking me is,— then I would answer—, but if what you are asking me is—, I would answer.—" The expert is essentially unraveling the bind deliberately created by the opposing attorney. For example, in the above scenarios, the expert would answer, "If what you are asking me is whether record review is an essential part of forensic assessment, the answer is, of course, yes, because we are constantly generating and checking out hypotheses, confirming some and rejecting others. We are not being biased by any particular piece of data that we may have because careful forensic examination involves an integration of multiple data sources."

Three Levels of Cross-Examination

Experts frequently become very anxious when confronted by personalized accusations on cross-examination. In fact, such personal attacks are really not so destructive. Attorneys learn to attack first the witness' credentials, secondly, the witness' opinions and only if the opinions and credentials are on solid ground should they attack the witness personally. Therefore, far from being intimidated by such an attack, the expert should feel quite confident that the attack really is an acknowledgment of how solid the credentials and opinions are, and the attorney is attacking the expert with the only material available.

What is an example of a personal attack? Implying that the expert is a "hired gun" or that the opinion can be "bought" is a frequent attack. The cross-examiner may ask, for instance, how much one is being paid for one's opinion. One needs to listen carefully to the question for it clearly implies that one will say anything if the price is right. An appropriate response would be, "I am not being paid for my opinion, I am being paid for my time." If the cross-examiner persists and one is asked how much one is being paid for one's time, the expert may respond, "That all depends on how long you cross-examine me".

One of the authors (DS) had done work in a particular jurisdiction for both the Public Defender and the Office of the United States Attorney. In this particular case, he was testifying for the United States Attorney and was being cross-examined by defense counsel about his fee. Upon eliciting the amount of fee, defense counsel shook his head in amazement and said, "No further questions." On redirect, the United States Attorney elicited testimony that DS had also done work for that same defense attorney and had, in fact, charged him a higher fee than the present fee in the last case he had done for that defense attorney.

Attacks on Psychological Testing

When experts, especially psychologists, testify with their findings based in part on psychological testing, they may be subject to a variety of attacks. An attorney will often attack the validity and reliability of testing. The best defense against this attack is to understand fully the tests one is using and the fact that the tests are only one part of a comprehensive forensic examination. Experts make serious errors when they try to make too many inferences from the testing, rather than using the testing in the same manner as any other data point in a forensic examination; they yield a hypothesis that is subject to confirmation or disconfirmation by other sources of data. It should be stressed in direct examination just what the forensic methodology is and how it depends on the integration of and consistency across multiple sources of data. Then, when an attorney on cross-examination tries to isolate out a particular finding from one test, the response would be, "As I stated in direct examination, that score is only one part of a comprehensive methodology and I did not rely exclusive on that particular score or test." One may then present the additional data that is consistent with that particular test finding (i.e., results from other tests, documented behavior, prior records). If an attorney seeks to ask questions about the validity and reliability of a given test, one should indicate that the question cannot be answered in such a simplistic manner, that there are many kinds of validity and reliability and that the attorney would need to define his or her terms more precisely. An example follows:

Attorney: *Now doctor, you used the MMPI-2 as part of your examination, is that true?*
DS: *That is correct.*
Attorney: *Now isn't it true, doctor, that research has shown that the MMPI-2 is not valid for this population?*
DS: *Could you please define what you mean by validity?*
Attorney: *Come now, doctor, you're a psychologist, don't you know what validity is?*
DS: *Of course, counselor, but there is face validity, construct validity and predictive validity. You will have to give a more precise definition before I can respond accurately to your question.*
Attorney: *I withdraw the question.*

Note here that there was a trap that the expert could have fallen into when the attorney spoke of the test not being valid "for this population". Had the expert asked "What population?", then the attorney would have the upper hand. In focusing, instead, on the issue of validity, the expert was able to demonstrate that the question really was a smokescreen, an attempt to 'throw the witness off balance'.

The expert will inevitably be challenged regarding whether or not a defendant is malingering or faking symptoms. One should be able to counter this by utilizing validity indices on many of the psychological tests used and also being familiar with the many available assessment instruments for malingering now on the market. As noted in Chap. 8 on clinical assessment, there are a number of well-validated instruments designed to detect malingering available from companies that publish psychological tests. *Structured Interview of Reported*

Symptoms (SIRS) is a highly valid instrument for the detection of malingering of psychiatric symptoms; the *Validity Indicator Profile* (VIP) is an excellent instrument to use for evaluating malingering of cognitive impairment and the *Test of Memory Malingering* (TOMM) for the evaluation of feigned memory deficits. On occasion, questions based on malingering in a clinical population will be asked to demonstrate that clinicians generally cannot tell the difference between a fake psychosis and a genuine. It needs to be pointed out that in clinical settings one rarely checks for malingering because one assumes people are presenting themselves for treatment because of distress or dysfunction. In a forensic setting, on the other hand, the assessment of malingering is an integral part of the examination. In other words, to critique a forensic assessment based on findings from clinical work is really mixing apples and oranges.

A frequent line of attack is seen in the use of Rosenhan's classic study, *On Being Sane in Insane Places* (Rosenhan, 1973) Rosenhan had several of his graduate students present themselves for admission to a psychiatric hospital claiming that they were experiencing auditory hallucinations. All were admitted. When they informed the staff several days later that they really were not mentally ill, that their being there was part of a class project, progress notes reflected their 'delusional thinking'. It took communication from Professor Rosenhan to the hospitals to demonstrate to the staff that these really were students. Nevertheless, the hospitals discharged them with diagnoses of some form of schizophrenia 'in remission'. As noted above, as opposed to a forensic setting, in a clinical setting, there is usually no reason to assess for malingering. In a forensic evaluation, it is a question which we must consider in every case.

The Learned Treatise Attack

Another frequent cross-examination question appears to begin in a rather benign manner. The expert is asked if he or she recognizes a particular work or author as authoritative in a particular field. This is an important question with far-reaching implications because once the expert acknowledges something or someone as an authoritative reference, then the expert can be cross-examined about it. If one is not familiar with or disagrees with substantial portions of a particular work, one should not acknowledge that it is authoritative. Be prepared to resist sarcastic comments, such as "How can you, supposedly a trained psychologist, not be familiar with Doctor Zippindorfer's famous theory of motivation?" Of course, even if one acknowledges a particular work as authoritative, it does not necessarily mean that one agrees with everything in the work, and this needs to be made clear. Of course, if one is unfamiliar with the work, do not pretend that one is familiar with it. This is a mistake that a number of experts make, fearing that if they say they are unfamiliar with a particular work, it would appear to diminish their credibility.

Preparation with Relevant Case Law

The forensic expert needs to be aware of important case law that deals with expert testimony and work with the retaining attorney, preparing him or her for issues that might arise. For instance, attorneys may argue on cross-examination that because someone is not a medical doctor, that he or she is not qualified to render an expert opinion. Knowledge of case law will enable the expert to prepare the attorney to handle this, noting several decisions in which courts have ruled that the degree which a proposed expert has is not as important as the extent of qualifications as determined by the individual trial judge. This was demonstrated quite strongly in a 1962 case, *Jenkins v. U.S.* In addition, the Insanity Defense Reform Act of 1984 established total parity between psychologists and psychiatrists in federal law (and by implication in the state laws of all states that revised their statutes to reflect federal law). When the old law spoke of psychiatric evaluation, report, and testimony, the new law spoke of psychiatric or psychological evaluation, report, and testimony. If an attorney tries to "sandbag" an expert by demanding that

the expert answer a question with a simple “yes” or “no”, it would be helpful if the expert were aware of and told the retaining attorney ahead of time about a variety of cases in which the expert is either encouraged or required to give the bases for his or her opinion. Experts are sometimes instructed to give their testimony in the kind of detail that one might expect from a doctor trying to explain to family about the nature of an illness that a family member has. This is more detailed in the “Instruction to Expert Witnesses”, part of the case of *Washington v. U.S.* (1967), discussed in Chap. 4 on Criminal Responsibility. This case states explicitly that the expert need not be restricted to a “yes” or “no” answer. Of course, the judge is, or should be, aware of the fact that an expert is not required to answer questions “yes” or “no”. If an attorney is demanding a “yes” or “no” answer, it is often effective for the expert to turn to the judge and say something like, “Your Honor, I cannot answer that question with a simple yes or no. May I be permitted to expand upon my answer?” It is a rare to non-existent occasion when the judge refuses to allow such explanations. And if they do, it may introduce possible error should the case need to go up on appeal.

