

Social Science and Psychological Influences in Law

When Christopher Simmons was 17 years old, he decided to commit a murder and made a careful plan. Simmons believed he could get away with it because he was a minor (*Roper v. Simmons*, 2005). Along with a fellow minor who he convinced to help him, he bound and gagged Shirley Crook and then threw her from a bridge. Simmons was convicted of murder and given the death penalty. The Supreme Court was asked to rule on the constitutionality of the sentencing a juvenile to death. In deciding the constitutionality of such a sentence, the Court considered evidence that developmental differences exist between adolescents and adults.

Roper v. Simmons, which we will look at in further detail later, is an interesting example to consider how law and social science assist each other. On one hand, the psychological literature helped inform the Court of potential vital developmental differences and helped enlighten the justices as to the potential ramifications of their decisions. On the other hand, in this case there was clear evidence that this teenager planned a murder. Regardless of whether the death penalty should ever be imposed, when there is clear evidence that the defendant teenager planned his victim's death, is it important for the court to consider that adolescents on average are impulsive and do not always consider the ramifications of their actions?

Further, when law and psychology intersect, can and how do we fully consider the potential ramifications of the social science beyond the confines of this one case? As Justice Antonin Scalia pointed out in his *Roper* dissent, if adolescents are not responsible for their actions in committing murder, then can they fully consider the ramifications of a decision to terminate a pregnancy, as the Supreme Court previously ruled they can? Can social science illuminate differences between these types of decisions?

In this chapter, we will start to answer these questions by considering generally how law and social science interact. Although our textbook focuses primarily on psychology, we cover other social sciences that play an important role in shaping law and policy, including criminology, criminal justice, and sociology. To review this intersection of law and social science, we begin by reviewing how the two fields are different and then look at the ways the fields have assisted one another. We end with a discussion of issues that must be resolved going forward, particularly as we move from considering if the fields of social science and law should interact at all, to determining how they should interact. Specifically, the chapter will consider:

- two U.S. Supreme Court cases that introduced the use of social science research by policy-making courts, *Muller v. Oregon* (1908) and *Brown v. Board of Education* (1954);
- developments in jurisprudence (the philosophy of law) and psychology from the late nineteenth century to the present day that have encouraged dialogue between the two fields;
- different ways in which psychologists and other social scientists participate as experts in the legal process;
- how courts can decide if scientific research or specialized knowledge in a given area is sound enough to provide a firm basis for expert testimony;
- some of the differences in psychological and legal ways of thinking about problems;
- how involvement with the legal system has affected the discipline of psychology; and
- ethical issues presented by psychology's interactions with the law.

LAW AND SOCIAL SCIENCE: SIBLINGS OR DISTANTLY RELATED COUSINS?

Understanding the extent to which law and social science can influence one another requires that we understand the ways they overlap and differ. Law and social science share some important characteristics. At a basic level, both are concerned with human behavior. Both law and social science change as society changes and as knowledge increases. However, they differ in how they understand and absorb change. Here, we review a few of these differences.

First, social scientists' goal is new knowledge; they try to be skeptical, exploratory, and open to changing ideas based on new information. In psychology, conclusions and theories are subjected to criticism and challenge through peer review and published criticism by other scientists. Law's movement is necessarily gradual. One of law's functions is to ensure social stability. The legal system has a role in maintaining a sense of cultural identity and continuity while slowly incorporating cultural innovation and changing values.

The contrast between law's conservative nature and social science's willingness to experiment can be problematic when social science professionals interact with courts. For social scientists and mental health professionals, being wrong is part of the trial-and-error process of learning. To judges and lawyers, this learning process may seem like unreliability.

Trial courts seek to find out the truth about past events that are the subject of a specific dispute, then make a specific decision relatively quickly with whatever knowledge they have. When the legal process arrives at an erroneous conclusion, an injustice may be done. Justice Harry Blackmun once characterized the difference in these terms:

Science is advanced by broad and wide-ranging consideration of *a* multitude of hypotheses, for those that are incorrect will eventually be shown to *be* so, and that in itself is an advance. Conjectures that *are* probably wrong are of little use, however, in the project of reaching a quick, final and binding legal judgment—often of great consequence—about a particular set of events in the past.

(*Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 1993, pp. 596–597).

Second, law and psychology evaluate behavior differently. Psychologists tend to see the behaviors, abilities, and responsibilities of different people as a continuum and as varying in the same person with different situations. They generally present conclusions in probabilistic terms, not as absolutes. The legal system often requires that people or behaviors be placed in distinct categories: insane or not, dangerous or not, negligent or not, guilty or not.

Third, psychologists and judges may also approach issues differently at the legislative (policy) level. These differences may lead to misunderstanding between the two groups—and often disappointment for social scientists who sometimes feel that courts do not give their work the weight it deserves. One of the functions of social scientists is to empirically test conventional assumptions about human nature. Policy makers are not always interested in or willing to credit research

questioning common sense or community beliefs (Redding, 1999). They may feel it is a community's right to implement policies that reflect its deeply held beliefs.

Finally, part of a judge's job is to uphold or express the symbols of society's basic values (Faigman, 1991). Even when they are interested in empirical research bearing on a decision, data about the assumptions or outcomes of a policy will comprise only one of their considerations. Judges must consider legal rights and duties, the fairness of procedures, the appropriate assignment of power and authority, and legal precedent. Their reasoning determines the conclusions they draw from research facts or whether they consider research at all.

HISTORY OF SOCIAL SCIENCE AND LAW: HOW THE FIELDS HAVE COME TOGETHER

Despite the areas in which social science and law differ, over the years the two fields have coalesced and now frequently influence one another. In the sections that follow, we review the history of law and social science and, in so doing, begin to discuss the similarities between the two. We start with an example of how quickly the two fields merged together in the 20th Century.

From *Muller* to *Brown*: Social Science's Growing Import

In 1903, laundry owner Curt Muller was convicted of violating an Oregon law limiting the workday of women in factories and laundries to ten hours. Muller maintained on appeal, all the way to the Supreme Court, that the state had no right to interfere with his employment contracts.

Florence Kelley, a social worker with the Hull House settlement, recruited future U.S. Supreme Court Justice Louis Brandeis as counsel for the State of Oregon. Hull House and social scientists and psychologists at the University of Chicago had long been interested in approaching social problems through the application of social science research (Faigman, 2004). Brandeis argued that Oregon had a legitimate interest in maintaining the health of its female citizens, that a body of research and expert opinion established that women's health was impaired if they worked long hours, and that, consequently, the state was justified in limiting the number of hours women could work. To support this contention, he appended summaries of 90 studies and reports to his **brief**. (A brief is a written document filed with a court summarizing the issues in the case and making arguments about relevant facts and interpretations of statutes and previous cases. Each side files a brief.)

The Supreme Court upheld the Oregon law. Justice David Brewer summarized the 90 studies in a footnote to the Court's opinion. He noted that, although the studies were not, "technically speaking, authorities," he would "take judicial cognizance of all matters of general knowledge" (*Muller v. Oregon*, 1908, pp. 420–421). He was saying the studies and reports were relevant to the issues the Court had to consider.

Less than 50 years after *Muller*, in *Brown v. Board of Education* (1954), the U.S. Supreme Court cited social science data when it ordered the end of public-school segregation (see Box 1.1). *Brown* overturned the 1896 Supreme Court ruling in *Plessy v. Ferguson* that separate facilities and schools for the races did not violate equal protection if the segregated facilities were equal. In *Plessy*, the Court declared, "We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority" (*Plessy v. Ferguson*, 1896).