The Hypothetical Question

One of the favorite techniques that are frequently used in cross-examination is the *hypothetical question*. This is a question asking the expert to assume a series of facts some of which may not have been known by the expert previously. An expert may be asked to assume, for the sake of the hypothetical, that various facts actually are in evidence and then, if it is assumed that those facts are true, would it be a fair statement that… and the attorney will then ask a question of the expert. The expert must listen very carefully to the ‘facts’ being presented in the hypothetical because they are, very often, the exact opposite of the observations reached by the expert. For instance, the expert may have reached a conclusion that a defendant (or plaintiff) may be of average intelligence, shows no sign of central nervous system impairment, and shows no sign of psychosis. The hypothetical, on cross-examination, may well be “Please assume doctor that the defendant is mentally retarded and shows signs of brain damage and psychosis, would it be a fair statement that…?” The expert is advised to respond to such a question by saying, “I cannot answer that question the way it is asked because you have asked me to assume a variety of conclusions which are the opposite of the data I have gathered. Ethically, I can only respond to questions when I have data to support my conclusions.” The attorney during the cross-examination will at that point usually ask the judge to instruct the expert to respond to the questions since experts are allowed to respond to hypotheticals. The judge will then ask the expert whether he or she can respond to the hypothetical; if the expert responds that he or she cannot for the same reasons articulated above, this line of cross-examination will usually stop at this point. This is, of course, a response similar to that noted earlier, citing ethical constraints while answering the “Would it change your opinion…” kind of question.

Staying Close to the Data

A final caution should be noted. Do not speculate. Render conclusions only when there is data adequate to support the conclusions. Whatever conclusions are offered need to be supported with empirical or clinical data. If one is concluding that the defendant or plaintiff is depressed, one needs to indicate precisely what the indications of depression are. If one has concluded that there is evidence of psychotic thinking, what precisely are some examples of the distorted thinking? More importantly, how do these clinical findings lead to the forensic conclusions? Do not overreach in an attempt to make the conclusions fit the forensic questions. For example, a conclusion that a person is mentally retarded or organically impaired does not necessarily mean that the person is not, for instance, criminally

responsible. One would have to demonstrate how the psychosis would interfere with the ability to appreciate wrongfulness or the ability to control one's behavior.

The fact that even well-qualified experts sometimes lose sight of the difference between clinical data and forensic conclusions is illustrated in the following examples. A very bizarre series of homicides were committed by a defendant. His defense, not surprisingly, was *Not Guilty by Reason of Insanity*. There was conflicting testimony from many well-qualified experts. When the jury convicted the defendant, rejecting the insanity defense, one of the defense experts expressed amazement that the jury felt that this very disturbed defendant was 'completely normal'. Of course, the jury was not indicating that the defendant was normal, but rather that, despite his serious psychopathology, he did not meet the legal criteria for insanity. One must also be on the alert for words that may have very specific meanings in legal settings that are different from the clinical usage which experts utilize. We may opine, for instance, on the basis of certain psychological tests, that an individual has difficulty anticipating the consequences of what they do or has difficulty tolerating stress or is impulsive. This may lead to an attorney asking whether or not this individual could plan, deliberate, form intent, etc. It is best not to translate the clinical findings into a legal conclusion unless there are other data present that supports it.

Expert Disclosure Obligations—Civil and Criminal Trials

In many including Federal jurisdictions all communications between the retaining attorney and the expert are protected from discovery. However, there have recently been laws passed regarding the discoverability of notes of a non-testifying expert. The expert always needs to consider is the status of the rules surrounding expert disclosure, as these rules may affect case preparation, trial strategy, and expert communications with the attorney. All Federal courts and state courts that have adopted the Federal Rules have different procedures for disclosing expert opinions in civil and criminal proceedings. Some of these may differ somewhat from the prior observations regarding attorney–client privilege, especially in civil, as opposed to criminal cases.

Rule 26 of the Federal Rules of Civil Procedure indicates that expert witnesses need to disclose a written report that previews the expert's proposed testimony to the opposing party. Rule 26 further states that the report must contain "all opinions the witness will express and the bases and reasons for them". This rule also indicates mandatory disclosure of the facts or data that are considered by the expert, exhibits that the expert proposes using to illustrate his or her opinion, the expert's qualifications, a list of other cases in which the expert testified and, if needed, a statement regarding how much the fee will be in this case. In light of the disclosures under Rule 26, nearly any written communication between an attorney and an expert may be discoverable. Therefore, nothing should be committed to writing before thoroughly reviewing the communication.

On the other hand, Rule 16 of the Federal Rules of Criminal Procedure indicates that an expert is not required to draft and disclose a report prior to testifying and a part of a criminal proceeding is mandated to disclose "only a written summary of any testimony through the witness' opinion bases and reasons for opinions" and qualifications need also to be given. Except for scientific or medical reports, Rule 16 does not permit the discovery of reports, memoranda, or other documents made by the defendant or attorney during the investigation of the case or statements from the defense attorney that have been made by the defendant and witnesses.

Under the civil rules, in addition, there may be a deposition of an expert, while in criminal proceedings, depositions are only available to preserve testimony in most jurisdictions although a few states, like Florida have open discovery rules that permit deposition or sworn testimony prior to trial. In short, criminal proceedings have different rules due largely to the constitutional protections against self-incrimination that are afforded to defendants.

Therefore, prior to consulting with an attorney, there should be a clear understanding of these rules of discovery, depending on whether the case is a civil or criminal one.

A particular issue that may come up has to do with non-testifying expert. The Federal Rules of Civil Procedure in the same Rule 26 states, in Part D, "Experts Employed Only for Trial Preparation. Ordinarily, a party may not, by interrogatories or deposition, discover facts known or opinions held by an expert who has been retained or specifically employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial. However, a party may do so only as provided in Rule 35(b) or on showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by any other means."

This Rule 35 may require a copy of the examiner's report, together with reports of earlier examinations of the same condition.

The exception deals with situations in which notes from a non-testifying expert or conclusions of a non-testifying expert are included in the report or testimony of the expert who does testify. In such a case, the notes of the non-testifying expert may be subject to legal discovery.

Summary

This chapter has dealt with a model procedure of how an expert witness may approach a case in which they have been hired. We go through the steps that should be anticipated and detail how they may be accomplished in typical cases. We caution you to always learn the rules in your jurisdiction from the attorney who hired you. In the second part of this chapter we review some of the frequent questions and answers appropriate for various cases. There are several ways to examine an expert that lawyers are taught in law school but those who have not used experts often may need some help in knowing what to ask you in order to get the evidence they need accepted. Working as a team with the retaining attorney, once your objective evaluation has been deemed useful to help the attorney's theory of the case, is the best way to avoid problems in being asked to state things that your data do not support. Understanding where the cross-examination will focus can prepare you for your testimony also. Stay calm, listen to the question, and answer it as best as you can is the best way to get on and off the witness stand.

Questions to Think About

1. Why do you need to talk to and prepare with an attorney before you testify?
2. What can you do to prepare for cross-examination if you are using a test that you borrowed from your good professional friend?
3. How will you respond to questions about malingering?
4. Sometimes attorneys want your opinion to support their case so badly, they try to talk you into saying something that you do not have sufficient data to support. What would be the best way to handle it especially if you want this attorney to continue to send you cases?

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25 Malpractice and Risk Management

Malpractice

Malpractice lawsuits are in civil court in a sub area under personal injury cases where a professional issue is raised by a client or patient to whom the professional owes some sort of fiduciary duty. Like other civil cases, the plaintiff has the *burden of proof* with a *preponderance of evidence* to demonstrate that the professional has committed or omitted an act that caused them harm or *damages*. The remedy for a *plaintiff* is for the *defendant* to pay money for damages. Mental health professionals rarely think about consulting and testifying in these cases as there is always the fear it could happen to them. The best way to avoid a malpractice case yourself is to know what the appropriate preventive strategies are. Most professionals carry malpractice insurance that would pay for hiring an attorney and a psychologist, hoping we will never need to use it. However, it is important to have the resources to protect your professional license which is considered your property.

In the following brief summary, we will talk about minimizing the risk of someone filing a successful lawsuit against you in the mental health profession, and then we attempt to apply some of the general principles to other professions. It is important to understand the basis for legal liability and review the practice areas that give rise to liability. Like in the other chapters in this book, we will be discussing new legal terms associated with malpractice claims that are italicized.

Key Legal Terms in Malpractice Claims

There are several areas in which we will focus. This includes establishing what are called *risk reduction practice routines*, including a focus on the concepts of *informed consent, confidentiality and privilege, and standard of care*. Informed consent is also discussed in the next Chap. 26 on ethical issues but it should be noted here that a vast majority of malpractice complaints revolve around the failure to obtain a fully informed consent to a procedure, with the obvious exception of very extreme behaviors, such as sexual misconduct. There is also a need to involve clients in the decision-making process so that they have a realistic expectation of what the professional can and cannot do for them.

Confidentiality is an ethical obligation incumbent on a mental health professional not to disclose information learned about a client without their permission. *Privilege* is a corresponding legal concept but it is not identical to confidentiality. The professional has the duty to keep information confidential. This is a *privilege* owned by the patient. Privileged communication is defined as consisting of four elements: 1. The communication originates in a confidence of non-disclosure. 2. Confidentiality is essential to the satisfactory maintenance of the relationship. 3. The community supports such a relationship. 4. More harm than good would be done by revealing the confidential communication.

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There are different *waivers of privilege* depending upon the setting, whether it be clinical or forensic. Some common waivers are mandatory child abuse reporting laws, putting one's mental state into litigation, evaluations for the purpose of involuntary commitment, the need for a psychologist or other mental health professionals to protect themselves against legal action or licensure complaint and, in some states what is called the *duty to protect* a third party. Still other states have what is called a criminal defense exception to privilege that occurs when you are treating the victim of or a witness to, a criminal offense. When there is a waiver of privilege, it is a limited disclosure for a specific purpose.

Some basic concepts that exist in malpractice have to do with the nature of a *tort*, which is an action of one private individual or group of individuals against another. The law recognizes three kinds of torts. First is an *intentional tort* in which the practitioner *knows or should have known* that harm could occur as a result of their activities or interventions. Second is *recklessness*, and this is defined as the conscious disregard of a known risk. Third is the kind that most often occurs in malpractice actions called *negligence*, which refers to the occurrence of a harm or injury that is directly related to a practitioner deviating from an accepted *standard of care*. Damages in such cases are often divided into what are called *nominal, compensatory,* and *punitive*. *Nominal damages* are those "in name only"; in other words, the practitioner has performed some act which the average or relatively prudent professional would not have, but no actual harm has ensued. The nominal damage is essentially a 'wake-up call', putting the practitioner on notice that their behavior could cause damage. *Compensatory damages* are seen as both specific and non-specific. The specific compensatory damages refer to a compensation for the loss that a plaintiff has suffered as a result of certain behavior attributed to the practitioner (defendant). These may take the form of medical and psychiatric expenses or of a reduction in earnings. The non-specific compensatory damages have to do with what is called "pain and suffering", a difficult concept to define. Because there have been so many awards that were very extreme, many states have moved to cap these compensatory damages at a particular level. There is a third type of damage that is added to the compensatory damage called *punitive damages*, which generally serve as a punishment where the behavior is regarded as outrageous or egregious and are often, but not always three times the amount of the compensatory damages (Shapiro and Walker, 2019).

Second, there is an element in malpractice cases from which the others derive: namely the concept of *a professional relationship*. Only the individual who has a professional relationship with the practitioner generally has legal grounds to institute a lawsuit, with the possible exception of the estate of an individual who has died, parents of a minor child and, in some cases, a third party who may have been injured by the behavior of a patient or client of a particular practitioner. Generally, other than these exceptions, it is only the person who has the professional relationship with the practitioner who can legally file a malpractice action.

Frequently a question arises about when a professional relationship begins; whether it is at the time of the initial phone call or at the time of the initial visit, and for as often as the term, professional relationship, is used in the law, it has never been well defined. For this reason, practitioners need to be exceedingly careful in documenting when they have agreed to provide professional services for an individual and when they have not, such as when they refer someone to another individual. In some cases there needs to be a fiduciary relationship involving actual or promise of payment. If a therapist was to become personally involved with someone who is not their patient, it must be made clear that it is not a professional relationship. If it is not clarified, it can be problematic. Even if the therapist and the other person discuss intimate details, this distinction is necessary. There is some limited case law suggesting that the patient's perception of whether or not it is a professional relationship is one of the factors that enters the determination of whether it is, in fact, professional in nature (*Thayer v. Orrico*, 2003).

> In a case where DS was involved, a divorcing couple were in conflict about custody of their young child. The mother was dating the counselor in the child's school to whom she turned for advice about their child. The father sued the counselor for malpractice during the litigation claiming he entered into a dual relationship. The counselor argued that he was not a therapist but was merely doing what any person would do in a romantic relationship.

Third, whatever the professional relationship is, there derives what is called a *standard of care*, which is based on the professionally accepted standards of the r*easonable practitioner*. Clearly, this concept of the reasonable practitioner is difficult to define but generally refers to the average or relatively prudent professional who not only conducts practice in light of applicable ethics codes and guidelines but also incorporates into their practice current scientific and professional developments. In addition to defining what is the standard of care, there also has to be a deviation from that standard of care; the ability to know if the practitioner was performing some action that the average or relatively prudent practitioner would not have done, or failing to do some things that the reasonable practitioner would have done. Fourth, there has to be a harm or injury to the client or to a third party and finally there must be a direct, sometimes called proximate, cause relationship; in other words, had there not be a deviation from the standard of care, the harm or injury would not have occurred.

Originally, the concept of average or relatively prudent professional practice was qualified in terms of what was called a "locality rule"; that is, a given setting could have a particular standard of care that might not be true in another setting. For instance, the standard of care in a major metropolitan area with many facilities and resources would be regarded as different from that in a rural isolated area. More recently, however, there has been a trend toward adopting a national standard, reasoning that all practitioners should be aware of certain approaches, even though realistically they may not be able to access them.

Common Causes of Malpractice Claims

There are several areas that frequently give rise to malpractice actions. We will briefly discuss a few of them here.

The first is called *negligent diagnosis*. This is not merely misdiagnosis, because anyone can misdiagnose a patient. Psychologists are human and make mistakes like anyone else. The negligent diagnosis comes from a failure to reach an appropriate diagnosis because one's assessment has not met the appropriate standard of care and some harm or injury occurs as a result. For instance, attributing a patient's headaches to anxiety without bothering to either perform or refer for a neurological or neuropsychological evaluation could be grounds for a negligent diagnosis claim were the patient to become seriously ill.

Another area that results in a substantial number of malpractice cases is *premature discharge* from a psychiatric facility. These are the cases in which, based on a careful review of hospital data, there is poor clinical justification for the release decision and often these inappropriate discharges are due to poor recordkeeping, inadequate diagnosis and a patient's inability to pay. Under any circumstances, the record regarding release must be very well documented.

Breach of confidentiality is another frequent cause of malpractice cases, but it must be qualified by the fact that the breach of confidentiality was made when there was no compelling need for such a breach; in other words, if there is a well-documented need for the waiver, then this heading most likely would not apply.

Sexual misconduct used to be the most frequent area of malpractice cases, although this does not appear to be the case any longer. The reasons for the decrease are not well known but probably have to do with the fact that there are more women in the workforce right now (women tend not to cross sexual boundaries as often as men) and many states have criminalized

therapist–patient sexual contact. On occasion, the issue of the professional relationship comes into play when someone who is not actually a therapist engages in sexual relationship with someone else's client and the question comes up for the jury as to whether a professional relationship did, in fact, occur. This is also an area in which fraudulent charges may be brought, especially by seriously disturbed individuals, and it is incumbent upon the therapist to confront these uncomfortable areas, normalize them, and seek consultation.

While they do not occur that frequently, some cases involving injuries due to *non-traditional therapies* can be quite dramatic. These include cases such as Dr. John Rosen, who physically assaulted some of his patients and claimed it was part of the treatment, *primal scream therapies, hot tub therapies,* and some of the *intense physical massage* which purports to open up energy meridians within the body. Under any of these circumstances, when a somewhat non-traditional approach is being used, there needs to be a full disclosure and a carefully crafted informed consent.

This leads to the next area which is, of course, *failure to obtain informed consent*. As noted earlier, this is frequently missing in the charts of many mental health professionals and there are many cases which document the fact that omissions from these informed consent documents are often the basis for legal action. A careful consideration of risks and benefits of the treatment, along with all of the applicable possible waivers of confidentiality, must be carefully thought through to avoid being found liable under this category. Some particular difficulties and misunderstandings occur when more than one client is involved, such as group and conjoint therapy, where what is confidential and what is not becomes problematic at times.

Abandoning a patient is never a good idea and, despite many therapists reluctance to deal with fee collection in a direct manner, there needs to be a carefully crafted informed consent regarding payment.

When a patient commits suicide, there is frequently a concern about possible malpractice but it must be stressed that the mere fact that a client committed suicide is not automatically grounds for malpractice or liability. It must be demonstrated that the failure to anticipate or deal with a suicide was due to the fact that a proper assessment was not performed. Unfortunately, some practitioners view a "do no harm" contract as sufficient as an assessment. This kind of approach is inadequate if it is the only one used as such contracts rarely consider the patient's competence to consent to the contract. However, if it is part of a more comprehensive treatment plan, then it could be appropriate.

As noted above, there is some degree of litigation surrounding *the duty to protect third parties,* which is when one's client or patient acts out in a violent manner and harms or kills another individual. There is a lengthy body of case law surrounding this concept, but generally the obligation to take protective action toward a third party occurs when there is a credible threat communicated to a therapist to inflict bodily harm or injury on an identifiable third party. States will vary, depending on whether this duty is discretionary or mandatory (that is, up to the clinician's clinical judgment or required by law, respectively), and, while in some states that need to notify a third party is required by law, others allow for a therapist to use more traditional options, such as hospitalization and other clinical interventions as alternatives. Practitioners need to consult their own state for what is required in that state. As noted before, in most cases, only the person with the professional relationship with the therapist has legal grounds to sue. However, an exception occurs when the professional contract is seen as a "special relationship" in which one party is regarded as having control over the behavior of another. While therapists will generally disagree with the idea that they have such control, legally the "duty to protect third parties" is based on it.