In their brief in *Brown* and the four companion cases heard with it, the National Association for the Advancement of Colored People (NAACP) argued that negative psychological effects of segregation were real and inevitable. The NAACP legal team, under the leadership of Thurgood Marshall (later to become the first African-American Supreme Court justice; see Figure 1.1), relied heavily for support of its argument against segregation on facts provided by social science research. These facts had been introduced by expert witnesses at the trial phase and was described in briefs to the Supreme Court.

The Court unanimously ruled that segregated schools were inherently unequal. Although it was not the only reason, the opinion explicitly stated that the decision was based in part on the psychological knowledge presented by the plaintiff. In the opinion, Chief Justice Earl Warren wrote that separating black children solely on the basis of race "generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely to ever be undone. . . . Whatever may have been the extent of psychological knowledge at the time of *Plessy v. Ferguson*, this finding is amply supported by modern authority" (*Brown v. Board of Education*, 1954, p. 494). In a now-famous Footnote 11, the chief justice cited research by a number of social scientists, including Kenneth B. Clark, an African-American psychologist who later became president of the American Psychological Association, and his collaborator and wife, Mamie (APA; see Figure 1.2 for a photo of Kenneth Clark).

In the decades since *Brown*, social science has penetrated deeply into legal culture (Levine & Howe, 1985; Saltzman, Furman, & Ohman, 2016). Courts

commonly discuss social science research in their opinions alongside discussion of legal cases. Private litigants as well as public interest and nonprofit groups often present courts with economic, social, or psychological findings along with analyses of law. It is debatable whether courts are using social science data properly or simply selectively to bolster a justice's opinion (Faigman, 1989, 1991, 2005, 2017), but it is clear that courts use such information more than ever before.

Box 1.1

Dolls and *Brown v. Board of Education*

Kenneth and Mamie Clark's racial identification study was one of the most famous studies included in the plaintiff's brief to the Supreme Court (*Brown v. Board of Education*, 1954). 253 African-American nursery and elementary school children, 134 who attended segregated schools in Arkansas and 119 who attended racially mixed schools in Massachusetts, saw four dolls, all wearing only white diapers and in the same position. The children were given the following instructions:

1. Give me the doll that you like to play with the best.
2. Give me the doll that is a nice doll.
3. Give me the doll that looks bad.
4. Give me the doll that is a nice color.

The following table summarizes the results:

**Choices of Subjects in Northern (Mixed Schools)
and Southern Segregated Schools Groups
(Requests 1 through 4)*—Percent Choosing the Doll**

<i>Choice</i>	<i>North (%)</i>	<i>South (%)</i>
Request 1 (play with)		
black doll	28	37
white doll	72	62
Request 2 (nice doll)		
black doll	30	46
white doll	68	52
Request 3 (looks bad)		
black doll	71	49
white doll	17	16

Request 4 (nice color)

black doll	37	40
white doll	63	57

* Individuals failing to make either choice not included, hence some percentages add up to less than 100.

The results do not provide straightforward support for the assertion that segregated schools are more psychologically deleterious than integrated ones. Both groups preferred the white doll, but the Northern children showed a stronger preference for the white doll than the children in segregated Southern schools. The Clarks argued that the Southern children were more adjusted to feeling inferior. Thurgood Marshall debated using the study. He finally decided that the findings on the whole demonstrated segregation's harm. Reports of the study may have gained support for the integration movement. Among the public, the details were less important than the disturbing discovery that black children rejected a doll because it looked like them. (*Source*: Kluger, 2004).

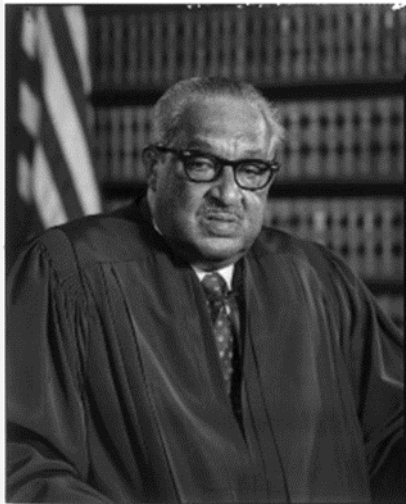


FIGURE 1.1

**U.S. Supreme Court Justice
Thurgood Marshall**

*Thurgood Marshall (1908–1993) was legal director of the NAACP during the years the organization brought lawsuits challenging racially segregated schools. A prime advocate of the use of social science data in school desegregation suits, he argued *Brown v. Board of Education* (1954) before the U.S. Supreme Court. President Lyndon B. Johnson appointed him to the U.S. Supreme Court in 1967. He was the first African American U.S. Supreme Court justice. He served until he retired in 1991. Library of Congress.*

The Beginnings: Pragmatic Jurisprudence and the New Social Sciences

The progress of social science from a small part in *Muller* to a central role in *Brown* reflected both the growing sophistication of the new human sciences and the rise of a legal culture conscious of social context and deliberate in its use of law to achieve desired social ends (Faigman, 2004). A review of some historical movements in the philosophy of psychology and law can help us understand current debates about how the law should use social science.

Traditional Jurisprudence

In traditional U.S. jurisprudence (philosophy or science of law), specific laws were thought of as derivatives of a natural universal law as discussed by scholars, classical philosophers, and religion. In the late nineteenth century Christopher Columbus Langdell, dean of the Harvard Law School, articulated and modernized this view of law (Auerbach, 1976). Langdell believed that judges and lawyers should identify the legal principles underlying each particular case, just as a mathematician solves a geometry problem by analyzing the shapes and applying the appropriate geometric theorems. Under this view, judges did not make law; they “found” it in the unchanging realm of natural law. Langdell developed the case method of study to hone students’ skills at this kind of analytical and deductive reasoning (logical reasoning from first principles).



FIGURE 1.2

Kenneth B. Clark

*Professor Kenneth Clark and Dr. Mamie Clark conducted the doll experiments (see Box 1.1) that were cited by the U.S. Supreme Court in *Brown v. Board of Education* (1954). Professor Clark, a distinguished social psychologist, later served as president of the American Psychological Association. He and his wife were very active in antipoverty programs and organizations throughout the years. Professor Clark died in 2005 at the age of 90. Dr. Mamie Clark died in 1983. Associated Press Collection.*

Experience, Not Logic

Social science and historical data were not relevant to Langdell's approach. However, other legal theorists rejected the existence of universal natural law. Oliver Wendell Holmes Jr. and Louis Brandeis, who both served on the U.S. Supreme Court, saw law as a way of establishing social policies—a means to an end. Inductive reasoning (reasoning from the particular to the general) should be used to learn from experience. Through observation of the world, judges and scholars could determine what rules led to what outcomes. They maintained that good solutions to legal problems could and should vary according to the social context and the goals of social policy. Holmes wrote,

The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. (From Oliver Wendell Holmes Jr., *The Common Law*, 1881; excerpted in Monahan & Walker, 2006, p. 2.)

Roscoe Pound's **sociological jurisprudence** went further. Pound, who had a doctorate in botany before going to law school, believed that law should proceed on the basis of "social facts." Law students should study the law in action, the actual social effects of legal institutions and doctrines (Pound, 1906, 1908, 1910). Another influential jurist, soon-to-be U.S. Supreme Court Justice Benjamin Cardozo, wrote on psychological and sociological influences on judicial reasoning and decision making (Cardozo, 1921). Pound and Cardozo encouraged judges to rethink precedents and to review more carefully the psychological and sociological premises for their decisions.