When considering defenses to malpractice actions, a plaintiff needs to prove all of the elements of malpractice, namely that there was a professional relationship, that there was a well-defined standard of care, that there was a deviation from the standard of care, and that they

suffered harm or injury which would not have occurred had the practitioner not deviated from the standard of care.

Finally, practitioners also need to understand the concepts of *contributory* and *comparative negligence*. The therapist needs to be very careful about documenting non-compliance, as well as compliance with treatment, for a jury may well find that the patient contributed to the unfortunate outcome. This may take the form of comparative negligence in which a jury will apportion damages and the portion that they attribute to the plaintiff will be subtracted from the total amount of damages that are found. Some states also have what is called "strict contributory negligence", in which case if the plaintiff is found to have contributed anything toward the damages, the case essentially is dismissed (Shapiro & Smith, 2011)

Code of Ethics and Malpractice Claims

What we have attempted to do in this brief summary is to look at some major areas of malpractice litigation and demonstrate how they fit into the overall concepts related to personal injury claims. We will now turn to more specific areas to demonstrate how closely tied malpractice litigation is to the *Codes of Ethics*. We will discuss these issues one by one.

1. **Who is the client**?
   In traditional counseling and psychotherapy relationships, the answer is simple. The client is the person, family, or group seeking your professional assistance. In forensic settings, it is more complex, since the referral is usually from a third party, such as an attorney or the court. Some forensic professionals regard only the referral source as the client, while others maintain that in forensic settings one has two clients, the referral source and the person being evaluated.

2. **What are the issues regarding confidentiality**?
   In clinical settings, the issue is more clearcut: The patient or client can expect confidentiality except under very unusual circumstances (child abuse reporting, protection of endangered parties). In forensic settings, we also encounter what is called attorney–client privilege. This privilege overlaps with, but is usually broader than, the psychologist's mandate of confidentiality. When a mental health professional works for an attorney, it must be decided if he or she will follow the attorney–client privilege, or the psychotherapist–patient privilege rules. Some experts try to blend the two together. Some forensic psychologists suggest that being hired by the attorney and not the client helps clarify that it is the attorney's privilege under which they work. Others believe that since the practitioner is licensed, and licensure requires certain mandatory disclosures, that a forensic practitioner should disclose to the person being examined and to their attorney, what the mandatory reporting requirements are.

3. **Multiple relationships**.
   In a counseling or therapy relationship, a therapist is careful not to engage in any multiple relationships that might lead to loss of objectivity or effectiveness and cause harm or exploitation to the client. This usually means that the therapist does not engage in romantic, sexual, or financial dealings with a client outside of therapy hours. Some forensic experts question the objectivity of a therapist who also testifies in a forensic setting. Some therapists question the ability of the forensic evaluator to present the complete picture of the client. Whatever the choice the expert makes, it is important to carefully think through all these issues. State laws, like in New Jersey, may make the decision for you (it forbids serving as both

a psychotherapist and a forensic evaluator, although both can testify as experts and give their opinions in the areas of their competence).

4. **Practice only in areas in which you are competent**.
   Competence is defined as practicing in a particular area only if you have appropriate and sufficient education, training, and experience. Within a forensic setting, where there is often a "battle of the experts" and a temptation to exaggerate credentials, the expert must exercise some restraint, presenting only the education, training and experience earned. For instance, someone who has been trained in adult personality and psychopathology would probably not have the competence to answers questions that would arise in a child custody situation, such as given a particular child's developmental needs, what parental arrangement would be in the best interest of the child? The expert must be prepared to present to the court the reasons why one's training is relevant to the specific matters being decided. The judge makes the final determination.
   The forensic professional also has to have a basic knowledge of the legal and professional standards governing his or her participation in a legal proceeding. If, for instance, the expert is practicing in a state where admissibility is determined by the scientific validity of one's opinions (*Daubert*), it is necessary to be prepared to present reasons why the material is scientifically acceptable. It is also important to understand the civil rights of parties in a legal proceeding and be aware of the legal basis, for instance, of a defendant's refusal in a criminal case to participate in an examination and avoid using any evaluation techniques that might threaten those civil rights. Competence also refers to having enough continuing education to be aware of current developments in forensic assessment instruments, normative data regarding the applications of psychological testing in forensic settings, and the manner in which a competent forensic assessment is performed.
   Let's consider an example: There has been a profusion of research and writing in the field of neuropsychological assessment. The psychologist, for instance, who is asked to address a neuropsychological issue, fails to utilize current assessment instruments and relies on outmoded screening instruments to answer these questions. That psychologist could be found to not be practicing according to the community standard.
   Those presenting themselves as forensic experts have an affirmative obligation to present to the court and to attorneys their own areas of competence and the relevance of their training to the issues at hand. If asked a question which one cannot answer due to limited scientific or professional knowledge on the topic, the expert must inform the court or the attorney that the question cannot be answered for these reasons.
5. **Informed consent**.
   The necessity for informed consent in a forensic evaluation has a lengthy judicial history, going back at least forty years. For instance, in a criminal case, it is necessary to inform the defendant of the nature of the evaluation, the lack of confidentiality in the evaluation, and to whom the results of the evaluation will be disclosed. In most states, if an expert is retained by a defense attorney and reaches a conclusion that is not beneficial to that attorney, the negative opinion need not be revealed to the prosecutor. On the other hand, in several other states, once a mental health defense is raised, the defendant has essentially waived attorney–client privilege

and the results of the evaluation become available to the government. It is, therefore, important for the expert to be familiar with the law in the state in which they practice in order to properly word the disclosure statement. If the evaluation is court-ordered, then usually no privilege exists and the report needs to be turned over to all concerned parties.

The expert needs to consider the defendant's capacity to render informed consent. While in a court-ordered evaluation consent is not technically required since it was ordered by a judge (though it would be advisable), an evaluation on behalf of an attorney on either side of a case requires that the person be competent to render informed consent to the procedure. This is true in criminal cases with defendants who are examined by either the prosecution or defense's experts or in civil cases whether hired by the plaintiffs or performing an independent psychological examination on behalf of the defense. While it doesn't come up as often in family law cases, informed consent would still be necessary no matter which side has hired the expert. Some litigants do not want to be examined by a mental health expert whom they have not chosen. That is their right not to participate (we can never force people to appear in our offices or even to answer our questions if they do), but it is important to disclose that the court may be notified of their failure to cooperate and that there may be consequences. If the consent cannot be obtained, it is appropriate to notify the attorney or obtain a court order before proceeding.

6. **Use up-to-date assessment techniques**.
Mental health professionals need to be aware of the proper applications of the techniques that they utilize and need to be sensitive to situations in which particular techniques or norms may not be applicable, for instance, in a forensic setting. Given the recognition that scores may mean different things in forensic than in clinical settings, clinicians must make qualifying statements about the degree of certainty with which diagnoses, judgments, , or predictions can be made about individuals. Certain tests now have normative data based on forensic and correctional populations. The clinician doing a forensic assessment should attempt, whenever possible, to utilize these forensic rather than clinical norms. If using a test that does not have such norms, then the clinician must speak to the limitations of the validity and reliability of the conclusions or recommendations, since the population being tested is different from the population on which the test was normed.

Example: *A psychologist within a correctional facility was evaluating inmates regarding whether or not they could be transferred to a less secure facility. The psychologist used an MMPI-2, which was normed on a clinical population, and concluded based on the test results that the defendant was defensive, out of touch with his hostile impulses and therefore not appropriate for transfer to a less secure facility. This psychologist failed to factor in the situation or contextual variables. An inmate being evaluated for a less secure environment would appear defensive on a test that had clinically generated norms. There is now research detailing the patterns obtained on the psychological test results of victims of domestic violence. These often differ from the interpretive statements in various computer programs, such as used with the MMPI-2. To interpret such profile without consideration of the fact that the group under consideration differs significantly from the group on which the test was originally normed would certainly be a deviation from accepted practice and has the potential for resulting in serious harm.*

7. **Be accurate in describing your credentials**.
When an expert testifies in court, there is frequently an attempt to make them appear more qualified than they really are. Generally, experts will not blatantly misrepresent credentials but an attorney trying to present their expert in the best possible light may exaggerate the expert's qualifications. If the expert is aware of this attempt to exaggerate the qualifications, they should take steps to correct the impression.

Example: *A psychologist who did not have a doctorate send out announcements describing herself as being M.S., A.B.D., Forensic*

Consultant. A.B.D. usually stands for "All But Dissertation" but placed on a business announcement it implies that is it some kind of credential qualifying her to be a forensic consultant. The relevant ethical standard has to do with not misrepresenting one's credentials, either though omission or through commission.

8. **Avoid the misuse of your data or your influence**.
While the caution to "do no harm" seems straightforward, many professionals do not perceive or think through the potential harm in their forensic activities. For example, should we do evaluations to determine competency for execution? If an individual is found incompetent for execution, should we participate in treatment programs to restore that individual to competency to be executed? In a similar manner, many professionals are now participating in sexually violent predator evaluations to determine whether or not an individual is prone to act in a violent sexually predatory manner in the future. Before undertaking such an evaluation, it is important to be familiar with the available literature regarding prediction of sexual recidivism. Then, only if the expert decides if she or he is comfortable making predictive statements under the circumstances of rather limited research, should she or he proceed with such an evaluation.
9. **Be certain you have sufficient data to back up your conclusions**.

Example: *A patient who had suffered a closed head injury and was undergoing cognitive rehabilitation was referred to a psychologist for an independent medical evaluation. The psychologist did not review any records, nor did he administer any psychological tests. Instead, he concluded, based on a brief clinical interview, that the patient was malingering. He contended that he could not have used any of the other sources of data because they would have "biased" his conclusions. This is clearly an inadequate basis for a conclusion of this magnitude, since, of course, we are dealing with an apparent neuropsychological impairment and this psychologist did no neuropsychological assessment. In addition, there are many well-validated tests for malingering, none of which the psychologist relied upon in rendering his conclusion that the patient was malingering.*

10. **Carefully document your records**.
Documentation in forensic cases must be exact and comprehensive; anticipating that at some point an attorney or judge may be looking at the record. The manner in which one reaches conclusions, in other words, how one gets from the data to the opinion, needs to be specified. Merely to state that one reached an opinion because of thirty years' experience is not acceptable. Making a diagnosis takes more than an intuitive "feeling". Adhere to standard procedures, for instance, in administering and interpreting tests. If a different or idiosyncratic approach to the assessment is used, document the reasons for the change and specify that it is not the standard methodology.
11. **Personally examine the client unless special circumstances prohibit it**.
Clinical forensic evaluations usually require a personal examination to come to an opinion about the client. There are certain circumstances in which this cannot be done. When, for whatever reason (e.g., an attorney objecting, a client being unavailable), the client cannot be personally seen, the conclusions in the report must be qualified in terms of the missing data. For instance, one may qualify the degree of certainty in one's conclusion by noting that the person could not be individually examined.
12. **Take steps to protect your data and your records**.
Sometimes, ethics and the law do collide (though not as often as people believe). The ethical obligation under these circumstances is to make known to the judge or attorney what the *Code of Ethics* requires and try to work out the situation responsibly. An area in which this occurs quite frequently is a demand for discovery of records. While the expert must be concerned about the preservation of the confidentiality of the records, under certain circumstances, for example, when a patient sues for mental or emotional damages, the privilege attached to those records may have been waived.

Reasonable steps would include notification of the legal authority involved about the ethical dilemmas posed by the case and an attempt to work the matter out informally. This may require the judge to redact certain non-relevant parts of the therapy record or it may involve providing the records to another mental health professional who has been trained in their interpretation. In some states, like Florida, psychologists are not permitted to release *raw data* to anyone who is not trained in their interpretation. On those occasions when this is not effective, the professional may have to file a *Motion to Quash* or *Motion for a Protective Order*, explaining to the court in a more formal manner the same issues previously discussed informally. If the court orders the records to be released, it is permissible to do so under the court order, making appropriate documentation in the file. Reasonable steps involve obtaining consultation from fellow forensic professionals or obtaining the advice of a qualified attorney (Florida Administrative Code, 2002).

Summary

We have attempted to discuss some of the areas where forensic experts need to be sensitive to the ethical implications that can arise and potential legal actions that may arise out of these. It is important to understand both the ethical and legal issues. Definitions of the terms commonly used in malpractice cases have been included here. In addition, we have listed 12 areas where malpractice claims are more commonly found. These include;

1. Defining who is the client and what is a professional relationship,
2. Confidentiality issues
3. Multiple relationships
4. Competence
5. Informed consent
6. Up-to-date assessment methods
7. Accurate credentials
8. Avoid misuse of data or influence
9. Sufficient data to back up conclusions
10. Document records carefully
11. Personally examine clients
12. Protect data and records.

Questions to Think About

1. How would you go about trying to find out what is the standard of care in your community?
2. You have a client that does not want you to write down anything they talk about during the evaluation. What are some of your options? Would you refuse to see the person? Would you be able to competently complete the evaluation? Would you skip the clinical interview? Would you agree hoping you can remember everything they tell you? Would you send the case back to the court? Decide why you would or would not do any of these or anything else you can think of doing.
3. There is a new president of an organization you belong to. You and your friends think this person's behavior indicates he is mentally ill. Your friend who is not studying psychology or law wants to send out a memo to all the other members that the president has bipolar disorder. They want you to sign the memo because you are studying psychology and will give their diagnosis more legitimacy. Should you sign your name to the memo? What are the risks and benefits?

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26 Ethical Issues in Forensic Settings

In this chapter we discuss the development of the American Psychological Association's (APA) *Code of Ethics* (2002, 2010, 2016) and its relevance to our forensic practice as most other mental health professions in the U.S and many other countries have adapted their own ethical standards from the APA's, perhaps as it was one of the earliest developed. In addition, many states' licensing laws incorporate all or parts of the ethical standards from the APA *Code of Ethics*, so it is important to be familiar with them in order to be sure you are acting in an ethical and competent manner.

History of the *Code of Ethics*

The *Ethics Code* of the American Psychological Association did not explicitly address any psycholegal issues when it was initially developed in the 1950s, as it dealt with generic areas, such as practicing only in the bounds of one's competence and not having inappropriate relationships with clients or patients. The first major change that had forensic implications was in the 1981 revision which dealt with limits of confidentiality. In the mid-1970s, there were two legal cases that involved limits of confidentiality when a client or patient made credible threatening statements to a therapist (*Tarasoff v. Regents of the University of California*, 1974, 1976). While these cases are too complex to be discussed here, the decisions set possible limits to the confidentiality of the psychotherapeutic relationship if a patient communicated intent to harm an identifiable third party. Until then anything revealed during the psychotherapy relationship was confidential unless the patient authorized its release.

Shortly after Tarasoff, the version of The APA Code of Ethicsused in the 1970s was considered outdated and subjected to another revision. There was dissension within the revision committee whether to continue the traditional medical provision of absolute confidentiality or include the new Tarasoff provisions requiring the limitations. Despite the vocal minority wanting to continue the traditional absolute confidentiality, the limits of confidentiality section were incorporated into the APA's *Ethics Code* in 1981.

The next change in the APA Ethics Code that had implications for forensic practice occurred in the mid-1980s after the APA entered into a *Consent Decree* with the U.S Federal Trade Commission (FTC). At that time, the FTC threatened to sue the APA for *restraint of trade*, meaning that if someone followed some of the ethical standards, such as the prohibition on advertising, they would be creating a monopoly which was illegal. Prior to this change, it was considered unethical for psychologists to advertise their practices. The reason for this is that they could be appealing to people who, because of their mental or emotional state, would not be able to make a fully informed decision regarding the type of treatment they wanted, especially if an unscrupulous practitioner were to promise some kind of instant or amazing cure.

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What emerged was an amendment to the 1981 *Ethics Code* that occurred in 1989 which had some very carefully worded language which allowed advertising but insisted that the advertising not be false, fraudulent or misleading. It also eliminated the prohibition against a practitioner offering "one-of-a-kind services" but if the practitioner were to do so, they had to provide the empirical support for that claim.

With the 1992 revision there was a major change in the conceptualization of the *Code of Ethics*. Prior to that time, the aspirational principles and enforceable standards had been mixed together. That is, statements about psychologists maintaining the highest standards of the profession were mixed with behavioral standards, such as the prohibition against having sexual relationships with patients. This became a major problem for the APA in the 1980s, for psychologists were being sanctioned for not maintaining the highest standards of the profession but when they challenged it, the APA was unable to state exactly what the highest standards of the profession were. We discussed the difficulties with defining the standard of care in Chap. 25 about malpractice and it is similar here. As a result, there was a decision on the part of that Ethics Revision Task Force to separate the aspirational and enforceable parts of the *Ethics Code* in 1992. The *aspirational principles* were just guidelines for what might be called 'best practices' and there could not be any disciplinary action for failure to meet one of these aspirational principles. It was only the concrete, enforceable *behavioral standards* that could be the basis for a sanction by the APA Ethics Committee.

Another important distinction in the 1992 *Ethics Code* was the clarification that the *Ethics Code* dealt only with one's professional activities and that what a mental health practitioner did in their personal life was not covered by the *Code of Ethics*. There was some concern, for example, about statements in the 1981 *Ethics Code* about psychologists not engaging in any activities that would put psychology in a bad light. This failed to clarify whether it was in one's personal or professional life at that time so it was clarified in 1992 to apply only to professional activities. While this was seen as a necessary curtailing of the expansiveness of the *Ethics Code*, some regarded it as 'watering it down'. Also, in 1992, for the first time, there was a discussion of exactly what was meant by *competence*, what was meant by *informed consent* and the necessity for careful documentation, especially within forensic settings. In fact, in the 1992 *Code*, for the first time, there was a separate section dealing with forensic activities, reflecting the recognition on the part of the APA Ethics Office that some of the generic standards did not apply very well to forensic settings. It also had a statement in it that dealt with the way that one should handle a situation when the *Ethics Code* and certain legal constraints came into conflict. Psychologists were urged to bring the ethical issue to the attention of a legally binding authority (a court or a judge) and attempt to work this out in a reasonable manner. This was further modified in the 2002 *Ethics Code* and, in fact, resulted in a great deal of controversy that we discuss below.