These different views of jurisprudence altered the way law is understood in the United States. Most U.S. students of law now accept that the law on the books and the law in action—to use Pound's famous aphorism (Pound, 1910)—are two different matters. Legal scholars and judges continue to value precedents, legal procedures, and formal reasoning from principles, but many are now responsive to information and ideas from the social sciences as well. Faigman (2005) contends that greater attention to science and the social sciences in law is inevitable: "If the Constitution is to 'endure forever,' its guardians will have to read it in light of the science of today and be prepared to incorporate the discoveries of tomorrow" (p. 364).

Developments in Psychology

At the time that Holmes, Brandeis, and Pound were developing their ideas about law, the social sciences were still relatively new disciplines. Wilhelm Wundt, working in the second half of the nineteenth century, was one of the first experimental psychologists. In 1892, a student of Wundt's named Hugo Munsterberg became a vigorous proponent of the "new psychology." In *On the Witness Stand* ([1908] 1923), Munsterberg argued that this new science had much to offer the legal world. He discussed memory and perception related to eyewitness testimony, suggestibility and untrue confessions, applications of the physiology of emotion to lie detection, hypnosis and hypnotic treatment for criminal impulses, and other methods of crime prevention or treatment (Munsterberg, [1908] 1923). Munsterberg complained that lawyers and judges, unreasonably in his view, refused to accept his contributions. In a law review article, John Wigmore (1909), the most prominent scholar of the law of evidence, replied that the research was too tentative and general to be of much use to the courts. However, at the end of the article in which he dismissed Munsterberg's work, Wigmore affirmed the potential value of a partnership between law and social science.

Legal Realism

In the 1930s and 1940s, **legal realism** took Brandeis's and Pound's pragmatic approach to law further. For this school of thought, what is (social reality) was as important as what ought to be (normative values) (Minda, 1995). Legal realists understood law as a vehicle for advancing social goals, a means of policy making. **Policy** refers to the general course, methods, or principles adopted by a government or legislature to guide its development of legislation or management of public affairs (Black's Law Dictionary, 2019; Webster's, 2003). Policies, unlike hypothesized immutable principles of universal law, change with time and are developed in complex cultural and political contexts.

During this period, research in psychology and law was becoming more sophisticated. By 1942, Albert Poffenberger devoted four chapters of an applied psychology textbook to psychology and law research, including careful experiments on perception, memory, and language related to legal topics. The legal realists pursued working relationships with psychologists to help in the examination of "social reality" (Schlegel, 1979, 1980).

The direct impact of legal realism should not be exaggerated. The movement more or less died out by the 1950s (Schlegel, 1979, 1980). Nonetheless, the idea

that knowledge based on experience (empiricism) should replace formal logic in arriving at legal conclusions took a large step forward. Most subsequent jurisprudence accepts, however, at least in part, the realists' premise that legal process takes social context and social facts into account in decision-making (Monahan & Walker, 2017).



WAIT . . . I WANT TO KNOW MORE

We hope that this textbook does more than just teach you about social sciences and the law. We hope that it helps inspire you to think more about whether this is a field in which you would like to work and what you would like to do in this field. In order to help you answer these questions, each chapter provides additional resources that discuss where you can go for the most recent information on the subject and potential employment opportunities, including websites by and about people who work in this area.

Where to Go to Learn More About Law and Psychology

- *Illinois Program in Law, Behavior, and Social Science*

<https://www.law.illinois.edu/iplbs>

The University of Illinois at Urbana-Champaign's Program in Law, Behavior, and Social Science brings together an interdisciplinary group of scholars to study a number of issues, many of them pertinent to psychology and law. A review of the papers on this website will give you a good sense of current research in the law and social sciences realm.

- *The Empirical Legal Studies Blog*

<http://www.elsblog.org/>

The Empirical Legal Studies Blog provides up to date information about ongoing empirical research on legal issues. There are also a number of helpful links listed at this website.

- *The European Association of Psychology and Law*

<https://www.eaplstudent.com/>

The EAPL's website has great resources on international research on law and psychology and opportunities to study law and psychology outside of the United States.

Where to Go to Learn More About Jobs in Law and Psychology

- *American Psychology-Law Society's (APLS) Website*

<http://www.apadivisions.org/division-41/education/students/careers.aspx>

This specific section of APLS's website covers current careers in the field of law and psychology. You can also find other information about current research, programs with a legal psychology focus, and current job openings.

- *University of California, Irvine's Center for Psychology and Law*

<http://psychlaw.sococo.uci.edu/for-students/job-postings/>

Here you can find current job postings for academic careers in psychology and law. In reading the job requirements, you can get a better sense of the credentials required for the position.

Law and Psychology After World War II

During World War II, the armed forces used social scientists and psychologists to help assign and train soldiers, to maintain morale, to understand and communicate with citizens of allied and occupied countries, to treat war trauma, and to help soldiers readjust to civilian life. The partnership of the social sciences with government continued after the war. Social scientists helped design and implement President John F. Kennedy's New Frontier and President Lyndon Johnson's Great Society social programs.

New schools of jurisprudence (the philosophy of law) developed in the postwar period as well. The legal process movement, acknowledging that values and beliefs about good policy may elude consensus, stressed the importance of procedural due process and fairness (see Chapter 2; Minda, 1995; Slobogin, 1995). The law and economics movement, a distant cousin of legal realism, undertakes to analyze and evaluate legal problems in terms of their economic implications. Retired judge (and professor) Richard Posner, associated with this school of thought, advocates legal and governmental pragmatism: an emphasis on consequences in decision making rather than on formal principle and on the balancing of interests (Posner, 2003). The social science and law movement applies knowledge and techniques from all the social sciences to resolving legal issues. Critical legal studies, feminist legal studies, and critical race theory examine law as a social institution mediating control of various resources (Minda, 1995).

The impact of empirical research has grown such that there are currently a number of highly regarded legal journals and societies considering empirical research and the law, including the Society of Empirical Legal Studies and the Journal of Legal Studies, amongst many others. Adherents of these new movements, many with homes in prestigious law schools, are receptive to research and empirical observation to further their analyses and to persuade others of the correctness of their views.

Today, psychologists, social workers, psychiatrists, sociologists, anthropologists, and other social scientists participate both directly and indirectly in all three branches of government and influence policy at every level (Saltzman, Furman, & Ohman, 2016). Clinical **forensic** (“belonging to courts of justice”; Black’s Law Dictionary, 2019) practice in general, and subspecialties in criminal and family law, have expanded greatly as well. Mental health professionals now contribute to the day-to-day administration of justice. They serve the courts as expert witnesses, and provide psychological services to the police and correctional systems. Family and juvenile courts work routinely with allied social service agencies. Clinical, cognitive, developmental, and social psychologists do the basic research on which expert opinion is grounded. Research by cognitive and social psychologists into issues such as the reliability of eyewitness testimony, false confession, juror biases, and juror decision making also influences the trial process, directly through expert testimony, and indirectly by suggesting ways judges and legislators may develop better procedures. Social scientists and legal scholars now quickly examine the legal implications of new developments in psychology and other social sciences.

Growth of a New Field

The expanded use of psychological research and mental health professionals by the courts and legislatures has stimulated the growth of the new field of law-psychology. Law-psychology is a recognized subspecialty within psychology supported by a substantial infrastructure of training courses, journals, associations, and credentialing bodies (Levine & Howe, 1985). The American Psychology-Law Society, founded in 1959 with 101 members, has become the Psychology and Law Division (Division 41) of the APA (Grisso, 1991) and has about 4,000 members. One of its web pages describes educational and vocational opportunities in this field (see Wait . . . I Want to Know More). Graduate schools of social work are also providing training in law and social science. The National Association of Social Workers has a legal fund to promote interest in legal issues and legal education in social work.

A comparable infrastructure has developed within the field of law. Legal scholars write law review articles about social science and legal issues (Hafemeister, 1992). Basic law school courses use texts that devote large sections to social science, psychological, and clinical research as it applies to law (Faigman et al., 2017; Moenssens et al., 1995). Many law schools offer separate courses in law and social science using **casebooks** (textbooks that teach a field of law through the presentation and discussion of court cases and related materials). Some law courses provide technical introductions to statistical and research methods so that some future lawyers may be equipped to evaluate the strength of social science studies (Barnes & Conley, 1986). The Supreme Court's *Daubert* decision (*Daubert v. Merrell Dow Pharmaceuticals*, 1993; see below) has increased the need for scientifically literate judges and lawyers. The decision requires judges to decide what science is sound enough to be admitted as evidence in lawsuits, and to shut the gate on "junk science." To influence the judge's decisions, practicing lawyers must be prepared to argue the scientific validity of expert evidence (Levine, 1999).

Problem-Solving Judges and Therapeutic Jurisprudence

As courts have struggled with how to deal with complex social problems, such as crimes by the mentally ill and juvenile crime, there has been an increased focus on the practical implications of recognizing social facts and social context. In some areas of law, the focus has shifted from the immediate disposition of cases to planning what will happen to participants after the case is decided (Rothman & Casey, 1999). Many courts are adopting a problem-solving approach to law in action and are seeking to collaborate with community organizations. In some jurisdictions, legislators have instituted legal system reforms or created new courts, such as drug courts, mental health courts, housing courts for the homeless, and integrated domestic violence courts, with the goal of holding defendants accountable while coordinating legal, social, psychological, and medical services to produce a therapeutic effect (Eaton & Kaufman, 2005). The last few decades have also seen an increasing emphasis on expanding the use of non-adversarial forms of dispute resolution, both traditional procedures like mediation and newer procedures like family conferencing, where parties to a conflict are brought together and empowered to resolve the conflict themselves. Together, these approaches, courts, and procedures are sometimes described as an *alternative justice system*, one that emphasizes collaboration of parties, future planning and prevention, and reconciliation of needs and interests.

These developments have found conceptual and empirical support from a school of thought called **therapeutic jurisprudence**. Developed in the 1990s by David Wexler and Bruce Winick, therapeutic jurisprudence proposes to study how legal rules and actions affect the mental health of participants and how knowledge about mental health can shape the law (Wexler, 1990; Wexler & Winick, 1991, 1996a, 1996b; Winick, 1997). The movement attempts to combine a proactive helping perspective with a traditional “rights” perspective. Its adherents believe that, within the important constraints of due process and justice values, laws, legal procedures, and legal actors should attempt to maximize the therapeutic effects of law and minimize the harmful effects.

AVENUES OF PARTICIPATION IN THE LEGAL ARENA

The legal system uses information provided by social science in a number of different ways. In an effort to better understand how the courts should analyze the admissibility of social science research, legal scholars have proposed a number of frameworks within which to consider the proposed evidence. Monahan and Walker (2017) proposed that social science evidence be classified in three categories:

- **Social Facts**—Social facts are the evidence presented by social scientists about the issues in a trial (the facts that will form the basis for the outcome). This kind of evidence was first described by Kenneth Culp Davis as *adjudicative facts* (Davis, 1960). The presentation of adjudicative facts is the most familiar use of professionals in the court system: *the expert is asked to testify about a factual question in contention*. Sometimes an experiment may be crafted specifically to provide adjudicative facts for a case. For example, in a trademark case, the expert may devise an experiment to test whether the defendant has infringed on the plaintiff’s trademark by using one that is too similar (see Monahan & Walker, 2017). Social scientists and mental health professionals only testify; they do not make decisions in legal proceedings. The decision is up to the ultimate fact-finder: a judge in a bench trial, the jury in a jury trial, and a review board in an administrative hearing.
- **Social Framework Evidence**—Monahan and Walker noted sometimes expert witnesses are not asked about any of the specific facts in a trial. Instead, the social scientists provide the jury or judge

with general information that will help them evaluate and understand the evidence (Monahan & Walker, 2017; Walker & Monahan, 1987). Social framework testimony may be especially useful when judges and juries are dealing with unusual or unfamiliar social or psychological phenomena, but it is not always admitted by courts (*see* Box 1.2).

- **Social Authority Facts**—These are general social science findings used by courts in deciding questions of law or policy. Davis referred to these as legislative facts. We discuss this category in more detail in the next section.

Box 1.2

Social Framework Testimony: Part of an Effective Defense

On May 24, 2012, Darrill Henry was sentenced to life in prison for murdering two people. At trial, Mr. Henry sought to introduce an expert to testify about suggestibility and lineups. The court refused Mr. Henry's request on the grounds that Louisiana prohibits expert testimony on all eyewitness identification issues. The Louisiana Supreme Court upheld the conviction. Three years later, the United States Supreme Court denied review of the case (*Henry v. Louisiana*, 2015). Is denial of social framework evidence of this nature a denial of due process? See Chapter 2 for discussion of due process.

Social Science and Policy: Presenting Social Authority (Legislative) Facts

When social scientists provide information that helps illuminate a policy decision or contributes to the formulation of new laws, they are providing social authority or legislative facts. There are a number of ways such information is communicated.

Informing legislators. Social scientists influence policy by working for executive agencies like state education and welfare agencies or the National Institutes of Health. They may act on legislative mandates to research public health and behavioral problems or help develop programs to implement legislative goals. Legislators frequently review relevant social science research when considering social problem legislation (e.g., sexual predator laws that permit civil commitment of repeated sex offenders after they have served their sentences). Individual legislators may have professionals on their own staff who prepare research

summaries. Congress may invite professionals to sit on special commissions to review research and to make recommendations. Congressional committees can request reports from government research agencies and can ask professionals to testify at committee hearings. Government agencies like the National Institute of Justice and the Department of Education fund academic research and employ social science researchers directly to help them develop programs and initiatives and to evaluate program and policy effectiveness.

Lobbying. Lobbyists and advocacy groups bring social science studies to the attention of legislators when the findings support policy choices beneficial to the group they represent. To be effective, advocates can't just say they want something; they must also argue that their position represents good policy, not merely their "special interests." Citing research justifying their support or opposition to policies helps them to accomplish their goals. For instance, Foster Youth in Action (FYA) connects a nationwide community of foster youth leaders and local partners to transform foster care policies. FYA uses social science research both for advocacy and in analyzing their own programs.

Psychologists and other mental health professionals lobby to promote their own "guild" or professional interests, to advocate for their clients, and to disseminate research. The APA employs professional lobbyists who advise legislators of the practical or socially useful aspects of research. The American Psychology-Law Society has provided informal luncheon briefings on various subjects to congressional staffers.

No. 88-478

IN THE
Supreme Court of the United States
 OCTOBER TERM, 1989

STATE OF MARYLAND,
Petitioner,
 v.
 SANDRA ANN CRAIG,
Respondent.