Between 1992 and 2002, several changes occurred. First, the statement about working things out in a reasonable manner when the *Ethics Code* and the law came into conflict was further clarified. Psychologists during the 1990s were concerned about courts requiring psychologists to violate the *Code of Ethics* by, for instance, revealing confidential records or test results that might violate test security. Therefore, in the 2002 revision, the statement about working matters out in a reasonable manner from the 1992 *Ethics Code* added the statement that if despite making the court aware of these matters, the court still ordered the psychologist to do something that would violate the *Ethics Code*, the psychologist could do so without fear of ethical sanctions. In other words, as long as the psychologist could document what they did to try to comply with the *Code of Ethics*, and then followed a lawful court order, that would not be a reason for a finding of unethical behavior.

Unfortunately, in light of the recent concern about psychologists being involved in the torture of detainees, this statement about following lawful court orders was misinterpreted and misconstrued to mean that psychologists could, in

fact, engage in torture if they were instructed to do so by their commanding officers after making a protest that it was unethical. It should be made clear that the issue of torture actually had nothing to do with the statement in the 2002 *Ethics Code* which was conceived at that time to deal exclusively with court orders requiring release of psychological data. There were many meetings during the 1990s attempting to provide more guidance to psychologists when they had to deal with a conflict between releasing records and following a legitimate court order. No one even considered the issue of torture during these deliberations. In addition, the concern about "I was just following orders" was misplaced, since the only known and documented individuals who were, in fact, actively engaged in torture programs, were two independent contractors for the Department of Defense. There is no evidence that military psychologists were ever involved in such torture and certainly not at the request of commanding officers.

In addition, the 2002 *Ethics Code* eliminated the issue regarding the necessity for more careful documentation being used in a forensic evaluation and eliminated the forensic section entirely, essentially incorporating most of the standards into the generic *Ethics Code*. Prior to the 2002 revision, there were also concerns with the use of the term *reasonable*, that appeared in the 1992 *Ethics Code*. There were differences of opinion as to what constituted *reasonable behavior*, so the term was defined in the 2002 *Ethics Code* to refer to the prevailing professional practice of psychologists at the time the intervention or service was performed, avoiding the problem of hindsight bias which might occur if subsequent standards of "reasonableness" were utilized when a case was being adjudicated. There was also an explicit statement that the *Ethics Code* should not be used in and of itself as the basis for civil liability or for a violation of the standard of care, realizing that these are complex concepts which, though they may incorporate parts of the *Ethics Code*, go well beyond that *Code*.

Finally, in the revision of the *Ethics Code in 2010*, in response to the pressures by many psychologists who felt that the statement previously about following a lawful court order without fear of ethical sanctions would provide a 'loophole' for psychologists who became involved in torture, that phrase was removed from the *Ethics Code* and following the suggestion that reasonable steps be taken to work out the conflict, added the following: "Under no circumstances will this resolution of issues involve the deprivation of basic human rights."

In 2016, after a referendum from the membership, the *Ethics Code* also added, in the section dealing with avoidance of harm, an explicit statement that psychologists could not be involved in any activities that involved torture.

Specific Sections that Apply to Forensic Psychology

Looking now at the specific sections of the *Ethics Code* that has relevance to forensic work, we have already discussed Standards 1.01, 1.02, and 1.03 dealing with misuse of work and conflict of ethics and the law.

Standards 1.04 and 1.05 regarding the resolution of ethical issues reflect some evolution of the concept. Initially, it was recommended that if a psychologist became aware of unethical behavior on the part of another psychologist, they should first try to work the matter out informally with the other psychologist. There was a growing recognition, however, that especially within forensic settings, this could cause some serious problems. For example, if the allegedly unethical behavior were being committed by an opposing expert witness in a case, then an attempt at informal resolution could be regarded as witness tampering, an offense which is a felony. Therefore, the phrase dealing with informal resolution was qualified by adding 'when appropriate'.

In addition, especially within forensic settings, there had been a rise in the number of fraudulent complaints by one psychologist against another. The reason for this is unclear at present but ethics committees and licensing boards are constantly dealing with one witness in a case making allegations of unethical behavior

against another. It is regarded as an ethical violation, in and of itself, to file such a fraudulent complaint.

Standard 2 of the APA *Ethics Code* having to do with practicing only within the bounds of one's competence, specified just what "competence" meant. Prior to this time, competence did not have a specific definition. When a consumer, for instance, was dissatisfied with the results of their evaluation or treatment, they could file a complaint with APA alleging that the psychologist was incompetent. As a result, Standard 2.01, starting in 1992 and continuing to the present, dealt with *competence* as reflecting the fact that a psychologist had knowledge, skill, education, experience, and training in a particular area. Interestingly, this standard is very close to the wording in the *Federal Rules of Evidence* regarding the definition of an expert witness (1975, 2000, 2014). While it does not have any immediate impact on the *Code of Ethics*, it may help psychologists to define their own areas of competence. For instance, if they were to receive a referral, and they do not know whether or not they have had sufficient training and experience to accept the referral, asking themselves the question, whether or not they would feel comfortable testifying in a court of law as an expert on the matter might serve as a helpful heuristic. In addition, one of the provisions of the old forensic section, namely, knowledge of applicable laws, was incorporated into the section on competence.

Standard 2.05 deals with delegation of work to those under one's employ or *supervision*. There has been a rather marked increase of complaints against supervisors regarding the work performed by those under their supervision. All state licensing laws have a section on supervision, but they vary greatly regarding exactly what those requirements are. Some states merely make reference to the fact that the supervisor is responsible for all of the activities performed by individuals under their supervision, while some have exceedingly detailed requirements regarding the number of times one has to meet with the supervisee, the nature of documentation, the kinds of issues that need to be discussed, etc. At the very minimum, however, the supervisor and supervisee should reach an agreement, preferably reduced to writing, regarding what the nature of the supervision is, how often meetings will occur and what the nature of the documentation needs to be. The supervisee needs to adhere to the requirement that they will bring all cases on which they are working to the attention of the supervisor and the supervisor is responsible for making sure that there is a 'good fit' between the expertise of the supervisee and the nature of the presenting problem. This does, in fact, put an obligation on the supervisor to carefully evaluate a client and supervisee to make sure that the supervisee can perform adequate and competent services. Unfortunately, the authors have observed that in several settings, the case is merely assigned to the next supervisee who has space available in their treatment load with very little attention paid to their actual level of competence.

Standard 3.04 deals, as noted earlier, with the *avoidance of harm*. The psychologist is to take reasonable steps to avoid harming those with whom they work when the harm is foreseeable and unavoidable. There are some problems with the definition of "*foreseeable*" and "*unavoidable*", but very often psychologists do not think through the implications of what they are doing. We've previously given an example of when psychologists are called upon to render an opinion on whether a given inmate is *competent to be executed*; they may perform the evaluation and reach a conclusion that might indeed assist the state in proceeding with the execution, without really understanding the implications of what they have said. If they are of the opinion that someone is competent to be executed, are they not, in essence, contributing to that outcome? If so, then could it be argued that they are not, in fact, taking reasonable steps to prevent harm? If they were to find someone incompetent to be executed, they may feel that they are working to the benefit of the individual since he or she will now be treated. However, the goal of that treatment is very limited, merely to get a person to the point where they are competent to be executed and this may involve the forced

administration of antipsychotic medications. While psychologists at present do not prescribe medication in most states, there can be some difficulties with this artificially induced competency and the fact that they are really being treated only to the point where the state can take their lives.

Another example of a harmful situation which psychologists very often do not recognize is with the evaluations of those individuals who are deemed *sexually violent predators*. The legal definition of sexually violent predator speaks of a "mental abnormality or personality disorder that predisposes the individual to commit predatory acts of sexual violence in the foreseeable future". This definition is problematic for several reasons, because, first, mental health practitioners do not recognize the term *mental abnormality* and, secondly, there is no personality disorder that has as one of its criteria *predatory acts of sexual violence*. In other words, the entire definition is a fiction, a legislative construct used to involuntarily commit individuals for treatment following their having served a term in prison. There are further concerns based on the available literature of the ability to predict future violent sexual behavior since most of the assessment instruments available have predictive validity just below or around 50% and some have concluded that a psychologist can obtain a more accurate assessment by merely flipping a coin. In addition, since there are no effective treatment programs for people with sexually violent predatory behavior, the psychologist is essentially involved in a subterfuge, committing an individual for treatment that does not exist, essentially meaning the commitment will be one without a time at which it is ended—it will be indefinite. In addition, the law allows a psychologist to render an opinion without personally examining the individual and basing the assessment on a record review alone, especially if the individual in question refuses to be examined. While it may be part of the law and allowed under those circumstances, it certainly violates parts of the *Ethics Code* which have to do with not making statements about someone whom you have not examined and having sufficient data on which to base one's opinions.