On Writ of Certiorari to the
 Court of Appeals of Maryland

**MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE
 AND BRIEF FOR AMICUS CURIAE
 AMERICAN PSYCHOLOGICAL ASSOCIATION
 IN SUPPORT OF NEITHER PARTY**

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March 2, 1990

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FIGURE 1.3

The APA Amicus Brief to the Supreme Court Reviewing *Maryland v. Craig* (1990)

The brief presented psychological evidence supporting the position that child witnesses in sex abuse cases should testify using closed-circuit video to enhance the completeness and accuracy of their testimony. The brief was successful in the sense that it was cited in the majority opinion as part of the rationale for the Court's majority opinion. See Chapter 7 for a discussion of this case.

Amicus briefs. Social scientists may also influence policy making by the judiciary. Appeals courts make policy in deciding cases when they specify the governing rule of law. One of the ways social scientists can bring research to the attention of the appellate courts is by filing *amicus curiae* briefs. **Amicus curiae** (“friend of the court”) briefs are submitted by a person or a group who are not a party to the case but would like to inform the court of its ideas or knowledge about the issues being argued. The briefs may be filed in support of one of the parties to the case or may be submitted to be helpful to the court without supporting either side (see Box 1.3 and Figure 1.3).

Social science and mental health organizations, such as the APA and the National Association of Social Workers, file *amicus briefs* for a number of reasons: when they feel the research may help a court to come to a more informed decision about an important issue; to protect the interests of a client or subject group, for example, children or persons with an intellectual disability; or to protect professional guild interests, for example, to argue that neuropsychologists are qualified to testify as to causation of a head injury (*Landers v. Chrysler Corp.*, 1997). The organizations call on members with expertise to prepare the briefs in cooperation with legal counsel. The briefs summarize and evaluate pertinent research, and explain how the research bears on a legal point at issue in the case.

Are amicus briefs effective? Observers disagree about how much social science research has actually influenced court decisions, Supreme Court decisions in particular. Briefs submitted by prestigious organizations such as the APA may garner more judicial attention than others. The APA has a reputation for submitting well-written arguments containing relevant research information. Sometimes (e.g., *Maryland v. Craig*, 1990), the briefs are cited in court decisions, showing they are not without influence.

Faigman (2005) observed that the results are mixed. He noted that the U.S. Supreme Court sometimes: (1) conformed its conclusions to empirical findings; (2) misapplied the findings in coming to its conclusions; (3) found the research inconclusive; or (4) dismissed the relevance of a particular study. Nonetheless, Faigman argues that social science research has changed the judicial process. When the justices have to deal with research, they can’t base their decisions on assumed facts. They must clarify the value premises underlying their arguments. If they disregard research data, they will not be persuasive unless they do so explicitly and explain their reasons.

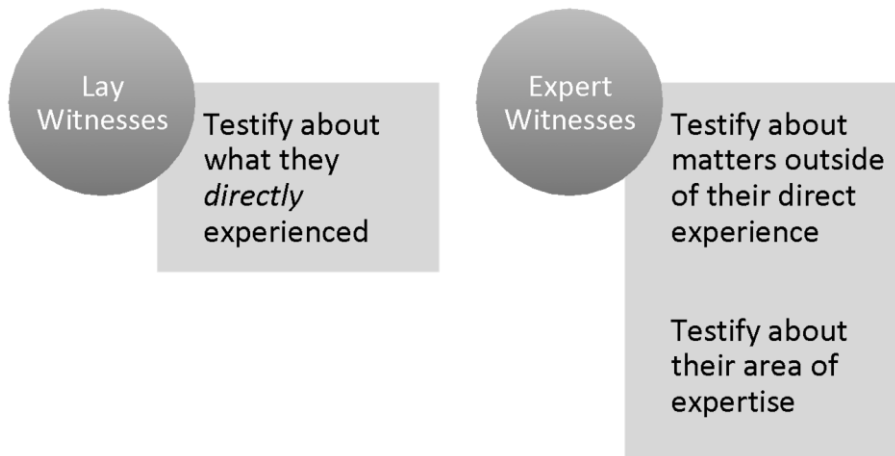
Box 1.3**Social Scientists as Friends of the Court**

In 2017, the APA filed an amicus brief with the Michigan Supreme Court in the case of *People v. Thomas*. The issue in the case was whether a police officer could present a single-picture lineup with only a picture of the alleged suspect. The APA argued that “the eyewitness identifications [here] were too unreliable to be admitted under the Due Process Clause.” The Michigan Supreme Court permitted the APA time to speak at oral argument (which is a fairly rare occurrence). Videotape of the oral arguments can be found at https://www.youtube.com/watch?v=kjna_Kn0mLc. The court ultimately agreed with the APA’s position under the circumstances of this case (there was no emergency to explain the use of such a lineup and the police officer asked “is this the guy who shot you” when presenting the picture).

If you watch the video of the oral argument, you will notice that it did not take place in a traditional courtroom but was held in a more accessible public location. Appellate courts will do this from time to time to allow the public more access to their proceedings. We highly encourage you to try and attend one in your state.

WHEN ARE THE FINDINGS OF SOCIAL SCIENCE AND PSYCHOLOGY SUFFICIENT TO BE ADMITTED INTO EVIDENCE IN A LEGAL PROCEEDING?

The courts must decide whether or not to admit testimony as “expert” testimony. To be admitted, **expert testimony** has to meet two criteria: it has to help prove a fact at issue (**probative value**), and the probative value has to outweigh any prejudicial or misleading effects the information might have. Of course, the testimony also has to be “expert.” Most witnesses testify to what they experienced directly. With some exceptions, they can’t just give their own opinions. Expert witnesses are allowed to express opinions (see chart below). Expert opinions are not considered mere conjecture because they are based on some special knowledge or skill. The testimony should provide something beyond common information known to most jurors. It is up to the courts to decide whether or not to admit testimony as “expert” testimony.



Traditionally, someone was considered an expert, qualified to give testimony, if he or she had the appropriate credentials or experience. But as science and technology advanced early in the twentieth century, fads and false starts began proliferating. Courts became concerned about the introduction of so-called “junk science” into evidence. What standards should courts use to decide if scientific evidence was reliable enough to present to a jury, which might be overly influenced by an expert’s credentials, jargon, or use of fancy instruments?



Putting It into Practice: Developing a Witness List

Your client is, unfortunately, injured in a terrible car accident. She believes that the driver purposefully hit her in a moment of road rage. Her injuries were quite extensive, and she had to miss class and work.

Your client wants to argue that the crash was intentional and caused by the defendant. The defendant states that it was a mere accident. You have been hired by the plaintiff as an attorney and need to develop a case strategy, including a witness list. Discuss and consider the next three questions.

- What are some examples of lay witnesses who might testify?
- What are some examples of expert witnesses who might testify?
- What would have to be shown for any of these witnesses to be allowed to testify?

The *Frye* Standard

James Frye, a defendant in a murder case, appealed his conviction on the grounds that the trial court erred in refusing to admit a polygraph test, which he had passed. The federal appeals court affirmed the lower court ruling on the ground that the expert evidence, the lie detector test, had *not gained general acceptance* among psychologists and physiologists. After this decision, the standard used in federal courts and in many state courts to determine whether to admit scientifically based testimony (known as the *Frye* standard; *Frye v. United States*, 1923) was whether the expert's opinion was developed using methods generally accepted in the relevant professional community. (Compare summaries of the evidence on the validity of polygraph tests in Faigman et al., 2017, and Iacono & Lykken, 2005.) When a lawyer wished to introduce scientific testimony, the judge held a hearing to determine if the testimony met the *Frye* standard.

The *Frye* standard posed difficulties. The main problem was that it *confused quality with consensus*. If a technique or theory was widely used, it was admitted even if there was little or no data supporting its scientific validity. On the other hand, the standard could be used to exclude cutting-edge science, because the work was not yet generally accepted. In 1975, the Federal Rules of Evidence were amended to make the procedures used in federal trial courts for admitting expert testimony easier and to clarify the basis of expertise.

The *Daubert* Decision and Social Science

The U.S. Supreme Court reviewed the issue of scientific testimony again in *Daubert v. Merrell Dow Pharmaceuticals* (1993). The appeal, described in Box 1.4, raised the question of when scientific evidence resulting from the use of new techniques should be considered valid.

Justice Harry Blackmun, writing the opinion of the Court, said that, although the 1975 Federal Rules of Evidence were meant to encourage flexibility, not everything was admissible. Before exposing the jury to an expert's opinion, the trial judge must decide whether the opinion has a valid scientific basis. To make the decision, he or she should examine the relevance and reliability of the proffered testimony carefully in an adversary hearing without the jury present. The aim of the hearing, the opinion explained, should be to assess the "scientific validity" of the underlying principles and research that form the basis for the expert opinion.

Box 1.4**A Legal Case in Point: *Daubert v. Merrell Dow Pharmaceuticals*, 1993**

Two children born with birth defects and their mothers sued the Merrell Dow Pharmaceutical Company. They claimed that their birth defects were caused by Bendectin, a drug prescribed to control morning sickness in pregnant women. Both sides acknowledged that the mother had taken the drug. The question was whether the drug caused the birth defects. Merrell Dow introduced experts who reviewed thirty published epidemiological studies involving 130,000 patients. They testified that there was no relationship between taking Bendectin and human birth defects.

The plaintiffs tried to introduce expert testimony by eight equally qualified experts who concluded that Bendectin did cause birth defects. The plaintiffs' experts' opinions were based on in vitro (test tube) studies of the organic effects of the drug, animal studies, and pharmacological studies showing a link between the chemical structure of Bendectin and other teratogens (agents that cause fetal deformity). They also wanted to introduce a meta-analysis of the epidemiological studies, which was undertaken specifically for the litigation. Meta-analysis is a statistical method, relatively new at the time, that is used to pool the results of a large number of studies.

The trial judge refused to allow the plaintiffs' experts to testify. The trial court ruled that the methods the plaintiffs' experts used to establish that Bendectin causes the defects (an adjudicative fact) did not have general acceptance in the field (*Frye* standard). The judge said that the generally acceptable approach for establishing causality was through human epidemiological studies, not animal or in vitro studies. He would not admit the meta-analysis because it had not been carried out for an independent scientific purpose and had not been reviewed and commented on by other scientists (for example published in a journal where articles are reviewed for methodological soundness by other experts before acceptance, or discussed at a conference). Because the plaintiffs had no way to prove Bendectin had caused the birth defects without their experts' testimony, the case was dismissed.

The plaintiffs carried their appeal to the U.S. Supreme Court. The Supreme Court's decision set forth new criteria for judges to apply in deciding whether an expert was basing an opinion on reliable or dubious science. On remand (return to a lower court for reconsideration), the Ninth Circuit Court of Appeals again sustained the trial court's decision, and the Dauberts finally lost the case.

To establish criteria for scientific validity or solid scientific knowledge, the Court turned to epistemology (theory of knowledge) and to the philosophy of science. The opinion defined knowledge not as certainty, but as facts or ideas that are accepted as truth on good grounds (warrants for knowledge). Good grounds meant that the knowledge was derived from use of the “scientific method.” The opinion specified and, in 2011, the Federal Rules of Evidence clarified, the criteria that federal judges might use to determine whether testimony could be considered scientific knowledge:

- Are the ideas capable of being tested, that is, “falsified” (disproved)?
- Have the methodologies and ideas been subject to peer review through publication or other means?
- Is there general acceptance of the methods used in the appropriate scientific community? Do experts in the field reasonably rely on the method?
- Is there a known or potential rate of error in the use of a technique, measurement, or classification procedure? (See, for example, discussions of error rates in prediction of dangerousness in Edens et al., 2005; Miller, Amentia, & Conroy, 2005.)
- Are there professionally accepted standards for the correct application of the technique?

The Court noted that scientific testimony did not necessarily have to meet every one of these criteria to be admitted; rather, the criteria were intended to provide some guidance for the trial judge in deciding the admissibility of scientific testimony.

In subsequent cases, the U.S. Supreme Court made it clear that federal trial judges may also exclude evidence when they believe that the underlying methodology is sound but “there is simply too great an analytical gap between the data and the opinion proffered” (*General Electric Co. v. Joiner*, 1997). In that case, an expert witness’ testimony about why a tire failed was not admissible because the underlying method of determining the tire’s propensity to fail was not deemed valid for that purpose (*Kumho Tire Co. v. Carmichael*, 1999; see Federal Rule of Evidence 702).

Daubert’s impact. The **Daubert standards** make federal trial judges the gatekeepers who admit or exclude expert testimony from the trial after hearing pro and con arguments at a preliminary adversary hearing. (Trial judges in state

courts that have adopted the *Daubert* standards perform the same function in those courts.) This adversary hearing is the first crucial step in determining whether the evidence will ever reach the fact-finder.

In most cases it will also be the last step as the Supreme Court has ruled that preliminary *Daubert* decisions will be reversed only if the judge abuses his or her discretion. The abuse of discretion standard means that, unless the trial judge's decision is almost completely without foundation in the evidence presented at the hearing, an appellate court will sustain the ruling. In *Weisgram v. Marley* (2000), the U.S. Supreme Court went further and held that if an appellate court found the underlying science insufficient or too speculative, the appellate court could even dismiss the case on its own without having to remand the case to the trial court for yet another hearing. Thus, in cases in which either side seeks to admit scientific testimony, lawyers and judges will have to take the admissibility of scientific evidence very seriously.

At present, it is unclear how frequently courts are exercising the gatekeeping function by excluding expert testimony based on unreliable social science data. Although some find that judges are acting as active gatekeepers (Cecil, 2005), others argue that courts seem to have adopted very liberal standards of admission, relying on the adversary process and cross-examination to expose weaknesses in the science underlying expert opinions and leaving it to the fact-finder to weigh the expert's testimony or reject it (Blanck & Berven, 1999; Lipton, 1999; Shuman & Sales, 1999; Studebaker & Goodman-Delahunty, 2002).

For judges to evaluate expert testimony actively and well, they will need some understanding of scientific methods and reasoning. Most judges have little training in scientific method, scientific practices, and technical language. Given time pressures, they may not be able to delve deeply into the questions that occupy the attention of scientists. At present, at least as reflected in the result of simulation studies, judges, especially those without scientific training, are relatively insensitive to good research design in the social sciences (Cutler & Kovera, 2012; Kovera & McAuliff, 2000a, 2000b; Kovera, Russano, & McAuliff, 2002). Lawyers will also have to be more aware of the underlying scientific issues to effectively present, defend, or challenge expert testimony. Pretrial briefs supporting or challenging expert evidence are already more common. Lawyers and psychologists must learn to understand and use each other's language (Levine, 1999). Treatises such as Faigman et al. (2017), which evaluate the status of the science underlying areas of commonly offered expert testimony, are consulted and used by judges and lawyers regularly.