There are also some concerns regarding possible multiple relationships within a forensic setting. Multiple relationships, in general, refer to relationships with the same individual which involves different parameters, such as having a business or intimate relationship with a client or patient. Not all multiple relationships are prohibited, only those that are regarded as harmful and the APA *Ethics Code* urges psychologists to think through whether or not the relationship could be considered exploitative or result in loss of effectiveness or loss of objectivity in trying to define whether or not it is harmful multiple relationships.

Within forensic settings, the issue is primarily whether or not someone who has been seeing a patient or client in the role of psychotherapist can also testify in court. The issue is a complex one and, for that reason, can be answered both yes and no. If the therapist is asked by a patient to testify regarding them in a court of law, it is permissible as long as the therapist deals only with the issues involved in therapy, mainly diagnosis, prognosis, degree of compliance with treatment, etc. They are experts on these topics. However, the therapist usually cannot answer any of the forensic or psycholegal questions because they usually do not have a sufficient base of information to answer those questions. The therapist has generally not conducted psychological testing, has not assessed for malingering, has not interviewed collateral sources or reviewed records. For that reason, the methodology of both kinds of relationships is quite different and should not be mixed. In other words, if a client gives a consent or asks a therapist to testify, the therapist should first indicate the limitations of their testimony before agreeing to do so.

Secondly, in addition to the methodology being different, the role of the therapist is quite different. In a therapeutic relationship, the therapist is seen in a therapeutic alliance with the patient or client, while in a forensic evaluation they are expected to be impartial and objective, merely gathering data and then reaching a conclusion based on that data. One of the most striking examples has to do with the assessment of malingering; that is, deliberately exaggerating

or fabricating some symptoms. It is a standard practice in a forensic evaluation to assess for malingering; but in a therapeutic relationship it is more important to understand how a patient views their problems rather than using an objective lens. In addition, attempting to assess a psychotherapy client for malingering, could almost certainly be inconsistent with a therapeutic relationship based on trust.

Finally, there is a legal issue involved, for if the role is that of therapist, then the privilege that attaches to that relationship is called psychotherapist–patient privilege and has a large number of possible exceptions to it. If retained by an attorney to do a forensic evaluation, on the other hand, then the psychologist may be covered under attorney–client privilege, a broader and far more protective privilege than psychotherapist–patient privilege. Therefore, serving in a dual role can become very confusing legally to know what form of privileged communication they are involved in at a particular time. For example, mental health professionals are mandated by state law to report reasonable suspicions of child abuse. In most states attorneys do not have that same mandate; if you are doing a forensic evaluation at the request of a defense attorney, do you abide by the mandatory reporting required of you by the state or follow the attorney–client privilege which may cover you?

Another area that we have discussed in other chapters that have major forensic implications is that of *informed consent*. Legally, informed consent involves three elements: *Sufficiency of information, competence and voluntariness.*

Sufficiency of information is what is covered in the *Code of Ethics*. The psychologist needs to inform the patient who they are, who retained them, what the nature of the relationship will be, and what will go into that relationship (such as psychotherapy and psychological testing). The questions that will be asked (i.e., competency to stand trial, parenting capability, proximate cause of an injury) also need to be spelled out. Finally, and most importantly, the psychologist must explain what the limits of confidentiality are. Clearly, in a forensic setting, the report will be going to certain individuals in addition to the attorney who may have retained you; the opposing attorney(s), possibly the state or defense in criminal cases, and possibly the court. These limitations of confidentiality must be made very clear to the individual being seen. It is important to make sure the client understands this information. Sometimes it can be provided in written form, also. It can be helpful to have them restate what you have told them in their own words. This is the competency prong and, if they can do so, they are regarded as competent to give informed consent. If they are not competent to consent, you should not proceed with the evaluation, but obtain the consent of either the attorney of record or a court order. If you believe they are competent to consent, then you need to ask the client or patient whether after knowing all of these facts they are willing to proceed with the evaluation or treatment and if they indicate that they are, then this satisfies the voluntariness prong. All of these are very important issues, especially with forensic work.

The next area that is of concern has to do with *confidentiality* and *disclosure*. As we noted earlier, since the 1981 *Code of Ethics*, the *Code* has incorporated the limits of confidentiality when there are identifiable threats to harm, not only a third party but the psychologist, him or herself. Where the difficulty arises is in terms of assessment of just how credible a threat is. There is a vast array of psychological literature regarding risk assessment to help make those decisions. Certain parameters are followed to help determine whether or not a threat made by a patient or client is credible. There is also significant variation among states regarding whether the reporting duty is mandatory or discretionary.

As noted above, once the APA entered the Consent Decree with the Federal Trade Commission, the issue had to do with advertising not being false, fraudulent, or misleading. The difficulty, of course, is in the precise definition of what constitutes these terms. It is common for individuals to put something on their letterhead or in their advertising that is not exactly fraudulent but tends to give a mistaken impression of their areas of competence. For instance, while the term *Board Eligible* does not really have any

meaning in psychology since one is either *Board Certified* or not, when people use the term Board Eligible in their advertisements, it sounds like a real credential. In a similar manner, people may put on a letterhead that they are Board Certified by the American Board of Professional Psychology but fail to mention their specialty area. In one case, reviewed by one of the authors (DS), the psychologist in question had failed to mention his specialty area and then titled the report "Neuropsychological Evaluation". This implied, of course, that the Diplomate was in Neuropsychology when, in fact, it was in a totally different area (school psychology). While what they did was not fraudulent, nor false, it was certainly misleading.

The media often tries to find psychologists to help viewers understand the issues in high profile cases. The best advice from the ethical point of view is to not give out any information. Certainly, if one is asked, as so often happens, to comment on a proceeding in which one has not been involved, this may run afoul of two ethical standards: not commenting on the personality of someone you have not examined and, not having sufficient data to comment. The second issue is a bit more subtle and has to do with the issue of privilege and confidentiality, namely how much one can, in fact, state publicly about the results of an examination, and what kinds of consent are needed.

Ethics in Assessment

Ethical issues in the assessment are very involved and for that reason we will go into substantial detail here.

Standard 9.01, titled, *Bases for Assessment*, covers the need to have sufficient data on which to base one's opinion, and the fact that a personal examination is required unless certain circumstances may prohibit its use. For example, someone who might be incarcerated for committing a violent crime may not be personally available but their records may be examined. In these cases, the examiner must qualify the conclusions in light of the missing data.

The section regarding validity and reliability of assessment instruments condenses a great deal of material into a short paragraph that really is quite complicated. However, with the exception of certain forensic assessment instruments, none of the widely used assessment instruments has ever been validated in pretrial forensic settings, which is where most current forensic work is done. Therefore, the interpretation of the meaning of the items may be quite different than what the computer printout states. In fact, even in the test manuals, there is often a specification as to the appropriate group on which the tests should be used. Psychologists sometimes violate this principle, believing the tests are applicable to any setting. For instance, a widely used assessment instrument is one called the Millon Clinical Multiaxial Inventory (MCMI) which has in its professional manual a statement about the normative group being people who have taken the test while in the early stages of psychotherapy. It goes on to state that using this test within a context different from this normative group (psychotherapy clients) would be inappropriate as they could not be compared with the standardized group's norms. Nevertheless, forensic examiners sometimes use this test to express conclusions in cases involving criminal responsibility, competency, proximate cause of a psychological injury, and child custody determinations.

There is a good deal of information in the current *Code of Ethics* dealing with the release of raw psychological test data. This, again, is quite complicated and goes back to an earlier version of the *Ethics Code* which essentially stated that raw psychological test data could be revealed only to another individual qualified to interpret it, which would generally mean another licensed psychologist. However, since HIPAA (1996) was passed giving a patient the right to copies of their own records and directing the psychologist to release those records to anyone whom the patient chooses, this ethical standard is difficult to maintain. A taskforce from the APA Division of Independent Practice (Division 42) recommended that the following sentence be inserted following the one dealing with the obligation to release data to the patient. It states, in essence,

that the psychologist may withhold the data if, in the opinion of the psychologist, release of this data would result either in substantial harm to the client or substantial misuse of the data, recognizing that the ultimate decision may need to be made in a court of law.

The reason this section of the *Ethics Code* had to be changed in light of HIPAA is the fact that what the patient produces, namely the test responses (which are considered or called *test data*) are regarded as part of that patient's *protected health information*. It should be noted, however, that this does not apply to the test questions or stimuli themselves, which are covered in a separate section of the *Ethics Code* under security of *test materials*. Therefore, while the responses may need to be revealed, the actual test questions, and stimuli such as the inkblots or the scoring sheets, do not need to be released as they are covered by a separate section of the *Ethics Code*. Psychologists will often receive a demand for all records, which includes not only the patient's responses but also the test materials themselves. It is important for the psychologist to refrain from doing so and attempt to make the argument that release of the raw data would harm the patient or result in misuse of the data.

HIPAA rules may not apply to assessments administered during litigation as it is not being used for health care and therefore, not considered *protected healthcare* information. However, it is usually suggested that most of the rules be followed anyhow, especially if any of the history gathered involves protected health information. The *Ethics Code* suggests the need to provide feedback about the results of psychological testing to clients or patients, but this may need to be modified somewhat in a forensic setting, as the communication may be more appropriately done with the court or attorney of record.