Expert panels. Judges may also make more use of their authority to appoint independent experts to help them evaluate complex evidence (Rule 706, Federal Rules of Evidence). Some members of the American Association for the Advancement of Science (AAAS) and the APA have also supported the use of neutral panels. However, it is not always clear that judges choose “impartial” panels. Lawyers believe cross-examination (or the traditional adversarial method) will lead to the fairest decisions (Monastersky, 1998).

Research into the effect of opposing experts on jurors’ understanding of expert evidence has shown that dueling expert opinions only makes jurors more skeptical of all evidence (Levett & Kovera, 2008). Additionally, there is evidence that jurors find expert evidence more credible merely because the judge has allowed its admission at trial (Schweitzer & Saks, 2009). Despite these questions, judges are beginning to appoint panels of experts in highly technical cases (Faigman et al., 2017).



Bringing It into Focus: Making a Murderer

Throughout this textbook we will introduce you to movies that can help you understand the topics raised here and that may be helpful for class discussions. In the Seventh Episode of Season 1 of the documentary “Making a Murderer” (which we will discuss throughout the book), the defense attempts to attack the credibility of a test that the prosecution uses to show that a blood sample was not tainted. In these scenes, you can see the defense use an alternative expert witness to try and question the reliability of the scientific process used in this case (see Season 1, Episode 7 starting around 42:02 for the prosecution’s expert witness).

Technical or other specialized knowledge. Does a person’s knowledge need to be based on rigorous science to be accepted as “knowledge”? What about knowledge acquired from experience and trained observation by clinicians and other practicing applied psychologists? The U.S. Supreme Court, in *Kumho Tire Co. v. Carmichael* (1999), accepted testimony based on “experience.” But the trial judge still acts as a gatekeeper with a *Daubert* hearing and analysis in cases in which the expert offers testimony on the basis of “experience,” just as the judge would if the expert were offering to testify on scientific grounds. Evidence that is too “speculative” may not be admissible (*Weisgram v. Marley*, 2000).

So far, forensic scientists (including clinicians) are rarely, if ever, barred from testifying because of limitations in the underlying science (Faigman et al., 2017;

Shelton, 2010; Slobogin, 1999). The *Kumho Tire* opinion should encourage judges to engage in greater scrutiny of the scientific research underlying testimony by practicing clinicians about such issues as diagnoses of mental illness, the prediction of dangerousness, or custody decisions. However, in the future, forensic scientists and clinical experts may have to become more knowledgeable about the scientific basis for their expertise, and be able to defend it against challenge, especially as new knowledge develops and as lawyers and judges become more sophisticated about the scientific issues.

Rethinking social framework evidence. Faigman, Monahan, and Slobogin (2014) have proposed a new way to consider the admissibility of expert testimony. The authors address a problem noted at the start of this chapter, that most research, social science research or otherwise, considers means and group trends while the law often requires the application of that research to a particular case. Faigman et al. (2014) are concerned that courts are not considering the tension that this places between what the research has actually found and how the expert is using it in in this case.

To remedy this problem, they propose that courts apply the five factors that have arisen out of the *Daubert* progeny ((1) relevance, (2) qualifications, (3) scientific validity, (4) added value (or helpfulness), and (5) unfair prejudice) differently depending on the nature of the expert evidence at issue. Building upon the three categories of expert evidence discussed earlier in this chapter, courts then determine whether the expert is a “*framework expert*,” one who is testifying solely about empirical research that provides the jury or judge with general information that will help them evaluate and understand the evidence at trial, or if the expert is a “*diagnostic expert*,” one who is applying the research to the case at hand. Each of the above five factors is then analyzed considering that expert’s classification. Whether the courts widely adopt this differentiation has yet to be seen. And, if they do, will that change how courts use social science?



Putting It into Practice: Attacking or Supporting the Admissibility of Expert Testimony

Suppose that the defense in our hypothetical car accident case has a witness who is a phrenologist. Phrenologists study the bumps in people’s heads to make inferences about these individuals’ personality traits. The proposed expert phrenologist wants to testify that the examination of the driver of the other car reveals that defendant is a passive person and would never commit a violent crime. Would this be admissible under the *Frye* standard? The *Daubert* standard? What

arguments could you make for and against the admissibility of this evidence?

HOW LEGAL SYSTEM INVOLVEMENT HAS AFFECTED PSYCHOLOGY

The involvement of psychology in the legal system serves several professional purposes. Researchers receive funding to pursue work of interest to the legal profession and to policy makers. They may derive satisfaction from knowing that their work has meaning beyond the bounds of universities and research institutes. Some researchers actively seek to present their work so that it can potentially influence the legal system. Psychologists testifying at trials contribute to settling cases and often receive generous financial remuneration for their contribution. Attention and recognition by the courts, legislative bodies, and high administration officials enhance the status of the discipline.

Research, Pretrial Hearings, and Cross-Examination

Controversy about the knowledge base of the social and clinical sciences is sometimes discouraging to psychologists, but has also stimulated thinking about methodological, psychological, and legal problems. Because psychologists who testify in court are subject to cross-examination, the quality of research in the pertinent field and the clinical experience on which they base their assertions matter (Matarazzo, 1990). In response to these pressures, experts have learned to be more careful about basic science and clinical conceptualization, and to state limitations of research. The specter of *Daubert* hearings should stimulate researchers to be more attentive to both the rigor and the breadth of their work and to undertake further research to meet objections to admissibility (Levine, 1999).

Internal and External Validity and Causation Versus Correlation

Psychological research often takes place in the isolated setting of the university laboratory with readily available student subjects. Some of this work seems contrived and artificial. The artificiality allows researchers to increase **internal validity** by increasing their control over confounding variables. An experiment is **internally valid** to the extent that the design, method, and analysis allow the researchers to attribute the results (changes in the dependent variable)

to the independent variables they have been varying and not to other factors (see Box 1.5).

When academic psychologists entered the legal arena, **external or ecological validity**, the degree to which experimental findings can be generalized to real-life situations, became an increasingly important issue. Psychologists who wish to influence the legal system have to be able to answer the following questions: do people actually behave in real-life situations the same way they behave when they are subjects in an experiment? Do they behave the way they say they would behave on a questionnaire? Do the variables the psychologist studies really reflect the legal issues the studies are meant to illuminate? As our legal colleagues say, “Are the studies on point?” That is, are they specifically relevant to an issue in the case at hand?

Researchers also often have to grapple with the fact that certain experimental paradigms or data only allow us to study the correlation between the dependent variable (**the thing being tested and measured**) and the independent variable(s) (**the thing you are manipulating or believe relates or causes the dependent**) and not the causal relation between them. Something has a **correlational** relationship when they tend to occur in the same direction together (e.g., increased ice cream eating and sun burns). Something is **causational** if it actually the reason or the mechanism for something else (e.g., increased (unprotected) sun exposure is the cause of sun burns and not ice cream eating). As researchers cannot experimentally manipulate or control certain variables (e.g., history of having gone to jail), we often are limited in whether we can draw a causal inference between two variables.

Box 1.5
Ways of Measuring Validity

Studies should be valid. There are a number of ways to measure validity, including the validity of the psychological measures themselves. By way of background, we review some of those terms here. We will discuss them throughout the book in relation to how courts evaluate evidence.

Criterion validity—the measure correlates with another measure we accept as the “gold standard,” if there is one, or the next best thing if there is not.

Construct validity—the test correlates with another measure that purports to measure the essential trait or characteristic of interest.

Face validity—the items of the test seem clearly related to what we say the test is measuring. In the legal context, face validity is related to the fairness of making a decision using the instrument (Hoge et al., 1997).

Discriminant validity—the instrument distinguishes groups of people with known differences in characteristics of interest but similar levels of related characteristics, e.g., disturbed people who have been found competent from disturbed people who have been found not competent.

EMERGING ISSUES

Almost every aspect of psychology's interactions with the legal system presents ethical or professional dilemmas. These are just a sampling of issues that arise in clinical forensic work, in research, and in advocacy efforts to influence public policy:

- How do we decide when there is a sufficient scientific basis for testifying about an issue (regardless of what the judge thinks about the admissibility of the testimony)? Can psychologists ethically agree to undertake work like custody evaluations when the knowledge base is still developing? If they testify, are they obligated to communicate uncertainty to the court?
- What are psychologists' responsibilities to their profession, to the clients, to the attorneys who solicit the testimony, and to the courts?
- What are the ethics of participating in jury selection using social science methods to try to select favorable jurors, or, more likely, exclude jurors with views unfavorable to the side using the jury consultant? In this context, particularly given that many criminal defendants cannot afford this sort of expert support, should psychologists be required to provide pro bono (free) hours?

Ethical Standards and Codes

None of these questions are easy. The APA's code of ethics (2010) contains general ethical guidelines, but these do not provide clear guidance about how to handle ethical issues specific to the law and psychology interactions. Standards have been developed specifically for custody cases (APA, 2009), and the organization has developed specialty guidelines to set practice and ethical standards for forensic psychology generally (American Psychological Association-

Committee on Ethical Guidelines for Forensic Psychology, 2012). Other international societies have promulgated guidelines in a variety of practice fields related to forensic issues (British Psychological Society, 2002; Psychological Society of Ireland, 2005).

Objectivity and Values: Controversy About Amicus Briefs

Psychologists have also been debating basic moral questions about whether and how psychology should attempt to influence policy at the legislative level. The ethical problems and the broader value issues are highlighted when the profession attempts to influence or bring psychological data to the attention of appellate courts or to the U.S. Supreme Court, whose decisions can strongly affect social policies.

The *amicus curiae* briefs submitted by the APA that do not directly involve psychologists' professional interests have often been the subject of controversy within the organization. The public policy briefs lend themselves to controversy because often they lean to one side. Often the controversy cannot be aired before the brief is written. The brief is written by experts in a field selected by the APA committee that commissions the briefs. The brief must be presented to the courts within a short period of time after the court indicates it has accepted the case for review. After the case has been resolved, there is sometimes heated discussion within the profession about whether the brief summarized the research fairly and whether there was sufficient good research to justify policy recommendations on scientific grounds.

Two important questions underlie the debates about the amicus briefs. When is a body of knowledge sufficiently well developed to be brought to the attention of a court in an amicus brief with the potential to affect sweeping policy changes? Behind this question is a larger one: what are and what should be the values of psychology?

Psychology's claim to social authority stems largely from a promise to provide scientific knowledge that is **objective**, that is, without interference from personal feelings, prejudices, or values. However, no one thinks psychology is or should be value-free. The traditional view is that psychologists should be as objective and dispassionate as researchers or scientists, but passionately ethical in their treatment of subjects and patients and in overseeing the application of their findings. This view is explicit in the APA's code of ethics.

Prominent thinkers in law and psychology disagree about the proper social role of psychology. For example, Grisso and Saks (1991) argue that psychologists

have no special claim to wisdom about legal and policy issues and, consequently, should not make policy recommendations. They maintain that psychology's social influence stems from its scientific credibility, and its credibility is compromised when it takes positions about issues whose resolution involves considerations beyond the scientific. Grisso and Saks believe, as does Faigman (2004), that the public is served when pertinent psychological research is presented to the Court, but that the research should be presented without supporting either side. Melton, on the other hand, believes strongly that psychologists should use their knowledge to actively seek to improve society through the legal system (Melton, 1987a, 1990, 1994). In his view, when good research is behind them, psychologists have a duty to take sides. Haney (1993) also believes in a socially activist psychology. However, he has expressed concerns that, when researchers start working within the legal system, they will lose their critical outside perspective.

We are not suggesting here that any of the APA *amicus curiae* briefs were inappropriate or that the APA should not submit briefs. Instead, we raise these discussions about the briefs to highlight the debate as to the contours of the role social science should play in the law.

SUMMARY

The modern use of psychological and social science research by the legal system is generally thought to have begun with *Brown v. Board of Education* (1954). Since *Brown*, interactions between law and psychology and law and other social sciences have increased dramatically. Psychologists and other social scientists are employed by the government to help plan and execute social service and justice programs and to deliver services directly. They influence trials by testifying as expert witnesses about the facts of the case or about the social and psychological context of the parties' actions to help the jury or judge interpret the facts. They also influence judicial policy decisions, by testifying as witnesses for (or submitting *amicus* briefs to) courts deciding questions of law and by testifying to legislatures.

The increased use of psychological, social science, and medical testimony has led to more questions about what standards should be used to determine when testimony is "expert" and how to distinguish junk science from sound science. After the *Frye* decision, courts looked to the expert's peers for guidance, admitting evidence obtained by professionally accepted methods. In *Daubert*, the Supreme Court introduced a new standard, giving federal trial judges the responsibility of assessing the soundness of methodology on which evidence was based. Another question the courts must resolve is how to evaluate knowledge based on

specialized training and experience but lacking the broad and rigorous evidential support required to meet the standard of scientific knowledge.

The relationship between law and psychology has not always been comfortable. Differences in the way the two fields think about problems and in the kind of work they do can lead to misunderstandings and, not infrequently, to frustration on the part of social scientists and psychologists. Nonetheless, the increased association with the legal system has brought greater social power to the psychological, clinical, and social sciences, and new sources of income and increased prestige to researchers and practitioners. With increased power has come a renewed emphasis on sound methodology in general and on developing ecologically valid research designs in particular. Psychology's increasing involvement with the legal system has also created new ethical dilemmas for social scientists and mental health professionals, and added urgency to discussions about what it means to use psychological and social science knowledge responsibly and ethically. We have entered an exciting era in which the importance of social science to everyday practical affairs is growing. It is more important than ever before for budding professionals and for intelligent citizens to be aware of the social sciences' growing impact and potential to influence our lives.

DISCUSSION QUESTIONS

1. In the beginning of the chapter, we introduced the issue of whether the social science should have been used in the *Roper* (2005) case. Was that the right decision? When should social science be introduced into a case? Who should make that decision?
2. Would you as a citizen like to see social science groups submit amicus briefs more often or less often? Why? Would you as a potential future scientist like to see social science groups submit amicus briefs more often or less often? Why?
3. What scientific concepts would a judge have to understand in order to decide whether the science in a given area was sufficiently valid to be admitted as testimony? Should judges have basic training in interpreting science? If so, should psychologists who study the legal world have basic training in law?
4. Do you think psychologists' and other social scientists' research is influenced by their political or social values? Should it be influenced by their values? Similarly, do you think judges' political values influence the weight they give to social science testimony in coming to a decision? How could you test your hypotheses?

KEY TERMS

abuse of discretion standard

amicus curiae

brief

casebook

causational

correlational

Daubert standard

dependent variable

expert testimony

external or ecological validity

forensic

Frye standard

independent variable

internal validity

jurisprudence

legal realism

meta-analysis

objective

on point

policy

pretrial hearings

probative value

remand

social (adjudicative) facts

social authority (legislative) facts

social framework

sociological jurisprudence

therapeutic jurisprudence