Specialty Guidelines for Forensic Psychology

The current edition of the *Forensic Specialty Guidelines* was passed in August 2011 by the APA Council of Representatives. The first edition of the *Forensic Specialty Guidelines* only appeared in a footnote to the *Ethics Code*, rather than being a document which in and of itself was recognized by APA. However, many states incorporated the original guidelines in their rules and regulations requiring that they be followed. Remember, guidelines are aspirational *best practices* and it is usually not mandatory to follow them like it is to follow the *Ethical Standards*.

While both editions have many similarities, the second edition of the *Forensic Specialty Guidelines* served to clarify many ambiguities which were encountered when using the first edition and the *Code of Ethics*. For instance, it makes very clear, with examples, the applicability of these *Guidelines*, noticing that there has to be definable foreknowledge that the results of an intervention or assessment are to be used to answer explicitly psycholegal questions. Therefore, questions regarding parental fitness, criminal responsibility, competency to stand trial, and proximate cause of a psychological injury would all be regarded as forensic activities that needed to be performed according to these *Guidelines*. On the other hand, more traditional clinical work, such as psychotherapy, in which a therapist may later be asked to testify in court, would not ordinarily be regarded as forensic activity and subject to these *Guidelines*. Nevertheless, there is, unfortunately, a widespread misunderstanding of these issues with some practitioners insisting that as soon as the therapist gets involved in a court-related activity, they must follow the *Guidelines* and be responsible for a lack of adherence to the *Guidelines*. This is simply an inaccurate statement, and the *Specialty Guidelines* make it very clear that even if a clinical activity is performed within a forensic setting (e.g., psychotherapy within a prison), it would not be regarded as forensic activity and subject to the *Guidelines* unless there was definable foreknowledge that it was to be used to answer such forensic questions.

While we have already discussed the concept of competence in our coverage of the *Ethics Code*, the *Forensic Specialty Guidelines* go even further, pointing out that the competency of a

psychologist in a forensic context is an affirmative obligation, that the psychologist needs to let the referring party or parties (attorneys or judges) know in advance the boundaries of their competence, the relevance of their background to specific issues and perhaps, most importantly, the limits of psychological knowledge. For instance, a rather typical referral for a psychologist within a forensic setting is to evaluate whether or not someone fits the *psychological profile* of a particular criminal offender. There is, in fact, no such thing as the psychological profile of any criminal offender and, for that reason, it is an affirmative obligation to make the referral source aware of that ahead of time.

A number of other issues involving the rights of the examinee to participate or not in the exam and a general understanding of the legal and professional standards are also spelled out. The *Guidelines* discuss such issues as the proper way to set fees, the issue of letters of protection, the prohibition against accepting contingent fees, and reaching agreements with attorneys and courts regarding the timeline of a case, and when work is expected to be completed. There is discussion consistent with our previous coverage of informed consent and the competence to consent to evaluation. In addition, there is more discussion regarding the reasons for not testifying about people who have not been personally examined, and the need to qualify opinions, when data are missing. For example, DS reviewed a child custody report in which the father and son appeared for the evaluation, but the mother did not. The psychologist concluded that the father should have custody as she inferred from the mother's not appearing that awarding custody to her was not in the best interests of the child. Nonetheless, she should not have made any custody recommendation without actually evaluating the mother. The psychologist should only have commented on the father's fitness to parent the child and not have made any assumptions of the mother's parenting abilities.

A strong emphasis is put on the discussion of what is called *legally relevant factors*, namely what we have described before as functional legal capacities and that these are distinct from various diagnoses. The legally relevant factors are the criteria that constitute the legal question at issue. For instance, in competency to stand trial, the legally relevant issues are the factual understanding, the rational understanding and the ability to assist counsel in a rational manner. If a diagnosis is used in a forensic case, it is a jumping-off point to address a particular legal issue but is not identical to the legal issue. For example, in a personal injury case, a diagnosis may help understand the person's harmful condition, but the legal issue is addressing the nexus of that harm to what caused it. In a custody case, a parent's diagnosis may not prevent them from being a good parent unless it is not in the child's best interests. When one makes a diagnosis, in forensic cases, one needs to comment on how the symptoms of the mental illness or cognitive impairment impact the various legal standards. Looking at it from the other point of view, a forensic assessment instrument may tell us whether or not a person meets the legal criteria for some standard but does not answer the 'why' behind the possible impairment, which a diagnostic workup may.

The Specialty Guidelines are particularly helpful in dealing with the assertions discussed earlier that following a lawful court order could be misused to justify torture by saying that they were just following orders. The Guidelines retain the statement that the psychologist may follow a lawful court order without fear of ethical sanctions, but then add a phrase clarifying that this cannot include the deprivation of basic human rights.

Another issue that constantly appears is the reference to what is called a *standard of care*. As we discuss in Chap. 25 on malpractice, the standard of care legally is defined as the level of practice of the average or relatively prudent professional. There had been some discussion to try to regard the *Ethics Code*, itself, as a standard of care and, as we noted earlier, while the *Ethics Code* is involved in helping to define a standard of care, the standard of care, in fact, goes beyond that because it takes into account the level of professional practice and the knowledge that a competent psychologist would have of the

research and professional literature at a given point in time. The standard of care is also relevant to both licensure and malpractice issues because both of them refer to a behavior which may represent a deviation from the standard of care. In malpractice cases there is the additional element of needing to demonstrate harm that was *proximally* (directly) caused by the deviation from the standard of care. Ethics and licensure complaints do not require the proof of actual harm that malpractice actions do.

There is also some controversy regarding the promulgation of new standards of care. Some very distinguished psychologists have urged the field to avoid developing new standards of care, noting that it merely gives unscrupulous attorneys more grounds for filing complaints against psychologists. On the other hand, there are those who maintain that without well-defined standards of care, the standard of care becomes whatever the plaintiff's expert witness can convince the judge that it ought to be. There are individuals who misuse the standard of care to justify a particularly idiosyncratic approach to a problem, then maintain that it represents the standard of care, and, for that reason, anyone not following that procedure has violated the standard of care. This is again an excellent argument for having the standard of care well-defined but, at the same time, flexible enough so that they do not provide additional information for litigation.

Some final issues need to be discussed regarding *recordkeeping and what gets disclosed in depositions*. While the *Ethics Code* and virtually all professional guidelines refer to the need to have records, it needs to be noted here that well-documented records are the best protection in malpractice actions. Gone is the day that individuals can say that they do not take notes or do not need to take notes. The nature of litigation currently demands that the standard of care and the ways in which the practitioner is following the standard of care be well-documented. One of the issues that frequently arises when regarding recordkeeping is whether the clinician keeps one record or two. Some clinicians believe that they should keep two records, one of which is the official record, which is merely a progress note regarding what matters are being accomplished in psychotherapy. Hunches, speculations, and psychodynamic formulations would be included in a separate set of what are sometimes called process notes. Clinicians are allowed, though not required, to keep this second set of private process notes which under HIPAA are called 'psychotherapy notes'. However, it is critical to understand that should there be litigation, all those notes are also discoverable. One may ask how an attorney might become aware that there is a separate set of records. The answer is quite simple. It is a boilerplate issue that is often raised in depositions, "Now doctor, the records that you have provided for us, are these all the records that you have kept in this case?" Certainly, to avoid perjury, the clinician would have to admit that they kept a separate set of process notes, in which case opposing counsel states that they would like to have those process notes. Any attempt by the clinician to say that those notes cannot be revealed or are protected will probably fail legally.

Summary

In this overview, we have attempted to cover some of the primary ethical issues that may become problematic when dealing with forensic activities. Some of these issues and questions are:

1. What are the limits of confidentiality in forensic settings?
2. What sort of advertising is considered appropriate in forensic work?
3. What is the meaning of aspirational principles and enforceable standards.
4. What is the meaning of personal as opposed to professional settings?
5. How is competency ethically determined?
6. What are the three elements of informed consent? Are they different in clinical and forensic settings.
7. What guidelines may psychologists use when dealing with a court order that raises ethical concerns?
8. What does "avoiding harm" mean in forensic settings?

9. How should requests from the media be handled when you are asked to comment on a case in which you have been involved? In a case in which you have not been involved?
10. What are some of the ethical constraints that are important in forensic assessments?
11. What is the meaning of 'definable foreknowledge' when assessing a psychologist's obligations in forensic cases?
12. Can non-psychologists follow the APA Forensic Specialty Guidelines and where will they find them? (www.apa.org/specialty guidelines).

Questions to Think About

1. Do you believe that the Code of Ethics should apply just to professional activities? What about if someone commits a fraudulent act like steals money from a friend? Should that be reportable to the licensing board?
2. Supposing you wanted to begin conducting evaluations of children who were alleging that they were abused. How would you go about trying to gain competence in that field?
3. Explain how being a therapist and a forensic examiner in the same case can become problematic?

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